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# Panel I: The Future of Sports Television

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# PANEL I: The Future of Sports Television

Moderator: Ronald A. Cass[*]

Panelists: Mark Abbott[†]
Irwin Kishner[‡]
Brad Ruskin[§]
Alan Vickery[||]

MR. TAXIN:[#] Thank you, Dean Treanor. I would also like to take this time to briefly thank all the staff and board members of the *Fordham Sports Law Forum*, some of whom are here right now and others will be here later, especially Laura Freedman, co-editor-in-chief here, who really helped me. She put together this symposium last year and did a wonderful job guiding me this year to make sure that everything went as smoothly as it did.

In the past few years we have seen the National Basketball Association ("NBA") leave its longtime network NBC in favor of a deal where the majority of its telecasts are on cable. Major League Baseball ("MLB") has begun broadcasting playoff games on cable. Almost every sport has a deal with a satellite company for additional games. And in this area specifically, the Yankees and Nets joined forces to create a sports-specific cable network, known as the YES Network. Just this week in Houston and Colorado, stories have come out announcing that sports teams in those areas are in discussions to form their own regional sports networks similar to YES.

This panel will focus on the different avenues of sports broadcasting and the pros and cons of each. Our first moderator

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today is Ronald Cass. Dean Cass has served as dean of the Boston University School of Law since 1990. Dean Cass has taught courses at the University of Virginia and Boston University in antitrust law and communications law, as well as co-authoring books on those subjects and others. Dean Cass has published articles in several scholarly journals, including the *Duke Law Journal*, and the University of Virginia, University of Pennsylvania, and University of California, Los Angeles ("UCLA") law reviews.

So, to kick off our first panel of the day, I am happy to introduce Dean Ronald Cass.

DEAN CASS: Thank you, Michael.

I have an easy job here. The job of the moderator is to tell one true story and then to introduce the panel.

My true story involves a fellow from Boston who passed away during a winter like this one, and, having failed to make a contribution to his law school, was confined to the fires of hell. He was there for a short time, and one of the Devil's lieutenants came to the Devil and said, "We've got a problem. This fellow from Boston seems to be happy." The Devil said, "What is he happy about?"

"Well, he claims that he's finally starting to warm up after all those New England winters," at which point the Devil said, "Let's turn up the heat."

His lieutenant comes back and says, "Well, he has taken off his overcoat, but he's still happy." The Devil replies, "Turn up the heat again." His lieutenant comes back and says, "He has taken off his jacket now. He's still happy."

This goes on and on, and finally the Devil says, "Okay, we're going with a different strategy. Turn off all the heat, turn on the air conditioning; we'll freeze him out."

And, of course, the lieutenant comes back and says, "Now he's deliriously happy. He's dancing around saying something about the Red Sox and the World Series."

[Laughter.]

It's a delight being here in New York, where World Series actually get won, and introducing our panel.

This is, as Michael said, a wonderful time to be talking about sports and sports broadcasting and cable. Those of us who are my age grew up with pterodactyls as pets, and we also grew up watching the occasional sports event on one of the three broadcast channels we could sometimes receive. Today you have not only hundreds of channels you can look at, but virtually any type of sport you want. If you want to see curling or snooker or other sports that we grew up not knowing that they existed, there is a channel that carries them, and soon there may be a channel that carries only that. We have any number of different things that are available on cable or pay-per-view, and things are now on networks, like Arena Football,[1] that would have been unthinkable as a major network sports event just a short time ago. It's a wonderful time to be a sports viewer.

It's a much more challenging time to be somebody who deals with the rights issues, with carriage, with trying to figure out where to put things, what you pay for them, what should be where. Our panel today consists of experts in all of those fields. I will introduce all of them at once, and then we will have them just go ahead and make their remarks.

First up will be Mark Abbott. Mark is the chief operating officer of Major League Soccer ("MLS"). He is in charge of all their business operations, including investment and expansion, including their broadcasting and legal and marketing departments. He is a former lawyer—he is a recovering lawyer, I believe.

MR. ABBOTT: I still keep my CLE[2] up.

DEAN CASS: And it's good when you can keep it up.

He has practiced with Latham & Watkins. He is a graduate of Boalt Hall, and a Georgetown undergrad.

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1 The Arena Football League is broadcast on NBC. *See* Arena Football League, *at* http://www.arenafootball.com (last visited Feb. 6, 2004).

2 There is a mandatory continuing legal education program for attorneys in the State of New York. *See* New York State Unified Court System, *Continuing Legal Education, FAQ's for Experienced Attorneys*, *at* http://www.nycourts.gov/-attorneys/cle/attorney_-faqs.shtml (last visited Feb. 6, 2004).

Our next panelist is Irwin Kishner. The most important thing to remember about him is that he is a graduate of Boston University School of Law. I really need say no more. But, in addition to that, he is the chair of the Corporate Law Department of Herrick, Feinstein. His practice includes mergers and acquisitions, entertainment law, and the representation of professional sports teams. He has been counsel for acquisitions and contracts for broadcast and cable coverage and has a wide-ranging practice and a very impressive list of publications as well.

Brad Ruskin, our next panelist, is a partner at Proskauer Rose here in New York. He is a litigator who has served as counsel to the NBA, the National Hockey League ("NHL"), the Association of Tennis Professionals Tour, and also has been counsel to groups involved in virtually every other major professional sport.

MR. RUSKIN: You wanted to mention Major League Soccer, the most important of them, please.

DEAN CASS: I knew that Mark would get a kick out of you mentioning that and wanted to leave it in your court.

MR. RUSKIN: Thank you.

DEAN CASS: In addition to sports and entertainment law, he also deals with communications law and intellectual property issues. He is a graduate of New York University and Brown University.

Alan Vickery, our last panel member, is a partner of Boies, Schiller & Flexner. He represents the YES Network, which has already been mentioned, and which I understand is in the middle of a lovefest with Cablevision. He has been counsel to the New York Yankees, and to the National Association for Stock Car Automobile Racing. He specializes in antitrust, securities, and white-collar crime, all of which are obviously beneficial in the sports world, as well as complex litigation. He is a former assistant U.S. attorney, a graduate of Amherst College and Columbia Law School.

They are all at the very top of their fields and very knowledgeable about the topic and you will love listening to them.

Let me turn it over to you, Mark.

MR. ABBOTT: Thank you very much.

I wanted to speak this morning a little bit about the impact that new technologies have had on the television business for sports, and then the impact that new technologies have had on lawyers as they deal with sports broadcasting agreements and the allocation of sports rights. Most of what I will talk about are things that I have had direct experience with in the last twelve months, to give you an idea as students of the types of things that typically come up when you are dealing with broadcast agreements as lawyers and the types of things that you typically need to be aware of and on the lookout for.

To de-glamorize sports, which has to be done sometimes, it's about the basic allocation of rights. When you take a look at what we as lawyers in the sports business do, it is often refereeing the fights over how those rights have been allocated. Whether it's an issue between a league and a team over an allocation of a right or between various broadcast partners, a lot of what we have to do is think through how we want to allocate those rights which we have to maximize the overall value for our sports league. We'll talk about that in a moment.

But I wanted to talk, first, about the impact that several new technologies have had on the sports business. I think everybody is generally aware, as Dean Cass just said, of the great move away from the three broadcast networks to cable and to satellite television and all that that entails.[3]

I think there are really four trends that I've seen, and that we've all seen in the last couple of years, that have really come to the forefront and dramatically changed the business, more so than the previous twenty years had done so.

The first is the growth of digital television. Digital television ("DTV"), if you're not familiar, is the digital transmission rather than through analog. This is done through either a satellite, like

[3] *See, e.g.*, J.R. Ball, *Can TFN Find Its Niche?*, GREATER BATON ROUGE BUS. REP., Aug. 5, 2003, *at* http://www.businessreport.com/pub/21_24/cover/3636-1.html.

DirecTV or Dish Network, or now digital cable which is starting to roll out across the country.[4]

There is no more room for analog channels. I don't know as students if you're aware of that, but there will be no more analog traditional channels added. The bandwidth is already used up.[5] And so any new channels that you see are digital. That means they can only be broadcast over satellite or broadcast in an area that has digital cable.

This has presented a great opportunity but also a limitation. The new niche channels that you see rising up that people are talking about—NBA TV,[6] or the National Football League ("NFL") is talking about its own single sports channel[7]—they rely upon the rollout of this digital platform.

It has gone a little bit slower than people had anticipated that it might go. It really relies upon cable systems adopting the digital platform for its distribution in order to get your channel distribution.[8] So a lot of these channels have an opportunity to be

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[4] Digital Television ("DTV") is a type of broadcasting technology by which broadcast television stations and cable providers send their signals out to viewers digitally. *See* Fed. Communications Comm'n [FCC], *Strategic Goals: Media, Digital Television*, *at* http://www.fcc.gov/dtv/ (last modified Sept. 10, 2003); Digital Television, *What Is Digital Television? Consumer Information Page*, *at* http://www.-digitaltelevision.com/consumer/what.shtml (last visited Feb. 6, 2004).

[5] According to the FCC, bandwidth, the range of frequencies over which analog television is broadcast, is scarce. *See* FCC, *Strategic Goals: Spectrum*, *at* http://www.fcc.gov/spectrum/ (last modified Oct. 6, 2003) ("Because there is a finite amount of spectrum and a growing demand for it, effectively managing the available spectrum is a strategic issue . . . ."). Alternative broadcasting methods, such as digital television, are more efficient and will make the broadcast spectrum available for other uses. *Cf.* KAET-DT, *Glossary of Terms*, *at* http://www.kaet.asu.edu/dtv/glossary.htm (last visited Feb. 6, 2004) ("Analog television receives one continuous electronic signal. In contrast, DTV works on the same principle as a computer or a digitally recorded compact disk. It uses binary code, a series of ones and zeros, rather than a continuous signal.").

[6] NBA TV allows viewers to purchase television packages of live National Basketball Association ("NBA") games on cable, satellite, and digital cable. *See* NBA, *NBA TV*, *at* http://www.nba.com/video/nbacom_tv.html (last visited Feb. 6, 2004).

[7] *See* Ball, *supra* note 3.

[8] For the FCC's discussion of the conversion of analog cable systems to digital television, see FCC, *FCC Acts to Expedite DTV Transition and Clarify DTV Build-Out Rules*, at http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0114.-html (Nov. 8, 2001).

distributed because there is now bandwidth; but they also have a limitation, and that is they have to wait until this digital rollout progresses. That is going to happen over the next several years.

That presents a lot of opportunities for sports leagues. We see it really in two ways that I think have already been alluded to. The first is the single-sports channels which have come up. The second is something which is very popular—what are called out-of-market packages.[9] We have one called MLS Shootout. NFL Sunday Ticket and Major League Baseball Extra Innings are the types of packages that we are talking about,[10] which have become very popular as a result of satellite.

It's a way for a league and teams to more directly connect with its fans all throughout the country, because no longer do you need to have just a national broadcast to reach everybody. If somebody is willing to pay the fees, which are relatively modest actually, to get one of these packages, you can have access to all the games from all the local markets. That is quite a lot of benefit to the fans and it is a great opportunity for professional sports leagues.

The second trend that is really starting to hit right now is high-definition television ("HD" or "HDTV").[11] There has been a lot of talk about high-definition television over the last few years and there has been a lot of talk about the requirements of broadcasters to broadcast in high-definition, but it is really starting to break out now.[12] That is driven by a few things.

