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**HOW SHOULD CHINA RESPOND TO ONLINE PIRACY OF LIVE SPORTS  
TELECASTS? A COMPARATIVE STUDY OF CHINESE COPYRIGHT  
LEGISLATION TO U.S. AND EUROPEAN LEGISLATION**

By Seagull Haiyan Song\*

**I. INTRODUCTION**

China won worldwide acclaim for its efforts in combating unauthorized retransmission of sports telecasts over the Internet during the 2008 Summer Beijing Olympic Games.<sup>1</sup> Despite the success that China has achieved in this battle against online piracy, the issue of whether the Chinese copyright regime affords legal protection for live sports telecasts over the Internet still remains to be clarified.<sup>2</sup> The fact that the Chinese government adopted a set of *sui generis* regulations,<sup>3</sup> rather than actual copyright law, to stop online piracy of those events creates uncertainty in the interpretations of law. This article argues that existing Chinese copyright law should and does provide such protection where there is sufficient originality in the sports telecast. I further argue that affording protection to sports telecasts not only brings China in line with the general practice of other jurisdictions but also will eventually promote the sports industry and local economy.

Part II of this article briefly summarizes the problem of online piracy of sports telecasts around the world and how American and European courts have responded to that problem. Part III reviews the different interpretations of Chinese copyright law among scholars with reference to the protection afforded to sports telecasts. It also explains the legal basis that the Beijing Olympic Games Committee (BOCOG) and the National Copyright Administration (NCAC) adopted to prevent unauthorized retransmission of sports telecasts during the 2008 Summer Olympic Games (Games). Parts IV and V discuss why it is important for China to afford protection for sports telecasts over the internet and propose several methods that the Chinese government might adopt to ensure such protection.

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<sup>1</sup>Euro. Broad. Union, *Beijing 2008: The Digital Games*, [http://www.ebu.ch/en/union/news/2008/tcm\\_6-62839.php](http://www.ebu.ch/en/union/news/2008/tcm_6-62839.php) (last updated Jan. 9, 2008).

<sup>2</sup> For purposes of this article, "China" refers to the specific jurisdiction of "mainland China" only and does not include Hong Kong, Macao, or Taiwan. Also, all mentioning of Chinese copyright law is in reference to "the PRC Copyright Law" only. The same is true for other Chinese laws discussed in this article.

<sup>3</sup> Since 2002, China has issued a series of *sui generis* regulations to protect all IP assets related to the 2008 Summer Olympic Games. *See infra* Part III(B).

## II. ONLINE PIRACY OF LIVE SPORTS TELECASTS WORLDWIDE AND HOW OTHER COUNTRIES RESPOND TO SUCH PROBLEMS

### *A. Background on the Unauthorized Retransmission of Live Sports Telecasts over the Internet*

There are three main ways that pirated versions of sports are consumed through the internet: (1) live streams, i.e. re-broadcast via peer-to-peer television services or streamed directly from a web server; (2) recorded versions of events uploaded to file-sharing networks such as bittorrent or eDonkey; and (3) highlights placed on user-generated-content (UGC) sites like YouTube or uploaded to file-sharing networks.<sup>4</sup> This article primarily focuses on the first of these, live streams, as this piracy tool is perhaps the most pervasive and problematic in the sports context.

Two primary technologies are used in the unauthorized retransmission of live sports telecasts over the internet, both of which enable real-time retransmission of live sports telecasts to a worldwide audience: (1) unicast streaming, and (2) streaming over peer-to-peer networks (P2P).<sup>5</sup>

As explained in the *Background Report on Digital Piracy of Sporting Events* (2008), prepared by Envisional Ltd. and NetResult Ltd in response to the *OECD Phase II Study on Digital Piracy*, unicast services send a video stream directly from the server to a viewer. No special software other than a typical media player (such as Windows Media Player, RealPlayer, or VLC) is required to view the stream.<sup>6</sup> P2P-based streaming services work differently. The initial broadcast is sent from one server to a few viewers in small parts or chunks, which are then redistributed to more viewers. In this way, the viewers are connected to a network of viewers, all of whom are both downloading and uploading the same parts to others.<sup>7</sup>

The technology required for streaming and rebroadcasting via unicast and P2P-based sites is quite straightforward. Most streaming channels begin with a standard home computer attached to a typical residential broadband connection. Any computer with a television tuner card installed, today a rather standard piece of hardware on many home computers, can re-broadcast a stream.<sup>8</sup> Unicast streaming usually requires a paid subscription fee because its operation costs could be quite high due to its huge demand of bandwidth and processing power.<sup>9</sup> Unlike unicast streaming, P2P-based streaming services are usually free online. Therefore, P2P has become a more popular technology for online piracy of live television programming, including live sports telecasts, in recent years.<sup>10</sup> Online Piracy using P2P technologies has been especially rampant in Canada,

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<sup>4</sup> See ENVISIONAL LTD. & NETRESULT LTD, BACKGROUND REPORT ON DIGITAL PIRACY OF SPORTING EVENTS 11 (2008).

<sup>5</sup> See *id.* at 20.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *id.*

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

<sup>10</sup> NetResult's figure shows that the P2P service Sopcast is the most popular streaming technology used for unauthorized streaming of live sports telecasts. *Id.* at 25.

China, South Korea, Sweden, Spain and Russia among others.<sup>11</sup> The servers located in these countries regularly make television programming available worldwide in real time over the internet.

The range of sports games affected by online piracy is quite extensive. They not only include popular global games such as soccer and basketball but also those more centered in a specific region, such as American football.<sup>12</sup> The number of people watching the unauthorized retransmission of sports telecasts can also be huge. As described in the *Background Report on Digital Piracy of Sporting Events*, “[a] single stream of a [National Basketball Association] game in December 2007 was viewed by over one million people with around three-quarters of the viewers believed to be located in China.”<sup>13</sup>

During the 2006 FIFA World Cup, thousands of end-users downloaded the telecasts online due to unauthorized retransmission of soccer games adopting P2P technologies.<sup>14</sup> In China, a dozen unicast and P2P-based websites were retransmitting the World Cup matches online without authorization by simply capturing the signals they received from local broadcasters. Shanghai Media & Entertainment Company, the sole authorized broadcaster of the FIFA World Cup in the territory of China, threatened to sue these infringing websites, however, the lawsuit was never filed because related government agencies advised that there is some uncertainty over whether sports telecasts are protected by existing Chinese copyright law.<sup>15</sup>

Outside China, sports leagues have already started bringing lawsuits to crack down on online piracy.<sup>16</sup> What is interesting is that instead of suing direct infringers, that is, the individual end-users watching the sport event, sports leagues and broadcasting organizations usually sue service providers or distributors. As Mike Mellis commented in his article *Piracy of Live Sports Telecasts*, this might be caused by the “impracticability or futility of copyright owners suing a multitude of individual infringers.”<sup>17</sup> The following sections will review a number of cases decided in the United States and Europe regarding their enforcement against online piracy of live sports events.

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<sup>11</sup> See OFFICE OF THE U.S. TRADE REP., 2008 SPECIAL 301 REPORT 10 (2008).

<sup>12</sup> See ENVISIONAL LTD & NETRESULT LTD., *supra* note 4, at 10.

<sup>13</sup> See *id.* at 11.

<sup>14</sup> FIFA itself recorded 3,300 cases that year, almost double the 2002 World Cup total of 1,884, which in turn is more than double the 1998 World Cup total of 773. FIFA, *About FIFA: The rights stuff* (Sept. 19, 2009), <http://www.fifa.com/aboutfifa/federation/news/newsid=1105906.html>.

<sup>15</sup> See XinHua News, *Chinese Internet Service Provider's Combat Against Online Piracy During the 2006 FIFA Games*, XINHUA.COM (June 2, 2006), [http://news.xinhuanet.com/newmedia/2006-06/02/content\\_4635712.htm](http://news.xinhuanet.com/newmedia/2006-06/02/content_4635712.htm).

<sup>16</sup> The Premier League, the Australian Football League, the Union of European Football Association and Cricket Australia, among others, have been active in taking legal actions against infringing websites or services, which facilitated piracy services. See ENVISIONAL LTD. & NETRESULT LTD., *supra* note 4, at 16-17.

<sup>17</sup> See Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 265 (citing *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003)).

**B. U.S. Copyright Law**

*1. Copyrightability of Sports Telecasts in the U.S.*

Under the U.S. Copyright Act, a sports event is not subject to copyright protection. However, the telecast of that event is protected as long as the telecast is recorded simultaneously with its transmission, i.e. fixed in a tangible form such as a tape, film or disc.<sup>18</sup> U.S. law recognizes that the broadcaster exercises sufficient creativity and originality in deciding how to televise the game or event. House Report 94-1976 states that “[w]hen a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and director are doing constitutes ‘authorship.’”<sup>19</sup>

*2. Lawsuits Brought Against Infringing Websites in the U.S.*

Sports leagues and their representatives have been successful in bringing lawsuits against infringers who provide unauthorized online retransmission of live sports telecasts. Such litigations involve both the direct liability of unicast service providers and the secondary liability of P2P providers.

