Protecting Home: Are MLB's Television Market Protections Reasonable Under Antitrust Law?

Edan Lisovicz[*]

[*] J.D. Candidate, 2014, Seton Hall University School of Law; B.A., magna cum laude, 2011, Colgate University. Special thanks to Professor Marina Lao for her insight and guidance throughout the writing process. Additional thanks to my family and friends for their support and encouragement.

INTRODUCTION

Fans of Major League Baseball ("MLB" or "Baseball") have long voiced their displeasure with the league's broadcast restrictions and blackout rules.[1] However, despite MLB Commissioner Bud Selig's candid recognition of the harm caused by television viewership restrictions, the league has failed to take significant steps to remedy the problem.[2] Consequently, in May 2012, baseball fans filed an antitrust lawsuit against MLB, several individual MLB clubs, and the regional sports networks ("RSNs") and multivideo programming distributors ("MVPDs") responsible for producing and distributing broadcasts of MLB games on television.[3] The crux of the complaint is that Baseball's broadcasting plan is implemented through illegal horizontal agreements that protect clubs against competition for television viewership in their home territories.[4]

In *Laumann v. National Hockey League*,[5] Judge Shira Scheindlin of the United States District Court for the Southern District of New York denied the defendants' motion to dismiss, holding that the complaint adequately stated a claim for harm to competition in the market for broadcasts of

1. *See* Jeff Wolf, *Decades-old blackout rules leave Major League Baseball fans in the dark*, LAS VEGAS REVIEW-JOURNAL (April 24, 2011, 9:01 AM), http://www.lvrj.com/sports/decades-old-blackout-rules-leave-major-league-baseball-fans-in-the-dark-120563299.html; Jeff Passan, *MLB's blackout problem keeps sport in dark ages*, YAHOO! SPORTS (June 22, 2012, 10:06 AM), http://sports.yahoo.com/news/mlb%E2%80%99s-blackout-problem-keeps-sport-in-dark-ages.html ("In areas where it makes no sense to carry a particular RSN, the fans are out of luck even if they buy the Extra Innings or MLB.tv packages."); Jeremy Lacks, *End of the Dark Ages? Lawsuits Put Sports TV Blackout Rules to the Test*, JD SUPRA (Jan. 1, 2013), http://www.jdsupra.com/legalnews/end-of-the-dark-ages-lawsuits-put-spor-81591/#Article5 ("Contemporary fans have long been frustrated by the current arrangement.").

2. Jeff Passan, *Selig's promise*, YAHOO! SPORTS (July 11, 2006), http://sports.yahoo.com/mlb/news?slug=jp-blackouts071106.

3. As discussed *infra* Part I, MVPDs are television providers that offer programming to subscribers for a fee. MVPD platforms included cable operators such as Comcast and Time Warner Cable, national satellite providers such as DirecTV and Dish Network, and large telephone companies such as VerizonFiOS or AT&T. *See Video Competition,* NAT'L CABLE & TELECOMM. ASS'N, http://www.ncta.com/IssueBriefs/VideoCompetition.aspx (last visited Oct. 29, 2012).

4. *See* Class Action Complaint, Garber v. Office of the Comm'r of Baseball, No. 12 CIV 3704, 2012 WL 1609215 (S.D.N.Y. May 9, 2012).

5. The suit against MLB was consolidated with a similar complaint against the National Hockey League. *See* Action Complaint, Laumann v. National Hockey League, No. 12-1817(KMW), 2012 WL 3019470 (S.D.N.Y. May 2, 2012).

live baseball games.[6] The decision was somewhat surprising given that a previous challenge to a very similar broadcasting arrangement used by the National Basketball Association ("NBA") failed to make it past summary judgment. In *Kingray, Inc. v. National Basketball Ass'n*, Judge M. James Lorenz of the United States District Court for the Southern District of California held that a complaint alleging that the NBA and DirecTV conspired to raise prices by blacking out basketball games failed to state a claim for anticompetitive harm.[7] While the holding in *Laumann* is undoubtedly a preliminary win for baseball fans aggrieved by the league's blackout policy, the legality of MLB's model ultimately depends on whether the league can show that the harm caused by viewership restrictions is justified for other procompetitive reasons.

This Comment compares the holdings in *Laumann* and *Kingray* and provides insight into the findings a court would need to make in order to hold that MLB's broadcasting plan violates antitrust law. Part I describes the structure of the sports television programming market and Baseball's broadcasting model, which implements blackouts through a combination of horizontal agreements among clubs and vertical agreements between clubs, RSNS, and MVPDs. Critics argue that this model is susceptible to antitrust attack because it reduces competition between teams and results in higher prices for consumers.[8] Part II provides a synopsis of relevant antitrust law, focusing on the three analytical tests courts apply to evaluate the reasonableness of restraints on trade. Examining the circumstances in which each test is applied makes it clear that the restraint at issue here should be analyzed under the rule of reason. Part III describes the first step in a rule of reason analysis and explains how different conceptions of output in the context of sports programming led to the different outcomes in *Laumann* and *Kingray*. Part III then describes why the analysis in

6. Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465 (S.D.N.Y. 2012).

7. *See* Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1184 (S.D. Cal. 2002).

8. *See* Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 144 (2001); Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject A Flawed Defense*, 2009 WIS. L. REV. 835, 888 (2009).

Laumann is the sounder approach. Part IV walks through the final two steps of the rule of reason and acknowledges that, while MLB's broadcasting plan harms competition in the market for live video presentations of professional baseball games, whether it violates the Sherman Act will hinge on MLB's ability to provide procompetitive justifications for its conduct. Part V concludes that MLB's broadcasting distribution model will survive antitrust scrutiny if the court finds that that the league's justifications are legitimate; if the justifications are not legally cognizable, the model will be declared unlawful.

I. MLB'S BROADCASTING PLAN

A. Baseball's Antitrust Exemption

Before examining the details of MLB's broadcasting model, brief mention should be made of the league's historic antitrust exemption, which theoretically could be asserted as a defense to any antitrust lawsuit brought against it.[9] In 1922, the Supreme Court held that Baseball was exempt from the antitrust laws because "exhibitions of base ball . . . are purely state affairs" and therefore not interstate commerce subject to regulation under the Sherman Act.[10] Despite acknowledging the serious flaws of this holding in the famous *Flood v. Kuhn* decision, the Court nevertheless upheld the exemption, declaring that it was the role of Congress—and not the Court—to undo it.[11] Thus, even if MLB's broadcast policy represents a flagrant violation of antitrust laws, it is possible that the league could escape liability by invoking its historic exemption.

9. *See* John Woolfolk, *Judge questions San Jose lawsuit against MLB over A's move*, INSIDE BAY AREA (Oct. 4, 2013, 7:35 AM), http://www.insidebayarea.com/breaking-news/ci_24239070/mlb-seeks-dismissal-san-jose-lawsuit-over-move.

10. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 208 (1922).

11. Flood v. Kuhn, 407 U.S. 258, 285 (1972). Since the *Flood* decision, lower courts visiting the issue have sought to limit the scope of the exemption, with one court holding that it does not apply to radio broadcasts. Henderson Broad. Corp. v. Houston Sports Ass'n, Inc., 659 F. Supp. 109 (S.D. Tex. 1987) (finding that an exclusive agreement between a MLB club and a radio station was not immune to antitrust challenge because the restraint affected competition in the broadcasting industry, not the baseball industry). *But see* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 268 (2012).

This Comment does not consider the relevance of this exemption to the *Laumann* litigation for two reasons. First, the legal foundation for the exemption is severely outdated,[12] and it seems likely that, should the Court revisit the issue, it would find that Baseball's conduct is covered under the antitrust laws. Second, and relatedly, MLB prefers to avoid invoking the exemption—probably out of fear that doing so will cause a court to revoke it.[13] Tellingly, the defendants in *Laumann* did not even bother to raise this defense.[14] Thus, other than briefly mentioning it here, this Comment does not concern itself with Baseball's antitrust exemption.

