Solidifying the Defensive Line: 
The NFL Network’s Current Position 
Under Antitrust Law and How it 
Can Be Improved

ABSTRACT

In the United States, the broadcasting of professional sporting events is a multi-billion dollar industry, and the National Football League (NFL) alone earned more than $3 billion from television contracts during its 2008 season. Considering the massive revenues that broadcast rights can generate, it is no surprise that some major professional sports leagues have recently developed their own television networks. While it was not the first league-owned television network, the NFL Network has certainly generated the most attention. Since it started broadcasting a select number of NFL regular season games in 2006, the NFL Network has been subject to media criticism, extensive litigation, and even Congressional committee hearings.

There are potential antitrust concerns surrounding the Network that are highlighted by an ongoing dispute between the NFL and cable provider Comcast Corporation. Comcast offers the NFL Network on a separate sports programming tier instead of on its basic cable package. As a result, subscribers must pay extra for access to the Network, and it reaches far fewer viewers than basic cable. The antitrust scrutiny stems from uncertainty about whether the NFL Network (1) is exempt from antitrust liability under the Sports Broadcasting Act of 1961, and (2) constitutes an agreement in restraint of trade in violation of Section 1 of the Sherman Act.

This Note first examines the analysis that a court is likely to use in determining whether the NFL Network violates antitrust law. For sports-related cases that involve potential antitrust liability under Section 1 of the Sherman Act, courts have applied the rule of reason analysis and have looked to what effects the challenged conduct will have on competition or consumer welfare. The NFL Network’s impact on competition and consumer welfare can be evaluated by considering its role in the League’s television policy, and how broadcasting games on the Network actually affects consumers’ access to NFL
programming. Ultimately, the NFL Network may avoid antitrust liability as long as it remains a supplement to the NFL’s primary focus: regional broadcasts of every NFL game on free, over-the-air networks. In that way, games shown on the Network only increase consumer access by giving viewers a way to pay for NFL programming that would not otherwise be available in their market. Finally, this Note proposes a flexible-scheduling policy that would address some of the NFL Network’s antitrust issues and ensure that consumer access to NFL programming is enhanced.

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A national poll conducted in 1993 estimated that nearly 60 percent of all adults in the United States watched televised broadcasts of National Football League (NFL) games. Since that time, the popularity of the NFL has continued to grow, with roughly 222 million people—or almost 75 percent of all Americans—watching on television.

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in 2006. With its growth in fan support, the League has enjoyed a consistent increase in revenues. Recently, the NFL’s net worth was estimated to be $12.8 billion, which is nearly double that of the professional sports league with the second highest net worth, Major League Baseball (MLB). As one commentator has noted, “The NFL’s [television] ratings, attendance as a percentage of stadium capacity, merchandise sales, Internet traffic, and overall fan affinity has left every other professional sports league in the dust.”

The NFL’s success as a lucrative brand is likely correlated to the development of broadcasting sporting events on television. Professional sports leagues did not consider television broadcasts to be a source of significant revenue until the late 1950s. Since that time, “[n]etwork television contracts have become the largest source of revenue for sports franchises.” Indeed, the success of virtually all professional sports leagues depends upon the marketing of the broadcast rights to their games. The NFL will generate more than $3 billion in 2008 from broadcast rights alone. This money is vital to the League’s survival, comprising approximately half of its total revenue each year.

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5. John A. Fortunato, *The NBA Strategy of Broadcast Television Exposure: A Legal Application*, 12 FORDHAM INT’L J. 133, 134 (2001), available at http://law.fordham.edu/publications/article.ihtml?pubID=200&id=119 (noting that before broadcast fees became a significant source of revenue, the NFL and other professional sports leagues focused on game attendance and ticket revenues, and that, today, such revenues are only a fraction of the NFL’s total income).

6. Id. at 135.

7. Id.

8. See *Can the NFL and Big Cable Cos. Get Beyond the Line of Scrimmage?*, KNOWLEDGE@EMORY, Apr. 9, 2008, at 2, http://knowledge.emory.edu/article.cfm?articleid=1135 [hereinafter KNOWLEDGE@EMORY] (noting that the NFL has long-term deals with CBS, NBC, and Fox, which have a combined value of more than $11 billion); Marie Leone, *NFL Runs Up the Score*, CFO.COM, Jan. 30, 2008, http://www.cfo.com/article.cfm/106008457?search (noting that additional contracts with cable network ESPN and satellite broadcaster DirecTV are worth $8.9 billion and $3.5 billion, respectively); see also Ted Hearn, *NFL Files FCC Complaint Against Comcast*, MULTICHANNEL NEWS, May 6, 2008, http://www.multichannel.com/article /CA6558159.html.

9. Leone, supra note 8.
A critical component in generating that income is the statutory antitrust exemption provided to certain professional sports leagues under the Sports Broadcasting Act of 1961 (SBA).\textsuperscript{10} Essentially, the statute allows the NFL “to act as a cartel and collectively package and sell the broadcast rights of its games to television networks.”\textsuperscript{11} The NFL’s development of its own network—the NFL Network (the Network)—has raised new questions about the scope of the exemption, and could possibly expose the League to antitrust scrutiny.\textsuperscript{12} Moreover, the relevance of these questions is not limited to the NFL. Each one of the “big four” professional sports leagues in the United States—the NFL, MLB, the National Basketball Association (NBA), and the National Hockey League (NHL)—has developed a television network that broadcasts league games.\textsuperscript{13} Thus, this Note’s analysis of the antitrust issues surrounding the NFL Network can likely be applied across the professional sports industry.

This Note will examine the antitrust issues surrounding the NFL Network and propose a policy to address potential situations in which the Network may be vulnerable to future antitrust scrutiny. Part I will review the relevant antitrust law and its role in the professional sports industry. Part II will discuss the current legal dispute between Comcast and the NFL, which highlights the key antitrust issues surrounding the NFL Network. Part III will demonstrate why the NFL Network is not exempt from antitrust liability under the SBA, and apply the relevant legal standard—specifically, the “rule of reason” test, with a focus on consumer welfare—in examining the Network’s current position under antitrust law. Finally, this Note will conclude that the NFL Network does not violate antitrust law, and propose a flexible-scheduling policy that will maintain the legality of the NFL’s television policy and prevent future antitrust liability.

\textsuperscript{11} Fortunato, supra note 5, at 133.
I. BACKGROUND

A. The Legal Foundations of Antitrust Liability

1. The Sherman Antitrust Act of 1890

The Sherman Antitrust Act of 1890 (the Sherman Act) was a major legislative effort by the Fifty-first Congress to codify common law prohibitions of anticompetitive conduct.\(^{14}\) Enacted to protect consumers, the Sherman Act targets market restraints that increase price and decrease output, which are inherently “unresponsive to consumer preference.”\(^{15}\) Under the Sherman Act, antitrust claims come within federal jurisdiction,\(^{16}\) and the consequences of a violation can include criminal sanctions.\(^{17}\) Virtually all contracts restrain trade to some degree, so a workable standard was needed to target only the agreements deserving of antitrust liability.\(^{18}\) The courts have adopted a reasonableness standard so that the statute only prohibits unreasonable restraints of trade.\(^{19}\)

Section 1 of the Sherman Act is the antitrust provision that primarily influences the NFL Network and the broadcasting of professional sports in general.\(^{20}\) It provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”\(^{21}\) Section 1 targets agreements between two or more individuals or entities; it cannot be violated by the unilateral action of a single actor.\(^{22}\) There are two basic methods of analyzing alleged Section 1 violations: (1) the per se approach, and (2) the rule of reason approach.\(^{23}\) A per se violation will

\(^{14}\) Ernest Gellhorn et al., Antitrust Law and Economics in a Nutshell 17 (5th ed., 2004). The Sherman Act “enable[d] government agencies and private parties to enforce prohibitions against trade restraints and monopolization.” Id. at 27.


\(^{16}\) Gellhorn et al., supra note 14, at 25.

\(^{17}\) Id. at 26-27.

\(^{18}\) See id. at 29.


\(^{22}\) Gellhorn et al., supra note 14, at 25-26.

\(^{23}\) Kaiser, supra note 20, at 1241; see also Standard Oil Co. v. U.S., 221 U.S. 1, 66 (1911); U.S. v. Addyston Pipe & Steel Co., 85 F. 271, 291, 299 (6th Cir. 1898).
generally be found by the courts for actions that, in all likelihood, “would always or almost always tend to restrict competition and decrease output.”

In NCAA v. Board of Regents, the U.S. Supreme Court rejected use of the per se approach in sports-related cases due to their unique nature.

A court considering potential antitrust liability in a sports-related case is therefore likely to judge the challenged conduct under the rule of reason. Based on the 1911 U.S. Supreme Court ruling in Standard Oil Co. v. U.S., modern applications of the rule of reason test generally focus on the following elements in determining whether there has been a violation of the Sherman Act: (1) collective action must be shown through the existence of “a conspiracy or an agreement among two or more persons,” (2) there must be an intention or purpose of such collective action to “restrain or harm competition,” and (3) the collective action must have actually succeeded in restraining or harming competition.

Since the mid-1980s, the Court has applied a modified version of the rule of reason test, often referred to as the “consumer welfare test,” in several antitrust cases.