In *iCrave TV*, a Canadian-based website provided internet users with real-time access to U.S. broadcasts of live television programs.<sup>20</sup> The suits were filed first by a coalition of television networks and studios in the United States<sup>21</sup>, then by the National Basketball Association (NBA) and the National Football League (NFL).<sup>22</sup> The plaintiffs claimed direct and/or indirect infringement of their exclusive rights under the Copyright Act, as well as infringement of their trademarks and trade names or otherwise making false designations of origin or false representation. The federal district court in Pennsylvania consolidated the two cases and ruled that the plaintiffs were likely to prevail on their copyright and trademark infringement claims. Thus the court temporarily enjoined *iCrave TV*'s transmission of copyrighted programming in the U.S. in February 2000.<sup>23</sup>

As Mike Mellis noted in his article *Piracy of Live Sports Telecasts, iCraveTV* establishes an important precedent with reference to “forum shopping” for content owners in copyright infringement litigation. U.S. copyright law is quite strict and the

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<sup>18</sup> See House Report 94-1476 at 52 (1976); see also *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668 (7th Cir. 1986); *Nat’l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>19</sup> See House Report 94-1476, *supra* note 18.

<sup>20</sup> See Michael A. Geist, *iCrave TV and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 225 (2000).

<sup>21</sup> *Twentieth Century Fox Film Co. v. iCraveTV*, 2000 U.S. Dist. Lexis 1091 (W.D. Pa. Jan. 21, 2000).

<sup>22</sup> See *Nat’l Football League v. iCraveTV*, No. Civ. A. 00-120, 2000 WL 64016397 (W.D. Pa. Jan. 21, 2000).

<sup>23</sup> See *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ. A. 00-121, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000).

court here ruled that the U.S. is a possible jurisdiction if some of the infringement occurred there, i.e., piracy services are available to American end-users.<sup>24</sup> This case therefore might provide helpful guidance for content owners who want to sue infringing websites in the U.S. and not in a country with more permissive copyright laws.

With regard to secondary liability claims, unauthorized P2P movie and music file-sharing services have generally been held liable for copyright infringement under secondary liability theories, including contributory, vicarious and inducement theories. As a result, the same theories might be useful in sports-related piracy lawsuits.

In *MGM v. Grokster*, the U.S. Supreme Court ruled that providers of software designed to enable “file-sharing” of copyrighted works may be held liable for the copyright infringement occurring on the network.<sup>25</sup> The Court did not address the contributory and vicarious liability issues originally argued by the plaintiffs, but rather sent those questions back to the lower courts to address.

Nonetheless, the Supreme Court found that there was sufficient evidence of inducement to justify a trial, and thus reversed the lower court’s decision. The Court defines inducement liability as “[o]ne who distributes a device *with the object of* promoting its use to infringe copyright, as shown by *clear expression or other affirmative steps* taken to foster infringement, is liable for the resulting acts of infringement by third parties” (emphasis added).<sup>26</sup> Inducement thus requires both “intent” and an “affirmative act” on the defendant’s part to be liable for copyright infringement. The Court cited three facts it believed might constitute an “affirmative act” of the defendant for inducement purposes: advertisements aimed at attracting users of a former P2P, Napster, to use the Grokster P2P; a newsletter containing links to articles that discussed infringing uses of the software, and active customer support to users who had trouble locating or downloading copyrighted materials. As to the question of “intent,” the Court ruled that the defendant’s internal discussion, business model, advertisement and failure to install filtering technology all indicated its purpose of boosting infringement. As a result, the Court reversed the lower court and concluded that there was enough evidence to allow the plaintiffs to go forward with the case.

The inducement theory developed in *Grokster* and traditional secondary liability theories (contributory liability and vicarious liability) decided in other cases<sup>27</sup> will likely allow sports leagues and their representatives to sue those providers of P2P technologies, because those providers typically have knowledge of the infringing activities of their end-users, have the rights and ability to prevent infringements from happening, and have

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<sup>24</sup> See Mellis, *supra* note 17, at 268 (citing Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 44 (2000)) (summarizing that the court found sufficient nexus to the United States to apply the U.S. Copyright Act and Lanham Act to the defendants’ activities; the court held that the plaintiffs exclusive public performance rights, codified in 17 U.S.C. § 106(4), were infringed by unauthorized “inbound” streaming of the live sports telecasts from Canada to U.S. end users).

<sup>25</sup> See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>26</sup> See *id.* at 919.

<sup>27</sup> In *Napster*, the Court imposed liability under both contributory and vicarious liability theories. *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001). *Aimster* was decided on the contributory theory. In *Re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

derived direct benefits from assisting their clients to access the P2P software to infringe the contented materials.

### ***C. European Copyright Laws***

Although there seems to be no harmonized laws regarding the protection of sports telecasts throughout Europe,<sup>28</sup> a number of European countries do recognize sports broadcasting rights in various ways, either by legislation<sup>29</sup> or by court orders.<sup>30</sup>

In a recent copyright infringement case decided by a U.K court, *Union of European Football Association (UEFA) v. Briscomb*, the plaintiffs, UEFA together with its licensed broadcasters “British Sky Broadcasting Group PLC” (BskB) and “British Sky Broadcasting Limited,” sued three individuals for infringing UEFA’s copyright in the broadcasts of a UEFA Champions League match made by BskyB. The defendants allegedly made copies of such broadcasts, retransmitted them or authorizing their retransmission to the public, and possessed in the course of business an article that is known or should have been known to contain an infringing copy of the broadcasts.<sup>31</sup>

Justice Lindsay held that plaintiffs “own the copyright not only in the live broadcasts but in the ancillary works.”<sup>32</sup> She defined “ancillary works” as “creative elements including all broadcasts of UEFA Champions League matches throughout the world contain[ing] uniform branding through the use of video sequences, onscreen graphics, logos and specially composed music...,[and ancillary works] consist[ing] of a programme content roll, short film clips called break bumpers, the UEFA starball logo and specially composed accompanying music, the UCL music.”<sup>33</sup> After examining a “substantial body of evidence,” which showed how various ancillary works were created and included within the live broadcasts,<sup>34</sup> Justice Lindsay ruled that the defendants were liable for copyright infringement.

The secondary liability theory adopted by most European courts is widely based on E-Commerce Directive 2000/31/EC, Article 14,<sup>35</sup> which seems similar to the approach

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<sup>28</sup> France seems to be an exception among European jurisdictions in that it designated by law the National Football Federation (Art. 17/18 of the Law No. 84-610 of July 16, 1984, as amended in 1992) as the sole authority for exploiting the broadcasting rights to the matches of the official competitions. See WERNER RUMPHORST, SPORTS BROADCASTING RIGHTS AND EC COMPETITION LAW 5 (Euro. Broad. Union July 25, 2001), available at [http://www.ebu.ch/CMSimages/en/leg\\_p\\_sports\\_rights\\_wr\\_tcm6-4406.pdf](http://www.ebu.ch/CMSimages/en/leg_p_sports_rights_wr_tcm6-4406.pdf).

<sup>29</sup> See *id.* at 5.

<sup>30</sup> For a detailed discussion of football television rights in Europe, including France, the Netherlands, Germany, Spain, Italy and the United Kingdom, see RUMPHORST, *supra* note 28, at 5-8; see also David Harbord, Angel Hernando & Georg Von Gravenitz, *Market Definition in European Sports Broadcasting and Competition for Sports Broadcasting Rights -- A Study For DGIV of the European Commission*, MARKET ANALYSIS LTD. (Oct. 20, 1999), <http://www.market-analysis.co.uk/PDF/Reports/dgivreport final.pdf>.

<sup>31</sup> *Union of Euro. Football Ass’n v. Briscomb*, [2006] EWHC (Ch) 1268 [6] (Eng.), 2006 WL 1635072.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> Article 14 of EUROPEAN E-COMMERCE DIRECTIVE 2000/31/EC (July 17, 2003), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:NOT>.

of U.S. courts. Basically, the mere operation of a P2P service might not be sufficient to constitute copyright infringement liability. However, where the service provider has actual knowledge of the illegal activity or information, and fails to act expeditiously to remove or to disable access to the information, the provider will be found liable for copyright infringement.

Among a number of secondary liability related cases decided in recent years,<sup>36</sup> in 2003 Premier Fernsehen GmbH & Co. KG has sued Cybersky, a German P2P software developer and distributor, for copyright infringement.<sup>37</sup> In late 2004 a German court issued an injunction prohibiting distribution of Cybersky's software, which enabled P2P re-streaming of encrypted content from pay television providers.<sup>38</sup> Although the Hamburg Germany High Regional Court reversed the first-instance court's injunction order on the appeal and ruled that a ban on the software was not warranted, it nonetheless stated that the defendant was liable for copyright infringement because the software and service were *advertised* as a way to end-run plaintiff's pay programming.<sup>39</sup>

### III. PROTECTION OF LIVE SPORTS TELECASTS IN CHINA

#### A. Existing PRC Copyright Law

During the 2008 Summer Olympic Games held in Beijing ("Games"), the International Olympic Committee (IOC) expressed a high degree of satisfaction with respect to the Chinese government's combat against online piracy of Games telecasts.<sup>40</sup> The fact that the legal basis adopted by the BOCOG and the NCAC is related to the *sui generis* Olympic regulations, however, rather than Chinese copyright law, still creates uncertainty for sports organizations over whether similar success will be replicated in future enforcement against online piracy of sports telecasts. Before describing the special regulations enacted in preparation for the Games, this section summarizes the uncertain status of sports telecasts under generally applicable Chinese copyright law.

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<sup>36</sup> In Finland, the Turku Court of Appeal decided on June 19, 2008 that the defendant, administrators of P2P site Finreactor, had actively participated in the reproduction of copies and were thus liable for copyright infringement. See Roschier, Attorneys Ltd., *Finreactor P2P Network Ruled Illegal by Court of Appeals*, LexUniversal (July 7, 2008), available at <http://www.lexuniversal.com/en/news/5855>. In France, the Court of First Instance in Paris found Daily Motion, a video sharing service, liable for copyright infringement of a movie posted by its users. See Meryem Marzouki, *French ruling against video-sharing platform DailyMotion*, EURO. DIGITAL RIGHTS (July 28, 2007), available at <http://www.edri.org/edriagram/number5.14/dailymotion-decision>.

