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## The NBA Strategy of Broadcast Television Exposure: A Legal Application

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# The NBA Strategy of Broadcast Television Exposure: A Legal Application

**John A. Fortunato, Ph.D.\***

## I. INTRODUCTION

Sports television is a unique form of broadcasting compared to other programming genres because of the relationship between a professional sports league and a broadcast network. The most unique characteristic of sports television is that a league and a television network sign a multi-year contract for broadcasting rights. Television networks pay large sums of money<sup>1</sup> to a sports league for the rights to broadcast a certain number of games over a certain number of years. The television network then sells the commercial time during these games to advertisers. This unique relationship exists because a sports league is granted permission by the federal government through the Sports Broadcasting Act (hereinafter "SBA"),<sup>2</sup> to act as a cartel and collectively package and sell the broadcast rights of its games to television networks. Professional sports leagues reap their greatest economic rewards and gain their most significant exposure source through network television contracts.

The exposure of nationally televised National Basketball Association (hereinafter "NBA") games, however, must be properly maintained so the value of the NBA broadcast rights remain high. The government once again is vital in permitting the NBA to maintain control over national television exposure as evidenced in *Chicago Prof'l Sports Ltd. P'ship and WGN Cont'l Broad. Co. v.*

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<sup>1</sup> The NBA's four-year, \$2.6 billion television contracts with NBC and Turner Broadcasting expire after the 2001-02 season. Some speculate that Michael Jordan's return will make the next NBA contract worth as much as 50 percent more. Terry Lefton, *Sports: The NBA's Digital Rebound*, THE INDUSTRY STANDARD MAGAZINE, June 25, 2001, available at <http://www.thestandard.net/article/0,1902,27219,00.html> (last visited Oct. 11, 2001).

<sup>2</sup> 15 U.S.C. §§ 1291-1295 (1961).

NBA,<sup>3</sup> which provides a justification for how the NBA, as a league-wide collective, and not individual teams, controls the national television exposure of league games.

## II. LITERATURE REVIEW

Literature regarding sports leagues and government, and sports leagues and television networks provides insight into these complex relationships. In examining government and sports, Noll<sup>4</sup> comments that “[v]irtually every major public policy toward business—antitrust, labor relations, taxation, even the constitutional prohibition against slavery—has a potentially significant application to sports.”<sup>5</sup> While Noll makes a valid point of applying public policy toward sports, the provisions of the Sports Broadcasting Act and *Chicago Prof'l Sports Ltd. P'ship and WGN Cont'l Broad. Co. v. NBA*<sup>6</sup> allow the NBA to benefit both monetarily and exposure-wise from its control of league television coverage.

Parente<sup>7</sup> points out that “[t]elevision was relatively unimportant to sports until the end of the 1950's when organized professional team sports began to look at television as a potential major source of revenue.”<sup>8</sup> Parente also claims that “once a sport, league, or team has had its ‘product’ bought by television for use as programming,

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<sup>3</sup> 754 F. Supp. 1336 (N.D. Ill. 1991).

<sup>4</sup> Roger G. Noll is a professor of public policy at Stanford University. Professor Noll's principle area of interest is public policies towards business. Noll has authored or co-authored “11 books and over 250 articles in areas such as telecommunications policy, federally supported research and development, environmental policy, and the management of universities.” California Council on Science and Technology Council Member profiles at <http://www.sdsc.edu/ccst/ccst/about/council/noll.html> (last visited Nov. 16, 2001).

<sup>5</sup> ROGER G. NOLL, *GOVERNMENT AND THE SPORTS BUSINESS I* (The Brookings Institute) (1974).

<sup>6</sup> 961 F.2d 667 (7th Cir. 1992).

<sup>7</sup> Donald Parente is an associate professor of advertising at Middle Tennessee State University. Dr. Parente's research interests include “the way advertising professionals write objectives, advertising campaign strategy and sports management.” Middle Tennessee State University faculty profiles at <http://www.mtsu.edu/~jour/advertis/faculty.html> (last visited Nov. 16, 2001).

<sup>8</sup> Donald E. Parente, *The Interdependence of Sports and Television*, 27 J. Communication No. 3, 128, 129 (1977).

that entity can seldom exist thereafter, at least in the same style or manner, without the financial support of television.”<sup>9</sup> McChesney<sup>10</sup> claims that “successful management of professional sports leagues and franchises is based on the capacity to best exploit rights payments.”<sup>11</sup> Bellamy<sup>12</sup> concludes that “television could survive without professional sports, but professional sports could not exist in their present form without television monies.”<sup>13</sup> Network television contracts have become the largest source of revenue for sports franchises.

Network television also provides the most important exposure vehicle for a professional sports league. Wenner<sup>14</sup> points out that the most common involvement people have with sports is through viewing games on television.<sup>15</sup> Lever<sup>16</sup> and Wheeler<sup>17</sup> also claim

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<sup>9</sup> *Id.* at 128.

<sup>10</sup> Robert W. McChesney is Research Professor in the Institute of Communications Research and the Graduate School of Library and Information Science at the University of Illinois at Urbana-Champaign. “His work concentrates on the history and political economy of communication, emphasizing the role media play in democratic and capitalist societies.” Robert W. McChesney personal biography at <http://www.robertmchesney.com/Bio.html> (last visited Nov. 16, 2001).