B. The Sherman Act

In 1890, Congress passed the Sherman Act (the "Act"),[15] based on the idea that the "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, [and] the highest quality and greatest material progress."[16] Often referred to as Congress' "consumer welfare prescription," [17] the purpose of the Sherman Act is to provide protection against various categories of harmful economic conduct and preserve "free and unfettered competition" in the marketplace.[18] Section 1 of the Act focuses on concerted action—i.e., collusion—among competitors. Although Section 1 condemns "[e]very contract, combination . . . or conspiracy, in restraint of trade,"[19] it is not interpreted literally.[20] Because almost every business contract restrains trade in some way, Section 1 is construed to

12. *See Flood*, 407 U.S. at 286 (1972) (Douglas, J., dissenting).

13. Samuel G. Mann, *In Name Only: How Major League Baseball's Reliance on Its Antitrust Exemption Is Hurting the Game*, 54 WM. & MARY L. REV. 587, 600 (2012) ("The clearest indication that MLB's antitrust exemption is irrelevant is the fact that MLB often chooses not to assert it. As sports law professor Mitchell Nathanson has noted, 'in an ironic effort to prevent the Sherman Act from applying to it, MLB has voluntarily abided by it.'").

14. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaints, Laumann v. Nat'l Hockey League, 907 F. Supp.2d 465 (S.D.N.Y. 2012) (Nos. 12-cv-1817, 12-cv-37024), 2012 WL 3966118.

15. 15 U.S.C. § 1.

16. N. Pac. Ry. Co. v. United States, 356 U.S 1, 4 (1958).

17. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

18. *N. Pac. Ry. Co.*, 356 U.S. at 4.

19. 15 U.S.C. § 1.

20. Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 343 (1982).

forbid only unreasonable restraints of trade.[21] A restraint is considered unreasonable if, under the totality of the circumstances, its anticompetitive effects outweigh its procompetitive effects (in antitrust parlance, such restraints are called "net anticompetitive").[22] Section 2 prohibits any conduct, concerted or independent, that monopolizes or threatens monopolization.[23]

Antitrust enforcement has traditionally been more concerned with concerted action under Section 1 than with monopolization under Section 2.[24] This is because the ordinary workings of the marketplace are more easily disturbed by collaboration between independent economic actors to suppress competition than by a single firm's attempts at monopolization.[25] The two elements of a Section 1 claim are: (1) concerted action; and (2) anticompetitive harm.[26] Although the concept of anticompetitive harm eludes precise definition, courts have noted that "antitrust claims are concerned not with wrongs directed against the private interest of an individual business but with conduct that stifles competition."[27] In other words, a restraint presents anticompetitive harm when it injures competition, not when it merely injures a competitor. [28] Thus, a successful challenge to MLB's blackout policy must prove not only that the 30 MLB clubs acted together to restrain trade, but also that the net effect of this activity was to injure competition in a relevant market.

21. *See* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) ("§ 1 of the Sherman Act has long been interpreted to prohibit only those contracts or combinations that are 'unreasonably restrictive of competitive conditions.'"); Am. Needle, Inc., v. Nat'l Football League, 130 S.Ct. 2201, 2208 (2010) ("[E]ven though, 'read literally,' § 1 would address 'the entire body of private contract,' that is not what the statute means.").

22. Feldman, *supra* note 8, at 840.

23. 15 U.S.C. § 2; s*ee also* United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 391 (1956) (defining monopoly power as "the power to control prices or exclude competition.").

24. *See* Am. Needle, 130 S.Ct. at 2208 ("[I]n § 1 Congress 'treated concerted behavior more strictly than unilateral behavior.'").

25. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

26. WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:3 (2011-2012 ed. 2011).

27. E. Food Services, Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1,4 (1st Cir. 2004).

28. Brunswick Corp., v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 488 (1977) ("[T]he antitrust laws were enacted for the 'protection of competition . . . not competitors.'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

C. Business Structure of Professional Sports Leagues

Antitrust challenges to the business of professional sports present a difficulty for courts because questions that are often easily addressed in the context of conventional industries are complicated by the interplay of common and adverse interests that define professional sports leagues. Whereas in most industries firms' decision-making processes are guided entirely by the goal of maximizing profits at the expense of competitors,[29] professional sports franchises must act not only in their individual self-interest but also in the best interests of the league as a whole.[30] The necessity of coordination regarding the scheduling of games and league wide sponsorships, among other things, complicates the question of whether cooperation between clubs amounts to collusion between competitors.[31]

The Major League Constitution describes the rules that govern the relationship between MLB and its clubs.[32] This contractual agreement provides that league decision-making authority is vested in a governing body comprised of representatives from each team.[33] With the exception of the Commissioner, who is chosen by the owners and appointed with limited powers such as overseeing the best interests of the game, the league is controlled entirely by the clubs and their owners.[34] Appearances notwithstanding, "[c]lub owners do not take their orders from executives at some separate organization called 'Major League Baseball' . . . they are the league, constituting the governing board and setting league policy."[35] This organizational structure puts club owners in

29. *See generally* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 53-54 (1995).

30. *See* Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008), *rev'd*, 130 S.Ct. 2201 (2010) ("NFL teams share a vital economic interest in collectively promoting NFL football. After all, the league competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success.").

31. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102-03 (1984).

32. *See* Major League Constitution, http://bizofbaseball.com/docs/MLConsititution June2005Update.pdf (last visited Mar. 18, 2013).

33. *See* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 537 (3d ed. 2004).

34. *Id.*

35. Ross, *supra* note 8, at 139.

the position of having to compete directly against their partners in a joint business venture.[36] Instead of focusing solely on their own profitability, clubs have a significant interest in seeing their competitors succeed, which is necessary to ensure the success of the league as a whole.[37] Although clubs compete vigorously on the field of play and vie for fans and sponsorships, cooperation and restraints on competition in some aspects of business are essential to a league's survival.[38] Truly "free and unfettered competition,"[39] the hallmark of an ideal marketplace, is simply not possible in the sports industry. The question confronting courts concerns how much freedom clubs should have to impose restrictions on competition that would, in other industries, amount to collusion. Although in *American Needle v. Nat'l Football League* the Supreme Court established that clubs are capable of conspiring in most situations, the full effect of this holding remains to be seen.[40]

D. Broadcast Restrictions

An obvious example of a necessary league-imposed restraint on competition is the concept of the exclusive home territory. Home territories give clubs the exclusive right to operate a franchise and play home games within a defined geographic area.[41] The Major League Constitution states that the thirty "Major League Clubs shall have assigned operating territories within which they have the right and obligation to play baseball games as the home Club."[42] Although the implementation of exclusive home territories is a clear

36. *See* RAY YASSER, SPORTS LAW: CASES AND MATERIALS (7th ed. 2011); *see also* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249 (2d. Cir. 1982) (noting that in order to "attract as many people as possible to pay money to attend games between members and to induce advertisers to sponsor TV broadcasts of such games . . . some sort of an economic joint venture is essential. No single owner could engage in professional [sports] for profit without at least one other competing team.").

37. Feldman, *supra* note 8, at 840.

38. *See* Dennis W. Carlton et al., *The Control of Externalities in Sports Leagues: An Analysis of Restrictions in the National Hockey League*, 112 J. POL. ECON. S268, S269 (2004).

39. N. Pac. R. Co. v. United States, 356 U.S. 1, 4–5 (1958).

40. *See* American Needle v. National Football League, 130 S. Ct. 2201, 2211 (2010).

41. *See* Major League Constitution, art. VIII, § 8, http://bizofbaseball.com/docs/MLConsititutionJune2005 Update.pdf.

42. *Id.*

restraint on competition, the necessity of such an arrangement is obvious. Without territorial restrictions, clubs could schedule home games in any location without regard to the effect on other clubs, and there would be nothing to stop a struggling franchise from moving to a larger market where it could siphon fans away from an indigenous team.