In Reiter v. Sonotone Corp., a case solidifying the consumer welfare test, the Court acknowledged the importance of consumer welfare in U.S. antitrust law, and characterized the Sherman Act as being “designed . . . as a ‘consumer welfare prescription.’” The consumer welfare test looks at whether the business practice at issue results in harm to consumer

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24. Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 19-20 (1979). The U.S. Supreme Court quickly realized that some antitrust cases could be resolved summarily, and the per se test is applied to actions that are “presumed to have no benefit to competition in the industry.” Kaiser, supra note 20, at 1241. Thus, for business practices that satisfy the per se test, no possible justifications can be supplied to defend their illegality. Id.


26. See Kaiser, supra note 20, at 1242; see also LaRocca, supra note 12, at 92-93 (stating that an antitrust violation is unlikely to be found “[i]f the procompetitive effects outweigh the anticompetitive effects”).

27. Ivy Ross Rivello, Sports Broadcasting in an Era of Technology: Superstations, Pay-Per-View, and Antitrust Implications, 47 Drake L. Rev. 177, 187, 190 (1998) (noting that the “Court has paralleled the term ‘competition’ with the term ‘consumer welfare,’” and the central focus of the inquiry—reasonableness in light of legitimate business purposes—remains the same).


welfare. It is based on neoclassical economics, which is the predominant, “mainstream” view of economics today and “involves economic agents . . . optimizing [value] subject to all relevant constraints.”

The policies underlying the antitrust exemption for professional sports leagues in the SBA support the idea that any detriment to “consumer welfare” would be an appropriate measure for actual harm in an antitrust case that relates to a professional sports franchise. Within the context of professional sports, courts should apply the same focus on consumer welfare that was a driving force behind the creation of the statutory exemption. Applying the consumer welfare test to a case involving sports broadcasting, a court would likely inquire whether the challenged conduct has a negative impact on consumer access to the broadcasts of professional sporting events. Because the output of a professional sports league is its sporting events or games, “it is only collective decisions designed to reduce the number of such games that threaten to diminish consumer welfare within the meaning of rule of reason analysis.”

The U.S. Supreme Court’s decision in NCAA v. Board of Regents provides the best example of the consumer welfare analysis in the context of sports broadcast rights. The Court held that the NCAA’s exclusive television policy amounted to a Section 1 violation of the Sherman Act because it limited the number of college football games that could be televised. The Court rejected the use of the per se test by the lower courts because the case involved “an industry in which horizontal restraints on competition are essential if the product is to be available at all.” Rather, the Court applied the rule of reason analysis—“to form a judgment about the competitive significance of the restraint”—was the same under either test.

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31. Rivello, supra note 27, at 190.


33. See Rivello, supra note 27, at 190.


36. NCAA, 468 U.S. at 95-96 (affirming the district court’s holding that the NCAA violated Section 1 of the Sherman Act).

37. Id. at 101. The Court did point out, however, that the primary focus of the analysis—“to form a judgment about the competitive significance of the restraint”—was the same under either test. Id. at 103 (quoting Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 692 (1978)).
test, under which a restraint of trade may be found unreasonable based on one of the following: (1) “the nature or character of the contracts,” or (2) the “surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.” The Court concluded that the challenged conduct unreasonably restrained price and output, and found “that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA ha[d] restricted rather than enhanced the place of intercollegiate athletics in the nation’s life.”

From the holding in *NCAA v. Board of Regents*, it can be inferred that when faced with an antitrust claim, professional sports leagues may defend their challenged actions by showing that any anticompetitive effects are outweighed by procompetitive benefits. Indeed, there may be valid business reasons that justify an otherwise prohibited restraint of competition. The NCAA unsuccessfully argued that its plan resulted in efficiencies, which increased the competition for its broadcast rights. It also claimed that any harmful effects were outweighed by the competitive balance that the policy preserved. Because it will generally maximize demand, the purpose of maintaining competitive balance can be a justification under the rule of reason analysis. Nevertheless, the Court rejected the NCAA’s argument, as “[t]he finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.”

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38. *Id.* at 103.
39. *Id.* at 104-05. The Court found “significant potential for anticompetitive effects” because the resulting price structure was “unresponsive to consumer preference” and not the product of a competitive market. *Id.* at 105-07.
40. *Id.* at 120 (emphasis added).
42. *Id.* Generally, exclusive dealing arrangements for the broadcasting of professional sporting events will not run afoul of antitrust law or policy, provided such broadcasts are freely accessible by the public. *Exclusive Sports Programming: Examining Competition and Consumer Choice: Hearing Before S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) (statement of Stephen F. Ross, Professor, Penn State University's Dickinson School of Law), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=ba31e64-810f-4e86-947e-3ef4d0e0201d&Witness_ID=91f7b627-48fd-4a1a-abfc-0448109b5f08.
43. *NCAA*, 468 U.S. at 114.
44. See *id*.
45. See *id.* at 119-20.
46. *Id.* at 120.
2. The Sports Broadcasting Act of 1961

The SBA was enacted in 1961 as a legislative response to two court rulings in the Eastern District of Pennsylvania. In the 1953 case *U.S. v. NFL*, Judge Allan K. Grim held that an NFL bylaw provision, which prohibited individual teams from selling their broadcast rights, was illegal under antitrust law. But it was a 1961 ruling, however, that spurred Congress to action. At that time, the NFL sought to execute a joint agreement with a television network for the broadcast rights of all teams. Because of the 1953 ruling, the NFL returned to the district court for a determination regarding the new joint agreement. Again, Judge Grim found the NFL’s conduct to be in violation of antitrust law and voided the agreement. Less than three months later, Congress enacted the SBA. It “established the legality of the professional sports leagues’ practice of packaging league games to a network and not allowing teams to individually sell their [broadcast] rights, which would otherwise be an unlawful restraint on competition.”

Under the SBA, an agreement facilitating the sale or transfer of “sponsored telecast[s] of the games of football, baseball, basketball, or hockey” by a professional sports league is exempt from the antitrust laws. This antitrust exemption is important because it facilitates the bundling of broadcast rights, which provide the majority of the league revenues. The exemption is a limited one, however, applying...

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48. *U.S. v. NFL*, 116 F.Supp. at 319. Judge Grim did, however, allow the NFL to retain a limited blackout privilege. *Id.* The purpose of the NFL bylaw was not to secure the large revenues the League receives now, but rather to ensure that the relatively new concept of televising games did not undermine ticket revenues or game attendance. See *id.*; *WTWV*, Inc. v. *NFL*, 678 F.2d 142 (11th Cir. 1982).
50. See *id.* A new competitor of the NFL—the American Football League—had signed a similar agreement with a different television network. See *WTWV*, 678 F.2d at 142. In 1966 an agreement was reached for the American Football League to merge with the NFL. NFL.COM, *NFL History by Decade*, http://www.nfl.com/history/chronology/1961-1970 (last visited Apr. 5, 2009).
51. *WTWV*, 678 F.2d at 144.
54. Fortunato, supra note 5, at 139.
56. See KNOWLEDGE@EMORY, supra note 8, at 1-2. For more regarding the statutory antitrust exemption in the SBA, see *Federal Statutory Exemptions from Antitrust Law*, 2007 A.B.A. SEC. ANTITRUST L. 217-21, 234-40.
only to “the joint sale of television broadcast rights.” Thus, antitrust liability with respect to other areas—such as labor relations—is not precluded by the exemption.

Uncertainty about the applicability of the SBA’s exemption can sometimes flow directly from changes that were unforeseen by Congress in 1961. Indeed, developments in technology have led to legal challenges regarding the scope of the exemption because there is little guidance from the statute itself. In Chicago Professional Sports v. NBA, the U.S. Court of Appeals for the Seventh Circuit had to decide whether superstations—particularly, WGN-TV of Chicago—should be allowed to broadcast NBA games contrary to the league’s legal monopoly over the broadcast rights to its games. Superstations are local broadcast stations that have national exposure “because cable systems throughout the nation carry [the] signal.” WGN-TV challenged an NBA policy restricting the national broadcast of games by superstations. The Seventh Circuit decided the antitrust exemption was not applicable because, according to the court, it should be construed narrowly, and the challenged conduct did not involve the “transfer” of broadcast rights. Applying the rule of reason test, Judge Frank Easterbrook, writing for the court, upheld the decision of the lower court to enjoin the NBA from enforcing the broadcast restrictions.

The development of satellite television is a more recent example of how new technology has raised questions about the SBA exemption. In Shaw v. Dallas Cowboys Football Club, the U.S. Court of Appeals for the Third Circuit considered whether the antitrust exemption applied to the joint sale of broadcast rights to a satellite television distributor. The NFL had collectively agreed to sell its broadcast rights to DirecTV, which the plaintiffs claimed was a

57. Mid-South Grizzlies v. NFL, 720 F.2d 772 (1983).
58. See id.
61. 961 F.2d at 667.
62. Id. at 669.
63. See id. at 669-70.
64. See id. at 670-71.
65. Id. at 674-77.
67. Id.
violation of the Sherman Act. The court determined the agreement was not covered by the exemption, as a satellite distributor did not fall under the statutory language of “sponsored telecasting.” It interpreted “sponsored telecasts” to mean “broadcasts which are financed by business enterprises . . . in return for advertising time and are therefore provided free to the general public.” Due to a settlement in the case, however, the ultimate issue—whether the agreement with DirecTV actually violated the antitrust laws—was never resolved by the court.