<sup>11</sup> Robert W. McChesney, *Media Made Sport: A History of Sports Coverage in the United States*, in *MEDIA, SPORTS, AND SOCIETY* 65 (Lawrence A. Wenner ed., 1989).

<sup>12</sup> Robert V. Bellamy, Jr. is Associate Professor of Mass Communication & Society at Duquesne University. Duquesne University personal home page directory at <http://www2.duq.edu/DUHP/HomePage.cfm> (last visited Oct. 23, 2001).

<sup>13</sup> Robert V. Bellamy, Jr., *Professional Sports Organizations: Media Strategies*, in *MEDIA, SPORTS, AND SOCIETY* 120 (Lawrence A. Wenner ed., 1989).

<sup>14</sup> Lawrence A. Wenner is Professor of Communications at the University of San Francisco. Dr. Wenner’s areas of interest include “[m]edia and sport; media criticism; media audience; media and commodification of culture; constructions of race, ethnicity, and gender in media.” University of San Francisco faculty profile at <http://www.usfca.edu/asfaculty/wenner.html> (last visited Oct. 23, 2001).

<sup>15</sup> Lawrence A. Wenner, *Media, Sports, and Society: The Research Agenda*, in *MEDIA, SPORTS, AND SOCIETY* 15 (Lawrence A. Wenner ed., 1989).

<sup>16</sup> Janet Lever is an Associate Professor of Sociology at California State Los Angeles. “Dr. Lever is an expert on leisure studies, applied sociology, gender, and the social consequences of human sexuality.” California State Los Angeles News Releases at <http://www.calstatela.edu/univ/ppa/newsrel/pitch17.htm> (last visited Oct. 23, 2001).

<sup>17</sup> Stanton Wheeler is the Ford Foundation Professor of Law and the Social Sciences at Yale Law School. Dr. Wheeler’s “teaching and research interests include the sociology of law, deviant behavior and social control, and socio-legal aspects of popular culture, including sports and music.” Yale University Institution for Social and Political Studies faculty profile at <http://www.yale.edu/isps/faculty/Wheeler.html> (last visited Oct. 11, 2001).

that “the single most dominant influence on the way in which sport is experienced in American society is that of the mass media, particularly television.”<sup>18</sup>

With the importance of network television to a professional sports league established, the purpose of this article is to provide a legal application to the broadcast television exposure strategy of the NBA, as it is the government that permits the professional sports and television network relationship to exist and the national television exposure strategy of the NBA to flourish. Description and analysis of the SBA and *Chicago Prof'l Sports Ltd. P'ship and WGN Cont'l Broad. Co. v. NBA* will help answer the following research question: what is the federal government's philosophy regarding sports broadcasting on network television? In addition to a description and analysis of these government provisions, key informant interviews are utilized to provide depth into the NBA strategy that results from the permission granted through these governmental provisions. Personal interviews were conducted with: Dave Checketts, former President and CEO of Madison Square Garden; Ed Desser, President of NBA Television & New Media Ventures; Brian McIntyre, NBA Senior Vice President of Communications; Mike Pearl, Senior Vice President and Executive Producer of Turner Sports; Tommy Roy, NBC Sports Executive Producer; and David Stern, NBA Commissioner.

### III. FINDINGS

In the situation of sports broadcasting, the professional sports leagues initiated federal government involvement in trying to gain exceptional government approval to collectively package and sell the broadcast rights for their games to television networks. The selling of rights fees for games to television broadcasters was originally a major point of contention between league and television executive personnel regarding television's impact on game attendance and separate franchises selling their individual broadcast rights,

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<sup>18</sup> Janet Lever & Stanton Wheeler, *Mass Media and the Experience of Sport*, 20 COMMUNICATION RESEARCH 125 (1993).

potentially creating an economic imbalance among all teams within a league.<sup>19</sup> Horowitz points out that “[t]he prospect of significant broadcast revenues, and the threat that broadcasts would adversely affect attendance, led to the adoption of rules in each sport that restricted inter-team competition for the sale of broadcast rights.”<sup>20</sup> These rules became a force behind several antitrust suits surrounding laws of broadcast policy.

#### *A. Antitrust Issues*

The first antitrust issue was raised in 1946, when major league baseball adopted a rule prohibiting one team from broadcasting a game in another team’s home territory or from another stadium without the home team’s consent.<sup>21</sup> Fearing the creation of a system that would not permit open competition, the Department of Justice became involved in the settlement of this antitrust issue. Many of the early sports broadcast suits dealt with the televising of the National Football League (hereinafter “NFL”) and on October 9, 1951, the Department of Justice filed suit against the NFL.<sup>22</sup>

In *United States v. Nat’l Football League*,<sup>23</sup> Judge Allan K. Grim decided to uphold the legality of the NFL bylaw, which prevented the telecasting of an outside game in a third team’s home territory when that team had a home game.<sup>24</sup> For example, a football game between the Chicago Bears and the Green Bay Packers could not be televised into the New York market if the New York Giants were playing a home game. This ruling would in effect allocate marketing territories for the purpose of restricting competition. Horowitz points out that “the court found that such a restraint was reasonable because of the adverse effects that competitive outside telecasts would be

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<sup>19</sup> See Ira Horowitz, *Sports Broadcasting*, in *GOVERNMENT AND THE SPORTS BUSINESS* 275, 275-83 (Roger G. Noll ed., 1974).