<sup>37</sup> See Germany: *Software to Re-stream TV Programs Infringes Copyrights, Court Says*, BNA WORLD INTELL. PROP. REP. (Apr. 1, 2006).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Timo Lumme, IOC Director of Television and Marketing Services, said "the exclusive rights of official Olympic new media platforms were protected by a P2Phisticated anti-piracy regime, overseen by the IOC, which successfully contained online piracy of Beijing 2008 footage to minimal levels." Euro. Broad. Union, *supra* note 1.

1. *Sports Events are Currently Not Copyrightable Works*

The People's Republic of China (PRC) Copyright Law is silent on whether sports events are copyrightable works. However, because most live events, including sports events, do not fall in the definition of Article 3 of Chinese Copyright Law, it is widely agreed that sports events are *not* copyrightable subject matter.<sup>41</sup> The prevailing notion is that a sports event is an occurrence of facts in reality. It is neither literary or dramatic work nor has a creator or author and thus does not fall into any of the "copyrightable subject matters" as listed in Article 3 of the PRC Copyright Law.<sup>42</sup>

2. *Sports Telecasts: Copyright Protection or Neighboring Rights Protection?*

There are conflicting views among Chinese scholars as to whether sports telecasts are subject to "copyright protection"<sup>43</sup> or "neighboring right protection"<sup>44</sup> under existing Chinese copyright law. Unlike the United States, China differentiates "copyrights" from "neighboring rights" as most civil law jurisdictions do. Generally speaking, neighboring rights protect those who assist intellectual creators in promoting and disseminating the creator's works to the public at large. Copyright laws can provide protection for four specific kinds of neighboring rights: 1) the rights of performing artists in their performances, 2) the rights of producers of phonograms in their phonograms, and 3) the rights of broadcasting organizations in their radio and television programs, and 4) the rights of publishers.

One view is that sports telecasts are "video recordings"<sup>45</sup> rather than "video productions/cinematographic works,"<sup>46</sup> the latter of which falls into copyrightable subject

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<sup>41</sup> Article 3 of the PRC Copyright Law, first adopted in 1990 and revised in 2001, sets out a detailed list of copyrightable subject matters under the law, which includes (1) written works; (2) oral works; (3) musical, dramatic, quyi and choreographic works; (4) works of fine art and photographic works; (5) cinematographic, television and video-graphic works; (6) drawings of engineering designs and product designs, and descriptions thereof; (7) maps, sketches and other graphic works; (8) computer software; and (9) other works as provided for in law and administrative rules and regulations. COPYRIGHT LAW P.R.C. (promulgated by the Standing Comm. Nat'l People's Cong. Sept. 1990, effective Oct. 27, 2001) Art 3, available at [http://www.chinaipr.gov.cn/lawsarticle/laws/lawsar/copyright/200608/232720\\_1.html](http://www.chinaipr.gov.cn/lawsarticle/laws/lawsar/copyright/200608/232720_1.html).

<sup>42</sup> This view is shared by a majority of scholars and legislators in China. See WEI ZHI & ZHU ZUO FA YUAN LI, PRINCIPLES OF COPYRIGHT LAW 16 (Beijing Univ. Pub'n House 1998); WU HANDONG & ZHI SHI CHAN QUAN FA, THE INTELLECTUAL PROPERTY LAW 80 (China Politics and L. Univ. Publ'g Co. 2002); Shen Li & Ti Yu Jing Sai Yu Ban Quan Bao Hu, *Sports Events and Copyright Protection*, 12(2) THE SPORTS J. (CHINA) 13-16 (2005).

<sup>43</sup> Unlike the broader term "copyright law" discussed in this paper, here the concept of "copyright" is much narrower and only includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, computer software, databases, and architectural designs. Its counterpart is "neighboring rights." See Jiang Zhipei, *Judicial Protection of IPR in China* (May 23, 1998), <http://www.chinaiprlaw.com/english/forum/forum1.htm>.

<sup>44</sup> Neighboring rights, also referred to as "related rights," are the counterparts of copyrights in a narrow sense. It includes the rights of performing artists in their performances, producers of sound recordings in their sound recordings, and those of broadcasters in their radio and television broadcasts. *Id.*

<sup>45</sup> COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 5 (defining the term "video recordings" as "fixations of a connected series of related images or pictures, with or without accompanying sounds, other than

matters under Article 3 of the PRC Copyright Law.<sup>47</sup> Those holding this view seem to believe there is not sufficient originality in the telecasting of sports events, thus such telecasts are not original or creative enough to qualify as “video productions/cinematographic works.”<sup>48</sup> As a result, interested parties might only claim “neighboring rights protection”<sup>49</sup> for sports telecasts either as “video recordings”<sup>50</sup> or as “broadcasting rights”<sup>51</sup> under Chinese copyright law.

As far as video recordings rights are concerned, although Article 41 of the PRC Copyright Law grants the owner of video recordings “the right to authorize others to reproduce, distribute, rent and communicate [the video recordings to] the public on an information network,”<sup>52</sup> nonetheless, because the value of sports broadcasting rights lies in its “live” feature,<sup>53</sup> the neighboring rights protection granted to “video recordings” (e.g. VCDs, DVDs, video tapes, etc.) will not help sports organizations or their representatives to stop real-time retransmission of live sports telecasts over the internet.

Another remedy available to stop online piracy of live sports telecasts may be based on broadcasting organizations’ neighboring rights, granted under Article 44 of the PRC Copyright Law. Unfortunately, the definition of “rights to broadcast”<sup>54</sup> set forth in

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cinematographic works and works created by a process analogous to cinematography;” in practice, they generally refer to CDs, DVDs, tapes, etc.).

<sup>46</sup> Cinematographic works, also known as “video productions,” refer to works “created by a process analogous to cinematography . . . recorded on some materials, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means.” See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 4.

<sup>47</sup> See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 3(5).

<sup>48</sup> See YU Zhenfeng, *Woguo zhiye lanqiu liansai dianshi zhuanboquande kaifa ji xiangguan lifa wenti (The Exploitation of Television Broadcasting Rights in the Chinese National Basketball Games and Related Legislation)*. SPORTS J. 10(5), 14-16 (2003). See also WENG Biao, *Ru He Tuisuan Tiyubisai dianshizhuanboquan de zhuanrangjiage (How to Define a pricing for Sports Broadcasting Rights)* SPORTS J. 6, 39-41 (1999).

<sup>49</sup> Chapter IV of the PRC Copyright Law provides various neighboring rights protection to: (1) publishing industry; (2) performers; (3) owners of sound recordings and video recordings (phonographic recordings), and (4) broadcasting organizations. COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 29-45.

<sup>50</sup> Chapter IV, Section 3 of the PRC Copyright Law, provides certain rights (neighboring rights) to owners of sound recordings and video recordings, including “a right to authorize others to reproduce, distribute, rent and *communicate to the public on an information network.*” See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 41.

<sup>51</sup> Chapter IV, Section 4 of the PRC Copyright Law provides another set of neighboring rights to broadcasting organizations, which include “(1) to rebroadcast its broadcast radio or television program; and (2) to fix its broadcast radio or television program on a sound recording or video recording carrier and to reproduce the sound recording or video recording carrier.” COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 44.

<sup>52</sup> See COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 41.

<sup>53</sup> RUMPHORST, *supra* note 28, at 3 (noting that “sports broadcasting rights have certain aspects which make them unique; each sports event is characterized by its particular “live” value, which will (almost) completely diminish as soon as the event is over.”).

<sup>54</sup> COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 10 (11) (stating that “the right to broadcast” refers to “the right to publicly broadcast or communicate to the public a work *by wireless means*, to disseminate broadcast works to the public *by wired dissemination or rebroadcast*, and to disseminate broadcast works to the public by a loudspeaker or by any other analogous tool used to transmit symbols, sounds or picture.”) (emphasis added).

the Copyright Law, which includes “wireless broadcasting” and “wired re-broadcasting of signals from a wireless broadcast,” has been interpreted very narrowly by some scholars. One of the prevailing interpretations held by Chinese scholars seem to suggest that the concept of “wired,” under Article 10(11), only refers to “cable television”<sup>55</sup> and does not include the new media “internet.” In other words, broadcasting organizations might stop infringers from retransmitting the content from radio retransmission (wireless) or television retransmission (wired re-broadcasting), but have no rights to stop infringing websites from retransmitting the signals over the internet.<sup>56</sup>

The unfortunate result of this approach of classifying sports telecasts as “video recordings” and denying broadcasting organizations’ neighboring rights over internet media is the absence of any legal basis for preventing unauthorized retransmission of live sports telecasts over the internet in China. Due to this concern, the Beijing Olympic Games (BOCOG) and National Copyright Office (NCAC) adopted Olympic-related regulations as a separate legal basis for combating online piracy of live sports telecasts during the 2008 Summer Games instead of existing Chinese copyright law.

### ***B. China’s Strategy During the 2008 Beijing Olympic Games To Combat Online Piracy of Live Sports Telecasts***

Apparently believing that existing Chinese copyright law may not protect pirated online sports telecasts over, the BOCOG and NCAC adopted particular regulations aimed at prohibiting the unauthorized retransmission of live Games telecasts during the Beijing Summer Games. Regardless of whether P2P websites providing unauthorized online retransmission of live sports telecasts were liable for copyright infringement, they could be held liable for violations of the Olympic-related regulations.