So why is the antitrust exemption important? The simple answer has been articulated by Emory University Professor Steve Walton: “If the sports leagues lose that exemption, they [are] toast.” To understand why the exemption is necessary for the NFL to survive, one must look at its business model. Perhaps the best explanation is that given by the Second Circuit in North American Soccer League v. NFL:

The success of professional football as a business depends on several factors. The ultimate goal is to attract as many people as possible to pay money to attend games between members [teams] and to induce advertisers to sponsor television broadcasts of such games, which results in box-office receipts . . . all based on public interest in viewing games.

Without the antitrust exemption, leagues would be prohibited from bundling the broadcast rights of its teams. The rights would then be sold by the teams individually, and the networks would be able to “cherry-pick” games featuring only the top teams and star players, which might lead to some teams’ games not being broadcasted on television at all. To increase popularity and generate greater revenues, however, the NFL seeks to maximize exposure for all teams through the sale of its broadcast rights.

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68. See id. at 300.

69. Id. at 302-03.

70. Id. at 301 (emphasis added). The court followed “the Supreme Court’s direction that exceptions to the antitrust laws must be narrowly construed.” Id. While acknowledging that the NFL retains some rights in the games that are televised, the court concluded that “the statutory exemption turns on the nature of the broadcast in question.” Id. at 300.


72. KNOWLEDGE@EMORY, supra note 8, at 1-2. Walton points out that the survival of the NFL depends on the revenue generated under its antitrust exemption, and losing it “would be an utter catastrophe.” Id. at 2.

73. See N. Am. Soccer League v. NFL, 670 F.2d 1249, 1251 (2d Cir. 1982).

74. Id.


76. See KNOWLEDGE@EMORY, supra note 8, at 1-2 (noting that allowing the NFL to bundle broadcast rights under the SBA exemption means that purchasers of those rights
II. CASE STUDY: NFL v. COMCAST

A. The NFL Network Dispute

The NFL Network has generated some antitrust scrutiny, which is highlighted by the NFL’s public standoff with a major cable provider.\textsuperscript{77} The League is currently engaged in a fierce legal battle against Comcast Corporation (Comcast) over the program carriage rights of the Network.\textsuperscript{78} Launched in 2003, the Network was initially designed to provide highlights, analysis, and programming that included a continuous dose of “archived footage, football-focused specials and old team highlight reels.”\textsuperscript{79} Cable companies gave the Network a lukewarm reception due to concerns that it lacked the programming content to appeal to a broader audience.\textsuperscript{80} Nevertheless, the NFL and Comcast entered an agreement giving the cable provider the right to broadcast the NFL Network to its subscribers.\textsuperscript{81} The agreement contained a clause, however, allowing Comcast to offer the Network as part of any of its cable packages, provided there was no subsequent agreement for an “additional cable package” executed by the parties before July 31, 2006.\textsuperscript{82}

The NFL eventually decided to broadcast regular season games on the Network.\textsuperscript{83} On July 28, 2006, the League reached a deal with Comcast regarding the specific games available for broadcast via the NFL Network.\textsuperscript{84} Soon thereafter, Comcast announced that it would place the NFL Network on its sports tier, which requires subscribers to pay an extra monthly fee for access.\textsuperscript{85} As a result, the NFL are forced to pay for the weaker teams along with those teams that may be more profitable.\textsuperscript{86}

\begin{itemize}
  \item \textsuperscript{77} See id. at 1.
  \item \textsuperscript{80} KNOWLEDGE@EMORY, supra note 8, at 1.
  \item \textsuperscript{82} Id. In other words, any agreement by the parties for an “additional cable package” would require Comcast to place the NFL Network on its basic cable lineup. See id.
  \item \textsuperscript{83} See LaRocca, supra note 12, at 87.
  \item \textsuperscript{84} Id.; see also KNOWLEDGE@EMORY, supra note 8, at 2.
  \item \textsuperscript{85} LaRocca, supra note 12, at 87-88.
\end{itemize}
Network is available to only 1 million Comcast subscribers who have purchased the additional sports programming tier, instead of the 24 million subscribers of Comcast’s basic cable.\textsuperscript{86} The NFL responded by filing a lawsuit against Comcast in December 2007, claiming that its agreement with the cable provider did not permit placement of the NFL Network on a “separate pay-basis ‘sports tier.’”\textsuperscript{87} The NFL also filed a program carriage complaint with the Federal Communications Commission (FCC) in May 2008\textsuperscript{88}, and created a massive public relations campaign encouraging NFL fans to increase pressure on Comcast to include the Network on basic cable.\textsuperscript{89} The case went to trial in 2007, and a New York state court granted summary judgment for Comcast, finding that there was “not a deal for an additional package.”\textsuperscript{90} In February 2008, however, the Appellate Division reversed the decision.\textsuperscript{91} It concluded that the ambiguity of the contractual terms created a genuine issue of material fact, and remanded the case for further proceedings.\textsuperscript{92} In the Fall of 2008, the parties agreed to mediation; however, it appears unlikely that an

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  \item \textsuperscript{86} Hearn, \textit{supra} note 8.
  \item \textsuperscript{87} Glass, \textit{supra} note 81, at 355.
  \item \textsuperscript{88} Hearn, \textit{supra} note 8. The complaint alleged that Comcast’s dealings with the NFL Network constituted discriminatory and retaliatory action in violation of federal law. \textit{Id.} Even when the NFL’s suit against Comcast went to mediation in August 2008, the League did not suspend its pending complaint. The FCC issued a decision in favor of the NFL on October 10, 2008, refusing to dismiss the complaint and sending it to an administrative law judge for review. Richard Sandomir, \textit{NFL Network Gets a Lift from Ruling}, \textit{N.Y. Times}, Oct. 12, 2008, at SP4, available at http://www.nytimes.com/2008/10/12/sports/football/12cable.html?partner=rssnyt&emc=rss.
  \item \textsuperscript{89} KNOWLEDGE@EMORY, \textit{supra} note 8, at 2. The NFL created a website—iwantmynflnetwork.com—that encouraged fans to contact their local government officials or even switch to other cable providers. See Comcast Sends NFL Network Cease-and-Desist Note, USA TODAY, Nov. 20, 2007, available at http://www.usatoday.com/sports/football/nfl/2007-11-20-comcast-letter_N.htm. Comcast responded by sending the League a cease-and-desist letter. See \textit{id}. As of April 2009, the Internet domain name appears to have been changed to iwantnflnetwork.com. See I Want NFL Network, http://iwantnflnetwork.com/ (last visited Apr. 6, 2009).
  \item \textsuperscript{90} NFL Enters. v. Comcast Cable Commc’ns, 51 A.D.3d 52 (N.Y. App. Div. 2008). According to the NFL, its agreement with Comcast on July 28, 2006, regarding the specific games to be broadcast on the Network qualified as one for an “additional cable package” and fell within the scope of the contractual deadline. Glass, \textit{supra} note 81, at 355. Comcast, on the other hand, argued that said agreement merely amended the original agreement with the League. \textit{Id.} The court’s ruling allowed Comcast to continue its placement of the NFL Network on a separate sports tier. See \textit{id}.
  \item \textsuperscript{92} \textit{Id.} at 61-62.
\end{itemize}
agreement will be reached before the current deal expires on April 30, 2009.93

B. Potential Antitrust Issues

Although this case involves a contractual issue between Comcast and the NFL, it highlights potential antitrust issues surrounding the NFL Network, which could have far greater implications for the League.94 Members of Congress have already threatened the NFL Network’s legitimacy under antitrust law.95 Specific legislation has been proposed that would eliminate or severely restrict the NFL’s antitrust exemption.96 According to the NFL, a repeal of the SBA—resulting in the sale of broadcast rights by individual teams—would harm output and severely limit consumer choice.97 The NFL claims that, without the exemption, “several NFL teams may well . . . cease[] operations due to their inability to obtain sufficient exposure and revenue from television.”98 The stakes are high. Yet, the NFL is no stranger to Capitol Hill, spending $380,000 and $1,125,000 on federal lobbying in 2006 and 2007, respectively.99

Perhaps the most significant congressional action on this issue to date was a Senate Judiciary Committee hearing led by Senator Arlen Specter, Republican from Pennsylvania, in November 2006.100 The committee sought to examine possible antitrust violations by the

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93. See Hearn, supra note 8; Donna Goodison, Clock Ticking on NFL Network, Comcast Deal, BOSTON HERALD, Apr. 1, 2009, (Finance), at 24; see also supra text accompanying note 88.

94. While the NFL’s legal battle with Comcast has received the most publicity, the dispute over the NFL Network is not limited to Comcast alone. Indeed, in 2008 the NFL Network was still inaccessible to 60 percent of all cable subscribers in the United States. KNOWLEDGE@EMORY, supra note 8, at 2. Furthermore, the move by a professional sports league to have its own exclusive network is not unique to the NFL. All four major professional sports leagues have developed some form of television network. See supra text accompanying note 13.


96. See generally John Lewin, NFL TV Blackouts: In Defense of Congress and Arlen Specter, BLEACHER REP., June 6, 2008, http://bleacherreport.com/articles/27928-nfl-tv-blackouts-in-defense-of-congress-and-arlen-specter. However, congressional action on this issue is unlikely to take place anytime soon. See Fisher, supra note 4. Indeed, there are a number of important issues requiring the attention of Congress, and many members are simply indifferent about the issue. Id.