<sup>20</sup> *Id.* at 279.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 281.

<sup>23</sup> 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>24</sup> See Horowitz, *supra* note 19, at 281.

likely to have on the home club's attendance."<sup>25</sup> The Court also ruled that because of the mutual interdependence of the franchises, the restriction would help preserve the league by protecting the weaker teams' home attendance.<sup>26</sup> The Court did find two illegal restrictions on broadcasts: (1) the prohibition against telecasts by another team when the home team was also telecasting an away game in its home territory, and (2) all restrictions on outside radio broadcasts.<sup>27</sup>

The professional sports leagues did not feel that the ruling of the Court interfered with the situation where all of the teams could collectively bargain as a cartel in negotiations for broadcast rights.<sup>28</sup> Consequently, the NBA and NBC signed the first league-wide television agreement in 1954; that year, the first nationally televised basketball game between the Boston Celtics and the New York Knicks was broadcast on NBC.<sup>29</sup> Following television contracts between the American Football League and ABC in 1960, and the NFL and CBS on April 24, 1961, the NFL brought a petition seeking an interpretation of the 1953 ruling in *United States v. Nat'l Football League*.<sup>30</sup> Judge Grim again ruled that by pooling television rights the franchises eliminated competition among themselves in the sale of these rights.<sup>31</sup> Horowitz explains that "[t]he [C]ourt also held that by granting to CBS the right to determine which games would be telecast and where, the agreement violated the 1953 judgment enjoining the league from entering into any agreement that could tend to restrict broadcast areas."<sup>32</sup> The Court therefore deemed the NFL-CBS contract to be in violation of the 1953 ruling.<sup>33</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *See* 116 F. Supp. at 323-24.

<sup>27</sup> *See id.* at 330.

<sup>28</sup> *See* Horowitz, *supra* note 19, at 281.

<sup>29</sup> PAUL D. STAUDOHR, PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS 98 (1996).

<sup>30</sup> 196 F. Supp 445 (E.D. Pa. 1961).

<sup>31</sup> *See id.* at 447.

<sup>32</sup> Horowitz, *supra* note 19, at 283.

<sup>33</sup> *See* 196 F. Supp. at 447.

*B. Sports Broadcasting Act*

Having failed in the judiciary, the leagues and the networks petitioned Congress for permission to pool and sell the broadcast rights to television networks. The result of hearings before the House of Representatives was the SBA, which was approved by Congress on September 30, 1961.<sup>34</sup> The new law simply granted clubs in professional sports leagues an antitrust exemption allowing them to pool their broadcast rights for the purpose of selling those rights to the highest bidder.<sup>35</sup> The purpose of the SBA is different from that of the Sherman Anti-Trust Act (hereinafter “Sherman Act”),<sup>36</sup> which is designed to ensure free market competition and prevent restriction of trade.

The SBA established the legality of the professional sports leagues’ practice of packaging league games to a network and not allowing teams to individually sell their rights, which would otherwise be an unlawful restraint on competition. The SBA is, however, a “special interest legislation, a single-industry exception to a law designed for the protection of the public.”<sup>37</sup> Section 1291 of the SBA amended antitrust laws so that they “shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs . . . sells or otherwise transfers all right or any part of the right of such league’s member clubs in the sponsored telecasting of the games.”<sup>38</sup>

The SBA facilitates the acquisition of network television money by professional sports leagues, entitling the leagues to their greatest source of revenue. In its current television broadcast contract signed on November 12, 1997, and beginning with the 1998-99 season, the NBA once again substantially increased its broadcast rights revenues

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<sup>34</sup> 15 U.S.C. §§ 1291-1295 (1961).

<sup>35</sup> *See id.*

<sup>36</sup> 15 U.S.C. § 1 (1914, 1948).

<sup>37</sup> *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992).

<sup>38</sup> 15 U.S.C. § 1291 (1961).

to a total of \$2.64 billion.<sup>39</sup> NBC doubled its payments to a total of \$1.75 billion (up from \$750 million) and Turner more than doubled its payments to a total of \$890 million (up from \$350 million) for a four-year contract through the 2001-02 season.<sup>40</sup> Tommy Roy, Co-Executive Producer for the NBA on NBC, describes the professional sports league and television network partnership as a cycle where if the NBA does well, more people watch the games, which provide higher ratings and advertising, and eventually lead to rights fees for the league.<sup>41</sup>

### *C. Exposure: The “Less is More” Strategy*

In addition to unmatched revenue, television networks provide unmatched exposure for a professional sports league. Brian McIntyre, NBA Senior Vice President of Communications, claims that the NBA can reach as many people in one broadcast as it can in numerous newspapers or local newscasts.<sup>42</sup> He characterizes a game broadcast, whether it is local or national, as nothing more than a two-and-a-half-hour infomercial for your product.<sup>43</sup> McIntyre explains the advantage of a national broadcast, stating:

local NBC has three-to-four minutes a night on their local news. Multiply that times seven and it is twenty-one to twenty-eight minutes a week—one broadcast gives us two-and-a-half-to-three hours depending on if you have a pre-game and a post-game. [With] our broadcast partners, we are going right to our target audience. The Finals and

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<sup>39</sup> See generally INFOPLEASE.COM, *The Rights Stuff: Major sports and their television deals as of Sept. 1, 2000*, available at: <http://www.infoplease.com/ipsa/A0877494.html> (last visited Nov. 18, 2001).