While home market protections initially provided the economic protection needed to encourage owners to invest in fledgling leagues, the advent of television broadcasting threatened their effectiveness and led to the adoption of exclusive "home television territories."[43] Article X of the Major League Constitution states, "each Club shall have, with respect to each game in which it participates, the right to authorize the telecast of such game only by means of over-the-air, cable and satellite technology, and only within its home television territory."[44] Thus, just as each club agrees not to play games in another club's home territory, each club agrees not to distribute live broadcasts of its games outside its local geographic region. This model ensures that, for example, the New York Yankees and their RSN partner have the exclusive right to televise their games within their home territory. In exchange, the Yankees and their RSN and MVPD partners agree to refrain from distributing telecasts outside of this territory, into, say, the home territory of the Philadelphia Phillies. A broadcast of a game by a local RSN into a club's home territory is referred to as an "in-market" broadcast.[45]

In addition to providing the rules that govern clubs' local broadcast rights, Article X provides that the Commissioner has the authority to negotiate contracts for national broadcasts on behalf of the clubs.[46] While revenue from local

43. *Id.* at art. VIII, § 9.

44. *Id.* at art. X, § 3(a).

45. *See* Laumann v. Nat'l Hockey League, 907 F. Supp.2d 465, 475 (S.D.N.Y. 2012) (defining "in-market" games as "games played by the team in whose designated home territory the subscriber resides.").

46. *See* Major League Constitution, art. X, § 4, http://bizofbaseball.com/docs/MLConsititutionJune2005 Update.pdf ("[T]he Major League Clubs grant to the Commissioner, acting as their agent . . . the exclusive right to sell on their behalf, throughout the United States and other territories as chosen by the Commissioner, exclusive or non-exclusive television and radio or other video or audio media rights (including the Internet and any other online technology)." Although by the middle of the twentieth century it had already been established that the right to control broadcasts of a live sporting event belonged to the clubs participating in the match, MLB clubs later ceded the right to broadcast their games to a national audience to the

television contracts belongs to the clubs themselves, revenues from national television contracts are considered the collective property of all clubs and divided evenly among them.[47] The Commissioner has used his authority in this area to make live video presentations of games available through three different media: national television broadcasts on over-the-air networks or cable channels, such as Fox and ESPN;[48] a subscriber-based television package known as "MLB Extra Innings" carried by many cable and satellite providers;[49] and a subscriber-based internet package known as MLB.tv.[50] Because these broadcasts are available to consumers throughout the United States—as opposed to only local fans within a team's home territory—they are referred to as "out-of-market" broadcast packages.[51]

E. The Blackout Problem

MLB's broadcasting plan draws the ire of fans because any in-market game available on a local RSN is automatically blacked out for purchasers of MLB Extra Innings and MLB.tv.[52] This means that if an out-of-market package

Commissioner. *See* Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D.P.A. 1938); Weiler & Roberts, *supra* note 33, at 635.

47. Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 917 (2008).

48. For example, MLB agreed to new national television contracts with Fox, TBS, and ESPN in 2012. *See* John Ourand, *ESPN Signs New Deal with MLB Through '21 Worth An Average of $700M Annually*, SPORTS BUSINESS DAILY, http://www.sportsbusinessdaily.com/Daily/Issues/ 2012/08/28/Media/MLB-ESPN.aspx (Aug. 28, 2012); John Ourand, *Fox, Turner contribute to $12 billion rights haul for MLB*, SPORTS BUSINESS JOURNAL, http://www.sportsbusinessdaily.com/Journal/Issues/ 2012/09/24/Media/MLB-12B.aspx (Sept. 24, 2012).

49. For instance, the "Extra Innings" package is offered by DIRECTV. *See* http://www.directv.com/sports/mlb (last visited Oct. 29, 2012).

50. *See* MLB.TV, http://mlb.mlb.com/mlb/subscriptions/index.jsp?&c_id=mlb& affiliateId=mlb (last visited Oct. 7, 2013).

51. Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 475 ("Package sales of broadcast rights are agreements among individual clubs, who could otherwise sell rights to broadcast their own games, to forego such independence in order to receive the presumably higher prices that such packages attract.").

52. The MLB describes its "Regular Season Local Live Blackout" policy for MLB.TV as follows:

> All live games on MLB.TV and available through MLB.com At Bat are subject to local blackouts. Such live games will be blacked out in each applicable Club's home television territory, regardless of whether that Club is playing at

subscriber resides within the home television territory of one of the clubs involved in a game, she will be unable to use the package to watch the game. For instance, the broadcast of a game between the Yankees and the Phillies will not be available to a MLB Extra Innings subscriber if the subscriber lives within the home television territory of the Yankees or the Phillies. To watch the game, the fan would have to purchase a television package that includes either the Yankees' or Phillies' RSN.

This problem can be significantly more inconvenient for baseball fans with the misfortune of living in a region of the country designated as the home television territory of more than one club. For example, Hawaii is considered the home territory of the San Diego Padres, Oakland Athletics, Los Angeles Dodgers, Los Angeles Angels of Anaheim, San Francisco Giants, and Seattle Mariners.[53] This means that any game featuring one of these six teams is blacked on MLB Extra Innings or MLB.tv in Hawaii. If a fan wants to watch a game played by one of these teams, he must subscribe to a MVPD that carries the team's RSN. The problem is, in-market games are blacked out regardless of whether a MVPD that services the area carries the RSN.[54] Thus, fans of the Seattle Mariners or the San Diego Padres living in Hawaii are unable to watch their favorite team's games; they cannot purchase a cable or satellite television package that carries the clubs' RSN partners, and the games are blacked out on MLB Extra Innings and MLB.tv because Hawaii is in the Mariners' and Padres' home television territories.[55]

> home or away. If a game is blacked out in an area, it is not available for live game viewing. If you are an MLB.TV subscriber and not within either Club's home television territory, the applicable game will be available live and as an archived game as soon as possible after the conclusion of the game. If you are an MLB.TV subscriber within either Club's home television territory or an MLB.TV subscriber in any territory, the applicable game will be available as an archived game approximately 90 minutes after the conclusion of the game. In addition, note: These blackout restrictions apply regardless of whether a Club is home or away and regardless of whether or not a game is televised in a Club's home television territory. All live Toronto Blue Jays games are blacked out throughout the entire country of Canada.

MLB.TV http://mlb.mlb.com/mlb/subscriptions/index.jsp?affiliateId=MLBTVREDIR #blackout (last visited Oct. 23, 2012).

53. Passan, *supra* note 1.

54. *Id.*

55. *Id.* ("In areas where it makes no sense to carry a particular RSN, the fans are out of luck even if they buy the Extra Innings or MLB.tv packages.").

According to a MLB press release touting the grant of a patent for the technology used to determine the location of a fan using the MLB.tv package, these restrictions are necessary because "[a]ll clubs have local TV broadcast rightsholders, and their contracts specify that fans inside a defined geographical radius who can view their broadcasts shall be blacked out from live online viewing."[56] The website for DirecTV explains the limitations as follows:

> In our agreements with sports leagues and associations, we are restricted from showing events near where a game is played or broadcast locally . . . . It's important to understand that blackouts and game availability are controlled by the leagues, associations, and networks that purchase the rights to broadcast individual games. To protect their rights, DIRECTV must enforce the restrictions mandated by them.[57]

Given that this arrangement has the effect of reducing the total number of broadcasts available to fans, it is natural to wonder why it exists at all. Is it not in MLB's best interest to make as many games available on television as possible? The structure of the vertical distribution channel that transmits broadcasts from stadiums to fans' living rooms helps explain why clubs agree to restrict output in this way.

F. Local Market Distribution: Clubs, RSNs, and MVPDs

Although local markets for sports television programming can take a variety of shapes, the first level of the distribution channel for sports programming always consists of the upstream vertical relationship between clubs and RSNs.[58] At this level, clubs sell the exclusive right to broadcast their games to a RSN.[59] Because RSN programming is among the

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56. Mark Newman, *MLB.TV granted landmark U.S. patent*, MLB.COM, (May 14, 2009, 11:00 AM), http://mlb.mlb.com/news/article.jsp?ymd=20090514&content_id=4724126&vkey=news_ mlb&fext=.jsp&c_id=mlb.

57. *Why was a nationally televised game not shown in my area?* DIRECTV, http://support.directv.com/app/answers/detail/a_id/32/kw/blackouts (last visited Oct. 29, 2012).

58. *See* Yankees Entm't and Sports Network, LLC v. Cablevision Sys. Co., 224 F. Supp. 2d 657, 663 (S.D.N.Y. 2002); Diana Moss, *Regional Sports Networks, Competition, and the Consumer*, 21 LOY. CONSUMER L. REV. 56, 60 (2008).