#### *1. Legal Basis of Combat Against Online Piracy of Live Sports Telecasts*

Since 2002, China has issued a series of Games-specific intellectual property decrees and regulations, including *Regulations on the Protection of Olympic Symbols*,<sup>57</sup> the *Beijing Regulation on the Intellectual Property Protection of Olympics-related Intellectual Property Rights* (“Beijing Regulation”),<sup>58</sup> and *Customs Clearance Notice for*

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

<sup>56</sup> Of course, when the infringing content are copyrightable works, such as music, TV episodes and movies, broadcasting organizations, which might also be copyright holders of such copyrighted works, can certainly bring lawsuits against infringing websites alleging violations of their copyrights, but not neighboring rights. Based on this author’s experience, during the past two years music industries and studios across the world have been very aggressive suing infringing websites in China for copyright infringement.

<sup>57</sup> Regulations on the Protection of Olympic Symbols (adopted at the 54th Exec. Meeting of the State Council on January 30, 2002, promulgated by Decree No. 345 of the State Council of the People’s Republic of China on February 4, 2002, and effective Apr. 1, 2002), available at <http://en.beijing2008.cn/bocog/ipr/> (last visited Nov. 1, 2010).

<sup>58</sup> *China affords comprehensive protection to the IP rights of the Beijing Olympic Committee*, SCIENCE NET, Apr. 17, 2008, <http://news.sciencenet.cn/sbhtmlnews/2008417231125601205432.html?id=205432> (Chinese only).

*Beijing Olympic Materials*<sup>59</sup> to comply with the IOC's requirements and to protect the Olympics' respective IP rights. The Beijing Regulation, a comprehensive catch-all provision often relied on by the BGCOC, was drafted so broadly that any unauthorized use, copy, production, sale, advertisement, promotion, public display and derivative use of trademarks, logos, designs, slogans and contents related to the Games are likely to violate the Beijing Regulation.<sup>60</sup>

## 2. BOCOG's Strategy to Combat Online Piracy of Live Sports Telecast

BOCOG worked with CCTV.COM, the exclusive licensee of the rights to broadcast the Games over the internet, and designed a license scheme authorizing nine prominent Chinese websites to retransmit Olympic-related content online.<sup>61</sup>

Meanwhile, a Joint-Working Group of Combating Olympic Infringement and Piracy was established in August 2008 to safeguard all IP rights related to the Games by establishing an efficient coordination mechanism between various Chinese agencies.<sup>62</sup> The Joint-Working Group consists of the NCAC, the State Administration of Film, Radio and Television (SARFT), the Public Security Bureau and the Ministry of Information Industry (MII), and it is headed by the NCAC.<sup>63</sup> The Joint-Working Group issued a number of "Action Plans" to combat against online piracy of sports events during the Games. For instance, one of such plans set out a four-month period (between June and October 2008) to crack down on unauthorized retransmission of Olympic related telecasts online. The Working Group also set up a hotline to receive and handle complaint calls reporting instances of Olympic piracy from copyright holders and the public.<sup>64</sup> Apparently, the efforts made by the Chinese government to deter Olympic piracy were successful. Based on the automatic monitoring system of the IOC, "more than 90 percent of illegal broadcasting took place abroad and domestic violations have been cracked down rapidly and effectively."<sup>65</sup>

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<sup>59</sup> China Customs, *Customs Clearance Notice for Beijing Olympic Materials* (July 29, 2008), <http://english.customs.gov.cn/publish/portal191/tab28300/module60424/info121218.htm>.

<sup>60</sup> These provisions are located in Article 8 of the Beijing Regulation. *See supra* note 58.

<sup>61</sup> The list of nine authorized websites include shanghai media group, sohu, sina, tencent, netease, ku6, PPlive, PPstream, and UUsee. *See* [http://news.xinhuanet.com/newscenter/2008-08/07/content\\_9021338.htm](http://news.xinhuanet.com/newscenter/2008-08/07/content_9021338.htm) (Chinese only) (last visited Nov. 2, 2010).

<sup>62</sup> *See* State Intellectual Property Office of the P.R.C., *Joint Working Group of Combating Olympic Infringement and Piracy established* (Aug. 26, 2008), [http://www.sipo.gov.cn/sipo\\_English/news/iprspecial/200904/t20090417\\_453165.html](http://www.sipo.gov.cn/sipo_English/news/iprspecial/200904/t20090417_453165.html).

<sup>63</sup> *See id.*

<sup>64</sup> Xinming Xu, *Gov't to stop illegal broadcasts of Games*, CHINA INTELL. PROP. LAW. (July 9, 2008), <http://www.ciplawyer.com/en/article.asp?articleid=877>.

<sup>65</sup> Xinming Xu, *IOC speaks highly of China's anti-piracy work*, CHINA INTELL. PROP. LAW. (Aug. 22, 2008), <http://www.ciplawyer.com/en/article.asp?articleid=930>.

#### IV. LOOKING BEYOND THE BEIJING OLYMPIC GAMES: WHY IT IS IMPORTANT FOR CHINA TO PROTECT LIVE SPORTS TELECASTS

Despite the success China achieved in safeguarding Games-related IP rights, it is unclear whether such success can be replicated in future prevention of online piracy of sports telecasts. The fact that the BOCOG and NCAC adopted the Olympic-related regulations, rather than existing Chinese copyright law, to stop online piracy creates a certain degree of uncertainty for rights holders. Before we turn into a technical discussion on how to protect sports telecasts, one preliminary question that we probably should ask is: should China protect sports telecasts at all?

U.S. and European protection of sports telecasts notwithstanding, there remain objections to or skepticism surrounding such protection. One concern is that using copyright law to protect sports telecasts might hurt consumer welfare. In his book *Free Culture- How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Lawrence Lessig advocates the concept of “free culture” and argues that “the war to rid the world of internet ‘pirates’ will also rid our culture of values that have been integrated to our tradition from the start.”<sup>66</sup> When Werner Rumphorst was addressing the balance of different interest groups in his article *Sports Broadcasting Rights and EC Competition Law*, he also raised the question “why should the public be forced to pay more and more for viewing sports events which are part of their own cultural environment?”<sup>67</sup> Nonetheless, to allow the public to watch sports telecasts at a reasonable price is different from allowing P2P websites to “free-ride”<sup>68</sup> on the efforts of sports leagues in organizing the sports events or to take advantage of the investment made by official broadcasters in broadcasting such events. The following analyzes, primarily from an economic standpoint, why China should protect sports telecasts.

To understand professional sport, it is important to recognize that sport is not just games, it is business.<sup>69</sup> Revenues earned by professional teams typically come from media revenues, game receipts, luxury seating, advertising and membership fees. During the past ten years, media revenues—revenue generated by business licenses with over-the-air broadcasters, cable channels and pay-per-view programmers—have increased significantly and now have become a huge proportion of the sports leagues’ revenues.<sup>70</sup>

In the case of the 2008 Olympic Games, TV rights accounted for approximately one-third of the total income, followed by sponsorship, ticketing and merchandising in

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<sup>66</sup> See LAWRENCE LESSIG, *FREE CULTURE- HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 19 (2004).

<sup>67</sup> See RUMPHORST, *supra* note 28, at 12.

<sup>68</sup> For a detailed discussion of the free-rider problem in the context of copyright law, see Williams M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328-33 (1989), available at <http://cyber.law.harvard.edu/IPCoop/89landl.html>.

<sup>69</sup> See Soonhwan Lee and Hyosung Chun, *Economic Values of Professional Sport Franchises in the United States*, 2002 SPORT J. 4, at 2, available at <http://thesportjournal.org/article/economic-values-professional-sport-franchises-united-states> (last visited Nov. 4, 2010).

<sup>70</sup> See *id.*

the order of magnitude.<sup>71</sup> In 1992, NBC paid USD 410 million for the U.S. broadcasting right of the Barcelona Olympic Games.<sup>72</sup> When it comes to the 2012 London Olympic Games, the payment for an exclusive U.S. broadcasting right has increased to USD 1.181 billion.<sup>73</sup> In the case of 1990 Football World Cup, sales of television rights were estimated to be USD 65.7 million (41%), sales of tickets were USD 54.8 million (34%) and sales of advertising rights were USD 40.2 million (25%).<sup>74</sup> Twelve years later, in the 2002 and 2006 Football World Cup finals, the world TV rights (excluding the U.S.) were sold for USD 1.97 billion.<sup>75</sup>

Unlike other types of entertainment over electronic media such as TV episodes, movies, education programs and documentaries, sports events have a unique “live” characteristic. Sports fans who watch live sports telecasts not only care about the final results or the box scores of the games, but also the progression of a game. They are generally less interested in watching previous games with known results.<sup>76</sup> As a result, the availability of P2P cast technologies and unauthorized online retransmission of live sports telecasts has posed a big threat to the interests of official broadcasters and sports leagues.

Typically broadcasters pay a large license fee to bid for the exclusive broadcasting right with the hope to recoup their investment by attracting a considerable amount of viewers. In addition, they need to invest resources, efforts and capital in telecasting/broadcasting the sports events. The failure to protect the “exclusivity” of broadcasters in broadcasting live sports events will likely adversely impact the interests of official broadcasters and reduce their willingness in future bidding. For instance, the cricket broadcast market in the United States has been declining primarily because of the availability and scale of unauthorized retransmission of matches on the internet. One of the two main broadcasters now seems less interested in bidding for cricket broadcast rights.<sup>77</sup>

As a result, the interests of sports leagues will also be damaged, whose profitability for selling broadcasting rights depends upon how effectively they can ensure the interests and rights of official broadcasters, i.e. to stop the online piracy of live sports telecasts. In other words, to allow the “free-riding” of P2P websites will hurt both the interests of the official broadcasters and the rights of sports leagues. More importantly, the failure to protect sports telecasts will reduce the incentives of sports organizations in organizing and hosting big scale events, thus eventually hurt the interests of consumers.