<sup>40</sup> See *id.*

<sup>41</sup> Interview with Tommy Roy, Co-Executive Producer, NBA on NBC (Oct. 21, 1998).

<sup>42</sup> Interview with Brian McIntyre, Senior Vice President of Communications, NBA (Dec. 16, 1998).

<sup>43</sup> *Id.*

the All-Star Game we are going to a bigger audience, bringing the casual fans.<sup>44</sup>

While the SBA permits a league as a collective to sell broadcast rights for its games to networks, it does not prohibit individual teams from entering into their own national television contracts.<sup>45</sup> These individual team broadcast contracts hinder the league's control and maintenance over national television exposure. The NBA took several measures, including litigation, to limit the rights of individual teams to sell games so the league could maximize the value of the television rights it sells to the national networks.<sup>46</sup>

During the late 1970's and through the mid-1980's broadcast exposure was a major problem for the NBA: few regular season games were being broadcast, some playoff games were not being broadcast on television, and even some games of the NBA Finals were being broadcast on tape delay.<sup>47</sup> This exposure problem is highlighted by the 1981 NBA Finals between the Boston Celtics and the Houston Rockets when four of the six games were broadcast on tape delay at 11:30 p.m.<sup>48</sup> One of the first initiatives the NBA implemented during these years to increase the league's finances and marketability was for the league as a whole to take greater control of its television exposure. Specifically, the league exerted more control over the independent franchises that had the capability to get their games broadcast on national television superstations. The NBA defined a superstation as "any commercial over-the-air television station whose broadcast signal is received outside of the local Designated Market Area."<sup>49</sup> The Atlanta Hawks, Chicago Bulls, and New Jersey Nets were three franchises who were able to get their games broadcast on the three NBA-recognized superstations: TBS,

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<sup>44</sup> *Id.*

<sup>45</sup> See 15 U.S.C. § 1291 (1961).

<sup>46</sup> See *infra* section Exposure: Superstations and the WGN Lawsuit.

<sup>47</sup> See generally 754 F. Supp. at 1342.

<sup>48</sup> See *id.*; see also Steve Pate, *Blast Off!*, NBA.COM, available at [http://global.nba.com/history/1981\\_rockets.html](http://global.nba.com/history/1981_rockets.html) (last visited Nov. 18, 2001).

<sup>49</sup> *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 754 F. Supp. 1336, 1345 (N.D. Ill. 1991).

WGN and WOR respectively.<sup>50</sup> The league, along with its broadcast partners, can control exposure by creating a programming schedule that carefully selects days and times of games and also the players and teams who will appear on network television broadcasts.

The NBA adopted a “less is more” strategy where the league would better attempt to control the positioning of the NBA on television and not saturate the market with games.<sup>51</sup> Regarding the “less is more” strategy, NBA Commissioner David Stern states, “when your ratings are not strong, and your product is not secure in its identity, a lot of exposure is not a good thing because the worst thing for a bad product is a lot of exposure, and so we were trying to shape up our product at the same time that we were trying to define exposure.”<sup>52</sup> Ed Desser, President of NBA Television, also describes the rationale behind the “less is more” philosophy. He states:

The market was only ready to accept so much and one of the strategies that we were fond of talking about . . . was “less is more,” and “less is more” was really all about . . . not overexpos[ing] ourselves . . . try[ing] to make each telecast special. We are fighting for ratings. We want our ratings to be as high as possible, on average, and therefore there is potentially too much exposure. If you are in a battle for your lives and what defines being on network television is a twenty share, [the question becomes] how do you get a twenty share? You do a variety of things. . . . You don’t put too many games on; you [heavily] promote . . . the games you do put on; you make sure you schedule each game in a logical way; you have good matchups, etc.; you produce it well; you have certain consistency of scheduling so people can know to expect it; maybe you don’t have wall-to-wall games so that people have to choose [one game over another]; you try and have measured amounts of [games] in the marketplace . . . push[ing] up the average. At a time when you are a second-class citizen, increasing your average is more

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<sup>50</sup> *See id.*

<sup>51</sup> *See infra* notes 52-53.