97. S. Hrg. 109-762, supra note 60, at 32.

98. Id. at 64.


100. See S. Hrg. 109-762, supra note 60, at 1.
NFL Network and focused on deals that would allow the NFL to “either grant exclusivity to one carrier or another or dictate the tier on which cable operators can place pro football programming.” Senator Specter was primarily concerned that by forcing its Network to be included on basic cable packages, the NFL would unfairly impose unnecessary costs on cable subscribers who may not want access. During the hearing, Senator Specter raised the following question: “Well, where you have the NFL in effect raising prices and limiting distribution [through its development of the NFL Network] without any countervailing reasons for it, don't you have a violation of the Sherman Act rule of reason?” The issue has not gone away in the time since the 2006 hearing. As recently as October 2008, several U.S. senators have sent the NFL a letter calling for “greater access to games shown on the league-owned NFL Network.” However, the NFL has taken the position that its legal dispute with Comcast can and should be resolved without government interference. It also insists that its television policy is consistent with antitrust law, and that no antitrust issues are created by its dispute with Comcast.

The NFL’s television programming is divided into three categories. The most important category is free over-the-air broadcasting. Every NFL game during the regular season and playoffs is provided on free, over-the-air television in at least one market. Second, the NFL Sunday Ticket on DirecTV is “a satellite package that allows fans to view out-of-market games that would not otherwise be available in their home community.” By subscribing to the Sunday Ticket, a fan can watch any NFL game broadcast. It was

101. Boliek, supra note 95. The hearing also focused on the validity of the League's NFL Sunday Ticket package on DirecTV. See S. Hrg. 109-762, supra note 60 passim.
102. S. Hrg. 109-762, supra note 60, at 6-7. In response, the NFL argued that broad distribution was in the public interest, and that there would not necessarily be added costs to the consumers. See id. It pointed to the fact that DirecTV and EchoStar provided the NFL Network on their basic packages at no added cost to subscribers. Id. at 7.
103. Id. at 15.
106. Id.
107. Id. at 5. Congress ordered a 1994 study by the FCC into the validity of the NFL’s television policy under the SBA. Id. at 64. Finding NFL operations consistent with the public interest, the FCC report concluded that no amendments limiting the application of the SBA were needed. Id. at 64-65.
108. Id. at 5 (noting testimony of NFL Executive Jeffrey Pash that “[e]very NFL regular season game and every post-season game is televised on free, over-the-air television”).
109. Id.
developed to supplement, rather than replace, the free over-the-air broadcasts. The third programming category is the NFL Network. The eight regular season games currently shown on the Network each season are also available through free over-the-air broadcasts in the home markets of the teams involved. With access to cable television becoming more common, the NFL Network has the potential to maintain national exposure while making the League less dependent on the bids of a few major broadcast companies. Despite the potential, however, Comcast’s current arrangement with the NFL has left the Network on a separate programming tier with limited viewership.

The other professional sports leagues that depend upon the antitrust exemption to the Sherman Act are not immune to the issues surrounding the NFL Network. Thus, absent the SBA, all professional sports leagues in the United States may be vulnerable to prosecution under federal antitrust law by continuing their current practice of bundling the broadcast rights of their constituent team franchises. Given the massive popularity professional sports currently enjoy, the debate over the proper treatment that antitrust

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110. Id. In other words, a fan will not have to buy the NFL Sunday Ticket to watch playoff games or any game broadcast in his home market.

111. See id. at 6.

112. Id.


114. S. Hrg. 109-762, supra note 60.
law should give the structural decisions made in this industry is very important.115

III. ANTITRUST ANALYSIS OF THE NFL NETWORK

Before examining possible antitrust violations, it must be determined whether the NFL Network is protected from antitrust liability by the SBA exemption. If so, the subsequent analysis of a Section 1 violation of the Sherman Act becomes moot. Conversely, if the NFL Network is outside the scope of the exemption, the NFL may risk antitrust liability. The potential illegality of the NFL’s actions is not lost on the cable companies.116 At least one cable provider has suggested that “the launch of the NFL Network, which could take games away from many fans unless cable companies pick it up, is a ‘monopolistic and predatory practice.'”117

A. The SBA Exemption Unlikely to Cover the NFL Network

A court would probably find that the NFL Network is outside the scope of the SBA antitrust exemption for several reasons. First, the language of the exemption itself clearly states that only “sponsored” telecasts are covered.118 This term has traditionally been interpreted to mean “free over-the-air broadcasts,” which derive their revenues from paid advertisements.119 Until recently, the NFL acquiesced in this interpretation. In the legislative record of the SBA, then-NFL Commissioner Pete Rozelle acknowledged that the exemption “covered only the free telecasting of professional sports contests and does not cover pay TV.”120 Several years later another NFL commissioner, Paul Tagliabue, conceded before a Senate Committee that the term “sponsored telecasts” does not include “pay

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116. See KNOWLEDGE@EMORY, supra note 8, at 2.
117. Id. at 2. According to Time Warner Cable, the fees that would be charged for carrying the NFL Network are “in the top five in terms of how expensive it would be [relative to the other networks Time Warner carries] . . . . [However,] the ratings [of the NFL Network] . . . are not even in the top thirty.” S. Hrg. 109-762, supra note 60, at 15.
119. See, e.g., Shaw v. Dallas Cowboys Football Club, 172 F.3d 299, 301 (3d Cir. 1999). The House Antitrust Subcommittee determined that the SBA “does not apply to closed circuit or subscription television.” Id.
and cable . . . . This is clear from the legislative history and from the committee reports.”

The statements of the former commissioners notwithstanding, the NFL now claims that the SBA does in fact “cover[] the joint sale of television rights to cable and satellite providers, whose offerings can and should be viewed as ‘sponsored telecasts’ within the meaning of the statute.” As a broadcast medium owned by a professional sports league, the NFL Network is another example of new developments in this industry that were unforeseen by Congress when the SBA was enacted.

In two notable cases—Shaw v. Dallas Cowboys and Chicago Professional Sports v. NBA—it was determined that the SBA exemption does not cover satellite television or superstations, respectively. However, a court has not considered whether the SBA exemption applies to a league-owned network specifically. In Shaw, the Third Circuit concluded that “the [SBA] statutory exemption turns on the nature of the broadcast in question.” Thus, the NFL Network’s position that it is exempt from antitrust liability under the SBA is not automatically foreclosed; indeed, in the past, federal courts have sometimes interpreted the SBA in a manner favoring the NFL.

Although the scope of the SBA exemption has traditionally been interpreted as covering free broadcasts only, it has not stopped the NFL and other professional sports leagues from “selling pooled telecast rights to many cable networks without legal challenge.” Based on the law’s lack of response to the general practice of transferring broadcast rights to cable networks, the NFL could potentially argue that the “restrictive view of the scope of the [SBA] has changed with the proliferation of cable television.” The NFL Network’s current status, however, likely precludes the success of any argument based on the proliferation of cable television. The vast majority of the 41 million consumers who have access to the Network

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122. S. Hrg. 109-762, supra note 60, at 32.
123. See supra text accompanying notes 59-70.
125. Shaw, 172 F.3d at 300.
127. Cox, supra note 1, at 576.
128. Id.
129. See id.; see also supra text accompanying notes 107-112.
come from satellite television distributors.\textsuperscript{130} Thus, it would be extremely difficult for the NFL to distinguish its wholly owned network from satellite television, which the Third Circuit concluded was beyond the scope of the SBA exemption in \textit{Shaw}.\textsuperscript{131} As long as satellite television is the primary way for consumers to access the Network, it is unlikely that a court will agree with the NFL’s position in light of \textit{Shaw}.\textsuperscript{132} Even if the NFL Network could be characterized as a cable network like ESPN, it is not certain that the league’s argument for exemption under the SBA would be successful. While the Third Circuit’s ruling in \textit{Shaw} involved satellite television, one can reasonably interpret it as supporting the position that only free over-the-air broadcasts are exempt under the SBA.\textsuperscript{133}

Finally, while the NFL may wish to read the statute differently, there is a general principle that antitrust exemptions should be construed narrowly.\textsuperscript{134} The SBA exemption is no exception to the rule, and a court is unlikely to interpret it in a manner that expands coverage beyond the plain meaning of its language.\textsuperscript{135} Moreover, the likelihood of liberal construction by a court is even more remote where, like the SBA, it would contradict the congressional intent that is clearly presented in the legislative history.\textsuperscript{136} Despite the subsequent changes that have taken place in sports and technology, Congress has not found it necessary to amend or update the statutory exemption. Thus, the general principle of construing antitrust exemptions narrowly supports the conclusion that the NFL Network is not immune from antitrust liability.\textsuperscript{137} Based on the foregoing, the SBA antitrust exemption does not apply to the NFL.


\textsuperscript{131} See \textit{Shaw} v. Dallas Cowboys Football Club, 172 F.3d 299, 300-03 (3d Cir. 1999).

\textsuperscript{132} See id. at 300-02.

\textsuperscript{133} See \textit{id.} at 299-302; Voluntary Trade Council, supra note 19, at 12-14. In other words, a court may conclude that, under \textit{Shaw}, any sale of broadcast rights not provided free to the general public will fall outside the scope of the SBA exemption. See LaRocca, supra note 12, at 91-92. Although a settlement precluded the court from deciding on the alleged antitrust violation, \textit{Shaw} is widely accepted as taking the position that only free over-the-air broadcasts are exempt under the SBA. E.g., Voluntary Trade Council, supra note 19, at 13.