As identified in the White Paper of EU in 2007, “[s]port is a dynamic and fast-growing sector with an underestimated macro-economic impact, and can contribute to the

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<sup>71</sup> See JOHN HORNE, *SPORT IN CONSUMER CULTURE* 52 (Palgrave Macmillan 2006) (citing MAURICE ROCHE, *MEGA –EVENTS & MODERNITY* 168 (Routledge 2000)).

<sup>72</sup> *See id.* at 53.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 52.

<sup>75</sup> *Id.*

<sup>76</sup> See Chia-heng Seetoo, *Can Peer-to-Peer Internet Broadcast Technology Give Fans Another Chance? Peer to Peer Streaming Technology and its Impact*, 2 U. ILL. J.L. TECH. & POL’Y. 369 (2007), available at <http://www.jltp.uiuc.edu/archives/seetoo.pdf> (last visited Nov. 4, 2010).

<sup>77</sup> *See ENVISIONAL LTD. & NETRESULT LTD.*, *supra* note 4, at 9.

Lisbon objectives of growth and job creation.”<sup>78</sup> The Commission points out in this White Paper that sports can serve as a tool for local and regional development, urban regeneration, rural development, and can also stimulate the development of local tourism and upgrading of local infrastructure.<sup>79</sup> Therefore, when the legitimate interests of sports leagues (including the IPR rights which bring a big proportion of the economic value of sports) are sufficiently protected, the beneficiaries are no longer restricted to the sports leagues who organize the events, the broadcasters who transmit the events, or the spectators who watch the events, but also the overall local industry and public who could benefit from this dynamic economy.<sup>80</sup>

## V. RECOMMENDATIONS ON HOW TO PROTECT SPORTS TELECASTS IN CHINA

In view of the significance of protecting live sports telecasts in China, I propose the following methods: interpreting or amending the law, adopting technology measures and encouraging international cooperation to provide protection for live sports telecasts in China.

### A. *Protect Sports Telecasts Through the PRC Copyright Law*

The first step will be to provide protection to live sports telecasts by clarifying or amending the existing Chinese copyright regime. This could be achieved by the following measures: 1) to recognize sports telecasts that contain sufficient originality as copyrightable works, and 2) to extend the rights of broadcasters to the internet media.

#### 1. *Recognize Creative Sports Telecasts as Cinematographic Works*

Most agree that the playing of a sports event is not itself copyrightable subject matter because, as discussed earlier, a sports event is usually considered an occurrence of facts in reality. The basic rule in copyright law is that facts and information in themselves are not protected; therefore, the prevailing opinion is that sports events shall not be protected by copyright law. Copyright, nonetheless, might arise where the sports events are produced, staged or photographed, especially where there is sufficient originality in the creation of telecasts.<sup>81</sup> In other words, sports telecasts that contain original elements in the telecasting process should be categorized as “video productions/cinematographic works” rather than “video recordings,” the former of which is subject to copyright

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<sup>78</sup> EURO. COMM’N, WHITE PAPER ON SPORT 10 (Nov. 7, 2007), available at [http://ec.europa.eu/sport/white-paper/index\\_en.htm](http://ec.europa.eu/sport/white-paper/index_en.htm).

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

<sup>80</sup> *Id.* at 11 (citing a study conducted during the Austrian Presidency in 2006, which suggested that sports in a broader sense generated value-added of 407 billion euros in 2004, accounting for 3.7% of EU GDP, and employment for 15 million people or 5.4% of the labor force).

<sup>81</sup> See Yuval Karniel, *Broadcasting Sporting Events on the Foreign Cable Channels - Is Copyright Black Out Really Necessary?*, 6 ALEI MISHPAT 259, 259 (2007).

protection. There are a number of cases decided in other jurisdictions on how this interpretation can be made.

In *Briscomb*, Judge Lindsay recognized the original elements, which she called as “ancillary works”, in the telecasts of sports events.<sup>82</sup> Having examined how the various ancillary works, which the Judge referred to as “the use of video sequences, onscreen graphics... a program content roll, short film clips called break bumpers, the UEFA starball logo and specially composed accompanying music, [and] the UCL music,”<sup>83</sup> are included and created within the live broadcasts, the Judge ruled that the plaintiff UEFA owns the copyright not only in the live broadcasts but in the ancillary works,<sup>84</sup> and found the defendant liable for copyright infringement.

Moreover, in *Interbox Promotion Corporation v. Quebec Inc. (Hippo Club)*, where the official broadcaster of the Canadian Middleweight Championship sued Quebec-based licensing establishments for presenting the televised event to the clientele without authorization on the grounds of signal piracy and copyright infringement, Justice Martineau also recognized the creativity and originality of sports telecasts.<sup>85</sup> Justice Martineau first acknowledged that a sports event is difficult to categorize as a “work” within the meaning of the Canadian Copyright Act<sup>86</sup>, but he argued that “[n]evertheless, the television reproduction of the event (whether or not accompanied by audio commentary) is comparable to a ‘cinematographic work’ as set out in section 2 of the Act.”<sup>87</sup> He then cited McKeown’s *Fox Canadian Law of Copyright and Industrial Designs*<sup>88</sup> and concluded that the unpredictability of the television production of a sporting event gives an element of originality, thus can subject sports telecasts to copyright protection.<sup>89</sup>

Both *Briscomb* and *Interbox* provide good examples of where courts distinguished “video recordings” from “video productions/cinematographic works.” Where the telecasting is a mere *mechanical* recording of an occurrence of facts in reality, then it likely does not possess enough originality to be qualified as a “video production”; rather it is only a “video recording.” A typical example of such video recording would be a security surveillance video camera installed inside banks, supermarkets or office buildings. Although there might be slow routine movements of the video cameras (rotating within 360 degrees), the video recording process does not possess enough “originality input” by human beings, thus shall not be categorized as “video productions.” However, where the telecasting process involves sufficient creative activities, such as “the use of video sequences, logos, music and graphics --ancillary works” identified by Judge Lindsay in *Briscomb*, such telecasts should be considered “video productions” or “cinematographic works,” which are protectable.

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<sup>82</sup> See *Briscomb*, [2006] EWHC (Ch) 1268, at 4.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 6.

<sup>85</sup> See *Interbox Promotion Corp. v. Quebec Inc. (Hippo Club)*, [2003] F.C. 1254 (Can. Que.).

<sup>86</sup> *Id.* at 4.

<sup>87</sup> *Id.*

<sup>88</sup> See JOHN S. MCKEOWN, *FOX CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS* 174-75 (Scarborough Carswell, 3d ed. 2000).

<sup>89</sup> See *Interbox*, [2003] F.C. at 4.

A number of recent Chinese copyright cases outside the scope of sports telecasts also address distinctions between video recordings and video productions, and thus might provide a good analogy for sports telecasts cases. In *Guangzhou Jingangyuan Karaoke Club Ltd v. Warner Music Hong Kong Limited*,<sup>90</sup> Warner Music sued a karaoke bar for the unauthorized display of its music videos in the bar. The defendant admitted the facts but argued that the music television videos (MTVs) they were playing were not copyrightable works because they were not “cinematographic” in nature.<sup>91</sup>

One of the issues the court addressed was whether three disputed MTVs produced in a similar manner to cinematographic works were “cinematographic works” or merely “video recordings.”<sup>92</sup> Warner Music argued that the threshold for “cinematographic works” under existing Chinese copyright law only requires the creativity and duplicability.<sup>93</sup> Because a production of MTVs usually requires creative input from director, performers, cameraman, editors, fashion designers, etc., MTVs should be categorized as “cinematographic works” and should be distinguished from “mechanical video recordings.”<sup>94</sup> The court agreed, holding that the disputed music videos satisfied the “creativity threshold” of cinematographic works required by the copyright law and thus should be protected as copyrightable works.<sup>95</sup> This decision has been reinforced by other courts.<sup>96</sup>

The reasoning in *Jingangyuan* and other MTV infringement cases is certainly a good analogy in the sports telecasts infringement cases. As with *Jingangyuan* (China 2006), *Briscomb* (UK 2006) and *Interbox* (Canada 2003), Chinese courts should distinguish “video recordings” from “video productions/cinematographic works” when evaluating the copyrightability of live sports telecasts. For sports telecasts that contain sufficient creative activities, i.e. creative input from directors, cameramen, commentators, etc., and possess enough “original elements” such as “logos, graphics, music, etc.,” they should be recognized as “video productions/cinematographic works” subject to copyright protection. This is especially true for modern sports telecasts produced by professional sports leagues or broadcasting organizations, which is an enormous undertaking involving immense creative inputs from directors, producers and talents on down to the camera people, sound technicians, graphics operators, etc.

When live sports telecasts that contain sufficient creativity are protected as copyrightable works, i.e. “cinematographic works,” sports leagues can then take actions as owners of copyrightable works based on Article 10 of the PRC Copyright Law to enforce against infringing websites.<sup>97</sup>

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<sup>90</sup> Guangdong High Court 2005-Yuegaofa minsan zhongzi No. 357.

<sup>91</sup> See *Jingangyuan*, 2005 Yuegaofa minsan zhongzi No. 357, at 3.

<sup>92</sup> *Id.* at 3.

<sup>93</sup> *Id.* at 4.

<sup>94</sup> *Id.*

<sup>95</sup> See *id.* at 5.