<sup>52</sup> Interview with David Stern, Commissioner, NBA (Apr. 14, 1999).

important than increasing the total. . . . What is a more attractive thing for a television network, one game that gets a ten rating, or five games that get a two rating? . . . One game that gets a ten rating, and so we had to control the amount of product in the marketplace in order to garner enough [viewers] that [advertisers] would pay attention.<sup>53</sup>

#### *D. Exposure: Superstations and the WGN Lawsuit*

In 1979, the NBA made its initial attempt to legislate the exposure of its game telecasts. The NBA's Board of Governors adopted a resolution that all future television contracts entered into by individual teams would be made "subject to the Constitution, Bylaws and all other rules and regulations" of the league, "as they presently exist and as they may from time to time be amended," subject to "the terms of any existing or future" television contracts entered into by the league and subject to review by the Commissioner to guarantee compliance.<sup>54</sup> The Board of Governors also passed a resolution providing the league with "the exclusive right to enter into contracts for the direct telecasting of NBA games by cable systems located outside the territory of all members."<sup>55</sup>

The new resolution voided a national contract the New York Knicks had signed with the USA Network, which was to pay the Knicks \$1.5 million for the broadcast rights to their games for three seasons from 1979-80 to 1981-82.<sup>56</sup> The NBA continued with their "less is more" strategy restricting exposure, and for the 1980-81 season teams were limited to forty-one over-the-air telecasts because, for example, the Atlanta Hawks for 1979-80 season had broadcast all eighty-two of their regular season games on TBS.<sup>57</sup> At the time, the NBA was not receiving revenue from independent individual team

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<sup>53</sup> Interview with Ed Desser, President, NBA Television (Aug. 26, 1998).

<sup>54</sup> *NBA*, 754 F. Supp. at 1342.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

broadcast rights contracts—only the Hawks profited from their contract with TBS.

Teams were still permitted to sell the other forty-one non-network games (if they were not on CBS—the national television network for the NBA from 1974 to 1990) to a local cable outlet only, and keep all of the revenue from whatever contracts they signed. The NBA agreed to broadcast its games on national cable outlets, signing contracts for the 1982-83 and 1983-84 season with both ESPN and USA for forty games with ESPN televising on Sunday night and USA televising on Thursday night.<sup>58</sup> The NBA would not allow any of these forty-one non-network games to be nationally broadcast opposite its new cable partners.

The NBA continued to impose restraints on its teams' ability to broadcast independently on a national network by limiting the superstation games to twenty-five for the 1985-86 season. In October 1989, the NBA passed a resolution “‘blackening out’ superstation games on nights when an NBA game is shown nationally on cable as part of the league’s national cable package.”<sup>59</sup> While individual teams are not permitted to broadcast a game on a superstation opposite a TNT or TBS game, teams can air a game head to head with a TNT or TBS game, but strictly on a local over-the-air or local cable channel. For example, if the New York Knicks are playing the Chicago Bulls on TNT, the game could not be broadcast nationally on WGN because it is a superstation, but could be televised on the Madison Square Garden Network (hereinafter “MSG”), the local carrier for the Knicks. Games that are televised on NBC are not permitted to be broadcast by an individual team carrier at all, not even on tape delay.<sup>60</sup> For example, if the New York Knicks are playing the Chicago Bulls on NBC, neither WGN nor MSG would be permitted to broadcast that game live or at any other later moment.

In 1990, WGN and the Chicago Bulls challenged the NBA’s attempt to control the television packaging of its product by reducing

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<sup>58</sup> 754 F. Supp. at 1343.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1344.

the number of games on superstations from twenty-five to twenty. WGN and the Bulls sued the NBA to have the number remain at twenty-five, arguing that the antitrust exemption provided in the SBA of 1961<sup>61</sup> did not apply, and this limit was an unreasonable restraint of trade.<sup>62</sup> The Bulls had approved the Board of Governors' resolutions for earlier reductions to forty-one and subsequently twenty-five games, but moved to block this further restriction.<sup>63</sup> At the time WGN reached 34% of all of the television households nationwide, and 31% of those homes were outside of the Chicago area.<sup>64</sup> WGN received no money from cable subscription, and relying on advertising sales for 98% of its revenues, was losing money by not having the Bulls games broadcast to the entire nation. The Bulls and WGN also had a successful ratings and advertising commodity with the broadcast rights to the most talented and marketable player—Michael Jordan.

In the early 1990's, WGN and the Bulls also failed to take advantage of a tremendous advertising opportunity. Due to microwave transmission technology, a superstation could generate two signals, one for local over-the-air, and another to send out to the rest of the nation. Ted Turner had been using this technology of splitting the feed with TBS in Atlanta and thus, for one program, had the ability to double the advertising revenues with two feeds to sell two different sets of advertising: (1) local spots for Atlanta viewers only, and (2) national spots which would be seen throughout the country.<sup>65</sup> While WGN had not been splitting the feed for its Bulls telecasts, the superstation had been using this transmission technology for its broadcasts of Cubs baseball games.<sup>66</sup> For its baseball telecasts, WGN offered advertisers three possibilities: (1) over-the-air Chicago only, (2) national cable only, or (3) both.<sup>67</sup>

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<sup>61</sup> *Id.* at 1343.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1342-43.

<sup>64</sup> 754 F. Supp. at 1348.

<sup>65</sup> *Id.* at 1346-47.

<sup>66</sup> *Id.* at 1346-47.

<sup>67</sup> *Id.* at 1347.