59. *Yankees*, 224 F. Supp. 2d at 663 (describing this level as "the sale by the owners/creators of sporting events of their rights to televise to owners of Programming Networks.").

most valuable programming on television,[60] bidding between RSNs competing in the same market is often intense.[61] In recent years RSNs have shelled out increasingly exorbitant sums for these exclusive rights.[62] For instance, the recently launched Time Warner Cable SportsNet reportedly agreed to pay the Los Angeles Lakers $3 billion for the exclusive right to broadcast Lakers' games for the next 20 years.[63]

The second level of the distribution channel consists of the sale of RSN programming to MVPDs.[64] MVPDs are television providers that offer programming to subscribers for a fee.[65] MVPD platforms include: cable operators, such as Comcast and Time Warner Cable; national satellite providers, such as DirecTV and Dish Network; and large telephone companies, such as VerizonFiOS and AT&T.[66] Because the exclusive right to broadcast a club's games is extremely valuable, RSNs often demand a premium from MVPDs for the right to carry their channels.[67] For instance, Time Warner Cable reportedly

60. *See* Brian Stelter, *Rising TV Fees Mean All Viewers Pay to Keep Sports Fans Happy*, NY TIMES (Jan. 25, 2013), http://www.nytimes.com/2013/01/26/business/media/all-viewers-pay-to-keep-tv-sports-fans-happy.html?_r=0. One reason the value of sports programming has skyrocketed in recent years is that its fan base provides a guaranteed live audience that cannot use digital video recording technology to avoid commercial advertising. *See* Michael Heistand, *MLB, FOX and Turner finally make TV deals official,* USA TODAY (Oct. 2, 2012, 12:31 PM), http://www.usatoday.com/story/gameon/2012/10/02/mlb-turner-sports-tbs-espn-fox/1608173/ (noting that despite a trend in which "consumers steadily move toward watching TV on an on-demand basis," live sports remain "relatively immune to being watched on a taped basis.").

61. Moss, *supra* note 58, at 57 ("Competition between RSNs in bidding for team media rights . . . is often quite fierce.").

62. *See* Stelter, *supra* note 60.

63. Tom Hoffarth, *Laker-centric Time Warner Cable channels launch Monday*, *but so far distribution is limited,* DAILY NEWS LOS ANGELES (Sept. 28, 2012, 8:45 AM), http://www.dailynews.com/ci_21650164/laker-centric-time-warner-cable-channels-launch-monday?source=most_viewed.

64. *Yankees*, 224 F. Supp. 2d at 663 (describing this level as "the purchase and sale of programming of local professional sporting events" between "Programming Networks and various MVPDs, such as cable operators, for delivery to their subscribers.").

65. Under the Telecommunications Act of 1996, "the term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13) (2013); s*ee also Yankees*, 224 F. Supp. 2d at 662 (describing a MVPD as a television operator that "provides pay television programming within its service area.").

66. *See Video Competition,* NAT'L CABLE & TELECOMM. ASS'N, http://www.ncta.com/IssueBriefs/VideoCompetition.aspx (last visited Oct. 29, 2012).

67. *See* Moss, *supra* note 58, at 57 ("RSN programming . . . is a unique product, of

demanded $3.95 per month per subscriber from MVPDs for the right to carry the new Time Warner Cable SportsNet channel.[68] Unsurprisingly, negotiations between RSNs and MVPDs for the rights to carry RSN programming can be quite contentious.[69]

The final level of the distribution channel consists of the downstream purchase of MVPD services (i.e., cable or satellite television subscriptions) by baseball fans and other consumers.[70] After deciding on a cable or satellite provider, consumers typically choose between different subscription packages that offer various levels of sports programming.[71] Avid fans of a particular league may supplement an ordinary sports television package with the purchase of an out-of-market product such as MLB Extra Innings.

The structure of the sports programming market shows that the agreements among clubs not to compete in each other's home television territories are enforced through downstream contractual agreements between clubs, RSNs, and MVPDs.[72] That the horizontal agreement to restrict the distribution of broadcasts is enforced through vertical blackout agreements complicates the antitrust analysis. However, if consumers can prove that they suffered an antitrust injury as a result of reduced output or artificially

tremendous value to a certain segment of consumers, and thus access to it is crucial to cable and satellite providers' ability to remain competitive.") (quoting Time Warner/Comcast/Adelphia, Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part), January 31, 2006, File No. 051-0151, *available at* http:// www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz_harbour.pdf).

68. Hoffarth, *supra* note 63.

69. *See* Moss, *supra* note 58, at 57; Joe Flint, *Time Warner Cable ready to play hardball over Dodger channel*, LOS ANGELES TIMES (Jan. 22, 2014, 11:41 AM) http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-dodgers-sportsnet-time-warner-cable-20140122,0,7610460.story#axzz2rcPb3Jx4.

70. *Yankees*, 224 F. Supp. 2d at 663 (noting that "distribution of multi-channel programming . . . involves the purchase and sale of pay television services between competing MVPDs and the residents and business in their respective service areas.").

71. *See* Moss, *supra* note 58, at 58 (noting that RSNs are offered to subscribers "in the form of sports channels and other premium sports packages.").

72. One such downstream agreement was analyzed in *Kingray*—discussed *infra* Part III—when blackout language in the NBA's contract with DirecTV provided that "DirecTV is to refrain from distributing within the home market of an NBA team any game that has already been licensed to a local telecaster or cablecaster for telecast within the team's home market, except where DirecTV has been authorized to televise the game as part of DirecTV's carriage of a regional sports network." Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1193 (S.D. Cal. 2002).

high prices, then they likely have standing to challenge Baseball's policy.[73]

II. THE APPROPRIATE LEGAL TEST

A. Three Tests of Reasonableness

Over time, courts have developed three tests for evaluating the reasonableness of a challenged restraint on trade: (1) the per se rule; (2) the quick look; and (3) the rule of reason.[74] The range of different tests creates a "continuum, on which the 'amount and range of information needed' to evaluate a restraint varies depending on how 'highly suspicious' and how 'unique' the restraint is."[75] While the ultimate issue addressed is always whether the challenged conduct is unreasonable, these tests give courts discretion when allocating burdens of proof and enable courts to tailor the level of scrutiny applied to a restraint according to the level harm it presents to competition on its face.[76]

Due to the complicated structure of the sports broadcasting market, which involves both horizontal and vertical restraints, arguments can be made for evaluating MLB's blackout policy under each of the three tests.

B. Per Se Rule

The per se rule applies when a challenged restraint presents obvious competitive harm and lacks "any redeeming

73. A legally cognizable "antitrust injury" is defined as an "injury of the type the antitrust laws were intended to prevent." Brunswick Corp., v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 489 (1977). The substance of this requirement is that the defendant's conduct must result in harm to *competition* itself as opposed to merely harm to a *competitor*. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). In other words, conduct will not be deemed to have caused antitrust injury merely because it causes a competitor to lose profits or consumers to pay higher prices—the lost profits or higher prices must be the result of "a competition-reducing aspect or effect of the defendant's behavior." Atl. Richfield Co., v. USA Petroleum Co., 495 U.S. 328, 344 (1990).

74. United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993).

75. Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F. 3d 499, 509 (4th Cir. 2002).

76. ANDREW I. GAVIL, ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 186 (2d ed. 2008) (noting that the quick look test, like the per se rule, "can be understood in evidentiary terms as a burden-shifting device.").

virtue" or legitimate purpose in the marketplace.[77] In the interest of judicial efficiency, courts will strike down practices that fit into this category without engaging in an inquiry into the restraint's reasonableness.[78] Although in earlier periods the per se rule was applied to a wide range of anticompetitive practices,[79] modern economics and changing understandings of the purpose of antitrust law have limited its application to "naked"[80] restraints, such as horizontal price-fixing agreements between competitors.[81] Because such conduct is "so plainly anticompetitive,"[82] courts can refuse to consider any potential justifications offered by a defendant and simply declare the practice "illegal *per se*."[83]

Despite how rarely the per se test is applied today, one can argue that it should be applied to MLB's conduct because its television plan is implemented through a "horizontal market allocation" among clubs. A horizontal market allocation is an agreement among competitors not to compete in certain geographic areas.[84] Because such agreements preclude competition entirely, they have the potential to be even more harmful than horizontal price-fixing agreements, which at least allow competitors to compete on the basis of qualities

77. N. Pac. Ry. Co. v. United States, 356 U.S 1, 5 (1958).

78. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829 (3rd Cir. 2010) ("Some categories of restraints, such as horizontal price-fixing and market allocation agreements among competitors, 'because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.'").