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[9] Out-of-market packages allow viewers across the country to purchase subscriptions to watch games of a particular sport that take place outside of their local area. *See, e.g.*, DIRECTV Sports, S*ubscriptions*, *at* http://directvsports.com/Subscriptions/ (last visited Feb. 6, 2004).

[10] *See id.*

[11] *See* Gary Brown, *How HDTV Works*, HowStuffWorks, *at* http://electronics.-howstuffworks.com/hdtv.htm (last visited Feb. 6, 2004). High definition is also referred to as "hi-def" or "HD."

[12] *See* Gary Merson, *High Definition All the Time: The HDTV Insider Talks With HD Net Founder Mark Cuban*, HDTV INSIDER NEWSLETTER (Jan. 2002), *at* http://hdtvinsider.com/sample.html; *see also Comcast Adds ESPN Programming to Local HDTV Service*, PUGET SOUND BUS. J. (Seattle), July 31, 2003, *available at* http://www.bizjournals.com/seattle/stories/2003/07/28/daily40.html (last visited Feb. 6, 2004).

One is the development of more content being broadcast in high-definition, which is causing more people to buy high-definition television. High-definition televisions are coming down lower in price. They are going to hit a price point in the next eighteen months where people will start to buy them and demand more programming. So, it's a "chicken and egg" in a way: nobody wants to have a high-definition television until there is programming; the programming won't come until people have high-definition televisions. But that is starting to happen.[13]

Three weeks ago, the NBA put on a forum around their All-Star Game, where they brought basically everybody from the media business in for a one-day conference to talk about trends. The most heavily discussed trend was the development of high-definition.

You are going to see ESPN launch its own high-definition channel in the next thirty days, I think it is, and they are going to do about 100 hours of programming this year. In addition, Mark Cuban, who you may know—the owner of the Dallas Mavericks[14]—has launched his own high-definition channel, called HDNet, and he has deals with various sports leagues.[15]

There is not a lot of economic value in these channels right now. That is, no one is making a lot of money broadcasting in hi-def. But there is a race on to see who is going to be a survivor in that arena.

Now, when we were at this forum, Cuban made a very interesting point, which nobody at the forum seemed to know or ever have heard about, and so it was curious to me. He said that the bandwidth of HD transmissions is such that the current platforms, both satellite and digital cable, will not be able to support the number of channels that they currently support if they all shifted to HD. No one seemed to know that or had appreciated that before. So there seems to be some coming limit potentially on

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[13] *See generally* Merson, *supra* note 12.

[14] *See* Dallas Mavericks, *Mavs Front Office*, *at* http://www.nba.com/mavericks/-news/staff_directory_010216.html (last visited Feb. 6, 2004).

[15] *See* Jonathan Sidener, *2002 Likely to Be Big Year for HDTV*, ARIZ. REPUBLIC, Jan. 1, 2002, *available at* http://www.hd.net/clipping.html (last visited Feb. 9, 2004).

channels once we move to a high-definition format, and I think there is a race on to see who can establish themselves before that occurs.

The third trend in technology that is impacting all of television but is a benefit for sports is TiVo and digital video recorders.[16] I think you're probably all familiar with what TiVo is. Basically it's a hard drive that allows you to simply record things off of television. It's much easier to use than a VCR. It's much higher quality. It allows you to very quickly fast-forward through commercials.[17]

This is causing all sorts of problems for the television industry. There was an article last year where Michael Eisner[18] said he had taken it home and tried it and found it to be a horrible technology and unusable.[19] What he really meant is it is a fantastic technology, everybody loves to use it, and he is very concerned about what is going to happen to the economics of the Disney Corporation as a result of its adoption.

People in the sports business tend to think that of all broadcast properties, sports is among the most TiVo-proof, and that is because you incorporate with more frequency now broadcast sponsorship and commercial elements within the game itself. So, the classic example is on the sidelines of an NFL game you will see the Gatorade container or the Motorola headset. That is not just there because the team chose they like Motorola. It is there because Motorola paid millions and millions of dollars for that to get that exposure.[20] And you cannot TiVo through that. It is on.

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16 TiVo is a service that can be programmed to find and digitally record a user's choice of shows. *See* TiVo, *The TiVo Story*, *at* http://www.tivo.com/5.1.asp (last visited Feb. 6, 2004).

17 *See id.*

18 Michael D. Eisner is the chairman and chief executive officer of the Walt Disney Company. *See* Disney Online, Disney Corporate Press, *Michael D. Eisner*, *at* http://psc.disney.go.com/corporate/communications/bios/Eisner.html (last visited Feb. 12, 2004).

19 *See TiVo's Good Reviews Don't Help Its Sales*, N.Y. POST, May 20, 2001, at 64, *available at* 2001 WL 19771522.

20 Motorola is the official wireless communications sponsor of the National Football League ("NFL"). *See* Terry Lefton, *Motorola Renews with NFL for $105M: League Bags a Big One as Sideline Sponsor Returns for 5 Years and Plans to Do Additional Promotions*, STREET & SMITH'S SPORTSBUSINESS J., Nov. 12–18, 2001, at p1.

When they shoot the coach, you are not TiVo'ing through that. And so TiVo presents sports a really unique opportunity to offer advertisers a way to reach fans that they cannot avoid. I think that is a very important trend and very important for the value of sports broadcast rights going forward.

The fourth trend, which has been going on for a long time—in fact, it had both a boom and bust in the last five years—is obviously new media, and that's the Internet.

The NBA, as I mentioned, has this forum every year. There is among professionals in the business still wide debate as to what the Internet means.

No one doubts that the Internet is a transformational medium. I saw a very interesting article the other day that compared it to the airline industry, the point of which was that both the airline industry and the Internet have done more to transform the economy than any other industries. That is, by virtue of being able to fly around the country, it has grown our economy, and the Internet allows communication to happen much quicker and access information much quicker. And so it has transformed the economy in very profound ways, yet you cannot make money at either of them.

I think that is one of the debates that is going on in the Internet. There are those who come to speak to sports professionals and say that the economic model is no different than that of the public library; it is just an information access device. I think most people in the sports business vehemently disagree with that and feel that the Internet is a way to more closely connect your product with the fan. It is all about providing the fan access to information that they want in a way that they want to receive it, and people are starting to find ways to monetize that.

When there was a lot of crazy money and it reached a fever pitch, just as the NASDAQ reached a fever pitch in March of 2000,[21] people had raised money from the public markets and the

[21] The NASDAQ reached its all-time high on March 10, 2000 when the index closed at 5048.62. *See* K.C. Swanson, *Lessons From the Folly: Opening the March 10, 2000, Time Capsule*, THESTREET.COM (Mar. 8, 2001), *at* http://www.thestreet.com/pf/funds-/investing/1335205.html.

capital markets and were throwing a lot of money at sports rights because, just as sports rights had been used, for example, in Europe by satellite providers to reach homes and to get subscribers, and just as it had been used here by cable companies to get subscribers, the Internet companies were going to use sports content to get eyeballs. The problem was nobody figured out how to monetize those eyeballs once they had them.

There is now a move to subscription-based services, and you will see a lot of this coming. It has happened already, and it is going to come even more this year. People have found that a model that works reasonably well on the Internet is to offer fans—for $9.95 a month—the ability, for example, in baseball to get all the audio broadcasts of all the games nationwide, or to get a package of highlights customized for the teams that you want.[22]

So, I think the story is still not told entirely on where the Internet is going exactly with respect to sports, but there is no question that it is transformational and that sports leagues are all grappling with the best way to deal with it. I think that you are going to see the fan benefit from that as there are going to be more opportunities to follow your favorite team and learn more about it.

That is a brief overview of the impact that technology has. There is a lot more to say about that, but those are the trends that I think are the most currently being discussed in sports leagues and sports teams.

I want to just spend the remainder of my time talking a little bit about the impact that these have had on attorneys, and particularly, if you get into this area, the impact it may have on you.

I tell the people that I work with—and we have some young attorneys in our office, and I am not as talented as the partners at major law firms here—I am terrified when I do television agreements, and I am primarily terrified because of the impact of technology and what it means. I will just give you some examples of things that have happened, and it causes you to pause and think through how you do these agreements in the future.

[22] For an overview of Major League Baseball's subscription services, s*ee* Major League Baseball, *Subscriptions*, *at* http://mlb.mlb.com/NASApp/mlb/mlb/subscriptions/index.jsp (last visited Feb. 6, 2004).

We have a national television agreement with ABC and ESPN, and we did it two years ago, and it goes through 2006.[23] When we did that, the soccer league bought the television rights to the World Cup for 2002 to 2006. So, we did an overall deal to bundle all of these rights, which was part of our strategy of acquiring the significant soccer rights in the United States and bundling them together. We did that deal in 2001, and so we had to sit down and think what the future might look like.

Last month, one of our owners, who owns the largest chain of movie theaters,[24] wanted to know why we hadn't protected the right to simulcast the ESPN games digitally into a movie theater so people could come watch it on the big screen. Well, I don't think anybody in 2001 knew that that was a possibility. I certainly didn't, and I don't think that even had I known at the time, I would have been able to protect it. But clearly, we didn't protect it. That sort of thing happens frequently, I find, in television rights agreements.

What do you do? The first thing you try to do is you sit down and you think through as you are doing these agreements a rights matrix: how in your mind are you going to allocate out all the different rights, and who is going to have an opportunity to take advantage of them?

The starting point is an obvious one. Other than very discrete rights which you grant to the broadcast partner, you reserve everything and have the right to do everything else that you want to do—broadcast it back into movie theaters, simulcast it on the Internet up against the broadcast, put it up on a satellite—and that is your starting position. That lasts about one minute into the negotiations, when the broadcast partner typically says, "You know, we are making a massive investment in your property here. For us to make that investment and for us to properly monetize on

[23] *See 'Landmark Agreement': ABC/ESPN Signs New Deal for MLS, World Cup Rights*, SI.com, *at* http://sportsillustrated.cnn.com/soccer/us/news/2002/01/02/mls_tv (Jan. 2, 2002).

[24] Anschutz Entertainment Group owns five Major League Soccer ("MLS") teams and United Artist theaters. *See* Paula Moore, *Anschutz Buys Another Pro Soccer Team*, DENVER BUS. J., Nov. 21, 2001, *available at* http://www.bizjournals.com/-denver/stories/2001/11/19/daily26.html (last visited Feb. 6, 2004).

that investment, we need to have certain exclusivities and certain protections." And so you try to find a way. The industry is sort of trying to shake out on this. It is not clear where some of those questions are going to come out.

One that is going on right now is in the NBA, where the NBA has national broadcasts which could be of the same game that is being broadcast at a local broadcaster, so you could have a national broadcast on one channel and a local broadcast on another channel in the same market.[25] That is a relatively new phenomenon. The NBA has the leverage to be able to do that. But the local broadcasters are fighting back and saying that it is not really good for them. People may not watch their broadcast, they may not make much money, and, therefore, they may not be willing to pay as much for the rights in the future.

And so these little battles are starting to take place, and I think in the next two or three years we are going to see how it shakes out in terms of what types of exclusivities people get as a result of technologies.

The other one that is coming is the simulcasting on the Internet of a signal back into a local market of a local broadcast, so that you could offer somebody the ability to go and sit at a computer and watch it on the Internet or go watch it on their television. Right now I think people generally believe that that is not much of a threat. That Internet broadcasts are not that competitive with television, and if you are sitting in your house, you are probably going to watch the television instead of going into your office and watching the broadcast on the Internet. At some point, that will change and that will become a more serious battle.

Right now I think it is largely confined to the broadcast of highlights and things of that nature, which people do not seem to believe is as competitive with the local broadcast as a strict simulcast on another television channel might be.