*E. NBA Position on WGN and Exposure*

The positioning of the NBA in this legal matter and its rationale behind the need to limit the number of national broadcasts on superstations refers directly back to the main benefits a league achieves when it signs a national television contract: revenue and the proper exposure. The NBA was not receiving any revenue or exposure from the contract between the Bulls and WGN. The beliefs of the NBA were clearly spelled out in the Proposed Findings of Fact and the Proposed Findings of Law that were filed by the NBA and cited in the case.<sup>68</sup> The extensive rationale of the NBA's argument is:

The reduction protects the teams' grant of exclusivity in their local markets, and enhances the value of the teams' local television contracts by protecting the exclusivity of those contracts from dilution caused by the importation of games from other NBA cities by reason of superstation telecasts. It also promotes the teams' media and sponsor relationships. It protects the value of the market extension agreements pursuant to which cable systems pay a fee shared equally by all NBA teams for the right to telecast local cable games in a team's extended market. It enhances the ability of the NBA to grant exclusive and lucrative national broadcast contracts and protects the value of those contracts. It ensures the league is compensated for all national exposure of its games. It preserves the price sponsors pay for national exposure on NBA national cablecasts and broadcasts. It promotes the NBA's relationship with the national broadcast and cable networks. It enhances the perception in the marketplace that the NBA offers a unique product and has control over that product. It fosters the development by the NBA of new technologies. It improves the level of competition in the television market and benefits consumers by making the NBA a stronger competitor and by providing greater national network coverage of NBA games. And in the

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<sup>68</sup> *Id.* at 1358-59.

long run, if the NBA as a league has no right to regulate the national distribution of NBA games by individual teams, the attractiveness of the league's national television product will be undermined, its national and local revenues will decline, the weaker teams will face financial difficulties, and the league's future will be threatened.<sup>69</sup>

The NBA also believed that its position was viable under the Sherman Act because the reduction of games actually promotes competition "between the NBA's network packages and other network programming and between local NBA broadcasts by the teams and other local programming."<sup>70</sup>

#### *F. Ruling*

Seven weeks after the complaint was filed by WGN and after a five-day trial, Judge Hubert Will, a federal district court judge in Chicago, ruled in favor of WGN and the Bulls.<sup>71</sup> Judge Will ruled that "because the games sold to WGN were owned and transferred by the Bulls rather than the league, the SBA does not, by its terms, cover this case."<sup>72</sup> Judge Will continued "the Bulls and the other teams still own and control the rights to the games not included in the league's contracts with NBC and TNT, and therein lies the NBA's vulnerability to this lawsuit."<sup>73</sup> The Court ruled that the NBA produced no credible evidence, anecdotal or statistical, that inclined the Court to believe that superstation broadcasts steal viewers from another team's local telecasts, damaging ratings and revenues.<sup>74</sup> The Court also found the arguments of the NBA under the Sherman Act<sup>75</sup> invalid because the Act prohibits every contract, combination or conspiracy in restraint of trade.<sup>76</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> 754 F. Supp. at 1359.

<sup>71</sup> *Id.* at 1351.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1351-52.

<sup>74</sup> *Id.* at 1359.

<sup>75</sup> 15 U.S.C. § 1 (1914, 1948)

<sup>76</sup> *Id.* at 1351.

The ruling in favor of WGN and the Bulls did not end the litigation between the NBA and WGN. The original ruling was reaffirmed on appeal in *Chicago Prof'l Sports Ltd. P'ship and WGN Cont'l Broad. Co. v. NBA*.<sup>77</sup> In 1993, the NBA attempted to adopt rules which would ban superstation telecasts. In 1995, Judge Will ruled that the NBA plan was an antitrust violation and that WGN and the Bulls would pay the NBA \$40,000, rather than the \$100,000 the NBA had sought, for each game the Bulls broadcast outside of Chicago.<sup>78</sup> The ruling by Judge Will was largely based on the fact that the NBA was already receiving more than \$2 million a year in copyright payments for Bulls games on WGN. On September 10, 1996, the Seventh Circuit<sup>79</sup> banned WGN from airing Bulls games nationally claiming that the federal judge had overstepped his bounds in 1995 in his favorable ruling for WGN.<sup>80</sup>

One notable aspect of the original lawsuit and its appeal was that it showed the NBA would assert its right to control its product through the SBA. The league was not anxious for any competition with its other national broadcasts and did not want games being broadcast nationally without the league receiving any of the revenues. Because the Hawks had reduced their TBS schedule to twenty games—TBS signed an agreement not to challenge any reduction in the number of superstation telecasts providing the rules applied equally to all superstations with the NBA in attempting to acquire the national television contract from ESPN and USA to TNT, also owned by Ted Turner—and because the Nets were well below that figure with only six games on superstation WOR, the entire WGN lawsuits amounted to a dispute over the broadcasting of five games on the surface; but the message of the need for the proper exposure and the impact that the proper exposure had on national television revenue was clear. The doggedness of the NBA in litigation also sent an unequivocal message to all NBA franchises who might attempt to challenge the league's national television exposure structure.

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<sup>77</sup> *NBA*, 961 F.2d 667 (7th Cir. 1992).