79. *See* Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 693 (1991) (explaining that by the 1960s the Supreme Court "had applied the per se rule to tying arrangements, horizontal territorial or customer allocations . . . group boycotts . . . and nonprice vertical restrictions imposed by a supplier on its distributors.").

80. Naked restraints are restraints with "no purpose except stifling of competition." They may be contrasted with "ancillary" restraints, which are restraints that are a necessary part of a larger agreement that serves some purpose other than merely restraining trade. Broad. Music, Inc. v. Columbia Broad. Sys. 441 U.S. 1, 20 (1979); s*ee also* United States v. Addyston Pipe & Steel, 85 F. 271, 282 (1898).

81. Horizontal price-fixing occurs when "direct or potential competitors at the same level of the market structure agree upon the prices that they will charge customers or pay suppliers. HOLMES & MANGIARACINA, *supra* note 26, at § 2:2; *see also* GAVIL, *supra* note 76, at 352.

82. Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006).

83. HOLMES & MANGIARACINA, *supra* note 26, at § 2:8.

84. *See* WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 5:5 (2013) (defining a horizontal market allocation as "an agreement among existing or potential direct competitors to divide or otherwise restrict territories, output, customers, or product or service markets among themselves.").

other than price.[85] For this reason, horizontal market allocations are highly suspicious and have traditionally been considered illegal per se.

One of the best-known examples of a court applying the per se rule to a horizontal market allocation comes from *United States v. Topco Associates, Inc*.[86] There, 25 small grocery store chains formed a cooperative association to market a line of groceries under the brand name "Topco," with each member being assigned a de facto exclusive territory.[87] Despite the fact that the members collectively possessed only a small market share, the Supreme Court issued a broad condemnation of horizontal agreements between competitors, declaring that the "restraint in this case is a horizontal one, and therefore, a per se violation of Sec. 1."[88] Although Baseball's home territory arrangement shares the key features of the agreement in *Topco*, a court would likely distinguish the two cases. The industry at issue in *Topco* has none of the special features that characterize professional sports, and many commentators agree that *Topco* would not likely be decided the same way under modern economic theory.[89]

Ironically, perhaps the best argument for applying the per se rule is that some sports franchises have argued this is the appropriate test. In a 2008 challenge to a newly adopted National Hockey League ("NHL") rule forcing clubs to devote a portion of their websites to league activities, the New York Rangers asserted that agreements to "ban out-of-market broadcasting of a team's games" were "specific horizontal agreements . . . that severely restrict individual team competition, and consumer choice, in areas such as broadcasting."[90] Similarly, in a 2009 bankruptcy court adversary proceeding brought by the Phoenix Coyotes against the NHL, the Coyotes argued, "[t]he NHL and its members

85. GAVIL, *supra* note 76, at 128.
86. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).
87. *Id.*
88. *Id.* at 608.
89. *See e.g.,* Charles F. Rule, *The Administration's Views on Joint Ventures*, 54 ANTITRUST L.J. 1121, 1123 (1985) (concluding that *Topco* would not be decided the same way under more recent antitrust law).
90. Plaintiffs' Motion in Opposition to Defendants' Motion to Dismiss, Madison Square Garden, L.P. v. Nat'l Hockey League, 2007 WL 3254421 (S.D.N.Y. 2007), *aff'd*, 270 F. App'x 56 (2d Cir. 2008). NHL Center Ice is the NHL's out-of-market internet package.

have conspired to create exclusive television and radio broadcast rights within designated territories through contracts within individual NHL members, thereby maintaining monopoly power within each team's 'home territory' by preventing others from broadcasting events within those territories."[91]

Despite the Rangers' and Coyotes' arguments, courts are unlikely to apply the per se rule because restraints in the sports industry are simply not suited for evaluation under the per se rule. Since the Supreme Court's decision in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,[92] discussed *infra*, courts have consistently refused to apply the per se rule to disputes involving professional sports leagues, holding that the per se rule is inappropriate in an industry where cooperation among competitors is necessary. For instance, when the Oakland Raiders challenged the NFL's exclusive home territory provision in an attempt to move the club to Los Angeles in the 1980s, the Ninth Circuit acknowledged that, although the rule "divides markets among the 28 teams, a practice presumed illegal . . . the unique structure of the NFL precludes application of the per se rule."[93]

Thus, it highly unlikely that a court would review the legality of MLB's blackout policy under the per se rule. The question of whether the "quick look" or the "rule of reason" should be applied is a closer call.

C. Rule of Reason

On the opposite end of the continuum from the per se test is the rule of reason, which is applied when a restraint's effect on competition is not obvious.[94] In a rule of reason analysis, a court must look at the totality of the circumstances, which

91. Second Amended Complaint, In re Dewey Ranch Hockey, LLC, 414 B.R. 577 (Bankr. D. Ariz. 2009) (Nos. 09-bk-09488, 09-bk-09500, 09-bk-09491, 09-bk-09495, 2:09-bk-09488, 2:09-ap-494-RTBP), 2009 WL 1569963.

92. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984).

93. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1392 (9th Cir. 1984).

94. *See* Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F. 3d 499, 509 (4th Cir. 2002) (explaining that the rule of reason is applied to "restraints whose net impact on competition is particularly difficult to determine.").

may include detailed economic analyses of market power,[95] in order to determine whether the challenged conduct amounts to an unreasonable restraint of trade.[96] In the often-cited language of Justice Brandeis, courts consider factors such as "the facts peculiar to the business to which the restraint is applied . . . the nature of the restraint and its effect . . . [t]he history of the restraint," and "the purpose or end sought to be attained."[97]

A rule of reason analysis consists of three stages.[98] First, the plaintiff must show that the restraint presents anticompetitive harm.[99] As discussed *supra* Part I, a properly pleaded complaint must allege that the defendant's conduct is harmful to competition as a whole in a relevant market, not that that it merely has an adverse effect on competitors or consumers.[100] A plaintiff may be able to demonstrate anticompetitive harm through the use of direct evidence, such as reduced output, higher prices, or reduced consumer choice, or through circumstantial evidence, such as a detailed economic industry analysis consisting of a relevant product market and proof of market power.[101] If the plaintiff meets its

95. Market power is the ability to control prices. *See* Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986) (defining market power as "the ability to cut back the market's total output and so raise price.").

96. United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (stating that under the rule of reason a court must look at "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.") (internal quotations omitted).

97. Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

98. *See* K.M.B Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995) ("Establishing a violation of the rule of reason involves three steps."); James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims after* American Needle, 21 MARQ. SPORTS L. REV. 517, 529 ("Courts typically apply a three-step rule of reason analysis.").

99. McKeown, *supra* note 98, at 529 ("First, the plaintiff must show an anticompetitive effect.").

100. *See* E&L Consulting, Ltd. v. Doman Indus., Ltd., 472 F.3d 23, 31 (2d Cir. 2006) (affirming dismissal of a complaint because it "simply does not allege . . . 'that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.'").