[25] If a game is being broadcast nationally, regional sports networks may also broadcast the game in their local territory only. *See* Dishnet, *Basketball Blackout Scenarios*, *at* http://www.dishnet.com/images/multisports/basketball.htm (last visited Feb. 10, 2004).

So in telling those couple of examples I want to give you a flavor for what I perceive to be some of the issues that you will confront as attorneys who get involved in these agreements.

As technology continues to progress and offer sports leagues more opportunities to reach these fans, there are more opportunities for lawyers because of these conflicts as they arise. And really, we are put in the position of having to look at the future and predict—with the business people—what we think it is going to look like. I think that presents some challenges, but it is also very intellectually stimulating.

And so I think it is an area as you look at things that you might want to become involved in, an area that you could find fruitful and interesting, and one that will have lots of growth in the coming years.

DEAN CASS: Thank you very much.

Irwin?

MR. KISHNER: Thanks, Mark. I appreciate it.

Today I am going to talk about the future of sports television and the emergence of what I term the vertically integrated model, or the regional sports network as it has been called in the press in recent days.[26]

I am going to start off by just giving you a background of what the TV/media rights world looks like today, talk about some of the components that go into it and some of the considerations of forming and organizing a vertically integrated network, and where I see it in the future emerging and in which particular markets.

Television programming of sports events has increased tremendously, almost geometrically, from decade to decade. From 1980 to 1990 television and cable networks went from an average of approximately 4,600 hours of programming to 7,500 hours of

[26] *See, e.g.*, David Barron, *Rockets to Begin Network: Astros to Be Joint Owner If FSN Can't Equal Offer*, HOUSTON CHRON., Mar. 1, 2003, at Sports 1, *available at* http://www.chron.com/cs/CDA/ssistory.mpl/sports/bk/bkn/rox/1800212 (last visited Feb. 6, 2004)(discussing the proposed Houston Regional Sports Network).

sports broadcasting, and from 1990 to 2000 that 7,500 hours increased to over 14,000 hours of sports broadcasts.[27]

The big four broadcasting networks spend over a billion dollars each on sports programming annually. Gross revenues generated by professional and collegiate athletic contests amounted to a $194 billion business in 2001.[28] So clearly there is a tremendous amount of money here, a tremendous amount of value here.

What the regional sports network, with a vertically integrated model, does is it takes one plus one. In other words, combining a sporting event with those broadcasting rights, thereby equaling a greater synergy, greater than one plus one.

The revenue stream from a media contract is one of the primary assets of any sports franchise. It is the means by which a team is able to put product on the field. For example—and I will get to this later—when the Texas Rangers were able to pay $25 million per year for Alex Rodriguez, or $250 million,[29] the reason by which that contract was able to be generated was as a result of Tom Hicks and his creating this regional sports network which was ultimately sold to Fox Sports Net for $500 million,[30] but the point being that this is a tremendous creation of value.

As an aside, while the TV contract is primarily the main generator of revenue for the team, there are other forms of media which also generate revenue, not the least of which is the radio contract. On the TV contract you are talking in the $50-million-plus area on the high side, to—well, for the Expos it was just under

[27] According to a 1997 poll, cable television provided over 14,000 hours of sports each year, with the four major networks contributing an additional 2,100 hours of televised sports. *See* Soonhwan Lee & Hyosung Chun, *Economic Values of Professional Sport Franchises in the United States*, SPORT J., *at* http://www.thesportjournal.-org/2002Journal/Vol5-No3/econimic-values.htm (last visited Feb. 6, 2004).

[28] In 2002, the sports industry grossed over $212.53 billion annually. *See* Tim Kroeger, *"Sporting" New Technology*, *at* http://komar.cs.stthomas.edu/qm425/03s/Kroeger1.htm (last visited Feb. 6, 2004).

[29] *See* USAToday.com, Baseball, *Inside Alex Rodriguez's Record Deal*, *at* http://www.usatoday.com/sports/baseball/mlbfs41.htm (last updated Dec. 20, 2000).

[30] The actual purchase price was $550 million. *See* Barry Horn, *FSN Adds Rangers, Stars over-Air TV Rights*, DALLAS MORNING NEWS, Mar. 23, 2000, at 8B.

a million. But on the radio side you are talking, call it $8, $9, or $10 million a year potentially for the rights.[31]

In forming these vertically integrated models, one of the considerations that you need to take into account are the league rules, because ultimately every league has a different set of rules which you need to navigate through.[32] Ultimately, these deals all need to be blessed by the league and you need to know what the discrepancies are.

Just to cull out one or two of these, there are territorial restrictions. For example, in the National Basketball Association you have the concept of an inner market where each team has by right an ability to broadcast its signal, and you have an external market which you can buy.[33] Actually, by paying to the NBA money, you can broadcast your signal to what is called the outer market.[34]

There are differences in the leagues between a television market and a radio market. Indeed, in Major League Baseball, just to point out one of the anomalies, every TV deal has to have a provision in it which states that if the broadcast signal is put out to in excess of 200,000 households outside of your territory, then you can terminate that contract as a matter of right, if directed by the commissioner.[35] So that is just one of the considerations.

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[31] In 2001, the New York Yankees received over $56 million in combined television and radio contracts, while the Montreal Expos received $536,000. *See* Doug Pappas, *The Numbers (Part Two): Local Media Revenues*, *at* www.baseballprospectus.com/news/-20011212pappas.html (Dec. 12, 2001).

[32] For the regional sports networks' blackout regulations of individual sports leagues, see Dishnet, *Sports Blackout Information*, *at* http://www.dishnet.com/images/-multisports/blackout.html (last visited Feb. 6, 2004).

[33] *See* Staci Kramer, *Sports Nets Get Closer to Home*, CABLEWORLD, Jan. 6, 2003, *available at* http://www.kagan.com/archive/cableworld/2003/01/06/cwd03010607.shtml (last visited Feb. 10, 2004).

[34] *Cf.* Comcast SportsNet, *FAQ*, *at* http://midatlantic.comcastsportsnet.com/faq/faq.asp (last visited Feb. 6, 2004) ("If you live outside of Comcast SportsNet's broadcast territory you may get Comcast SportsNet's Orioles, Wizards and Capitals broadcasts via DirecTV by ordering the MLB Extra Innings package, the NHL Center Ice package or NBA League Pass or through an outer-market package which your cable system may offer.").

[35] *See generally* Jeff Friedman, *The Impact of Major League Baseball's Local Television Contracts*, 10 SPORTS LAW. J. 1, 3–9 (2003).

Another consideration is that each league has its own national rights agreement with TV producers, TV companies, and almost always the national rights agreement will preempt the local rights agreement.[36] This is one form, in my opinion, of revenue-sharing. I mean, here you have a league that is taking broadcast opportunity from the individual teams and packaging that. But that is another consideration.

Lastly, one of the major considerations, as Mark had alluded to earlier, is the effect of the Internet on all this. As of today, it still has not been a major issue, but clearly as time evolves, that is something that we are going to need to consider.

The new vertically integrated model can be said to have its basis in other derivative models. What I mean by that is there are definitely vertically integrated media companies today. For example, Cablevision owns the Knicks and the Rangers,[37] Fox owns the L.A. Dodgers,[38] Time Warner owns the Braves,[39] Disney owns the Anaheim Mighty Ducks and the Anaheim Angels,[40] and there are a couple of other examples.

Actually, you could trace the roots of the vertically integrated model back to CBS, with its purchase of the New York Yankees in the 1960s, although that did not work out too well for CBS at the

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[36] *See, e.g.*, FindLaw, Corporate Counsel Center, *Purchase of NBC TV Advertising Inventory*, *at* http://contracts.corporate.findlaw.com/agreements/net2phone/nbc.ad.1999.-06.25.html (last visited Feb. 8, 2004).

[37] *See* Cablevision, Corporate Information, *About Cablevision*, *at* http://www.cablevision.com/index.jhtml?pageType=about_cablevision (last visited Feb. 8, 2004) (describing Cablevision's properties, which include the New York Knicks and the New York Rangers).

[38] *See* Bob Pool & Carla Hall, *Murdoch Buys the Dodgers: A Fox in the Chicken Coop?*, L.A. TIMES, Mar. 20, 1998, at A12; *Fox, Dodgers Reach Agreement in Principle on Sale*, SHAWNEE NEWS-STAR (Oklahoma), Sept. 5, 1997, *available at* http://www.news-star.com/stories/090597/dodgers.html (last modified Sept. 5, 1997).

[39] The Turner Communications Group, which later became the Turner Broadcasting System, Inc. and ultimately merged with Time Warner, Inc., purchased the Atlanta Braves in 1976. *See* Ted Turner Pictures, Ted Turner Biography, *R.E. Turner*, *at* http://www.tedturnerpictures.com/tedturner/biography.html (last visited Feb. 8, 2004). The company also owns a controlling interest in the NBA's Atlanta Hawks. *See id.*

[40] *See* Walt Disney Co., Investor Relations- Annual Report 2002, *Anaheim Sports, Inc.*, *at* http://Disney.go.com/corporate/investors/financials/annual/2002/kb/par/asi.html (last visited Feb. 8, 2004).

time. I believe they spent $14 million to buy the Yankees, and nine years later they sold them for $4 million.[41]

But in any event, all these models were based on existing media companies trying to find new product to put on the airwaves. The vertically integrated model is different, because here it is ownership of the sports team, either by itself or in alliance with others, creating this new company, if you will, and by doing so creating additional revenue streams as well as creating enhanced value for the company and the franchise—enhanced value, in the sense that for the franchise, because you now have a combined company which, in theory at least, will expand the universe of potential buyers for that product.

Attempts to execute this strategy have met with a fair degree of success. Sometimes it has failed, but most of the models that I have been seeing really have been fairly successful.

As I alluded to earlier, Tom Hicks, the owner of the Dallas Stars and the Texas Rangers, was planning to start a competitive sports network.[42] After doing the initial legwork, he sold the rights for that network for $500 million.[43] Again, he created much more value than he would have had through the traditional means.

Paul Allen, the chairman of Charter Communications, created a regional sports network built around his team, the Portland Trail Blazers.[44] Although that effort ultimately failed, in the end, I believe, he garnered more dollars for his team or for himself than he would have normally.

Also, another good example is the recent sale of the Boston Red Sox, in which an ownership group led by John Henry

[41] CBS purchased 80 percent of the Yankees for $11,200,000 in 1964. *See* Yankee Tradition, *Yankee Tradition History Facts*, *at* http://yankeetradition.com/yankee_-tradition_history_facts.htm (last visited Feb. 8, 2004). In 1973, CBS sold the team to George Steinbrenner for $10 million. *See* Mike Puma, *"The Boss" Made Yankees a Dictatorship*, ESPN Classic, *at* http://espn.go.com/classic/biography/s/-Steinbrenner_George.html (last visited Feb. 8, 2004).

[42] *See supra* note 30 and accompanying text.

[43] *See id.*

[44] Paul Allen, owner of the Portland Trailblazers, launched the Action Sports Cable Network in July 2001. *See* Andrew Seligman, *Commentary: ASCN Folds, and That's a Good Thing for Trail Blazers*, COLUMBIAN (Vancouver, Wash.), Nov. 8, 2002, at b1. The network went out of business in the fall of 2002. *See id*.

purchased the Red Sox for $700 million.[45] The reason why that deal was so highly valued was that as part of that deal, the team's stake in the New England Sports Network was included.[46] That $700 million valuation for the sale of the Red Sox shattered the previously high sale of the Cleveland Indians, which was $323 million.[47]

In forming a regional sports network or this vertically integrated model, there are seven major components that everybody needs to consider before you can even begin to undertake the analysis. I just want to hit those before going into what I see as the future of this.