\textsuperscript{134} See, e.g., Chicago Prof. Sports Ltd. P’ship v. Nat’l Basketball Ass’n, 961 F.2d 667, 671-72 (7th Cir. 1992). This case may also support a narrower, yet potentially valid, argument that the exemption only applies to “transfers” of broadcast rights. See \textit{id.} at 670-71; 15 U.S.C. § 1291 (2009).

\textsuperscript{135} See, e.g., Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126-29 (1982); \textit{Shaw}, 172 F.3d at 301.

\textsuperscript{136} See, supra notes 64, 69-70 and accompanying text.

\textsuperscript{137} See generally Pireno, 458 U.S. at 126-29; \textit{Shaw}, 172 F.3d at 301.
Network; unless Congress alters or expands the SBA, the Network is not exempt from antitrust liability under Section 1 of the Sherman Act by way of the SBA alone. Just because the Network is not exempt, however, does not necessarily mean that it violates antitrust law.

B. Applying the Rule of Reason Test to the NFL Network

“[T]he Sherman Act was intended to prohibit only unreasonable restraints of trade,” and the NFL Network must satisfy this reasonableness standard if allegations of antitrust violations are to be dismissed. Because the NFL “involves an industry in which horizontal restraints on competition are essential if the product is to be available at all,” the per se analysis would be inappropriate. Consistent with judicial treatment of alleged antitrust violations in sports-related cases, the rule of reason test, as outlined in Part I.A.1 of this Note, should be used to determine whether the NFL Network violates the Sherman Act. The three elements required for a Section 1 violation are: (1) collective action; (2) a purpose to restrain competition; and (3) actual harm to consumer welfare that is not balanced or outweighed by procompetitive benefits.

1. Collective Action

The first element of the rule of reason test is collective action. The NFL is structured as a trade association, with each of the thirty-two member teams operating as a separate business yet sharing the overall revenue. Because Section 1 of the Sherman Act only applies to “agreements,” not unilateral action, the NFL could probably avoid liability under that provision if it is considered, at least for antitrust purposes, a single entity. As a result, the League has consistently argued for its single-entity status. The high level of interdependence among league members has been cited by many as

139. Id. at 101.
140. See id. at 100-01.
141. See id. at 100-03; discussion supra Part I.A.1.
142. See supra text accompanying notes 26-30.
145. Id. at 56.
grounds for treating sports leagues as single-entities under antitrust law. However, “[t]he courts have acknowledged that sports leagues are a unique form of economic organization along the lines of a joint venture.” The fact that each NFL team is owned and operated independently, sharing only a percentage of overall revenues, means the League is probably not a single entity under antitrust law. Indeed, if the League were a single entity, there would be no reason for the SBA exemption. Thus, the NFL has not traditionally been considered to be able to exploit a “single entity defense” to alleged antitrust violations, and the “collective action” requirement would likely be satisfied for a Section 1 claim against the NFL Network.

2. Purpose to Restrain Competition

The second element required for a court to find a Section 1 violation is a purpose to restrain competition. Like the NCAA, the NFL holds a regulatory role in its sport by establishing and enforcing eligibility standards, playing rules, and operational guidelines. The television policy held illegal in NCAA v. Board of Regents sought to limit the “adverse effects” to “football game attendance” thought to result from the television broadcasts of college football. Similarly, the NBA policy enjoined by the Seventh Circuit in Chicago Professional Sports v. NBA was restrictive in nature and limited the broadcasting of NBA games. The NFL’s television policy, on the other hand, seeks to maximize exposure. Because the purpose of the

146. Rivello, supra note 27, at 182.
147. Id. at 183.
148. Stephen F. Ross, An Antitrust Analysis of Sports League Contracts with Cable Networks, 39 EMORY L.J. 463, 466, 468 (1990) (“Indeed, the [SBA’s] antitrust exemption . . . would have been entirely unnecessary if the single entity argument was valid in this context.”).
149. Additionally, the NFL’s tax-exempt status will not protect it from antitrust liability. In Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, the U.S. Supreme Court acknowledged that “[t]here is no doubt that the sweeping language of Section 1 [of the Sherman Act] applies to nonprofit entities . . . and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct. 468 U.S. 85, 100 n.22 (1984).
150. See id. at 88 (addressing the NCAA’s “important role in the regulation of amateur collegiate sports”).
151. Id. at 91. To this end, the NCAA sought to share television exposure among member teams. Id. at 92 n.6. There was a limit placed on the number of times each team could play a televised game. See id. at 92 n.7.
NFL Network is to increase output and promote the NFL, \(^\text{153}\) it is easily distinguished from the improper purpose featured in *NCAA v. Board of Regents*, which was largely a protectionist motive that sought to limit output. \(^\text{154}\)

While the NFL may truly believe that its television policy promotes the public interest, “it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.” \(^\text{155}\) The NFL Network will be subject to an objective “reasonableness” standard, and good faith is not considered a valid defense. \(^\text{156}\) If a court finds that the purpose of the Network is “reasonable in light of the legitimate business purposes of the league as a whole,” \(^\text{157}\) the plaintiff cannot satisfy the “purpose” element required for a successful claim under Section 1 of the Sherman Act. According to the NFL, it is not the Network itself that conflicts with antitrust law, but the restrictions placed on the Network by cable companies—in other words, keeping it on a separate programming tier—that create restraints on competition by “interfer[ing] with the [NFL]’s mission to distribute [its] games broadly.” \(^\text{158}\)

When faced with antitrust questions, the NFL has justified the supplemental elements of its television policy—the NFL Sunday Ticket on DirecTV and the NFL Network on Comcast cable television—by claiming that they provide the following benefits: (1) enhanced competition in the television market; (2) increased output by making more games available to fans; and (3) a supplement, rather than replacement, of the primary focus on free over-the-air broadcasts. \(^\text{159}\) Each one of the “big four” professional sports leagues in the U.S. has its own television network, and the NFL Network is an important part of the League’s television policy. \(^\text{160}\) Given the

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154. See *NCAA*, 468 U.S. at 91, 96, 119.
156. *Id.* at 101 n.23.
158. *LaRocca, supra* note 12, at 89. Notwithstanding the NFL’s position, the League insists that its “commercial negotiations” with Comcast should be left to the market and free from congressional intervention. *S. Hrg.* 109-762, *supra* note 60, at 75.
159. See *S. Hrg.* 109-762, *supra* note 60, at 75.
160. See *KNOWLEDGE@EMORY, supra* note 8, at 2-3 (noting that, by targeting a league’s marketing efforts to specific consumer segments, the networks of professional sports leagues can “narrowly define who they speak to, then serve those audiences like no other network can”).
popularity of NFL games, it does not seem unreasonable for the league to place a small package of games on its new network “in light of [its] legitimate business purposes.” Ultimately, the reasonableness of the Network under antitrust law will depend on its actual competitive effects.

3. Actual Harm to Consumer Welfare

The third element in an antitrust violation analysis is actual harm to competition or consumer welfare. Under NCAA v. Board of Regents, challenged conduct will generally violate Section 1 if competitors “create[] a horizontal restraint—an agreement among [them] on the way in which they will compete with one another.” Such agreements generally have the effect of placing a limit on supply that is unresponsive to consumer demand. Because every NFL game is televised in at least one market, consumer access can be an effective measure of competitive effects. By defining output in terms of consumer welfare, the competitive effects of the NFL Network can be accurately determined without compromising the general application of the Court’s analysis in NCAA v. Board of Regents. For the purposes of this analysis, consumer welfare can be said to increase when consumers (or viewers) have greater access to the television broadcasts of NFL games. This is consistent with the methodology advanced by Professor Stephen F. Ross for joint transfers of broadcast rights to cable networks generally, which focuses on “whether viewership is lower because of the challenged conduct than it would be if that contract were enjoined.” Ross argues that “[w]hen such agreements reduce viewership, they constitute unreasonable restraints of trade in violation of Section 1 of the Sherman Act, and should be enjoined.” Therefore, in analyzing whether televising games on the NFL Network actually harms viewership, it is necessary

161. Rivello, supra note 27, at 190.
163. See id. Just as the NCAA was found to have market power in televised college football, the NFL can reasonably be said to have market power in professional football telecasts. See id. at 111-12.
164. Indeed, the U.S. Supreme Court has acknowledged that the Sherman Act was developed by Congress as a “consumer welfare prescription.” Id. at 107, quoted in LaRocca, supra note 12, at 95.
165. Ross, supra note 148, at 477-78. For purposes of this analysis, the terms “viewership” and “consumer access” are synonymous.
166. Id. at 464.
to determine the output, or viewership, that would likely exist if the
Network was enjoined from broadcasting live games.\textsuperscript{167}

The NFL reportedly decided to forgo $400 million in revenue by
reserving for its Network the broadcast rights of the eight-game
package.\textsuperscript{168} It follows that other networks were willing to purchase
the rights had they not been reserved to the NFL Network under the
League’s current television policy.\textsuperscript{169} For all three free over-the-air
networks that aired national broadcasts of NFL games in 2007 (CBS,
NBC, and Fox), there was an average of more than 15.9 million
viewers for each broadcast.\textsuperscript{170} Cable network ESPN averaged 11.2
million viewers in 2007 for its exclusive Monday Night Football
broadcasts, down from 12.3 million in 2006.\textsuperscript{171} By contrast, the games
televised on the NFL Network in 2006 and 2007 only averaged 3.1
million and 4.6 million viewers, respectively.\textsuperscript{172} Clearly, the national
over-the-air networks have a much larger presence than the NFL
Network—but if the NFL Network did not broadcast the games, is it
likely that the net viewership would actually increase?