<sup>96</sup> (See *Shanghai Kylin Mansion Culture & Entmn’t Co. v. Go East Entmn’t Co.*, Shanghai High Court 2005-Hugao minsan zhizhongzi No. 98; and *Shanghai Haoledi Music Entmn’t Ltd. v. Sony Music Entertainment HK Ltd.*, Shanghai High Court 2005- Hugao minsan zhizhongzi No. 115.).

<sup>97</sup> Under Article 10, copyright owners have the following rights: (1) the right of publication; (2) the right of authorship; (3) the right of alteration; (4) the right of integrity; (5) the right of reproduction; (6) the right of

2. *Expanding Rights of Broadcasters to Include Internet Media*

Also, as far as the rights of broadcasters are concerned, China should amend its current PRC Copyright Law to expand the interpretation of “broadcasting”<sup>98</sup> from traditional media of “radios, televisions, cables etc.” to new media such as online content.<sup>99</sup> After all, the neighboring rights that broadcasters enjoy under the copyright law regime should not be restricted or discriminated against only because of the different medium that is used to carry the content.

***B. Adopt Counter Technologies to Combat Against Online Piracy***

New technologies such as fingerprinting, watermarking, filtering and automated take-down tools, etc. might make it possible to prevent piracy content from the internet. For instance, TVU, developers of the TVUBroadcast software and the TVU BD1000 Broadcast Appliance, claimed a few years ago that it had developed a new product that provides a solution specifically designed for live broadcast events such as the 2008 Beijing Olympic Games.<sup>100</sup> Based on TVU, the VideoDNA Live service offers broadcasters and rights holders real-time digital fingerprinting, fully automated identification, and tracking and monetization of live media content on the web.<sup>101</sup> The new technology will allow content owners, broadcasters and content distributors (including P2P websites) to identify and track unauthorized uploads of broadcast content within minutes of the event taking place.<sup>102</sup>

At present, there is ongoing debate in China as to whether content service providers (CSPs) and/or internet service providers (ISPs) should be required to install “filtering” technology before they can enjoy the “safe harbor” rule provided by the *Regulation on the Protection of Rights of Communication through the Information Network* (Information Network Regulation).<sup>103</sup> Based on the current Information Network

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distribution; (7) the right of rental; (8) the right of exhibition; (9) the right of performance; (10) the right of showing; (11) the right of broadcast; (12) the right of communication on the information networks; (13) the right of making cinematographic works; (14) the right of adoption; (15) the right of translation; (16) the right of compilation; and (17) any other rights to which copyright owners are entitled. COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 10 Here, sports leagues might base their claims on the specific provisions (5), (11), (12) and (17) to enforce their rights.

<sup>98</sup> COPYRIGHT LAW P.R.C., *supra* note 41, at Art. 44.

<sup>99</sup> Of course if China agrees to sign the WIPO Broadcasting Treaty, a draft of which is not yet available, rights of broadcasters will also be extended to the internet. However, since key members of WIPO fail to agree on key terms of such a treaty, it is unclear when the draft of the WIPO Broadcasting Treaty will be finalized.

<sup>100</sup> See Mika Saitoh, *TVU and Vobile Announce First Commercial Deployment of Digital Fingerprinting for Live Event Producers and Content Owners*, REUTERS (May 19, 2008), <http://www.reuters.com/article/pressRelease/idUS127078+19-May-2008+PRN20080519>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Regulation on Protection of the Right to Network Dissemination of Information (promulgated by the State Council on May 10, 2006, effective July 1, 2006), art. 14), <http://www.chinaitlaw.org/?p1=>

Regulation and a number of recent ISP liability cases, take-down notices are usually required before alleging the secondary liability of ISPs.<sup>104</sup> Although the requirement of sending take-down notices is generally considered a good solution to balance the rights of content owners and the obligations of ISPs and might have proved efficient in resolving other copyright infringement cases such as online piracy of movies and music, it is not helpful in resolving the current issue of online piracy of live sports telecasts.

Because of the unique “live” characteristics of sports telecasts, to require the proprietors to send P2P websites a take-down notice to remove the infringing content is mostly, if not always, unrealistic and meaningless. As it takes at least a few hours, if not days, to go through the “take-down” and “counter take-down” notice process, it will be far too late when P2P websites eventually agree to remove the infringing content. Therefore, to require the CSP and ISP websites (including P2P and streaming sites) to install filtering technology and/or provide automated take-down tools before they can claim “safe-harbor” rule protection would be a good solution to solve the online piracy of live sports telecasts.

One possible objection that websites might raise against the idea of mandatory installation of filtering technology might be the costs. However, because most P2P or UGC websites might have already installed similar filtering technology/software to comply with local laws and regulations,<sup>105</sup> the argument that installing filtering technology might bring additional economic burden should not stand.

### ***C. Harmonization of International Laws***

Online piracy of live sports telecasts is a global problem. Pirate servers are usually located in multiple countries, such as Canada, the Netherlands, China, Korea, Sweden, the U.S. and the U.K.<sup>106</sup> They engage in “intellectual property arbitrage” by exploiting variances in countries’ laws and enforcement mechanisms to avoid enforcement.<sup>107</sup> As Professor Pamela Samuelson explains in her article, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, IP arbitrage can arise where courts in one country cannot enforce a judgment against a foreign P2P in the absence of domestic assets; furthermore, enjoining the foreign P2P websites will fail to stop domestic users from accessing the technology available from foreign sites via the

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print&p2=060717003346 (addressing the rights of content industries and providers in the digital environment and, as with the Digital Millennium Copyright Act (DMCA), providing a number of “safe harbor” provisions for ISPs to avoid infringement liability, one of which is the receipt of a “take-down” notice).

<sup>104</sup> See Seagull Haiyan Song, *Why Were There Different Outcomes in Two Chinese ISP cases?*, 25 *THE COMPUTER & INTERNET LAW*, 6 (Sept. 2008) (providing a more detailed discussion of the liability of ISPs and the necessity of take-down notices).

<sup>105</sup> For instance, Chinese website operators are required by local laws to filter phonographic content, violent pictures and other sensitive information.

<sup>106</sup> See Mellis, *supra* note 17, at 261.

<sup>107</sup> *Id.* at 260 (quoting Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 *U. CHI. L. REV.* 223, 223 (2004)).

internet.<sup>108</sup> A consequence of the arbitrage is that the stringent laws of one jurisdiction might be weakened by the lower-protection rules in another jurisdiction.<sup>109</sup> Therefore, to effectively prevent online piracy, harmonization of national laws should be encouraged.

## VI. CONCLUSION

Online piracy of live sports telecasts is a growing problem that has drawn growing attention from sports organizations, broadcasters and others in the digital environment. The increasing use of P2P technology has made sports telecasts vulnerable to copyright abuses and infringement. Unlike the United States and most European countries, where sports telecasts are protected either through its domestic legislation or the established precedents, questions remain as to whether the current Chinese legal regime protects these telecasts.

It is the belief of this author that sports telecasts satisfying the originality requirements of copyright law are and should be protected as cinematographic works subject to copyright protection. Furthermore, to allow P2P websites to free-ride on the efforts of sports organizations and official broadcasters in organizing and broadcasting the sports events will eventually hurt the consumer welfare and the local industry to a larger extent. In short, providing legal protection for live sports telecasts serves China's own purposes and interests in 1) being consistent with international practice, and 2) supporting local sports and broadcasting industries and boosting the local economy in the long term.

To respond effectively against the online piracy of live sports telecasts, China must recognize the copyrightability of sports telecasts and extend rights of broadcasters to include new media formats such as online content. Also, China might consider mandatory filtering requirements for ISPs before they can enjoy the safe harbor protection. Last, but not least, international collaboration, e.g. harmonization of international laws, will be important to avoid P2P intellectual property arbitrage.

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<sup>108</sup> See Samuelson, *supra* note 107, at 230.

<sup>109</sup> *Id.* at 223.

**“CAN I SEE SOME ID?”: AN ANTITRUST ANALYSIS OF NBA AND NFL  
DRAFT ELIGIBILITY RULES**

By Steve E. Cavezza\*

**I. INTRODUCTION**

LeBron James could have gone to Ohio State for one season. He could have brought in millions of dollars in revenue for The Ohio State University (OSU) Athletic Department, the National Collegiate Athletic Association (NCAA), television networks, and OSU sponsors. However, LeBron presumably would not have seen a single penny of the profits he produced. After one year as a Buckeye, having grown from an immature eighteen-year-old child to a nineteen-year-old man, equipped with one year of college education under his belt, he would have been allowed to enter the National Basketball Association (NBA) Draft. This, of course, was not the fate of LeBron James. Instead, in 2003, he went straight from high school to the NBA, where he signed a lucrative contract with the Cleveland Cavaliers at the youthful age of eighteen.<sup>1</sup> In 2005, the NBA began barring high school players from participating in its draft.<sup>2</sup> Had LeBron been born just two years later, he likely would have spent his first year after high school in a dorm room in Columbus rather than a mansion in Cleveland.

The National Football League (NFL) has a similar rule that bars players from joining its league until they are three years out of high school.<sup>3</sup> The NBA and NFL (collectively, the “leagues”) are the only major professional sports leagues that prohibit player entrance based on the time since high school graduation.<sup>4</sup> Eighteen-year-old high school graduates who wish to pursue a professional career in these leagues are barred from doing so, even though they can vote, as well as fight and die for their country.<sup>5</sup> These age restrictions are a concerted action that bars entry into the leagues, and as such,

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<sup>1</sup> Associated Press, *James signs, ready to lace up for Cavs*, DESERET NEWS (July 4, 2003), available at <http://www.highbeam.com/doc/1P2-7106755.html> (“James signed his three-year, \$12.96 million rookie contract with the Cleveland Cavaliers, who selected the 18-year-old Akron high school phenom with the No. 1 overall pick in the NBA draft.”).