<sup>78</sup> Jim McConnville, *WGN-TV/NBA Headed Back to Court in 6-Year-Old Case; Superstation Will Not Be Allowed To Broadcast Bulls Games During this Round of Litigation*, BROADCASTING & CABLE, Oct. 21, 1996, at 45.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

Ed Desser, President of NBA Television, describes the NBA response to the WGN lawsuits stating, “we (the NBA) have an overall strategy, an overall arrangement where teams exploit local rights and the league exploits national and international rights on behalf of all the teams collectively.”<sup>81</sup> Brian McIntyre, NBA Senior Vice President of Communications, describes the problems that arise when there is a system where superstations are broadcasting at their own volition and not that of the league. McIntyre states, “it is our (the NBA’s) property,” the questions are “How do we best position it? How do we best project our image? And there is no doubt that television plays a major role in this. [There was] no money coming into the league,” instead it was “going right to one team, and killing any kind of national exposure potential.”<sup>82</sup>

### *G. NBA Exposure Strategy*

As a result of the NBA efforts through the WGN case, the league, and not individual teams, has control over all of its national television exposure. Once the league has permission granted by the government for economic and exposure control over its product, the NBA along with its broadcast partners can determine how to best present the league in terms of placement of the schedule and which teams and players to televise. TNT broadcasts NBA games twice a week and TBS broadcasts once a week during the regular season.<sup>83</sup> NBC begins its NBA broadcast schedule with a prime-time doubleheader on Christmas night and televises NBA games at least every Sunday from the end of January through the playoffs.<sup>84</sup> All NBA broadcast partners increase the number of game telecasts during the playoffs. The preference of network television in scheduling league games is still a prevalent strategy employed by the NBA. As the largest revenue source for the NBA and to preserve the

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<sup>81</sup> Desser, *supra* note 53.

<sup>82</sup> McIntyre, *supra* note 42.

<sup>83</sup> See generally NBA NATIONAL TV SCHEDULE, available at: [http://www.nba.com/schedules/national\\_tv\\_schedule/index.html](http://www.nba.com/schedules/national_tv_schedule/index.html) (last visited Nov. 16, 2001).

<sup>84</sup> See *id.*

lucrative broadcast income, television networks need to broadcast the best games that will achieve the highest audience ratings and advertising dollars. To demonstrate the importance of the network television schedule, the overall NBA game schedule is composed after the national television schedule is arranged.

The broadcast partners are always involved in formulating the NBA season and television schedule. NBC and Turner have input in the initial drafts of the schedule of games that will be on their networks and the times that the games will be played. Mike Pearl, the Senior Vice President and Executive Producer for Turner Sports, states that Turner submits a best wish list of games to the NBA and the league uses that input when making its scheduling decisions.<sup>85</sup> This negotiation of the program schedule is where the strength of the relationship between the NBA and its broadcast partners can easily be recognized; the national television broadcasts are the best opportunity to showcase the league from the NBA perspective, and the networks simply want the most popular game. Commissioner Stern explains that “we used to be much more insistent that every team be represented a certain amount, and frankly we have been more open to the networks’ strategic view, which is the way to grow the sport is to focus on those teams that people want to see.”<sup>86</sup> Ed Desser describes in detail the scheduling of the NBA in terms of the preference that is given to its broadcast partners:

It starts with kind of a basic framework that is negotiated as part of the television agreement. We don’t know what the games will be, but there are basic parameters of how many regular season, how many Sunday afternoon, how many Sunday prime-time [games there will be]. . . . The next [step] is actually putting together the schedule for the particular year, and that is put together based upon accumulating building availability dates, and NBC and Turner scheduling availability dates. There are a [number] of place holders on their schedule for the NBA

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<sup>85</sup> Telephone Interview with Mike Pearl, Senior Vice President & Executive Producer, Turner Sports (Feb. 25, 1999).

<sup>86</sup> Stern, *supra* note 52.

on NBC [in] a particular pattern. Generally speaking, most Sundays are now formatted in a triple-header format. There are a fair number of deviations, so there are some single-headers during the NCAA Tournament and there are some split doubleheaders. . . . Basically we occupy most of the 5:30 [p.m.] to 8:00 [p.m.] slots in the first quarter and usually at least one other, either 12:30 [p.m.] or 1:00 [p.m.] to 3:30 [p.m.], or 3:30 [p.m.] to 6:00 [p.m.] . . . So you [receive] that information then there are just certain things you know. For a 1:00 game on a Sunday afternoon you know you are basically limited to the east[ern] and central time zones. So you look to see what buildings are available on that particular Sunday. Is . . . [Madison Square] Garden available? Is Miami available? Is Chicago available? Is Detroit available, etc.? And the flip side of what buildings are available, is what teams are available to travel? If a team isn't available, [if] it doesn't have a building available to play a home game, then by definition [it is] available to play a road game. . . . [T]hat is the basic pattern. Then it becomes [a matter of] assembling this mosaic. . . . [The factors include] last year in the playoffs the Knicks and Miami was a great matchup, there is a rivalry there, [there is a] slot from 1:00 [p.m.] to 3:30 [p.m.] and . . . Miami arena [is available]. Are the Knicks available to play in Miami that day? . . . [If] they are . . . [that step is] done. . . . [T]rying to come up with . . . compelling matchups and assembling the network schedule is the first part of the process because after that . . . [if] the Knicks are in Miami Sunday afternoon, then you . . . create the road trip around it. . . . [If] Orlando is free on Friday night, we'll have them play in Orlando Friday, and Miami on Sunday and maybe Monday night. Since it's not the next day *per se*, they could play in Atlanta,<sup>87</sup> so there's a nice little road trip . . . [and that step is done].