The statistics provided above for the over-the-air networks
measure the “national-window games” only.\textsuperscript{173} These games are free
national broadcasts and are limited to two Sunday afternoon games
(CBS and Fox) and one Sunday night game (NBC) during each week of
the NFL regular season.\textsuperscript{174} So while it is technically true that every
NFL game is broadcast on free over-the-air television, viewers do not
have free access to every game. If they did, there would be no need for
the supplemental elements of the NFL’s television policy, much less
any antitrust issues surrounding the broadcasts. Not counting
ESPN’s “Monday Night Football” on cable, viewers will have free over-

\textsuperscript{167} See id. at 464-65; see also NCAA, 468 U.S. 85.

\textsuperscript{168} Adam Thompson, NFL vs. Cable Is Turning into a Real Nailbiter, WALL ST. J.,
Nov. 14, 2006, at B1; see also S. Hrg. 109-762, supra note 60, at 16. While $400 million may
seem like a substantial amount of money to turn down, the $1.1 billion the NFL receives
from ESPN each year for Monday Night Football helps put the offer in perspective.

\textsuperscript{169} See generally Thompson, supra note 168.

\textsuperscript{170} Street & Smith’s SportsBusiness Daily, Final Nielsen Ratings for NFL Regular
same networks averaged roughly 16.3 million viewers in 2006. Id.

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} See id.; Posting of Oldhead1 to GroundReport, NFL TV Recap: 225 Million
Americans Watched, http://www.groundreport.com/Arts_and_Culture/NFL-TV-Recap-225-
Million-Americans-Watched_2 (last visited Apr. 3, 2009). In the past, a free national
broadcast of an NFL game was available each Monday night during the regular season, but
this package has recently moved to cable network ESPN. See NFL on Television –
the-air access to no more than three “national-window games” each week, and the only other free access for viewers will be a regional broadcast of the team(s) in their home market.\textsuperscript{175} Traditionally, national broadcasts of NFL games occur on either Sunday or Monday nights.\textsuperscript{176} The games televised on the NFL Network are played on Thursday nights, and a free over-the-air regional broadcast is still provided in the home markets of both teams.\textsuperscript{177}

In reality, while the NFL Network requires consumers to pay for access, the Network actually increases net viewership. Because the NFL can decide not to broadcast games on Thursday nights, it can legitimately argue that such an agreement actually increases output.\textsuperscript{178} Even though the broadcast rights could have been sold for $400 million, there is no guarantee that the games would remain on Thursday nights. Most likely, the games would be moved back to Sundays, consistent with the schedule that existed prior to the NFL Network. Accordingly, the Network’s broadcasts likely result in a net increase in viewership, because it makes more regular season games available to consumers. Indeed, the Thursday night games would not otherwise be available, since the “national-window games” and the regional broadcast in teams’ home markets are not affected. In other words, when a game is televised on the NFL Network, consumers outside the home markets of the two participating teams can gain access—for a price—to a game that would normally be unavailable.

Before the NFL Network existed, Professor Ross applied a similar analysis to the NFL’s agreement with cable network ESPN.\textsuperscript{179} For an alleged Section 1 violation, the burden would likely be on the plaintiff to show that absent the agreement at issue “the league or its members would probably enter into an alternative contract (or contracts) that would result in an increase in the number of persons

\begin{itemize}
\item \textsuperscript{175} See NFL on Television – Wikipedia, supra note 174. All of these broadcasts occur on Sundays: NBC’s broadcast is on Sunday nights, and those of CBS and Fox are on Sunday afternoons. The NFL’s broadcast agreements are largely structured according to conference. \textit{Id.} CBS owns the broadcast rights to all games featuring American Football Conference (AFC) teams, with Fox owning those featuring National Football Conference (NFC) teams. \textit{Id.} “Inter-conference games are broadcast by the network that is the normal broadcast partner for the \textit{away} team’s conference.” \textit{Id.} As the broadcast partners of the two conferences, CBS and Fox own what is similar to a residual interest in the conference games. \textit{Id.} Such rights, however, are subject to limited exceptions: NBC’s Sunday night game, ESPN’s Monday Night Football, and the NFL Network’s Thursday night package.
\item \textsuperscript{176} \textit{Id.; see also} supra text accompanying note 164. The exceptions are a few Saturday night games following the end of the college football regular season.
\item \textsuperscript{177} See S. Hrg. 109-762, supra note 60.
\item \textsuperscript{178} See Ross, supra note 148, at 478-79.
\item \textsuperscript{179} See id.
\end{itemize}
viewing the game.” 180  This might be a very difficult task, because it requires more than just the existence of alternative outlets for the broadcasts. 181 Likewise, a plaintiff in an antitrust case against the NFL would need to establish that, if the NFL Network was enjoined from televising the games, it would be likely that other networks would televise the games on a national scale. 182  Such a showing is made even more difficult by the fact that there were very few Thursday night games prior to the development of the NFL Network. 183  To further strengthen its defense, the NFL could present evidence showing that offers for the Thursday night package were insufficient, and, but for the NFL Network, there would be no such package at all. 184  With consumer welfare as the central focus of antitrust law, it should make no difference whether the net increase in viewership results from an independent cable network or the league-owned network.

In rare circumstances, the magnitude of a particular game on the NFL Network may present an exception to the foregoing analysis. A highly anticipated game—one seen as more important than all the other games in a given week—would likely draw offers from national networks that would cancel out the net increase in viewership normally provided by the Network. In other words, a particular matchup may be so appealing that over-the-air networks would provide free national broadcasts to consumers, which would obviously

180. Id. at 478.
181. Id.
182. See id. One could argue that there is a need to evaluate the effect on viewership, if any, that would result from shifting the games currently shown on the NFL Network to DirecTV’s NFL Sunday Ticket package. This is unnecessary, however, when one considers that the NFL Network is currently provided in DirecTV’s basic channel lineup at no additional cost to subscribers. See S. Hrg. 109-762, supra note 60, at 5-6. The NFL Sunday Ticket package, on the other hand, is only available to DirecTV subscribers at an additional fee. See id. Thus, such a move from the NFL Network to the NFL Sunday Ticket package would actually reduce viewership. Furthermore, the NFL’s contract with DirecTV for the NFL Sunday Ticket package is set to expire after the 2010 season. NFL Grants Five-Year Rights Extension to DirecTV for $3.5 Billion, BROADCAST ENGINEERING, Nov. 12, 2004, http://broadcastengineering.com/newsrooms/nfl-direcTV-extend-20041112/.
183. Prior to the NFL Network, the League typically scheduled one Thursday night game to kickoff the regular season in September, and two games were typically played on Thanksgiving Day (not in primetime). See, e.g., NFL.com, Schedules, http://www.nfl.com/schedules?seasonType=REG&season=2002&week=1#Week (last visited Apr. 6, 2009).
184. See Ross, supra note 148, at 479 (focusing on competing offers from over-the-air and cable networks, and concluding that the NFL could strengthen its defense by “present[ing] internal documents or credible testimony showing that the network offers for these selected games were unacceptably low and that, absent the [cable network’s offer] . . . the NFL would have eliminated this mini-package of games”).
result in higher viewership. The NFL confirmed this theory in the last week of the 2007 regular season when it allowed a historic game, originally scheduled for the NFL Network, to be simultaneously broadcast by both NBC and CBS. Seen by 34.5 million viewers, the game featured the New York Giants and the New England Patriots—in an exciting fashion, the Patriots ultimately won, becoming only the second team in NFL history to finish a regular season with an undefeated record. To keep such a game on the NFL Network and significantly reduce consumer access would eliminate the “net viewership” justification outlined above.

The current dispute with Comcast leaves the NFL in a delicate position regarding the NFL Network. Including the Network in basic cable would likely alleviate most of the antitrust concerns discussed in this Note. The current placement of the Network on a separate sports programming tier on pay cable should lead the NFL to consider the antitrust implications in future decisions regarding its Network. As it stands now, the NFL Network maintains the potential to violate antitrust law in the future. For example, if games on the Network would likely be free national telecasts, the current justifications weaken and ultimately disappear. Under such a circumstance, keeping the games on the NFL Network would result in a substantial reduction in viewership—and if games are not televised on the Network to increase exposure, then it must be that the NFL has some financial or other motive. It is this very scenario—“increase [in] the profits of the producer at the cost of the consumer”—that antitrust law seeks to prohibit.