<sup>2</sup> Tim Legler, *Age minimum part of new labor deal*, ESPN.COM (June 21, 2005), <http://sports.espn.go.com/espn/print?id=2091539&type=story>.

<sup>3</sup> NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012 [“NFL CBA”], ART. XVI, § 2(b), available at <http://www.docstoc.com/docs/20343876/NFL-Collective-Bargaining-Agreement-2006-2012>.

<sup>4</sup> Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 731 (2006).

<sup>5</sup> Harvey Araton, *Sports of the Times; Old Enough for the Army, Not the N.F.L.?*, N.Y. TIMES (Feb. 6, 2004), <http://query.nytimes.com/gst/fullpage.html?res=990DEEDE113BF935A35751C0A9629C8B63&n=Top/Reference/Times%>.

each restriction constitutes a “group boycott.”<sup>6</sup> Assuming the non-statutory labor exemption<sup>7</sup> does not apply to these age-based eligibility rules, they violate antitrust laws under a rule of reason analysis.

## II. NBA AND NFL AGE-BASED DRAFT RESTRICTIONS

### A. *The NBA Draft Eligibility Rule*

The NBA originally had no age requirement, but only a handful of high school graduates joined the league.<sup>8</sup> The NBA eventually imposed a rule in its bylaws that required a player to be four years removed from his high school graduation in order to be eligible for the draft.<sup>9</sup> This rule was challenged in 1971 by high school All-American Spencer Haywood.<sup>10</sup> After two years of college, Haywood joined the NBA’s rival at the time, the American Basketball Association (ABA).<sup>11</sup> The ABA had no rule restricting college underclassmen from entering its league.<sup>12</sup> The ABA named Haywood both its Rookie of the Year and its Most Valuable Player.<sup>13</sup> He then signed a contract with the NBA’s Seattle Supersonics.<sup>14</sup> When the NBA threatened to invalidate the contract because Haywood was only three years removed from high school, Haywood filed an antitrust suit against the league and won.<sup>15</sup>

Shortly after the decision in *Haywood*, if a student-athlete wanted to play professional basketball in the NBA, all he needed was a high school diploma or its equivalent.<sup>16</sup> Notable stars such as Moses Malone, Darryl Dawkins, Kevin Garnett, Kobe Bryant, Tracy McGrady, Jermaine O’Neal, LeBron James, Amare Stoudemire and Dwight Howard successfully made the transition directly from high school to the NBA.<sup>17</sup>

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<sup>6</sup> See *The Denver Rockets v. All-Pro Mgmt, Inc.*, 325 F. Supp. 1049, 1060-61 (C.D. Cal. 1971) (explaining that a group boycott occurs when one group of people refuses to contract with another group of people).

<sup>7</sup> The U. S. Supreme Court constructed the non-statutory labor exemption after recognizing that, “to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.” *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996). The exemption is discussed in detail *infra* Part III(B). For a more thorough discussion of the exemption’s history, see Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc.*, 1 U. PA. J. LAB. & EMP. L. 297 (1998).

<sup>8</sup> Prior to Kevin Garnett in 1995, only four players were drafted by NBA teams straight out of high school: Moses Malone (1974), Darryl Dawkins, Bill Willoughby (1975), and Shawn Kemp (1989). *High School Players and the NBA Draft*, RIVALDS.COM, <http://ssbasketballold.rivals.com/content.asp?SID=1132&CID=356192> (last visited Dec. 15, 2010).

<sup>9</sup> *Denver Rockets*, 325 F. Supp. at 1059.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1052.

<sup>12</sup> *Id.* at 1060.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1054.

<sup>15</sup> *Id.*

<sup>16</sup> See Jack N.E. Pitts, Jr., *Why Wait: An Analysis of the National Football League and National Basketball Association’s Draft Eligibility Rules*, 51 HOW. L.J. 433, 435 (2008).

<sup>17</sup> *High School Players and the NBA Draft*, STUDENTSPO RTSBASKETBALL.COM, <http://ssbasketball.rivals.com/content.asp?SID=1132&CID=356192> (last visited Nov. 1, 2010).

In 2005, however, the NBA implemented a new age rule and included it in the league's Collective Bargaining Agreement (CBA).<sup>18</sup> Article X, Section 1(b)(i) of the CBA requires that:

“[T]he player (A) is or will be at least nineteen years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player . . . at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school).”<sup>19</sup>

Essentially, American players must be nineteen years old *and* must wait for one NBA season to elapse after they graduate from high school to be eligible for the draft. The current CBA runs through the 2010-11 season, and the NBA has the option to extend it for the 2011-12 season.<sup>20</sup>

### ***B. The NFL Draft Eligibility Rule***

Like the NBA, the NFL originally had no age eligibility rule barring entry into its league.<sup>21</sup> The NFL adopted its first such rule in 1925.<sup>22</sup> The league unilaterally imposed the rule,<sup>23</sup> requiring that all players be at least four years removed from the time of their high school graduation before they could be eligible for the NFL Draft.<sup>24</sup> The NFL created the rule in response to a star college running back, Harold Edward “Red” Grange (a.k.a. “The Galloping Ghost”), who left the University of Illinois during his senior year and joined the Chicago Bears.<sup>25</sup> Many people, including Grange's head coach at Illinois, condemned his decision because he had “abandoned his studies for a blatantly commercial career” and because it was “unethical for Grange to capitalize upon a reputation that he had acquired in college for direct personal gain.”<sup>26</sup>

The four-year rule remained in effect until 1990, when it was essentially reduced to three seasons.<sup>27</sup> This requirement was set forth in the NFL's Constitution and Bylaws.<sup>28</sup> It required a student-athlete to be four years out of high school, but allowed for a “Special Eligibility” application for players seeking entry into the NFL Draft after only

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<sup>18</sup> NBA 2005 COLLECTIVE BARGAINING AGREEMENT [“NBA CBA”], TIT. X, § 1, *available at* <http://www.nbpa.org/cba/2005>.

<sup>19</sup> *Id.*

<sup>20</sup> Larry Coon, *NBA Salary Cap FAQ*, CBAFAQ.COM (Jul. 8, 2010), <http://members.cox.net/lmcoon/salarycap.htm#Q5>.

<sup>21</sup> *Clarett v. Nat'l Football League*, 306 F. Supp 2d 379, 383-85 (S.D.N.Y. 2004) (reviewing the history of pro football collective bargaining) [“*Clarett I*”].

<sup>22</sup> *Id.* at 385.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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

<sup>26</sup> *Id.*

<sup>27</sup> *Clarett v Nat'l Football League*, 369 F.3d 124, 126 (2d Cir. 2004) [“*Clarett II*”].

<sup>28</sup> *Id.* at 127.

three seasons removed from their high school graduation.<sup>29</sup> This “Special Eligibility” application was merely a formality, as the Commissioner regularly granted such requests.<sup>30</sup>

The NFL’s CBA did not contain an age requirement until 2006.<sup>31</sup> The rule, set forth in Article XVI, Section 2(b) of the 2006 CBA, states:

“No player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.”<sup>32</sup>

While no cases challenging this current rule have been brought, in 2004 Maurice Clarett challenged the previous rule’s three-year minimum.<sup>33</sup> Clarett was a heralded high school running back from Youngstown, Ohio.<sup>34</sup> For his success on the field as a high school senior in 2002, he was named Ohio Mr. Football, *USA Today* High School Offensive Player of the Year, and a *Parade* All-American.<sup>35</sup> The following season Clarett took the field as a member of the Ohio State (OSU) Buckeyes.<sup>36</sup> He was the first freshman in sixty years to begin the season as the starting running back for the Buckeyes.<sup>37</sup> During his freshman campaign, Clarett rushed for over 1,200 yards and scored sixteen touchdowns in just eleven games.<sup>38</sup> Led by Clarett, OSU won its first National Championship in thirty-four years.<sup>39</sup> He was named the Big Ten Freshman of the Year and voted the best running back in college football by *The Sporting News*.<sup>40</sup> At six feet tall and 230 pounds, he was taller and heavier than some of the NFL’s all-time greatest running backs.<sup>41</sup> There was little doubt that Clarett was an NFL-caliber player who would be drafted in the first round.<sup>42</sup>

Due to academic and legal troubles off the field, Clarett was ruled ineligible for his sophomore season.<sup>43</sup> At the time, Clarett was only two years removed from his high school graduation<sup>44</sup> and thus ineligible for the draft for one more year.<sup>45</sup> Clarett decided

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<sup>29</sup> *Id.* at 128-29.

<sup>30</sup> NFL, *Fifty-three players granted special eligibility for 2010 NFL Draft* (Jan. 2010), <http://www.nfl.com/draft/story?id=09000d5d815d4503&template=with-video-with-comments&confirm=true>.

<sup>31</sup> NFL CBA, *supra* note 3, at ART. XVI, § 2(b).

<sup>32</sup> *Id.*

<sup>33</sup> *Clarett I*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

<sup>34</sup> Associated Press, *Timeline: The Rise and Fall of Maurice Clarett*, ESPN.COM (Sept. 18, 2006), <http://sports.espn.go.com/nfl/news/story?id=2545204>.

<sup>35</sup> *Id.*

<sup>36</sup> *Clarett I*, 306 F. Supp. 2d at 382.

<sup>37</sup> *Id.* at 387.

<sup>38</sup> Mark Schlabach, *2001 Hurricanes cream of BCS crop*, ESPN.COM (May 21, 2008), <http://sports.espn.go.com/espn/print?id=3406050&type=story>.

<sup>39</sup> *Clarett I*, 306 F. Supp. 2d at 387.