First off, you need year-round programming, or at least marquee programming. That marquee programming is obviously found by the sporting broadcast of the team or teams that you are going to have the rights to. Therefore, if you want year-round programming, you will need to combine baseball and basketball, or baseball and hockey.

Another component is you need filler programming: historical interest stories or human interest stories. You can accomplish this by purchasing a library of rights from others.

Another factor: you need the correct demographics. You need to have the people who can pay and a sufficient population base to support the emergence of the network.

You need the proper economics. What I mean by that is there is this dispute going on now, as we've alluded to earlier, between Cablevision and the YES Network. That turns out to be based on whether YES should be carried as a basic package product or a premium package product.[48] That translates into the revenue stream that ultimately winds up into the network.

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[45] *See Done Deal: Red Sox Sold to Henry Group; Duquette's Days Numbered*, SI.com, *at* http://www.cnnsi.com/baseball/news/2002/02/27/redsox_sold_ap/ (Feb. 27, 2002). The reported value of the deal was $660 million. *See id.*

[46] *See id*.

[47] *See id*.

[48] *See* Len Maniace, *YES-Cablevision Dispute Settled*, JOURNAL NEWS (White Plains, N.Y.), Mar. 13, 2003, *available at* http://www.thejournalnews.com/print_newsroom/-031303/a01p13yes.html (last visited Feb. 10, 2004).

You need to have financing lined up because the start-up costs here are fairly substantial, and to weather the storm through that start-up it is very advisable to have financing in place.

Solid management. You need to have a management team that is able to cut your affiliation agreements in such a way as to know what the market is, what the rights fee should be, etc.

Another very key element in the emergence of these regional sports networks ("RSNs") or the vertically integrated model is that the existing media deal for these teams needs to be expiring or about to expire, because otherwise there are no rights which you can sell.

Recent examples of areas in the United States where I see the emergence of this in the next couple of years or where I see it today can be defined as follows.

Northern California, where I see the Oakland Athletics, the Sacramento Kings, and the Golden State Warriors. There, you have the right population demographics, you have eight-million-plus people, you have the right median household income, and you have those various teams' media contracts expiring relatively soon.[49]

The Houston area, where you have the Houston Rockets and the Houston Astros, is another market that is ripe for it. Indeed, I think I have heard that they are starting something down there.

The Cleveland area, where you have the Cavaliers, the Indians, and the Columbus Blue Jackets, all of whose deals are expiring in the next year or two, is another market that is ripe for the formation of this RSN.

The Minneapolis area, where you have the Twins and the Timberwolves, is another area that's ripe.

The Milwaukee area, with the Bucks and the Brewers.

The Denver area, which again I have heard rumblings that this may actually be underway, where you have the Rockies, the

[49] Demographics information for Alameda and Sacramento counties can be found at California Department of Finance, *California County Profiles*, *at* http://www.dof.ca.gov/-HTML/FS_DATA/profiles/pf_home.htm (last visited Feb. 8, 2004).

Avalanche, and the Nuggets from the MLB, NHL, and NBA, respectively.

The central Florida area, again another area that is ripe, with the right demographics, where you have the Devil Rays, the Lightning, and the Magic.

In conclusion, in this week's *Street & Smith's*,[50] which I saw being handed out today, there was an article indicating that the Kansas City Royals are launching their own network, called the Royals Television Network.[51]

The bottom line on all this is that this model has many uses way beyond just big-market teams. Indeed, I foresee in the not-too-distant future the emergence of specialty sports networks beyond just the major four leagues. For example, NASCAR racing would be ripe for forming a network; championship wrestling; Major League Soccer—all these arenas are ripe for the emergence of this new model.

Thanks.

DEAN CASS: Thank you, Irwin.

Brad?

MR. RUSKIN: Thank you.

In preparing my comments for this morning, I was thinking about a "Seinfeld" episode, a rerun that I saw earlier this week. You knew it was an old "Seinfeld" because he was still doing standup comedy as part of the show. As part of the standup routine, he was speaking about fears that people have.[52] Now, this was some number of years ago. He said that in a survey that he had seen the single greatest fear among Americans was public speaking, and he thought that was quite remarkable.[53] And then he

[50] *Street & Smith's Sports Annuals* are sports annuals published at the start of each season of baseball, professional and college football, and professional and college basketball. They are available at http://www.streetandsmiths.com (last visited Feb. 8, 2004).

[51] Major League Baseball's Kansas City Royals launched a regional sports network in early 2003. *See* Joe Posnanski, *Owning TV Network Key for Royals*, KAN. CITY STAR, Feb. 21, 2003.

[52] *Seinfeld: The Pilot* (NBC television broadcast, May 20, 1993).

[53] *See id.*

said on that same survey death came second.[54] So on thinking and reflecting on that, he went on to say, "So that means that when you go to a funeral, most of the people there would rather be in the casket than giving the eulogy."[55]

Well, I am not here to give a eulogy on sports on television. You knew there would be a segue. To the contrary, sports is strong and sports has great value.

The two themes that I want to touch upon today are: (1) the special strength and value that sports has, and will continue to have, in the television marketplace; and (2) the extent of migration of sports to various non-broadcast options.

Now, on the one hand, as I think Dean Cass mentioned, sports faces tremendous challenges in the marketplace today. There is certainly a level of pressure on rights fees, on what broadcasters will commit in the first instance to leagues, that I think is greater than it has been probably at any other time over the past decade. There is certainly among telecasters an increasing desire for low-cost programming. The advertising market is extremely tight, and has been tight for a period of time.

And the market is plagued by, or at least marked by, fragmentation—fragmentation meaning the ever-increasing number of broadcast outlets, of channels—which has the effect of each individual channel being less significant in the marketplace. Now, that trend has been ongoing for many years, but the trend when one looks at it today leads, across all television programming, to ratings for any type of television program that are markedly less than ratings for similar programs five year ago, certainly ten years ago or twenty years ago.

All that said, sports remain special, and they remain special in the marketplace for a number of reasons. The first really goes to the very special nature of sports. What many telecasters are looking for is destination viewing, a common term today. They want programming that viewers will want to make an appointment to see. I think NBC called it "appointment television," the first one

54 *See id.*
55 *See id.*

to coin it.[56] They want programming that viewers are going to see as somehow special, necessary, and that they will actually at ten o'clock want to be in front of their television set.

Mark mentioned before that sports is viewed as either TiVo-proof or more TiVo-proof than most other forms of content. That is true. He explained one of those reasons, which is the ability to continue to provide advertiser or sponsor message during the content of the sport, be it on ice, be it through showing signage, be it through other forms that he described.[57]

The other reason that it is TiVo-proof, or somewhat TiVo-proof, is that people care about seeing the event live. One of the joys of sports is that you do not know what the outcome is going to be and you want to watch it when you still do not know what the outcome is going to be, notwithstanding the fact that my wife remains amazed that I can watch a 1980 hockey game, she claims twice a week. But nevertheless, and for the joys of ESPN Classic,[58] the fact is sports has that. Very little else does.

I would have said nothing else does. But, interestingly, I think that one of the things that now does is reality television. On the one hand, it is the telecaster's dream because it is low-cost programming. It is the telecaster's dream because I know my twelve-year-old daughter could come up with ideas that are at least as good as most of what I am seeing, which is not really denigrating my twelve-year-old daughter. Her ideas are pretty good, but it does allow for creativity in that area.

But it also has the element that people want to see it live. You know, when they're in the office at the water fountain the next day, for reasons that each of you can describe to me, they actually want

[56] See NBC Cable Networks, *NBC Olympics & Clear Channel Advantage in Joint Marketing Alliance*, *at* http://www.nbccableinfo.com/insidenbccable/networks/Olympics-/resources/inthenews/081303.htm (last visited Feb. 8, 2004).

[57] *See supra* note 20 and accompanying text.

[58] ESPN Classic, which launched in May 1995, "is a 24-hour, all-sports network featuring the greatest games, stories, heroes and memories in the history of sports." *See* ESPN ABC Sports, Customer Marketing and Sales, *at* http://www.-espnabcsportscms.com/adsales/portfolio/index.jsp?content=general_portfolio_expanded.html#classic (last visited Feb. 8, 2004).

to know who "Joe Millionaire"[59] selected, and they want to watch the show not yet having known whether it was Zora, Thora, or Sarah that was his choice.

And so reality television has some of those elements. In fact, as you can see, it has been, and is continuing to be, dominant in the television landscape, and certainly in the over-the-air broadcast landscape.[60] That said, sports is still the dominant flow of content that has that special quality and that allows it to be of great interest to telecasters.

Sports also has a different element, and I think it is an element that is sort of interesting as we face a time of possible war and other things that we face in our lives. Sports creates, probably as much as anything, the ability for a shared common experience. The fact is that sports allows us to connect with people whom we do not otherwise know. I mean, how quickly when one is abroad and meets another American does your conversation somewhere along the way turn to sports as an immediate bond that you know things and your life has been touched in a similar way? I think that shared common experience, for obvious reasons, is always important but becomes ever more important.

It is also why—and I will come to this in a moment—certain big events will always remain on broadcast network, events like the Super Bowl, because those events have an ability to reach a number of people that few things do. That experience remains important, I think, as part of, the American psyche if you will.

So for all those reasons sports have a lot of very special qualities.

You can look at how important sports is, how important it is to television, through many prisms. Looking at ESPN and its growth

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59 "Joe Millionaire" is a Fox reality dating series that aired in January and February 2003. *See generally* Imran Siddiquee & Lauren Traut, *Students Flock to 'Joe Millionaire' Parties*, DAILY ILLINI (Feb. 25, 2003), *at* http://dailyillini.com/feb03/feb25/-news/stories/news_story09.shtml.

60 *See* Nadine Sack, *Reality Programs Dominate TV*, RED & BLACK, Feb. 28, 2003, *available at* http://www.redandblack.com/vnews/display.v/ART/2003/02/28/3e5f8e32bc-590?in_archive=1 (last visited Feb. 10, 2004).

is extremely telling.[61] As a few people have mentioned, there is a great proliferation of various networks on cable television today. But if you were to ask a question to a cable operator: "You only get one, you only get to pick one network; what's the most important network that you must have?" The answer invariably is ESPN. Not surprisingly, this is why ESPN is able to charge more per subscriber than any other national or cable network.[62] But the fact is it is ESPN that stands tallest among all of the various cable networks.

And not just ESPN. At least on my own home television, we have an RCN[63] home. We of course have four ESPN networks between ESPN, ESPN2, ESPN Classic, and ESPN News. And, of course, not just at home. I flew down to the NHL All-Star Game a couple of weeks ago on JetBlue Airways. It was the first time I had flown on JetBlue. It was wonderful actually. They are not a client, but I'll tell you it was wonderful. But on JetBlue you have a television set on the plane, as I'm sure many of you know. I think they had fourteen or sixteen channels and four of those channels were ESPN channels, which I really thought was quite remarkable. And, of course, on a couple of other channels, not surprisingly, sports [were] present.

With respect to ratings, while it is true that ratings have moved down across programming, I think it is probably also so that they have gone down less across sports programming than many other forms of programming. I think in the sports world there is a lot of wringing of the hands: "How can it be Major League Baseball used

[61] ESPN/ABC Sports currently operates several media outlets, including ESPN, ESPN2, ESPN Classic, ESPN Radio, ESPN News, and ESPN.com. *See* ESPN ABC Sports, Customer Marketing and Sales, *The ESPN ABC Sports Media Mix*, *at* http://www.espnabcsportscms.com/adsales/portfolio/index.jsp?content=portfolio.jsp?category=PORTFOLIO (last visited Feb. 10, 2004).