C. Proposed Solution to Address the NFL Network’s Antitrust Concerns

First, in order to increase consumer access and strengthen a potential argument for exemption from antitrust liability under the

185. For the same reason, transferring the broadcast rights of NFL playoff and championship games to a cable network would likely be an antitrust violation.
187. Id. While it may be an issue under the NFL Network’s current arrangement, it is unrealistic to suggest that the same would be true for a game scheduled on a basic cable network like ESPN.
188. See generally Ross, supra note 148, at 489-91.
189. See id. at 490-91.
190. Id.
191. Id. (applying similar analysis to transfers of games to cable networks generally).
SBA, the NFL Network should make every reasonable effort in dealing with Comcast to secure placement of the channel on the cable provider’s basic cable package. To enhance its bargaining position, the Network has reportedly discussed the possibility of becoming a joint venture with cable network ESPN. Yet the benefits of such a move are anything but certain, as it will undoubtedly result in less control and shared returns. Moreover, there is no guarantee that partnering with ESPN will actually be effective in achieving basic cable carriage for the NFL Network. Instead, the NFL should look to reduce the fee it charges cable companies for the Network. Granted, there is also no guarantee that a price reduction will be effective, but it would aid the NFL’s cause in several respects. A cheaper fee would cut against Comcast’s biggest argument: that carriage of the Network would mean added costs to consumers without commensurate benefits to them. While a lower fee might lessen the Network’s profitability, the NFL is apparently willing to consider a joint venture that will have the same result, and also give the NFL less control. In fact, the financial benefits of such a move may outweigh the lost fees, because “[o]nce in the basic [cable] package, the [NFL] would benefit from advertising sales.”

Regardless of which cable package the NFL Network is offered, there are two important factors that must remain constant: (1) the Network’s games should continue to be coupled with free over-the-air local broadcasts in the home markets of both participating teams; and (2) as long as the over-the-air networks are interested in purchasing them, all playoff and championship games should be nationally broadcast free to consumers. If the NFL changes the supplemental

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193. According to cable companies, the NFL Network’s current fee would cost eighty cents per subscriber, putting it among the most expensive cable networks. S. Hrg. 109-762, supra notes 60.

194. The NFL has argued that its fee is not too high because DirecTV and EchoStar are able to carry the Network in their basic cable packages without increasing prices. See id. at 6. The weakness of this argument lies in the exclusive nature of these providers, which allows them to attract enough consumers to offset the costs. If the NFL Network was more widely available, these providers would be unable to maintain their prices at the current fee. See id. at 21-22.

195. LaRocca, supra note 12, at 88.

196. Because sports fans generally do not pay to watch televised games, there is some disagreement on whether they should be considered the “consumers” in this analysis. The only other approach, however, is to make advertisers the “consumers,” which would shift the focus from protecting consumer surplus, a fundamental purpose behind the antitrust laws, to promoting the efficient allocation of resources. See Ross, supra note 148, at 485-88.
role assigned to the Network under the current television policy, it does so at its own peril. Not only could such changes result in antitrust liability by significantly reducing viewership, but they would also give Congress a reason to limit or even eliminate the SBA exemption.\textsuperscript{197} Ideally, the NFL would like its Network to be included on basic cable, which would effectively eliminate antitrust challenges. Despite the NFL’s massive bargaining power, however, the cable companies are under no obligation to accept the League’s demands. As a result, the NFL should actively seek out policy alternatives to address the antitrust issues surrounding the Network. In other words, it would benefit the NFL to focus on what it can control. The following proposals are provided under the assumption that the NFL Network will remain on the additional pay-basis, sports programming tier for the foreseeable future.

1. Flexible-Scheduling Policy for the NFL Network

The adoption of a flexible-scheduling policy for NFL Network games could improve the League’s position under federal antitrust law by ensuring that the Network maintains a supplemental role in the League’s television policy. Flexible-scheduling (or a flex-schedule) is not a new concept to the NFL, as the League currently employs such a policy for Sunday night broadcasts on NBC during the final seven weeks of the regular season.\textsuperscript{198} Under the existing flex-schedule, the NFL can move one game that was originally scheduled for Sunday afternoon to the NBC broadcast slot in primetime.\textsuperscript{199} This allows the League to “ensure[] quality matchups on Sunday night . . . and [gives] surprise teams a chance to play their way onto primetime.”\textsuperscript{200} The schedule includes a twelve-day notice format, which requires the NFL to announce the scheduling changes no later than twelve days before the affected game.\textsuperscript{201}

\begin{footnotesize}

\textsuperscript{197}. See supra text accompanying notes 95-113.

\textsuperscript{198}. NFL on Television – Wikipedia, supra note 174. The 2006 NFL regular season was the first time a flexible-scheduling policy was implemented. See NFL.com, Flexible Scheduling, http://www.nfl.com/schedules/tv/flexible (last visited Apr. 3, 2009).

\textsuperscript{199}. NFL.com, Flexible Scheduling, supra note 198. The NBC Sunday night game has a scheduled start time of 8:15 p.m. EST. Id.

\textsuperscript{200}. Id.

\textsuperscript{201}. Id. During the final week of the season, however, the NFL can “reschedule games as late as six days before the contests so that as many of the television networks as possible will be able to broadcast a game that has major playoff implications.” NFL on Television – Wikipedia, supra note 174. As part of their agreements with the NFL, CBS and Fox are allowed to “protect” five games from being selected for the Sunday night slot, allowing the networks to broadcast them as originally scheduled. See id.
\end{footnotesize}
Unlike the NFL’s existing flex-schedule for Sunday nights, where the best matchups are chosen, this Note’s proposed flex-schedule for the NFL Network would select one of the least appealing games in a given week. This may seem counterintuitive for a young network with limited original programming, but the potential antitrust consequences far outweigh any interests the NFL Network may have in televising “national” games. This policy would provide the NFL with flexibility, and enable it to avoid featuring games on the Network that would otherwise be free national broadcasts. A flex-schedule prevents a repeat of the problem caused by the 2007 Patriots-Giants game, and makes certain that the NFL Network is always increasing net viewership. The NFL would have difficulty maintaining the current “net viewership increase” justification if a free over-the-air network was willing to nationally broadcast an NFL Network game.  Thus, erring on the side of caution, any game that could potentially be the marquee matchup of a given week should not be selected for the Network.

Currently, the NFL Network’s schedule of games is developed prior to the season, and it can be very difficult to predict which games will, in fact, be appealing at different points in the football season. Indeed, it was this very occurrence that caused the League to implement its current flex-schedule for Sunday nights. Thus, the League has clearly accepted that some games not originally thought to have national appeal can end up being worthy of the Sunday-night slot in primetime. There is nothing keeping these “surprisingly popular” games from being scheduled on the NFL Network, thus leaving open the potential for antitrust issues. The proposed flexible-scheduling policy could be easily implemented to address this vulnerability. Under the NFL’s present contracts with CBS and Fox, each game is given a grade—A, B, or C—to indicate the probable scope of its consumer appeal. The games receiving an A grade are likely to be broadcast nationally; whereas, on the other end of the spectrum, those games having a C grade are shown “only in the two teams’ home television markets.” The NFL could simply utilize this existing rating system and limit the type of games shown on the Network to

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202. See supra text accompanying notes 180-91.
203. A preseason prediction for which late-season games will have playoff implications seems especially difficult when one considers that the first game broadcast on the NFL Network is not until Week 10 of the regular season.
204. See NFL.com, Flexible Scheduling, supra note 198.
206. Id.
only those with C grades. As a result, net viewership is always increased since, but for the NFL Network, the games would not otherwise be available outside the teams’ home markets.

2. The Pros and Cons of a Flex-Schedule

The proposed flexible-scheduling policy would likely have several benefits. Most importantly, it would reduce the risk of antitrust liability by ensuring that the NFL Network only increases net viewership. It may also increase the Network’s perceived relevance by many consumers. For example, a viewer living outside the home market of his favorite team may monitor the NFL Network schedule more frequently under the proposed flexible-scheduling policy. It gives viewers an incentive to pay attention because of the possibility that their favorite teams will be featured on the Network in a particular week. 207 Another potential benefit of the proposed flex-schedule is the resulting increased exposure of individual teams. Only a limited number of games (less than 40 percent) 208 can be free national broadcasts each week, and there are often some games that deserve more than home-market exposure but are passed over by national networks for matchups likely to be more popular. 209 Finally, the proposed flex-schedule may allow the NFL Network’s Thursday night package to be expanded without attracting more antitrust scrutiny. Because the flex-schedule would ensure that the Network maintains a supplemental role to free over-the-air broadcasts, the League could choose to broadcast more than eight games. 210 Such a move would not only increase exposure, but also put additional pressure on cable providers to include the NFL Network in their basic cable packages.

Of course, there are other potential concerns that the NFL may need to address before implementing the flex-schedule, but none appear to outweigh the aforementioned benefits of this proposed policy. Perhaps the biggest concern is logistics: using a flex-schedule for the NFL Network games would require drastic changes in game

207. Indeed, just by announcing the NFL Network games as they are selected, the League can create opportunities to increase its Network’s exposure throughout the regular season.

208. There are generally thirteen or more NFL games per week during the regular season, and only four to five are broadcast free over-the-air by either CBS, Fox, or NBC. See generally NFL on Television – Wikipedia, supra note 174.

209. To use an example from the 2008 NFL season, the Detroit Lions made NFL history by becoming the first team to finish a regular season with a record of 0-16.