101. *See* GAVIL, *supra* note 76, at 186 ("Circumstantial evidence . . . would consist of market definition, a calculation of market shares, and an inference from high market shares that the defendants had the capacity to harm competition, i.e., market power. Direct evidence . . . [is] evidence of actual anticompetitive effects, of the exercise of market power, such as reduced output, higher prices, or diminished quality."); *see also* Realcomp II, Ltd. v. F.T.C., 635 F.3d 815, 825 (6th Cir. 2011) ("When restraints are not per se unlawful, and their net impact on competition not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant

burden of showing that a defendant's practice has adverse effects on competition in a relevant market, then the second step of the rule of reason requires the defendant to offer procompetitive justifications for its conduct.[102] If the defendant is able to do so, then the court applies a balancing test that weighs procompetitive and anticompetitive effects to determine whether a restraint is net anticompetitive.[103]

If Baseball's broadcasting model did not involve exclusive home television territories, the rule of reason would undoubtedly be the appropriate test for evaluating the exclusive vertical distribution agreements between clubs and RSNs.[104] Unlike horizontal agreements between competitors at the same market level, vertical distribution arrangements are justified by numerous procompetitive benefits. For example, although exclusive vertical distributorships inhibit "intrabrand"[105] competition for a supplier's products by granting dealers monopolies in defined geographic areas, they can also bring about distribution efficiencies by helping to alleviate the "free rider" effect,[106] and by encouraging retailers to engage in promotional activities that otherwise might not

market and the effects of the restraint in that market.").

102. *See* Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830 (3rd Cir. 2010) ("The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects or defendant's market power. If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." (quoting United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993)).

103. *See* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) ("The true test of illegality 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.").

104. *See* HOLMES & MANGIARACINA, *supra* note 26, at § 2:14 ("[V]ertical nonprice restraints are governed by the far more flexible rule of reason"); s*ee also* GAVIL, *supra* note 76, at 352 (explaining that vertical restraints are agreements between firms operating at different levels of a market structure).

105. "Intrabrand" restraints are restraints that "affect competition between sellers of the same brand—such as rival Chevrolet dealers." GAVIL, *supra* note 76, at 352. They may be contrasted with "interbrand" restraints, which "limit competition between competing brands, such as Chevrolet and Ford." *Id.; see also* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

106. *See* McKeown, *supra* note 98, at 527 (defining free riding as "a form of externality that exists when the actions of one firm benefit another firm without the latter firm (the free rider) having to pay for that benefit.").

be worthwhile.[107] Because vertical restraints present benefits as well as harms to competition, the rule of reason is applied as a balancing test: if the benefits outweigh the harms, the restraint will be upheld; if the harms clearly outweigh the benefits, the restraint violates Section 1 of the Sherman Act.

D. Quick Look

Finally, over time courts have determined that a full rule of reason analysis is not needed to assess the legality of every restraint that is not illegal per se.[108] If a business practice has obvious anticompetitive effects but some procompetitive justifications, courts may apply an intermediate test known as the "quick look."[109] Under the quick look test, an economic industry analysis proving that a restraint is net anticompetitive is not required, and the burden instead shifts to the defendant to prove that there are legitimate procompetitive reasons for imposing the restraint.[110]

The Supreme Court's decision in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma* ("NCAA") was integral to the development of the quick look standard.[111] There, the challenged conduct consisted of agreements between the NCAA and its television partners that imposed limits on the number of college football games that could be aired each week and on the number of games each school could televise in a given season.[112] Recognizing that they could obtain significantly more lucrative contracts on their own, a coalition of large

107. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977) (explaining that exclusive vertical distribution agreements can have the benefit of "induc[ing] retailers to engage in promotional activities.").

108. Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of* American Needle v. Nat'l Football League, 16 STAN. J.L. BUS. & FIN. 183, 198 (2011) ("In the middle of the spectrum, where an arrangement seems less nefarious, a court may instead apply the 'quick look' test (sometimes also referred to as an 'abbreviated' Rule of Reason test).").

109. United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (describing the quick look test as "an intermediate standard.").

110. Madison Square Garden, L.P. v. Nat'l Hockey League, 2007 WL 3254421 at *6 (S.D.N.Y. 2007), *aff'd*, 270 F. App'x 56 (2d Cir. 2008) ("A truncated rule of reason analysis, a 'quick look,' would indeed relieve the Plaintiff of its initial burden of identifying a relevant market and showing an actual adverse effect on competition.").

111. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

112. *Id.* at 92.

universities with successful football programs brought an antitrust action against the NCAA under Section 1.

After the plaintiffs provided convincing proof that the NCAA's plan reduced output, made broadcasts unresponsive to consumer preferences, and essentially fixed the prices of network bids, the Supreme Court determined that no detailed industry analysis was needed to determine that the restraint was net anticompetitive.[113] At the same time, the Court was not ready to declare the restraint per se illegal because it recognized that college football is an industry in which "horizontal restraints on competition are essential if the product is to be available at all."[114] Because neither the per se rule nor the rule of reason was appropriate for evaluating the restraint, the Court presumed the restraint was unreasonable but gave the NCAA the opportunity to rebut this presumption by offering procompetitive justifications.[115]

In so doing, the Court planted the seed for an intermediate standard to be applied in situations where a defendant could have a legitimate reason for engaging in conduct that appears unreasonable on its face. In the end, the Court rejected the NCAA's contentions that the plan was needed to protect live attendance at games and to maintain competitive balance, and ruled in favor of the plaintiffs without requiring them to provide detailed economic proofs that the plan was net anticompetitive under the rule of reason.[116]

Given the slight probability of a court applying the per se test to a restraint in the professional sports industry, a plaintiff's best shot at proving MLB's broadcasting plan is illegal is to argue that the league's conduct falls into the quick look category. If a court can be convinced that "an observer with even a rudimentary understanding of economics could conclude that the [blackout policy] would have an anticompetitive effect on customers and markets," then it will

113. *Id.* at 108.

114. *Id.* at 101.

115. *Id.* at 117-119 (rejecting the NCAA's proposed justifications). *See also* GAVIL, *supra* note 76, at 186 ("[T]he 'quick look' can be understood in evidentiary terms as a burden-shifting device: evidence of actual harm to competition gives rise to a presumption that the challenged conduct was an unreasonable restraint of trade and shifts the burden of production to the defendant to offer evidence that the conduct can otherwise be justified.").

116. *NCAA*, 468 U.S at 108.

apply the quick look.[117] The quick look saves the plaintiff from having to prevail in litigation under the rule of reason, which is often extremely expensive and rarely successful.[118]

E. The Rule of Reason is the Appropriate Standard

Should the court in *Laumann* apply the quick look or the rule of reason? As discussed, the court will apply the rule of reason unless it determines that MLB's blackout plan is "so plainly anticompetitive" that it requires "only a cursory examination" to determine its illegality.[119] Unfortunately for the plaintiffs, the presumption that the rule of reason applies to most restraints,[120] especially those in the sports industry, will likely carry the day. It is unlikely that the plaintiffs will be able to provide conclusive proof that MLB's broadcasting plan is net anticompetitive in the absence of a detailed economic study to that effect.

Furthermore, even if the court concluded that "no elaborate industry analysis"[121] was needed to show the broadcasting plan leads to higher prices and reduced output, MLB would have the opportunity to prove that there are procompetitive justifications for its conduct.[122] As long as MLB is able to produce some evidence of procompetitive effects, such as proof that the restrictions enhance the "character and quality of the product,"[123] a court must weigh these considerations under a full-blown rule of reason analysis.[124]

117. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

118. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009).

119. Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006).

120. *See id.* at 5 ("[T]his Court presumptively applies rule of reason analysis.").

121. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 US 679, 692 (1978).

122. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 ("Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.").

123. *See id.* at 102.

124. *See* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) ("If the defendant offers sound procompetitive justifications, . . . the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis."). Furthermore, the summary judgment determination in *Laumann* provides no reason to doubt that the case will ultimately be decided under the rule of reason. In denying the defendants' motion to dismiss, Judge Scheindlin cited *American Needle* for the proposition that "'[w]hen restraints on competition are essential if the product is to

III. RULE OF REASON: STEP ONE

A. Reduced Output and Anticompetitive Harm

As discussed *supra* Part II, the rule of reason evaluates whether a restraint is net anticompetitive by weighing the harm it presents to competition against the benefits it provides to consumers.[125] The first stage in the three-step rule of reason analysis requires the plaintiff to allege that the challenged restraint has resulted in harm to competition.[126] Reduced output is one of the most commonly recognized forms of anticompetitive harm.[127] Output restrictions brought about by anything other than natural market forces harm competition by raising prices and impairing competitors' ability to compete on the merits.[128]

NCAA makes it clear that whether a broadcast plan artificially reduces output is a pivotal consideration in determining whether it violates the Sherman Act.[129] There,

be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 490 (S.D.N.Y. 2012) (quoting Am. Needle, Inc. v. Nat'l Football League, 130 S.Ct. 2201, 2216 (2010) (quoting *NCAA*, 468 U.S. at 101)). The court also relied on the holding in *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) that "agreements by individual clubs to grant the League the exclusive right to license use of certain rights originally held by the individual clubs are analyzed under the rule of reason." *Laumann*, 907 F. Supp. 2d at 490.