[62] *See* Jon Lafayette, *ESPN Sweetens Bitter Pill of Next Rate Hike: Execs Say Extreme Sports SVOD-broadcast Service Adds Value*, CABLEWORLD, Apr. 29, 2002 (noting that ESPN is the most expensive national basic cable service at $2 per subscriber), *available at* http://www.kagan.com/archive/cableworld/2002/04/29/cwd141722.shtml (last visited Feb. 10, 2004).

[63] RCN is a telecommunications service provider, offering cable, Internet, and telephone connections. *See* RCN, *at* http://www.rcn.com/index.php (last visited Feb. 10, 2004).

to get a sixteen and now it's getting a four or a five?"[64] You can look at it in a lot of different areas and a lot of different sports. But the fact is "All in the Family" used to get a twenty-seven;[65] today the leading shows are getting approximately half that.[66] It is all the way across television programming that the fragmentation has had its impact.

But sports stays strong, and many of those decreasing effects. And, if you were to look from 1980 to 1990, it was true that for virtually every sport, there was a significant decrease in its average rating of any of its events, across regular season or across average playoffs, that was market.[67] If you look over the last three or four years, it is much more of an up and down.[68] There has been some flattening out there, and for many of the sports they have been increased on a year-to-year basis. It is really more sport-to-sport and the particular match-ups that they might have over the course of a period of time.

The other thing that makes sports special is technology. Mark was addressing some of the aspects of technology and some of the

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[64] *See generally* Charles P. Pierce, *The Decline (and Fall) of Baseball*, BOSTON GLOBE MAG., June 23, 2002, at 12 (discussing the problems facing baseball, including its declining popularity).

[65] Nielsen Media Research bases its ratings on its "National People Meter Sample." According to Nielsen's Web site, "[a] single national household ratings point represents 1%, or 1,084,000 households." Nielsen Media Research, Inc., *Top Ten Primetime Broadcast TV Programs*, *at* http://www.nielsenmedia.com/ratings/broadcast_-programs.html (last visited Feb. 8, 2004). "All in the Family" aired on CBS from January 12, 1971, until September 1983. *See* Tim's TV Showcase, *All in the Family*, *at* http://timstvshowcase.com/aif.html (last visited Feb. 8, 2004). It was the most popular show of the 1978–1979 season, averaging a 30.5 household rating. *See* R.D. Heldenfels, *Stand-Up Comic Gets Different Kind of Show: 'Big Time' Variety Program Will Allow Audience to Discover 'Real' Steve Harvey*, AKRON BEACON J., July 14, 2003.

[66] For more information about the weekly Nielsen ratings, see Nielson, *supra* note 65. The ratings information is updated weekly.

[67] *See generally* Museum of Broadcast Communications, *Sports and Television*, *at* http://www.museum.tv/archives/etv/s/htmlS/sportsandte/sportsandte.htm (last visited Feb. 8, 2004) (discussing the relationship between sports and television as well as the viewership of televised sports over several decades).

[68] *See* Richard Sandomir, *The Decline and Fall of Sports Ratings*, N.Y. TIMES, Sept. 10, 2003, at D1 (explaining that a "confluence of factors" in 2003, ranging from the war in Iraq to rain delays, put "a larger-than-usual dent in the viewership" of major sporting events, but that viewership for some sporting events, such as the World Series, are stronger than ever).

trends.[69] But what is interesting is the extent to which sports is such a leader in the development of technology as it affects the broader viewing experience.

Again, anyone who watches sports can think among the things that you have seen that have enhanced your viewing experience—whether it's the first-and-ten line.[70] Again, when my younger, nine-year-old daughter saw it the other day, I had to tell her that that didn't exist in a football game a few years ago. She was incredulous. She said, "Well, it's so helpful. You know when the first down is." And it is. And we quickly go from being amazed by it to it being an essential part of our viewing.

It was less than ten years ago that Fox created the Fox Box, which in the upper-left-hand corner told you the score and told you how much time was left.[71] It seems like such an essential element of your viewing; it's almost annoying if it isn't there and you tune in and you want the information. Again, a technology developed through sports.

Most recently, you can see things like the pitch track, where you can see where a pitch crosses home plate.[72] I'm not sure umpires love it, but as a viewer it is a wonderful addition.

I saw last week a skiing competition, an absolutely wonderful use of technology, where you're watching skiers come down a course, each as an individual skier coming down on their own. They then take the two skiers, the two leads, and they can place them side-by-side after both have completed their performance, and you can actually see how they are coming into a turn differently and how that affects their time.[73] So it takes this

[69] *See supra* notes 3–22 and accompanying text.

[70] The first-down line is a computer generated bright yellow or orange line "extending from one side of the field to the other . . . representing exactly [where] the offense must get to for a first down." *See* HowStuffWorks, *How the First-Down Line Works*, *at* http://entertainment.howstuffworks.com/first-down-line.htm (last visited Feb. 8, 2004).

[71] In 1994, Fox debuted the Fox Box in 1994. *See* John Levesque, *A Perilous Evening in the Fox Box*, SEATTLE POST-INTELLIGENCER, July 11, 2001, at D3.

[72] *See* John Fay, *Sports on TV-Radio: GM Uses Media to His Disadvantage*, CINCINNATI ENQUIRER, June 3, 2001, at 2C (discussing Fox's new pitch-track computer that shows where each pitch is located).

[73] *See* Jeffrey Benner, *New Olympics Cam Also Coaches*, Wired News, *at* http://www.wired.com/news/technology/0,1282,50376,00.html (Feb. 13, 2002).

mystery of "I don't understand; he beat her by four-tenths of a second and that was a huge victory." Suddenly, you watch them side-by-side and you see it in a much different way.

One last one. In tennis, I recently saw the use of a technology where someone in the middle of a match was able to show where every ball had bounced during the course of the match, and you were able to see the difference between the two competitors—the level of depth that one player was hitting the ball and how close it was to the baseline, and that player was dominating the match.[74] It was fascinating to watch it. You could see how they were focusing and hitting to a player's backhand consistently, and you could understand that much more about strategy.

You know, think about it. At what other forms of television do you see that level of technology? If you think about sitcoms or dramas, they increase in certain ways, but they do not bring technology to us in those ways to enhance the experience.

I think HDTV will do more of that. It is really a form of distribution. As Mark said, there are real questions as to where the money gets made. Other than that, it will become an essential way of viewing. And for many sports, the promise of HDTV, both because of its clearer picture and also because of the shape that it will bring you, is viewed as a wonderful promise. Hockey, for example, suffers on television because the shape of the rink is different than the shape of your television set. The ability to expand that, to be able to see a greater amount of action, and to be able to see plays forming should be wonderful to the viewing experience. And again, for all those reasons television is special and sports is special on television.

Interactivity is another area. Again, it is difficult to know all the ways in which the Internet will emerge and evolve, but what is certain is that it provides additional opportunities for information exchange, which is a part of sports that brings the fan and the viewer closer to the sport—whether or not people will be watching streaming video in their office, whether or not it is an ability for them to exchange information with people while they are watching

[74] *See* CNNfyi.com, *Line Gadget to Rule out Tennis Tantrums*, *at* http://www.cnn.-com/2000/fyi/news/11/17/tennis.lines/ (Nov. 15, 2000).

something to call the play, try to make decisions, or create their own camera angles in the way that they want to see it. You know, I like watching tennis from behind the court, somebody else likes watching it with their head going back and forth; whatever, you will make that choice—all provide, I think, wonderful promise for sports.

The other thing I wanted to touch upon is the area of migration. This is a 1994 report by the Federal Communications Commission ("FCC"), a decade ago, commissioned by Congress in 1992, titled "The Inquiry into Sports Programming Migration."[75] Interestingly, as part of the 1992 Cable Act,[76] Congress instructed the FCC to conduct an examination of the carriage of local, national, and regional sports programming by broadcast stations, by cable programmers, and what they described as pay-per-view services, and at that time to analyze the economic causes and the economic and social consequences of migration trends, and to submit legislative or regulatory recommendations.[77]

They defined sports programming migration as "the movement of sports programming from broadcast television to a subscription medium (i.e., one for which viewers pay a fee)."[78] They looked at the period from 1980 through 1994. They concluded at that time, interestingly, that there had not been significant migration of sports programming from broadcast to subscription television. Now, there are a number of things that I find interesting in this.

The first thing that is interesting is the very fact that Congress would commission such a study. It really highlights the uniqueness of sports and how we look at sports in our life. I went over the summer and saw a Rolling Stones concert, and there is advertising these days that exists at concerts. It was sponsored by someone and the Stones made some amount of money because they had a sponsor of their concert. Now, if I had said that that

75 In the Matter of Implementation of Section 26 of the Cable Television Consumer Prot. & Competition Act of 1992; Inquiry into Sports Programming Migration, 9 FCC Rcd. 3440 (1994) (final report) [hereinafter Inquiry].

76 Cable Television Consumer Prot. and Competition Act of 1992, 47 U.S.C. § 521 (1992).

77 *See id.*

78 Inquiry, *supra* note 75, at 3442.

should be their one form of revenue stream—they shouldn't get to charge for tickets too just because I want to view the Rolling Stones. That would have seemed like a silly proposition. Yet somehow with sports, that sense the there is almost a birthright to it does permeate, or has at times permeated, in the culture.

I'm told I am getting short on time, so I will try to wrap up. Just a few more comments.

Sports is different in that way. The fact is that with respect to migration, there has been an evolution, not a revolution, but it shows the power of evolution, because the fact is, what was unthinkable not that long ago is now commonplace. The fact is that when one looks at the cable and satellite landscape today, it dominates the sports world. It is really only the NFL that is able to make broadcast television its primary method of distribution.[79] As to each of the other major sports and as to every other sport, cable and satellite is their major mode of distribution, and that means playoff games—something that would have been unthinkable at one point in time.[80] And again, that has happened as cable TV has grown, and it has become really a part of our life in most every way.

The effect of that, I think, has been, on balance, wonderful for the fan, because at the end of the day it has created more opportunity for viewing, it has created the kind of packages that leagues have created, some of which Mark referred to—the satellite packages, or those available on cable through on-demand, and allow super-fans to obtain as many games or obtain every game, if that is what they want. It allows other fans to have all kinds of viewing available to them on cable, and the like.[81]

The ultimate point, the reason that this has happened is that cable creates a dual-income stream, and that dual-income stream—the ability to get money both through advertising and through subscriber bases—is what is attractive and what allows leagues and

[79] *See* Stefan Fatsis, *What Price Touchdowns?*, WALL ST. J., Jan. 3, 2003, at A7.

[80] The NBA has entered into multi-year distribution deals with three cable providers. *See, e.g.*, *NBA Enters Deal with Cable Systems*, SI.com, at http://sportsillustrated.cnn.com/2003/basketball/nba/09/29/bc.bkn.nbatv.distributi.ap/index.xml (Sept. 29, 2003).

[81] *See supra* notes 9–10 and accompanying text.

property owners to ultimately get the value to which they are entitled out of the rights of their product.

So, all that said, the bottom line is sports remains strong, sports remains attractive, and it will continue to exist in a highly competitive world, but sports will continue to be critical to the future of television.

Thank you.

DEAN CASS: Thank you, Brad.

Alan?