210. Under the current policy, adding more games to the NFL Network would run the risk of increased antitrust scrutiny. See supra text accompanying notes 184-89.
times (shifting an affected game from Sunday afternoon to Thursday night). The three-day change is significant, especially when one considers that the current Sunday night flex-schedule merely delays an affected game by a few hours. The logistical impact of shifting games to Thursday nights is not limited to the teams and fans. Football teams are not the only parties that use NFL stadiums, and the League could run into scheduling conflicts by changing the date of a game. In fact, the NFL has alluded to logistical problems as a reason for not extending its existing flexible-scheduling policy to the Monday Night Football broadcasts on ESPN.

Certain measures—namely, extending the notice format and preselecting “eligible” games—can be taken as part of the proposed flexible-scheduling policy to avoid most of the logistical challenges mentioned above. The existing flex-schedule has a twelve-day notice format, but the proposed policy could use a thirty- or forty-five-day period. Because the NFL Network would just be choosing from the C games—rather than looking for the single most popular matchup like the Sunday night flex-schedule—a longer notice format should be workable. Similar schedule adjustments in college football have not been problematic. To aid with venue conflicts, the NFL could preselect two to three games—matchups likely to have a C grade—for each scheduled broadcast on the NFL Network. Then only two or three venues would need to keep the Thursday date open. With only a limited amount of games being televised nationally each week of the regular season, the preselection of games can limit potential logistical problems while maintaining the flexibility afforded by the proposed policy.

From a legal perspective, the proposed policy would not immunize the NFL Network from antitrust liability. Rather, it would

212. NFL.com, Flexible Scheduling, supra note 198. Obviously shifting a game from Sunday to the preceding Thursday (3 days earlier) would result in teams having less preparation time and a shorter recovery period for that week; but, the same is true for a Thursday night game scheduled before the season begins. Thus, it seems that by providing teams with enough advance notice, the proposed flex-schedule could be designed to have no greater impact on teams than existing Thursday night games.
213. Jackson, supra note 211.
214. See supra text accompanying notes 205-06.
merely strengthen the Network’s existing justifications under the rule of reason test—namely, increased viewership. Hypothetically speaking, there may be some situations where the proposed flex-schedule would be unable to maintain a “viewership increase” justification for the Network. For example, if the superstation TBS, a network available on basic cable, made a competitive offer for the NFL Network’s Thursday night package, the aforementioned antitrust justifications would be severely weakened. Keeping the games on the Network would harm consumer welfare, because a basic cable network like TBS would provide greater access and lower costs to consumers. Even if the NFL moved the games back to Sundays, TBS would still give the consumer access to an extra game he could not have viewed otherwise.216

Such a scenario is likely foreclosed, however, by the NFL’s current agreements with CBS and Fox. Each deal is structured according to conference, allowing what is similar to a residual interest in all AFC games to be owned by CBS and all NFC games to be owned by Fox.217 With the exception of certain national broadcasts—NBC’s Sunday night game, ESPN’s Monday Night Football, and the NFL Network’s Thursday night package—CBS and Fox are the exclusive broadcast partners of the two conferences.218 As a result, a decision by the NFL to move the Network’s games would trigger the residual rights of either CBS or Fox, effectively preventing a transfer of the Thursday night package.219 Also, the sheer cost of bundled NFL broadcast rights would likely deter basic cable networks’ interest in the Thursday night package, particularly since the proposed flex-schedule would be used to avoid the most appealing games. Cable network ESPN pays $1.1 billion annually for the NFL’s Monday Night Football package, which translates into more than $64 million per game.220 Surely the expense of NFL broadcast rights limits the number of cable networks that are capable of making competitive

216. This is assuming, of course, that none of the games would be nationally televised by a free over-the-air network.
217. See Wikipedia.org, NFL on Television, supra note 174.
218. See id.
219. The NFL should be able to determine whether the games will be played on Thursday nights. By moving them back to Sunday, the League might be able to block a transfer when it wants to keep the games on the Network but feels that its hand is being forced by antitrust concerns.
220. John Consoli, NBC, ESPN Snap Up NFL Packages, ADWEEK, Apr. 19, 2005, http://www.allbusiness.com/marketing-advertising/4153921-1.html. It is important to note that the $1.1 billion annual payment covers certain other broadcast rights as well, including the NFL PrimeTime pre-game show and the NFL Draft. Id. ESPN is in the middle of an eight-year deal with the NFL that was signed in 2005. See id.
offers for the NFL Network games. Moreover, the risk of this scenario can be eliminated if the Network attains basic-cable carriage, because consumers’ access (in terms of viewership) would not change between two basic cable networks.

Finally, in conjunction with the adoption of a flexible-scheduling policy for NFL Network games, the NFL should thoroughly document its decision-making process in order to effectively defend against any alleged antitrust violations.\textsuperscript{221} Proper documentation will facilitate a showing that, due to the insufficiency of alternative offers, the Thursday night package would not exist without the NFL Network.\textsuperscript{222} Such a showing can make it much more difficult for plaintiffs to establish that the Network actually reduces viewership.\textsuperscript{223} If the NFL can present evidence refuting the claims of potential plaintiffs, it would go a long way in insulating the Network from future antitrust scrutiny.

IV. CONCLUSION

As professional sports leagues continue to develop their own television networks, the antitrust issues they create under the Sherman Act will become increasingly important in the sports broadcasting industry. As the pioneer of such networks, the NFL Network was developed as “an essential part of [the NFL’s] long-term strategy for maintaining the health of the sport of football, for developing fans, and for increasing the avid interest of its current fans in the sport.”\textsuperscript{224} In the Network’s brief six-year history it has been the target of considerable antitrust scrutiny, drawing criticism from Congress, cable providers, and even football fans.\textsuperscript{225} As the NBA, NHL, and MLB improve their own existing networks, they are undoubtedly keeping a watchful eye on the NFL Network.

There are two primary antitrust issues for the NFL Network and its counterparts: (1) whether they are exempt from antitrust liability under the SBA; and (2) if not, whether they violate Section 1 of the Sherman Act. For the reasons outlined in Part III.A of this Note, the television networks owned by professional sports leagues are

\textsuperscript{221} See Ross, supra note 148, at 477-80.
\textsuperscript{222} See id.
\textsuperscript{223} See id.; supra text accompanying notes 179-84.
\textsuperscript{225} See e.g., id.; S. Hrg. 109-762, supra note 60; KNOWLEDGE@EMORY, supra note 8; see also LaRocca, supra note 12.
probably beyond the scope of the SBA exemption and not immune from antitrust liability. For any cases involving alleged Section 1 violations of the Sherman Act by one of these league-owned networks, the court will apply the rule of reason test, which the U.S. Supreme Court has recognized as the appropriate standard for sports-related antitrust cases. A Section 1 violation under the Sherman Act requires collective action and an improper purpose; however, ultimate liability for the NFL Network or its counterparts will likely depend on the final element: actual harm. Consistent with the Court’s treatment of the challenged television policy in NCAA v. Board of Regents, actual harm can be characterized in terms of consumer welfare by asking whether consumers’ access to the programming (in terms of viewership) has been reduced.

Essentially, a league-owned network that reduces consumer access to the League’s programming may constitute an illegal practice in violation of the Sherman Act. The plaintiffs bear the burden, however, of proving that viewership would likely be higher if the League’s network did not exist. Thus, the actual effect on viewership necessarily depends on the existence of likely—and superior—alternatives. Certain factors of a professional sports league—such as the amount of games available, consumer demand for league programming, and the program carriage rights of the League’s network—could potentially influence what likely alternatives are available, and thus ultimately impact the actual effect a league-owned network has on viewership or consumer welfare.

In Part III.B of this Note, the rule of reason test was applied to the NFL Network to determine whether it complied with antitrust law. As a supplement to free over-the-air network programming, the NFL Network probably does not violate Section 1 of the Sherman Act because it actually enhances consumer welfare by making additional access to NFL games available to consumers for a small fee. The

226. See supra text accompanying notes 127-37, 141-84.
228. See supra text accompanying notes 162-67.
229. See generally, NCAA, 468 U.S. 85.
230. See Ross, supra note 148, at 478-79; see also supra text accompanying notes 164-67.
231. See generally Ross, supra note 148, at 478-79.
232. Id. at 478-79.
233. See id.
234. For example, the large number of games featured by the NBA or MLB relative to the NFL would likely make it easier for their networks (NBA TV and the MLB Network, respectively) to maintain a role as a supplement to free over-the-air broadcasts.
235. See supra text accompanying notes 175-79.
level of free consumer access is unaffected; the same number of games will be broadcast free over-the-air whether the NFL Network televises its eight game package or not. Therefore, the consumer's position does not change, except that the NFL Network now offers him the option of purchasing additional access to an extra eight games over the course of the regular season.

Until the NFL Network can achieve basic cable carriage, one caveat remains: consumer access should never be reduced as a result of the Network. This would most likely occur where the NFL Network televises a game that would otherwise be a free national broadcast. By adopting the proposed flexible-scheduling policy, the NFL could boost the supplemental role of its Network while simultaneously alleviating antitrust concerns. It could utilize the existing grading system for games to maintain a net viewership increase and provide much-needed flexibility in the Network's broadcast schedule. The proposed flexible-scheduling policy can do more than strengthen the NFL Network's defense against future antitrust challenges; it has the potential to assist the Network in blazing the trail for other professional sports leagues as they develop the next generation of sports broadcasting.

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236. The games will still be televised for free in the teams' home markets, and there will still be a national broadcast from CBS, NBC, and Fox. See _supra_ text accompanying notes 177-79.

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