125. *See id.* at 485-87 (framing the issue before the court as whether the "multi-level conspiracy consisting of horizontal and vertical agreements implicating the League defendants, the RSNs and the MVPDs" has an "anticompetitive effect that [is] harmful to the consumer" or whether it "'stimulates competition . . . in the consumer's best interest.'").

126. McKeown, *supra* note 98, at 529 ("First, the plaintiff must show an anticompetitive effect.").

127. *See* Jacobs v. Tempur-Pedic, Intern., Inc. 626 F.3d 1327, 1339 (11th Cir. 2010) ("Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality.").

128. *See* Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594-95 (7th Cir. 1984) ("An agreement on output also equates to a price-fixing arrangement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in in order to limit demand to the reduced supply. Thus . . . raising price, reducing output, and dividing markets have the same anticompetitive effects.").

129. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 106 ("[R]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.").

the NCAA's plan was held to be anticompetitive because "[p]rice is higher and output lower than they would otherwise be."[130] Thus, one test of a broadcasting plan's legality is whether it limits output to a level "lower than [it] would otherwise be" in the absence of the restraint.[131] This test was relatively easy to apply in *NCAA* because the plan at issue there prevented schools from selling broadcast rights to all but three networks and capped the number of television appearances each school could make in a given year.[132] However, *Kingray* and *Laumann* reveal that the application of this test is not always so straightforward. These cases show that different notions of how to measure output in the context of the sports broadcasting industry can lead to vastly different outcomes.

B. The Kingray Approach to Output

In *Kingray,* the plaintiffs alleged that the NBA and DirecTV conspired to restrict output and raise prices by making NBA League Pass available exclusively through DirecTV and blacking out games available on local RSNs.[133] NBA League Pass is a subscriber-based television package that allows purchasers to watch all out-of-market games subject to blackouts of in-market games that would otherwise be available.[134] Essentially, it is the NBA's version of MLB Extra Innings. The *Kingray* plaintiffs alleged four theories of anticompetitive harm, including a claim for conspiracy to limit output.[135]

130. *Id.*

131. *See* Ross, *supra* note 51, at 476 ("The fatal flaw in the NCAA plan, according to the Supreme Court, was that output was 'lower than [it] would otherwise be.' The key issue, therefore, is whether viewership is lower because of the challenged contract than it would be if that contract were enjoined."); *see also* Ethan Flatt, *Solidifying the Defensive Line: The NFL Network's Current Position Under Antitrust Law and How It Can Be Improved,* 11 VAND. J. ENT. & TECH. L. 637, 659-60 (2009) (defining output in terms of consumer welfare and stating that "consumer welfare can be said to increase when consumers (or viewers) have greater access to the television broadcasts.").

132. *NCAA*, 468 U.S. at 106.

133. Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1184 (S.D. Cal. 2002).

134. *Id.*

135. *See* Class Action Complaint for Violations of the Sherman Act, Clayton Act, and California Business & Professions Code and Demand for Jury Trial, Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1184 (S.D. Cal. 2002) (No. 00 CV 1545 JM), 2001 WL 34674898.

The court dismissed all four claims, holding that the plaintiffs failed to allege anticompetitive harm. Addressing the reduced output theory, Judge Lorenz found that blackouts did not bring about a reduction in output because every time a blackout is enforced on a certain channel, it still available on another channel.[136] Because of this, the court held that "NBA League Pass's black-out provision does not restrict output; it only affects what channel the game is available on."[137] Distinguishing *NCAA*, the court noted that NBA League Pass made over one thousand previously unavailable out-of-market regular season games accessible to consumers.[138] This led the court to conclude that introducing NBA League Pass actually increased output by making more games available relative to the status quo ante.[139] Accordingly, the challenged restraint passed the *NCAA* test because it did not render output lower than it would otherwise be.

C. The Laumann Approach to Output

Similar to *Kingray*, the plaintiffs in *Laumann* alleged that the broadcasting restraints implemented by MLB and its television partners violated Section 1 because they resulted in reduced output and increased prices for consumers.[140] However, despite the fact that MLB and the NBA enforce viewership restrictions through the same kind of agreements among teams, RSNs, and MVPDs, Judge Scheindlin rejected *Kingray*'s holding that anticompetitive harm is *not* present when blackouts prevent fans from watching games on certain channels. Although the court acknowledged that blackouts do not prevent games from being available to consumers on all channels, it declared, "[m]aking all games available as part of a package, while it may increase output overall, does not, as a matter of law, eliminate the harm to competition wrought by preventing the individual teams from competing to sell their

136. *Kingray*, 188 F. Supp. 2d at 1193 ("The NBA DirecTV contract provides that the only time a game is 'blacked out' on the NBA League Pass is because it is otherwise available to view on a free local over-the-air broadcast or via local and national channels.").

137. *Id.* at 1194.

138. *Id.* at 1195.

139. *Id.*

140. Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 485 (S.D.N.Y. 2012).

games outside their home territories in the first place."[141] In other words, even if an out-of-market package makes more games available to consumers relative to the status quo ante, it may still render output lower than it would be when compared to a market with no restraints at all. Thus, Judge Scheindlin held that the plaintiffs adequately alleged that MLB's broadcasting arrangement presented anticompetitive harm in the form of reduced output, allowing the case to proceed to the second step of the rule of reason analysis.

D. Total Viewership is the Proper Measure of Output

Comparing *Kingray* and *Laumann* makes it clear that *Laumann* provides the more accurate measure of output and the better analysis. *Kingray* fails to apply *NCAA* correctly because it defines output solely in terms of the total number of games available on television.[142] The better definition of output in the sports programming context, as *Laumann* implicitly acknowledges, is total viewership.

In finding that NBA League Pass increased output,[143] *Kingray* simply compared the total number of NBA games available on television before and after the introduction of NBA League Pass. The flaw in this approach is that a broadcasting arrangement that increases output relative to a previous state of affairs may still significantly restrict output. Indeed, Judge Lorenz acknowledges that one reason NBA League Pass increased output is that, "with few specified exceptions, out-of-market games were not available to the public" prior to its inception.[144] Thus, while NBA League Pass may have resulted in increased output, the increase was relative only to the prior, even more restrictive, distribution arrangement in place.

The *Laumann* analysis is preferable because it takes a holistic view of the market as opposed to the narrower before-and-after approach taken in *Kingray*.[145] The assumption

141. *Id.* at 490.

142. Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 754 F. Supp. 1336, 1356 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992) ("Measuring output simply by the number of games gives an incomplete picture.").

143. *Kingray*, 188 F. Supp.2d at 1195 ("[O]utput of out-of-market NBA games increased by virtue of the NBA League Pass, rather than decreased.").

144. *Id.*

145. *See* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918)

underlying the plaintiffs' position in both cases is that eliminating territorial restrictions would increase output in the market for live video presentations of games by giving clubs the freedom to negotiate television contracts with RSNs, MVPDs, and internet providers throughout the country.[146] As Professor Stephen Ross explains, "[a]bsent restraints, individual teams would compete not only on the playing field and for playing talent, but for television viewers as well. For example, the Chicago Bulls might be able to market their own games to stations across the country who would be interested in featuring performances by superstar Michael Jordan."[147] If this were the case, fans would have the freedom to subscribe to the RSN of their choosing regardless of their geographic location. Increasing the variety of programming options available to consumers would bring about increased competition among clubs, RSNs, MVPDs, and internet providers, which would consequently drive down costs for consumers.[148]

In this way, MLB's broadcasting plan restricts output not because it limits the total number of games that can be seen on television, but rather because it limits total viewership.[149] Total viewership is a more accurate measure of output in the context of sports programming because the total number of consumers having access to games is a better reflection of product availability than the total number of games broadcast.[150] Defining output in terms of the number of

(explaining that the legality of a restraint is determined by, among other things, "the facts peculiar to the business to which the restraint is applied" and "[t]he history of the restraint.").