MR. VICKERY: Thank you, Dean Cass. And thank you, Michael Taxin, for inviting me to be here today.

The advantage of having a name that is at the end of the alphabet is you do not have to go first, when everybody's expectations are at the highest. The disadvantage is that you have a lot longer to ponder Brad's question about whether you would rather be up here or be dead. I will tell you the answer when I'm done.

What my colleagues and I are in the business of doing is litigating over the allocation of rights that Mark referred to as being the core of the business of sports.[82] One of the great advantages of litigating in this field is that, unlike most areas that lawyers litigate, there are people other than you and your colleagues who are fascinated by what you are doing. So it is nice to have a subject matter that is independently, inherently interesting to not only you but others as well.

Picking up on what Mark said about the business of the allocation of rights, I would add the obvious corollary, which is the allocation of costs and revenues and profits. I think that those factors are probably at the heart of the flux in the whole question of vertical integration in the media and sports field.

There are two points that I want to address today, or two issues that I would like to discuss briefly. One is the whole question of the struggle between vertically integrated cable companies and sports teams for the ownership and the right to exploit the

[82] *See supra* notes 23–25 and accompanying text.

television rights that go with putting on a sports event. The other issue is the future of sports broadcasting in what is called advanced basic, or expanded basic, compared to paying a separate premium price for sports on a tier.[83]

Let me start, first, with the question of the struggle over the right to control. The way in which, as Irwin really pointed out better than I could, sports broadcasting has worked in recent years is through vertical integration between the ownership of the teams and the broadcasting of the games to the media. There are really three levels of integration, and he touched on all three: one is the actual ownership of the team that puts on the event; the second is the ownership of the network that programs and packages the sporting events; and then the third level of integration is the distribution, either over-the-air, traditional broadcasting, or through cable distribution, or now through satellite distribution.[84] And I suppose the Internet is yet an additional one, although that has not caught on as much thus far.

The Cablevision model that Irwin alluded to is one in which, at least a number of years ago, Cablevision controlled the distribution to a very large segment of the New York area through its ownership of cable companies. And it integrated into the programming level through Madison Square Garden and Fox Sports New York, in effect, to ensure a supply of programming for its cable distribution.[85] That is particularly important to a cable company, or at least the FCC concluded a number of years ago in its report on the cable industry that sports programming is deemed critical to the success of a cable company in a particular area.[86]

[83] *See, e.g.*, Frank Angst, *A Guide to Keeping Your Eye on Junior*, CHARLESTON GAZETTE (W. Va.), Mar. 26, 2000, at P4D.

[84] *See generally* Wikipedia, *Satellite Television*, *at* http://en.wikipedia.org/w/-wiki.phtml?title=Satellite_television&printable=yes (last modified Oct. 25, 2003).

[85] *See generally* Bob Raissman, *Giving Hockey Cold Shoulder*, DAILY NEWS (N.Y.), Apr. 11, 2003, at 98.

[86] *Cf.* Elizabeth L. Warren-Mikes, Note, *December Madness: The Seventh Circuit's Creation of Dual Use in* Illinois High School Association v. GTE Vantage, 93 NW. U. L. REV. 1009 (1999) ("Any event, particularly a sports event, enjoys a symbiotic relationship with the networks or cable stations that broadcast it. . . . [T]he media depend upon the advertising as well as the ratings boost that occurs when it is granted the right to televise a major event . . . .").

Now, that may be a question that is, at least with respect to regional or local sports, up in the air at this juncture, but that is the traditional wisdom.

Cablevision then took it a step further by integrating all the way to the team level, so that by acquiring Madison Square Garden LP, it acquired the Knicks and the Rangers as well as the forum in which they put on the games.[87] So they were integrated at all levels. And for a time, Madison Square Garden Network and Fox Sports New York were the only regional sports networks in the New York area and carried the Yankees under a long-term licensing agreement, the Nets, the Knicks, the Rangers, the Devils, etc.[88] And, in a very true sense, their advertising slogan, "New York is our town," was accurate.[89]

Now, when the long-term rights agreement—I think it was a ten- or twelve-year agreement—between the Yankees and Madison Square Garden came up for renewal, there was a contentious fight and litigation over the continuation of those rights.[90] The licensing agreement, like many sports licensing agreements, had a "right to match" provision in it.[91] What at least the owners of the Yankees recognized was that the middleman—that is, the programming network level—was a new line of business that was potentially quite lucrative. And why should they give it up to somebody else?

So the Yankees and the Nets got together and formed YankeeNets,[92] and they then, in turn, after litigation—there was

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[87] *See* Cablevision, Corporate Information, *Sports & Entertainment*, *at* http://www.cablevision.com/index.jhtml?pageType=entertainment (last visited Feb. 9, 2004) (describing Cablevision's properties, which include Madison Square Garden).

[88] *See* Brad Rock, *A Utahn Makes It Big in N.Y.*, DESERET NEWS, Sept. 27, 2002 (providing that until recently, Madison Square Garden Network ("MSG Network") and Fox Sports New York had broadcast rights to eight of ten major professional sports teams in New York: the Knicks, Nets, Islanders, Rangers, Devils, Yankees, Mets, and Liberty).

[89] This is the slogan for the MSG Network. *See* MSGNetwork.com, *at* http://www.-msgnetwork.com/index.jsp (last visited Feb. 9, 2004).

[90] *See* Nate Allen, *MSG Matches Yankees' IMG TV Deal: Dispute Likely to Continue Over Deal*, Mark's Sportslaw News, *at* http://www.sportslawnews.com/-archive/Articles%202000/Yankeesoneyeardeal.htm (Nov. 17, 2000).

[91] *See id.*

[92] YankeeNets LLC was formed in June 2001, when the Yankees broke away from the Cablevision Systems Corp.-owned MSGNetwork. *See* R. Thomas Umstead, *Yankees Go Home, Form Own Net*, Mutlichannel News, *at* http://www.multichannel.com/article/-

litigation which resulted in a settlement that allowed the Yankees, in effect, to get back their broadcast rights and then re-market them free of any matching provision.[93] What they did was they ended up joining with other partners to create the YES Network.[94]

YES Network was an independent programming network. It was not affiliated with a cable company or a national media company, which was a new model.[95] But, instead, it was affiliated with the actual teams that were being broadcast. So, in effect, the benefit of the broadcast was now being fully exploited by the owners of the teams rather than by deferring to the cable companies.

It has led to a fight between the cable companies and the owners of the teams because there are some thirty-one regional sports networks across the country,[96] and traditionally they have been controlled by cable companies or other giant media companies, and now the future model seems to be the teams taking over their rights and trying to do the programming themselves.

I think Irwin again mentioned some of the examples, such as the recently announced Houston regional sports network, which is a joint venture, or will be if it succeeds, of the Rockets and the Astros.[97] The Boston New England regional sports network is another example where the team is affiliated with the network, and there is not a big media company or cable distribution that is tied in.[98]

CA90559?display=Search+Results&text=yankees+go+home%2C+form+own+net (June 25, 2001).

93 *See* Richard Sandomir, *Yanks Pay $30 Million to End Deal with MSG*, N.Y. TIMES, June 21, 2002, at D2.

94 *See* Rudy Martzke, *Yank' TV Could Bring in $100M*, USA TODAY, Sept. 11, 2001, at 1C.

95 *Cf. id.*

96 *See, e.g.*, *DirecTV Regional Sports Networks*, *at* http://www.satisfied-mind.-com/directv/regsports.htm (listing DirecTV Regional Sports Networks) (last visited Feb. 9, 2004).

97 *See* Barron, *supra* note 26.

98 The New England Sports Network ("NESN") broadcasts the Boston Red Sox, the Boston Celtics, and the New England Patriots, as well as local college teams. *See* Boston.com, Sports, *NESN*, *at* http://www.boston.com/sports/nesn/ (last visited Feb. 9, 2004).

Traditionally, there has been an interdependence between the regionals' programming and the distribution. You can't have a successful regional programming network unless you get to the customers in that region because, in effect, what regional sports programming networks capitalize on is the much greater appetite that local fans have for their teams than a national audience would have. Therefore, there may be twelve major Yankees games broadcast by Major League Baseball over national network television, but there are 150 or 160 games that are broadcast over the local regional sports network to the people in New York who would like to see a lot more games and follow the team much more closely. The traditional model was that the cable company wanted to ensure that it had the control of all those games so that it could guarantee delivery. Now the teams are controlling it, and yet the teams cannot do it without access to the distribution. So therein lies the roots of the litigation that is currently ongoing between the YES Network and Cablevision.[99]

Obviously, I cannot discuss it in great detail, but on a very general level what is at issue there depends on your perspective: Cablevision says it is about the Yankees and YES Network wanting to charge too much for their product; the YES Network alleges and is seeking to prove (and, parenthetically, will prove) that what is really going on is that Cablevision wants to get back the Yankees and the Nets, which it has lost from MSG to an independent network and that they are unfairly taking advantage of their control of the distribution channel[100]—that is, the top level or the bottom level of the vertical integration, depending on how you look at it. They have a lock on 3 million customers in the New York area, and that is a key part of the YES Network model to get access to those customers. It is three million out of eight million, and it is three million of the most important customers because they tend to be clustered closer in to the immediate New York City locale.[101]

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[99] *See* Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp., 224 F. Supp. 2d 657 (S.D.N.Y. 2002); *see also* Allan Drury, *Suit: Give Us Our Bronx Bombers*, JOURNAL NEWS (Westchester Co., N.Y.), Aug. 17, 2002, at D.

[100] *See Yankees Entm't & Sports Network*, 224 F. Supp. 2d at 664.

[101] *See id.* at 662, 669.

I won't go into all the theories, but, in effect, we are contending, and the litigation is all about whether, they are misusing their monopoly power over the distribution channel to give themselves an unfair advantage by either refusing to carry YES, but at the same time carrying the competitors of YES, which are MSG and Fox Sports New York; or they are offering to carry them but on terms that are not economically practical.[102]

What will be interesting to see is whether there is similar litigation in other parts of the country over some of the new networks, like the Houston network.[103] Now, there the Astros have brought a declaratory judgment, but they are where the Yankees were two years ago, which is that their declaratory judgment is to get them free of their contract with the Fox entity down there, which has a similar right to match. They are seeking a declaratory judgment that Fox has thirty days to match what they have set up, and it is their belief that Fox will not be able to match.[104] So, first they have to get back the rights, then they have to deal with the question of distribution. The YES Network case is on the second level, the distribution, and trying to get that to be successful.

One of the examples mentioned earlier was Paul Allen's venture out on the West Coast.[105] As I understand it, it did not succeed, and the reason it did not succeed—and this is, again, just based on what I read in the papers—is that they did not have the key piece, that is, the access to the distribution channel, because the cable companies refused to do a deal with them. And so that highlights the power that refusal to carry by the cable company has in determining the success of a regional sports network.

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[102] For a discussion of the settlement of the litigation between Cablevision and the YES Network, see Len Maniace, *Just in Time for Opening Day*, JOURNAL NEWS (Westchester Co., N.Y.), Mar. 13, 2003, at 1A.

[103] *See* Barron, *supra* note 26.

[104] The Houston Astros filed a declaratory judgment suit asking the court to determine whether the team is free to seek a "bona fide third party offer" two years before the 2005 deadline to opt out of its Fox contract, which expires in 2009, since the team wants to launch its own regional sports network with the Houston Rockets. *See id.*

[105] *See supra* note 44 and accompanying text; *see also* Gilbert Chan, *Seeking Deal Fit for Kings*, SACRAMENTO BEE, Apr. 28, 2003, *available at* http://www.sacbee.-com/content/sports/basketball/kings/story/6531885p-7482561c.html (last visited Feb. 9, 2004).