The scenario of the national television schedule dictating the overall NBA schedule as described by Desser can be applied using the 2000-01 NBA schedule, most notably with the 1999-2000

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<sup>87</sup> Desser, *supra* note 53.

defending NBA Champion Los Angeles Lakers. On three separate occasions, the Los Angeles Lakers road schedule is strongly coordinated with the NBA on national television (See Table One).

Table One - Los Angeles Lakers 2000-01 Television Coordinated Road Schedule

<u>Day</u>	<u>Date</u>	<u>Opponent</u>	<u>National Network</u>
Sun	1/28	New York Knicks	NBC
Tue	1/30	Cleveland	
Wed	1/31	Minnesota	TNT
Tue	2/13	New Jersey	
Wed	2/14	Philadelphia	TNT
Fri	2/16	Charlotte	
Sun	2/18	Indiana	NBC
Wed	3/14	Detroit	
Fri	3/16	Washington	
Sun	3/18	Orlando	NBC
Mon	3/19	Atlanta	
Wed	3/21	Milwaukee	TNT

(Source: NBA)

Through this scenario, the networks are receiving the most desirable NBA product for their broadcasts: competitive teams featuring the top players in the league.

Problems could arise between franchises as certain teams are obviously on national television more than others. Teams such as New York, Los Angeles, and Chicago might receive national exposure often, but through the NBA broadcast agreements, each team receives the same amount of national television revenue. Dave

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Checketts, former President and CEO of Madison Square Garden,<sup>88</sup> explains the situation:

We don't forget about the fact that we get a major share of the national revenue. [However] . . . we get 1/29<sup>th</sup> of the national revenue and our marketplace probably accounts for 1/7<sup>th</sup> of the watching audience. . . . [I]f we were to really argue that case, we would say we deserve much more than 1/29<sup>th</sup> and so you shouldn't put the Knicks on national television any more than you do anyone else. . . . [T]he truth is they put the Knicks on . . . as many times as they possibly can, because we do have such interest in New York.<sup>89</sup>

The rights fees from the league's broadcast partners represent the single largest source of shared revenue among the twenty-nine NBA franchises. These franchises, in essence, have agreed not to compete with one another in the area of broadcasting. In a free open market and each team having permission to negotiate their own national television contract, strong franchises from large media markets such as the New York Knicks or Los Angeles Lakers would easily earn more money than franchises in smaller markets such as the Sacramento Kings or the Memphis Grizzlies. The greater revenue could easily alter the scales of competitive balance between all of the teams with large market teams being able to sign more high-priced talent. The rationale for the revenue sharing of the NBA is commented on in *Chicago Prof'l Sports Ltd. P'ship and WGN Cont'l Broad. Co. v. NBA*:

It is not disputed, and it is plain from the financial figures, that the prosperity of the league currently depends on the volume of the shared revenues generated by the league's economic activity on behalf of the teams and particularly

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<sup>88</sup> Madison Square Garden houses three professional sports franchises: the New York Knicks (NBA), the New York Liberty (WNBA), and the New York Rangers (NHL).

<sup>89</sup> Interview with Dave Checketts, Former President & CEO, Madison Square Garden (Oct. 16, 1998).

on the revenues generated by the broadcast contracts with the national networks.<sup>90</sup>

Ed Desser comments on the league revenue sharing ideas and the importance of these objectives in the overall operation of the NBA, stating how the revenue aspects of this play into issues of competitive balance.

There are a whole variety of systems that are designed to help maintain the integrity and quality of the product. It goes beyond just how it is televised or how it is presented. . . . Milwaukee and San Antonio collect the same amount of network television revenue as the Knicks and the Lakers [in order to give] them the same number of chips, or close to the same number of chips, to play with as they compete for talent.<sup>91</sup>

#### IV. CONCLUSION

The purpose of this paper is to demonstrate that the federal government permits the NBA, at the expense of individual teams, to systematically maintain control over national television exposure of its games. The philosophy of the federal government is clear: professional sports leagues are unique and deserving of special legislation like the SBA of 1961, which allows the league to pool the broadcast rights to their games to the highest television network bidder. Once this right to collectively package and sell the rights to games has been granted, sports leagues now have their greatest source of revenue.

In addition to unmatched revenue, television provides unmatched exposure. The NBA policy of television exposure is if not dictated by, at least permissible, through both legislative and judicial government guidelines as expressed in the arguments that are a result of *Chicago Prof'l Sports Ltd. P'ship and WGN Cont'l Broad. Co. v.*

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<sup>90</sup> *NBA*, 754 F. Supp. at 1340.

<sup>91</sup> Desser, *supra* note 53.

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*NBA* and its progeny. The *NBA*, and not individual teams, must have the ability to control the overall television exposure of its games in order to maintain the value of national television rights contracts. The *NBA*'s extensive litigation in the *WGN* case, particularly since it essentially focused on five games of the Chicago Bulls, was illustrative of the league exerting its right to maintain economic value and control exposure of national television. Once league-wide control is permitted, the *NBA* and its broadcast partners can then create a schedule of teams and games that is the most appealing to the national television audience.