146. STEPHEN F. ROSS & STEFAN SZYMANSKI, FANS OF THE WORLD UNITE! 15 (2008) (explaining that "[a]bsent the exclusive territorial arrangements agreed to by league owners, individual teams would either directly, or more likely via intermediaries, arrange for their own games to be available to out-of-market fans.").

147. Ross, *supra* note 51, at 467.

148. *See* Memorandum of Law in Opposition to Defendants Motion to Dismiss or in the Alternative for Partial Summary Judgment, Madison Square Garden, L.P., v. Nat'l Hockey League, No. 07 CV 8455, 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008), 2008 WL 2825036 (noting that fans "are deprived of alternatives that could be offered by individual clubs—such as the ability to purchase single games or the games of a single team—and of the lower prices that would result from such competition.").

149. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Complaints, Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (Nos. 12-cv-1817, 12-cv-3704), 2012 WL 5272352.

150. *See* Ross, *supra* note 51, at 478 ("The key issue, therefore, is whether viewership is lower because of the challenged contract than it would be if that contract

games broadcast leads to absurd consequences. If this were the case, leagues could impose any arbitrary limitation on viewership, and as long as each game was available on some channel and at some price, there would be no reduction in output.[151] For example, MLB could decide to make broadcasts available only on a pay-per-view basis for the cost of a ticket to the ballgame. Even though this kind of plan would cause a vast majority of fans to forego watching games, under *Kingray*'s reasoning, such a restriction "does not restrict output; it only affects what channel the game is available on."[152]

Appreciating this reality, *Laumann* acknowledges that MLB's plan reduces total viewership by "'forc[ing] . . . consumers to forego the purchase of [these games] from other distributors [the individual clubs]' resulting in decreased consumer choice and increased."[153] Thus, the *Laumann* plaintiffs stated a claim for anticompetitive harm under step one of the rule of reason by showing that MLB's broadcasting plan uses agreements among economic actors to limit the total number of fans having access to games.

IV. RULE OF REASON: STEPS TWO AND THREE

Once a plaintiff successfully states a claim for anticompetitive harm, the next step of the rule of reason shifts the burden to the defendant, who must come forward with procompetitive justifications for its conduct.[154] If the court finds that the defendant's justifications are legally cognizable, the final step of the analysis requires the court to balance competitive effects and to determine whether the

were enjoined.").

151. Or, as the plaintiffs effectively point out, "It is no more correct to assert . . . that the only measure of output of sports telecasts is the number of games available than it is to say that the measure of output of books in the number of titles available." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Complaints, Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (Nos. 12-cv-1817, 12-cv-3704), 2012 WL 5272352.

152. Kingray, Inc. v. Nat'l Basketball Ass'n, Inc., 188 F. Supp. 2d 1177, 1194 (S.D. Cal. 2002).

153. *Laumann*, 907 F. Supp. 2d at 490 (quoting Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012)).

154. *See* McKeown, *supra* note 98, at 539 ("[T]he second step of a rule of reason analysis . . . requires the defendant to come forward with a procompetitive justification for the challenged arrangement or restraint.").

defendant could feasibly adopt a less restrictive alternative.[155] At the balancing stage, a plaintiff will only succeed if it is able to prove that the restraint's anticompetitive effects greatly outweigh its procompetitive benefits, or that a less restrictive alternative could easily be adopted.[156]

In practice, courts rarely engage in the balancing of procompetitive and anticompetitive effects required by the third stage,[157] and plaintiffs almost succeed under the rule of reason.[158] Probably because courts are not accustomed to the difficult task of sifting through economic analyses of market power and weighing the harmful and beneficial effects of a restraint, the overwhelming majority of rule of reason cases are disposed of at one of the earlier stages.[159] In fact, according to a recent study, only one of the past 222 antitrust cases to go to a final determination under the rule of reason was resolved in favor of the plaintiff.[160] However, the same study showed that all but seven of the 222 cases never made it past step one of the rule of reason because the court found that the plaintiff failed to demonstrate anticompetitive harm.[161] Thus, the fact that the court found an anticompetitive effect is undoubtedly a victory for the plaintiffs, and shows that the outcome of the case will turn on MLB's ability to produce procompetitive justifications for its conduct.

In its defense, MLB will likely assert that home television territories are needed to promote competitive balance, which courts have recognized as a legitimate interest in professional

155. *Id.* at 542 ("The final step in a rule of reason analysis involves weighing the procompetitive and anticompetitive effects and evaluating whether less restrictive alternatives would satisfy the legitimate needs.").

156. *See* Capital Imaging Associates, P.C. v. Mohawk Valley Med. Associates, Inc., 996 F.2d 537, 543 (2d Cir. 1993) ("Assuming defendant comes forward with [procompetitive justifications] the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives.").

157. Carrier, *supra* note 118, at 837 ("In the first decade of the twenty-first century, courts have continued their use of a burden-shifting framework in applying the rule of reason. They almost never balance."); s*ee also* Edelman, *supra* note 108, at 203 (noting that antitrust plaintiffs face "an uphill battle.").

158. Carrier, *supra* note 118, at 830.

159. *See* Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 A.B.A. SEC. ANTITRUST L. CIV. PRAC. PROC. COMMITTEE: PERSPECTIVES IN ANTITRUST 2-3 (2013).

160. *See* Carrier, *supra* note 118, at 830.

161. *Id.* at 829.

sports.[162] It will argue that its broadcasting model helps level the playing field by limiting the disparity in television revenues earned by small and large market clubs.[163] It will likely argue that giving individual clubs the ability to broadcast games throughout the country would exacerbate the existing disparity in television revenues by allowing large market teams to take an even larger slice of the pie to the detriment of smaller market teams.[164]

If MLB can provide economic analyses to support their justifications, then the court will likely uphold the legality of the broadcast plan rather than attempting to balance the benefits of the arrangement against its harms. If the defendants can show that the restrictions have the effect of "making the entire league successful and profitable," then the court will likely find that they withstand scrutiny under the antitrust laws.[165]

V. CONCLUSION

Although *Laumann* reached the correct conclusion in determining that MLB's broadcasting plan harms competition in the market for live video presentations of professional baseball games, whether the plan runs afoul of the antitrust laws depends on whether a court accepts MLB's procompetitive justifications. If the league is unable to provide proof of the need for these restrictions, then the court will see no need to go through a full rule of reason analysis

162. Major League Baseball Props. v. Salvino, Inc., 542 F.3d 290, 331-32 (2d Cir. 2008) ("[C]ompetitive balance among the teams is essential to both the viability of the Clubs and public interest in the sport . . . .").

163. Although some of the difference in television revenues is redistributed among teams through the league's revenue-sharing policies, the disparity among large and small market teams is still significant. For instance, taking into account money distributed through revenue sharing and from national television contracts, the Los Angeles Angels earned an estimated $119,610,000 in total television revenues in 2013 whereas the Cincinnati Reds earned only $44,000,000. Without revenue sharing policies in place, the Angles would have earned $123,150,000 in local television revenues while the Reds would have earned only $10,000,000. *See* Dave Warner, *How MLB Splits Your TV Dollars*, AWFUL ANNOUNCING (May 17, 2013), http://www.awfulannouncing.com/2013/may/how-mlb-splits-your-tv-dollars.html.

164. Judge Scheindlin hints at other potential justifications, such as that "'individual [teams] are inherently unable to compete fully effectively' or that the agreements are 'necessary to maintain a competitive balance.'" Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 491 (S.D.N.Y. 2012).

165. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2206 (2010).

and will instead apply the quick look test to strike down the current model. If MLB can provide legally cognizable procompetitive justifications, then the rule of reason applies and the court will almost certainly conclude that dividing the market for baseball games into exclusive home television territories and "granting the Leagues exclusive rights to distribute out-of-market programming . . . [is] reasonable and in compliance with antitrust law."[166]

166. *Laumann*, 907 F. Supp. 2d at 490.