Let me turn to the second point that I wanted to raise, which is an outgrowth of the first, and that is whether the future of sports broadcasting is going to be in broadcast basic or expanded basic, which is what most people pay for when they sign up for either a satellite product or a cable company.[106] In effect, what you do is pay about $40 or $50 a month, and the satellite company or the cable company decides what comes with that price. You typically get CNN, the History Channel, the network broadcast signals, ESPN, and then, traditionally in every place but New York on Cablevision, you get the local regional sports networks.[107]

As the current fight between YES and Cablevision[108] illustrates, Madison Square Garden Network and Fox Sports New York, with some exceptions that I will not get into because it is just too complicated to take up the time right now, are carried in Cablevision's advanced basic offering. Cablevision requires all other cable companies in the area to offer it that way. And that is the way in which regional sports program networks are offered throughout the country.

One of the things that Cablevision is saying—and this again is in the papers—is that YES is too expensive, that subscribers to Cablevision should not be forced to bear the cost of YES if they do not happen to be Yankees fans.[109] Well, what they are saying is a challenge to the entire way in which the cable industry has developed. Everybody who subscribes to cable probably has some channels that they never watch, yet they are still paying for. That is always the problem with bundling. In some sense, it is like a newspaper—you buy the *New York Times*, you might never read the editorial page, or conversely you might not ever reach the sports page, but you are still paying for it. Expanded basic is essentially the same idea. You've got the Travel Channel, History

[106] *See supra* note 83 and accompanying text.
[107] For packages and monthly rates, see Cablevision, Products & Services, *Pricing and Packages*, *at* http://www.cablevision.com/index.jhtml?pageType=ratecard&zCode=-10583&serviceType=io (last visited Feb. 9, 2004).
[108] *See generally* Yankees Entm't & Sports Network v. Cablevision Sys. Corp., 224 F. Supp. 2d 657 (S.D.N.Y. 2002).
[109] *See, e.g.*, *YES Sports Channel Files Antitrust Suit Against Cablevision*, WALL ST. J., Apr. 30, 2003, *available at* 2002 WL-WSJ 3393318.

Channel, cooking channels, sports, news, and you are not asked to pick which ones you want to include in the package.[110]

Now, the idea of picking is what is referred to as "á la carte," and there may be a future in which when you sign up for your cable company, you agree to pay a price, such as $40 a month, and you pick from a Chinese menu of programs, and you get to select ten or fifteen. The problem with that is that it completely redistributes the way in which the revenues and costs would flow, and it is unclear whether a lot of channels would survive, such as the History Channel or a lot of specialties. The sports networks, interestingly enough, would probably be the most vigorous under that model.

But again, the problem in the current Cablevision proposal is that trying to do it with just one network isolates it in a way that it would be economically infeasible. And so if the industry is going to move to a model of "á la carte" or "tiering," it has to be done on a broad basis, such as putting all sports, including national sports, on a tier, or putting at least all regional sports on a tier.

One of the obvious things about the litigation—this again is in the public record—is that we are alleging that Cablevision is giving preference by putting its MSG and Fox Sports New York in advanced basic and offering the level of compensation to them for their product in a more advantageous way than what is being offered to YES.[111] If you put them truly equally on a separate tier, that is probably impossible to accomplish, given the structure of Cablevision and its control over the distribution, but that is the question that faces the entire regional sports network industry.

You have examples in other parts of the country, for instance, the recent dispute between Time Warner Cable and Sunshine.[112] The Sunshine Network is in Florida. Its contract with Time Warner came up for renewal, and it sought a forty percent increase in how much it was going to be paid for its signal. Time Warner

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[110] *See* Cablevision, *supra* note 107.

[111] *See Yankees Entm't & Sports Network*, 224 F. Supp. 2d at 663–64.

[112] *See* Susan Strother Clarke, *Time Warner Not Savoring Sunshine; With No Deal in Place, the Cable Operator Has Bounced the Network from Its Lineup*, ORLANDO SENTINEL, Jan. 3, 2003, at D1.

decided they couldn't reach agreement, so it is off the air, and there are over a million people in Florida that are not currently able to watch their favorite local sports teams.[113] The question will be: who blinks first? Has the cable company learned that it loses customers and has to give, or is it the sports network that has to reduce the amount that it wants to charge?

I will conclude by saying that the outcome of this debate goes well beyond the sports world, but the most obvious effect that it would have in the sports world is if the cable companies prevail and they are able to keep regional sports networks off the air if the price is not what they want to pay, then there is going to be a lot less money for regional sports networks; and if there is a lot less money for regional sports networks, that means a lot less money to pay for the broadcast rights from the local teams. And if there is less money for the broadcast rights, that means there is less money to pay salaries of players.

So, the outcome of the current fight between the cable companies and the teams and the fight between independent regional sports programmers and the cable companies for control will have wide ramifications not only for the immediate companies involved but for ultimately the teams themselves.

Thank you.

DEAN CASS: Thank you very much, Alan.

Before we move to the questions and answers, I do want to point out that, in keeping with the directive of the Department of Homeland Security, we have color-coded the panel. I know a number of you were worried about the difference between the orange and yellow threat levels. Our code is that academics wear blue ties, people working for sports franchises wear yellow ties, practicing lawyers wear red ties, so you can keep us apart and you can tell which of these groups is the real threat.

QUESTIONER: I have a couple of historical points. Regarding the Cablevision situation, what role will the government

[113] *See id.* Time Warner and the Sunshine Network reached agreement on a multi-year contract on March 13, 2003, restoring Sunshine Network programming to Time Warner customers in the affected region. *See* Rick Harmon, *Sunshine-Time Warner Blackout Over*, TAMPA TRIB., Mar. 14, 2003, at Sports 1.

be playing? What can there be done legislatively, such as what they are doing in New Jersey, to give people more choice about coverage?[114] There are many areas, especially in the metropolitan area, where you cannot have a dish because of your apartment situation or whatnot. So is there a movement to actually change the structure to allow some flexibility?

DEAN CASS: I think, Alan, that sounds like a question for you.

MR. VICKERY: Okay. I'll try a hand at it. You make a very good point, which I probably should have mentioned, which is that in a lot of areas, particularly in heavily-populated and dense metropolitan areas, satellites are a very limited alternative to the wire that goes into your house. And, similarly, only in the densest of areas within big cities are second cable companies, such as RCN, known as "overbuilders," an option.[115] So that, even though the federal Cable Act does not allow municipalities to give exclusive franchises to cable companies, for most of the country, in effect, there is only one cable company.[116]

And a satellite is not an option. Satellite can be blocked by trees. It can also be blocked because if you live in a building, the building might not allow you to put a dish on the roof. And also, economically you may not be able to afford the cost of changing, particularly if there is some danger that you may move in the near future.

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[114] The New Jersey Cable Telecommunications Association ("NJCTA") represents the majority of the regulated cable companies in New Jersey who, combined, provide service to more than 98 percent of all cable customers in the state. This group now provides not only traditional cable TV, but advanced telecommunications services. *See Testimony of Karen D. Alexander, President N.J. Cable Telecommunications Ass'n Before the Commerce Comm. of the N.J. State Senate* (May 13, 2002), *available at* http://www.cablenj.org/press_testimony_5-13-02.asp (last visited Feb. 10, 2004).

[115] *See* Shira Levine et al., *America's 7 Most Innovative Operators*, AMERICA'S NETWORK, Dec. 1, 2002 (discussing RCN's investor profile), *available at* http://www.-rcn.com/investor/coverage.php (last visited Feb. 11, 2004).

[116] *Cf.* Press Release, Consumers Union, As Cable Rates Rise Again, Consumer Groups Say Companies Are Using Monopoly Power to Unfair Advantage (Jan. 8, 2003), *available at* http://www.consumersunion.org/telecom/cable103.htm (last visited Feb. 11, 2004).

So, there are still many people for whom what the cable company says goes. That, I think, leads directly to your question about whether is there any room for government intervention. Of course, the federal government could intervene by either changing the Cable Act in some way, or the FCC does have a regulation which it could enforce if it wanted to, which says that if a cable company owns or is affiliated with a programming network—and in this case a sports programming network—and distributes that to customers, it is illegal to discriminate against an unaffiliated, competing network.[117] And so, if the FCC got actively involved, the only question would be whether or not, say, Cablevision is discriminating against the YES Network in refusing to carry it in favor of its own networks or offering it terms that are not practical or reasonable.

Other areas in which government intervention is possible are sort of indirectly, obviously invoking the court system. The antitrust laws still apply, even though there is a federal Cable Act that restricts the extent to which there can be regulation of what cable companies do.[118] And so, through litigation, either by competitors, which is what is happening here, or by presumably a government enforcement officer.

Interestingly enough, there have been two class action lawsuits against Cablevision on behalf of the actual subscribers themselves over the YES and Cablevision impasse.[119] One was a very short-lived case on Long Island by representatives who sought to invoke the antirust laws and the Racketeer Influenced and Corrupt Organizations ("RICO") laws, and they were just tossed out on

[117] *See* Robert K. Hahm, *Regulation of the Video Marketplace: Access Duties Under the Video Dialtone Order and the Cable Television Consumer Protection and Competition Act of 1992*, 2 VILL. SPORTS & ENT. L.F. 261, 307–08 (1995).

[118] *See supra* note 76.

[119] *See* Moccio v. Cablevision Sys. Corp., 208 F. Supp. 2d 361, 366–67 (E.D.N.Y. 2002). A second lawsuit was filed against Cablevision, which alleged that the cable company violated a New York law that prohibited it from abandoning a service "without providing six months notice to the New York State Public Service Commission" and "notify[ing] subscribers in writing of the changes." *See* Drury, *supra* note 99, at D.

standing grounds.[120] The other is pending in Westchester by a group that is trying to invoke the New York Public Service Law.[121]

In New Jersey, what is happening there is that there is a New Jersey state antitrust law, which is similar to the federal Sherman Act,[122] and the bill that was just passed by the Assembly adopts the FCC standard that I just described as a standard under the New Jersey antitrust law.[123] So, it would, in effect, add a state remedy and a state enforcement avenue against conduct that the FCC has so far chosen not to do anything about.

QUESTIONER: I wonder if, along those lines, this doesn't take you to something that implicates more broadly the way cable provider networks are financed, and whether there isn't a built-in problem here, as we saw with Microsoft, where they got attacked for tying Internet Explorer with Windows.[124] Could there not be an argument made and a building problem that the companies that provide multiple networks are forcing cable companies to take a channel they don't want—and I don't want to pick on any one of them, but you used the History Channel, but someone might say maybe MSNBC, which doesn't seem to have a big audience but is carried because if you want NBC they will package it with MSNBC; you want NBC re-transmission rights, you take that. Is there a building problem there which might impact this? It's a little bit away from sports, but could it implicate sports as well?

DEAN CASS: Do others want to jump in on that?

MR. RUSKIN: I'll start. I think that when you are focused on the program suppliers and the content suppliers, putting aside the types of situations that Alan is describing through vertical integration—where he is going to make claims about discriminatory conduct or otherwise utilizing market power—the fact is that as to suppliers of content, there are really none who have any form of market power to establish tying claims. To the contrary, the marketplace for program suppliers is highly

[120] *Moccio*, 208 F. Supp. 2d at 370–81; Drury, *supra* note 99, at D.
[121] *See* Drury, *supra* note 99, at D.
[122] 15 U.S.C.A. §§ 1–7 (2003).
[123] *See* New Jersey Antitrust Act, 56 N.J. STAT. ANN. § 9 (2003).
[124] *See* United States v. Microsoft Corp., 253 F.3d 34, 45 (D.C. Cir. 2001).

competitive. And so if someone makes a decision—you know, "I'll only sell you the History Channel if I also sell you X"—to my mind, that is an economic decision that they are making. That might end up hurting both of their products, or not, but I think it is highly unlikely to lead to a tying claim.

QUESTIONER: I believe it was Irwin who mentioned it, but it is directed toward any of the panelists. How do the new vertical integration companies, whatever you want to call them, affect revenue-sharing agreements and leagues? Nobody mentioned a football team that is looking to have a vertically integrated broadcasting network. It doesn't seem appropriate there, whereas for baseball it seems very appropriate.

MR. KISHNER: Well, the reason why you do not have it in football is because all television rights are owned by the league in football, while the other major sports leagues have left a substantial portion of the television rights in the actual clubs, and they have only taken portions of those, although the portions that they are taking are increasing.[125] As you trace it from year to year to year, it actually has been the trend upward, where they have taken more.

This turns on the whole issue of big-market clubs versus small-market clubs and the issue that in order to have a league you really need to have small-market clubs, and everybody wants there to be a level of competitiveness so that one team does not dominate all the others.

As far as revenue-sharing is concerned—

DEAN CASS: I thought you were a Yankees fan.

[125] *Cf.* Leonard Shapiro, *NBC Gets in on WWF Football*, WASH. POST, Mar. 30, 2000, at D02 (stating that NBC may not be able to "get[] back into the NFL broadcast mix if the league exercises its option to renegotiate with its current partners after the 2002 season"). For a history of how television broadcast rights became vested in individual baseball teams, see Friedman, *supra* note 35, at 2–3. The New York Yankees exercised independent control of their television rights when they optioned to terminate Cablevision's MSG Network contract to broadcast their games. *See* Drury, *supra* note 99, at D.

MR. KISHNER: The Yankees are the greatest team ever, and we should all accept that, and I think they will win the World Series this coming year.

But, besides that, it does come to revenue-sharing in the sense that this has not been challenged on that level yet. And indeed, one could argue that it is not related to revenue-sharing, simply because it is ownership, and ownership in another type of venture. What I mean by that is if owners of sports teams were able to market—you know, they can't in this area—a tee-shirt or what have you, should that go into the revenue-sharing equation? And you could really take that argument very broad if you wanted to.

MR. RUSKIN: Let me disagree with a piece of what Irwin said, just because Dean Cass said we had to do that at some point.

I just want to start with a proposition. He said leagues have in an increasing amount taken away from teams portions of their rights. I think that is a misnomer. The league in the creation of professional sports today is the fundamental starting point of the rights. No team has anything to sell. There is no product of a team playing by itself. What the NBA or the NFL or the NHL or Major League Soccer provides is a product—NBA basketball, NFL football, MLB baseball, and the like—that is, a series of competitions between teams. It creates that product, and the interest in the product evolves from that.

And so, it is true that leagues have different economic models over time . The NFL, because of the strength of the product, has sold all of those rights on a national basis. Certain other leagues, often because there is a greater quantity of games and for a variety of other reasons, have made economic decisions that it makes sense to allow some amount of local selling of local rights because those teams are in the best position to know those markets.

They then make decisions, to go to your question, as to once that occurs, how do you deal with the revenues? And again, those are just decisions of business models. One could decide that all those local revenues ought to go to the league and be shared equally, or one could create a decision that to "incentivize" local teams it is worthwhile to allow them to keep some percentage of those earnings, in the same way that when you focus on gate, the

Yankees are the best team in baseball history, but the fact is the interest in watching the Yankees comes from watching them beat the Red Sox. Independent of that, one would not have the level of interest in the Yankees.

And so, when you focus on issues of revenue-sharing, ultimately those are allocations of incentives of how one can best grow and then split the pie. But the starting point has to be that these are rights that are owned by the leagues. And this issue, of course, leads to a great amount of sports litigation when people seek to challenge the league's ability to sell those rights or to limit teams' ability to sell rights, whether it is teams challenging those decisions or whether it is telecasters challenging those types of decisions.

MR. VICKERY: I have to liven things up here a little bit, too. When you talk about revenue-sharing, I couldn't disagree more with what Brad had to say.

MR. RUSKIN: Fortunately, the courts are with me.

MR. VICKERY: Revenue-sharing is clearly a form of communism, and you see what that did to the Soviet Union.

It is true that you cannot have an exhibition without two teams, but the whole nature of competition is to encourage teams to do the best they can. The reason that the Yankees are not only the highest rated in terms of television audiences in the country, but they are, as I understand it, the second most popular team in virtually every major metropolitan market across the country. The reason for that is that there has been tremendous investment, a lot of hard work, a lot of imagination, creativity, and good judgment in building the team that it is.

There is an interesting article, and I can't remember where I read it, about the NFL, saying that one of the problems with moving players around so much to try to level the playing field is you make it a much more boring sort of enterprise to watch.[126] Now, people may disagree with that. But there is no such thing as

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[126] *See generally* Brian Schmitz, *Lakers Could Be the Next DYNASTY: The Lakers Look Poised to Join the Elite Corps of Sports Greats, but They Will Find It's Tough to Become a Sports Dominator*, ORLANDO SENTINEL, June 25, 2000, at C10 (noting that most sports teams lack the staying power to be genuine dynasties).

a dynasty anymore, because in any given year anybody can win the Super Bowl. Anyway, there obviously could be a lot of disagreement on that subject.

I do want to point out one very important economic factor. The fact that, say, Cablevision or Fox or Comcast can own and operate a regional sports network by licensing the rights from a sports team, in effect, proves that that is a completely separate business from the business of running the team itself. And so, the fact that the people who own a sports team may also invest in a regional sports network does not in any way suggest that that business is part of the team's business, for revenue-sharing purposes, for example.

MR. RUSKIN: Ron, can I just ask one question?

MR. VICKERY: I'm going to rebut.

MR. RUSKIN: I want you to rebut, but I just want to ask Alan, first, because I was curious. When your partner, Mr. Boies,[127] brings in many, many, many millions of dollars and your partners then, I assume, share that pie, I just want to make sure that you are not engaging in some form of communist activity.

MR. VICKERY: You know, it seems to me that that is the heart of it.

DEAN CASS: I do think we have to give Mark, who was educated at Berkeley, a chance to speak in favor of communism.

MR. VICKERY: David keeps every last dime.

MR. ABBOTT: Tragically, I created a structure for our league which is very league-centric and not team-centric, so I will violently disagree with Alan and agree with Brad, and I will be very brief.

But when you take a look at the history of the business of sports, the four major professional sports leagues were formed in the late-nineteenth century to the early-twentieth century, and they were inherently local businesses. The only role of the league was to organize the competition, provide the referees, and sometimes

[127] David Boies is the managing partner at Boies, Schiller & Flexner. *See* Boies, Schiller & Flexner LLP, Lawyer Profile, *at* http://www.boies-schiller.com/htm/flash.htm (last visited Feb. 11, 2004).

adjudicate disputes between the teams. All revenues were local. There was no national television. There was not even national radio at the time that most of the leagues were formed, and so they were local businesses.

That has changed dramatically over time, obviously, and now there is an interdependence between each of the teams to make the business viable. This was particularly true in soccer, where we had a league from 1958 to 1984, the North American Soccer League, the league that Pele played in.[128] And we had one or two teams that were dynasty-type teams. One was here in New York, the Cosmos,[129] that was tremendously successful, although it too went out of business when all the other teams went out of business, and when it had no one to play against.

While I am no genius at economic theory, what I have never understood is when people talk about competition, I think in business you hope and pray that legally you find a way that your competitor goes out of business. In sports, if your competitor goes out of business, you go out of business, and I think that that is a very important distinction.

Revenue-sharing does not need to suppress incentives. In fact, all the leagues find a way within the context of revenue-sharing to provide incentive and growth. There are studies which show that although dynasties attract fans, it is the "any given Sunday" phenomenon that also attracts fans. You want to know that on any given Sunday your team has as much chance as the other team to win, and that is what builds fan loyalty over time.

QUESTIONER: Just following up on your comment about ownership of regional sports networks and teams, isn't that really not true? For example, with the Dodgers sale right now,[130] any potential buyer would like to package the regional sports network

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[128] The North American Soccer League ("NASL") began in 1967 and folded in 1985. For a brief history of the NASL, see American Soccer History Archives, North American Soccer League (NASL) 1967–1984, at http://sover.net/~spectrum/nasl/naslhist.html (last updated Aug. 11, 2003).

[129] The New York Cosmos signed the great Brazilian star Pele in 1975. *See id.*

[130] *See* John Lippman, *Murdoch's News Corp. Places Los Angeles Dodgers Up for Sale*, WALL ST. J., Jan. 22, 2003, at B4.

along with the team, and doesn't that complicate it if the parties want to unwind that relationship?

MR. VICKERY: When you say "unwind the relationship," I am not sure that I am following you.

QUESTIONER: Let's say that if you are going to buy the Dodgers, you are going to want the regional sports network, too. I mean, why would you buy the Dodgers and then allow the Fox Sports Network to keep the broadcasting rights or the licensing rights, because intrinsically the value is much higher together?

MR. VICKERY: You may. You still own the rights in the first instance, and so there is a licensing fee that is paid by Fox to the team. Those fees tend to be growing over time, in fact fairly substantially, and that is one of the stress factors in the entire equation.

Yes, ideally you would like both, but they both may or may not be for sale. But I do not think that it means that you have eliminated the interest in buying sports teams if you cannot also buy the regional sports network that goes with it. But obviously, that is one of the issues that is present in today's environment.

QUESTIONER: I want to follow up somewhat on that question. It seems to me that with the economy changing now, a lot of the content providers and networks are getting out of the sports ownership business. Fox is selling the Dodgers.[131] There are other examples like that. So do you see that becoming more of a trend, that maybe it is not valuable for the content provider to own the team any longer. Or is that just the economic times that we are living in now?

MR. RUSKIN: I think that reflects a different phenomenon. The phenomenon that you are seeing there, which includes Disney, Fox, and AOL/Time Warner, is the phenomenon of short-term pressure on public companies. The values that come from owning sports teams do not create quarterly EBITDA,[132] and for each of those public companies the pressure on a quarterly basis to report

[131] *See id.*

[132] EBIDTA stands for "earnings before interest, taxes, depreciation, and amortization." *See* Investopedia.com, *EBITDA*, *at* http://www.investorwords.com/5883/EBIDTA.html (last visited Feb. 11, 2004).

is a pressure that does not make sports teams necessarily fit perfectly. So, you see that on the one hand. And then you see, as each of my colleagues have addressed, this increased desire of teams, and even leagues, to control a greater amount of their rights in the distribution of the product.

But keep in mind when you talk about what is going to happen with the Dodgers or whether can they sell it, it is true that there appears to be an ability to make some money by controlling your rights on a regional basis. On the other hand, it has risk. The reason why people have sold rights is because when you sell rights, the telecaster is taking the risk, and you get a rights fee that is certain. So, competition exists in that marketplace, and business people make decisions as to the level of risk they want to take.

DEAN CASS: You will be happy to know as a panel that you have left the audience sufficiently confused and interested, as we have a lot more hands, even though we are out of time.

I do want to thank the panel. You have done a wonderful job. You have earned the enormous appearance fees promised by the *Fordham Sports Law Forum*. Thank you all.