<sup>40</sup> *Id.* at 388.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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

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

<sup>45</sup> *Id.*

to challenge the NFL's eligibility rule in order to gain entry into the 2004 NFL Draft.<sup>46</sup> He argued that the NFL's age rule was an illegal restraint on trade because it excluded a broad class of players from the NFL labor market, thereby constituting a "group boycott" in violation of antitrust laws.<sup>47</sup> Claret succeeded at the district court level, where the judge held that the non-statutory labor exemption<sup>48</sup> did not apply and the rule violated antitrust laws.<sup>49</sup> The Second Circuit disagreed with the district court and articulated a broad application of the non-statutory labor exemption, shielding the rule from antitrust laws.<sup>50</sup>

### III. ANTITRUST LAWS AND SPORTS

#### A. *Antitrust Laws in the Sports World*

Professional sports leagues are unique in many ways, from the way they are organized to how they are regulated. Antitrust law in the field of sports is no exception to this uniqueness. To understand it, a basic overview of antitrust laws as applied to sports is necessary.

##### 1. *The Sherman Antitrust Act*

Antitrust claims challenging restrictions on trade or commerce arise under the Sherman Act.<sup>51</sup> Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade."<sup>52</sup> The U.S. Supreme Court has long held that only "unreasonable" restraints are prohibited.<sup>53</sup> For a viable Section 1 claim to exist, three requirements must be met: (1) a contract, combination, or conspiracy; (2) the contract, combination or conspiracy produced a restraint of trade; and (3) the restraint affected trade or commerce among the several states.<sup>54</sup> In most settings, restraints of trade concern the product market.<sup>55</sup> This is not so for player restraints in sports, however, which typically concern the labor market.<sup>56</sup>

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<sup>46</sup> *Id.* at 389.

<sup>47</sup> *Id.* at 390.

<sup>48</sup> This exemption is discussed in detail *infra* Part III(B).

<sup>49</sup> *Id.* at 410.

<sup>50</sup> *Clarett II*, 369 F.3d at 124, 142 (2d Cir. 2004).

<sup>51</sup> 15 U.S.C. § 1-7. Congress enacted the Sherman Act in 1890 as a response to anticompetitive practices of large firms forcing out smaller competitors. For a discussion of the origins of federal antitrust laws, see Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports Leagues Labor Market Restraints*, 75 GEO. L.J. 19 (1986).

<sup>52</sup> 15 U.S.C. § 1.

<sup>53</sup> See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

<sup>54</sup> 15 U.S.C. § 1.

<sup>55</sup> *McCann & Rosen*, *supra* note 4, at 734.

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

2. *The Application of the Sherman Act in Professional Sports*

In the 1922 case of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,<sup>57</sup> the Court ruled that major league baseball was exempt from antitrust laws.<sup>58</sup> Many courts subsequently incorrectly granted antitrust exemptions in a variety of professional sports cases,<sup>59</sup> prompting the Court to revisit the issue in 1958 in *International Boxing Club of New York, Inc. v. United States*.<sup>60</sup> In that case, the Court held that there was nothing inherently special about professional sports that deserved granting them a broad exemption from antitrust liability, yet it did not overturn its *Federal Baseball Club* holding.<sup>61</sup> Today, all professional sports leagues except Major League Baseball are subject to the antitrust laws.<sup>62</sup>

3. *Legal Standard: Per Se, Rule of Reason, & “Quick Look”*

There are three legal standards a court may use when evaluating an alleged Section 1 violation. These standards are known as “*per se*,” “rule of reason,” and “quick look.”<sup>63</sup> If a restraint has such a “pernicious” effect on competition, it is deemed *per se* illegal without any inquiry into its justifications, effects or motive.<sup>64</sup> Essentially, *per se* illegality exists if a restraint is illegal on its face.<sup>65</sup> This typically occurs with practices such as group boycotts, price-fixing schemes, and horizontal market divisions.<sup>66</sup>

Alternatively, the “rule of reason” standard examines all the circumstances involved in the disputed practice, both justifications for and arguments against the alleged restriction.<sup>67</sup> The focus of an inquiry under the rule of reason is whether the restraint imposed is justified by a legitimate business purpose and is no more restrictive than necessary.<sup>68</sup> An agreement will be deemed unlawful if it causes an anticompetitive injury that outweighs its pro-competitive effects.<sup>69</sup> The standard attempts to ensure sufficient

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<sup>57</sup> *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208-09 (1922). The Court has refused to overturn this exemption twice, despite finding its original “justification” to no longer be valid. Congress has also rejected numerous bills that would have statutorily removed this exemption.

<sup>58</sup> *Id.*

<sup>59</sup> See Donald G. Kempf, Jr., *The Misapplication of Antitrust Laws to Professional Sports Leagues*, 32 DEPAUL L. REV. 625 (1983).

<sup>60</sup> *Int’l Boxing Club of New York v. United States*, 358 U.S. 242, 245 (1955).

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

<sup>62</sup> *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957).

<sup>63</sup> *McCann & Rosen*, *supra* note 4, at 734.

<sup>64</sup> *N. Pacific Railway v. United States*, 356 U.S. 1, 5 (1957).

<sup>65</sup> *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995).

<sup>66</sup> See, e.g., *Nw. Wholesale Stationers, Inc. v. Pac. Stationary Printing Co.*, 472 U.S. 85 (1985) (holding that a group boycott is a *per se* violation of the Sherman Act); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (finding fee agreements among physicians to be an example of price fixing and therefore a *per se* violation of the Sherman Act); *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972) (finding a horizontal market division to be a *per se* violation of the Sherman Act).

<sup>67</sup> See *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1570 (10th Cir. 1991).

<sup>68</sup> *Mackey v. Nat’l Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

<sup>69</sup> *Nat’l Society of Prof. Engineers v. United States*, 435 U.S. 679 (1978) (describing the evolution of the Rule of Reason and explaining the rule’s focus on the competitive significance of the restraint).

competition within a marketplace, and courts often consider the possibility of less restrictive means to achieve the same effects.<sup>70</sup>

A third standard, somewhat of a hybrid form of scrutiny, is the “quick look” rule of reason standard. Here the *per se* and rule of reason standards are blended together. “Quick look” borrows the presumption of unreasonable practices from the *per se* standard and, like the rule of reason, it considers likely anticompetitive effects and market power; only, however, “to the degree necessary to understand a challenged restraint’s competitive consequences.”<sup>71</sup>

#### 4. *The Rule of Reason - The Standard for Sports*

Courts typically regard sports leagues as functionally unique and thus better suited for either a rule of reason or “quick look” rule of reason analysis when evaluating a Section 1 claim.<sup>72</sup> Professional sports leagues are unique insofar as they act as collaborations whose teams compete individually on the field but cooperate economically off it for the prosperity of the league.<sup>73</sup> Additionally, courts generally accept that professional sports leagues need to enforce various on and off-field regulations in order to exist and function.<sup>74</sup> Some regulations, such as when and where games are to be played and what rules are to be followed during the game, are necessary to facilitate competition, even if they might otherwise be viewed as illegal restraints on trade.<sup>75</sup> For these reasons, the rule of reason analysis has become the preferred form of scrutiny used by the courts in deciding antitrust claims involving professional sports.<sup>76</sup>

The seminal case for applying the rule of reason instead of a *per se* rule in the sports-related antitrust context is *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.<sup>77</sup> The case involved members of the NCAA bringing an antitrust challenge to the association’s plan for televising college football games.<sup>78</sup> The arrangement limited the amount of intercollegiate football games that could be televised and disallowed the sale of television rights by individual teams unless it was

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<sup>70</sup> *Tarabishi*, 951 F.2d at 1569-71.

<sup>71</sup> William E. Cohen, *Per se Illegality and Truncated Rule of Reason: The Search for a Foreshortened Antitrust Analysis*, FTC STAFF DISCUSSION DRAFT (Nov. 1997), available at <http://www.ftc.gov/opp/jointvent/persepap.htm>; see also Marc C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U.L. REV. 125, 126, 130-31 (2002) (noting how quick look rule of reason “avoids automatic condemnation of a restraint but does not require an in-depth analysis to evaluate the restraint”).

<sup>72</sup> See, e.g., Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 147-48 (1999).

<sup>73</sup> Cf. 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* P 1503.1 (2d ed. 2003); Nathaniel Grow, *There’s No “I” in “League”*: Professional Sports Leagues and the Single Entity Defense, 105 MICH. L. REV. 183 (2006); Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 64 (2006); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 252 (1984).

<sup>74</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984).

<sup>75</sup> See *id.* at 101.

<sup>76</sup> See Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS LAW. J. 205, 209 (1996).

<sup>77</sup> See *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 85.

<sup>78</sup> *Id.*

in accordance with the plan.<sup>79</sup> The U.S. Supreme Court held that the NCAA's actions were a restraint on trade and ruled in favor of the universities. The Court reasoned that, although the plan created horizontal price-fixing and output limitation, a rule of reason analysis was proper instead of *per se* because horizontal restraints on trade were essential if the product was to be available at all.<sup>80</sup>

Similarly, in *Smith v. Pro Football, Inc.*,<sup>81</sup> the same analysis was used in applying the rule of reason. In *Smith*, a former professional football player brought an antitrust action against the NFL based on an unlawful restraint arising out of the player draft.<sup>82</sup> In choosing to apply the rule of reason, the appellate court stated, "the courts have consistently refused to invoke the boycott *per se* rule where, given the peculiar circumstances of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal."<sup>83</sup> The court found that the NFL player draft, as it existed in 1968, had a severely anticompetitive impact on the market for players' services, and its alleged precompetitive effect upon playing field equality did not encourage economic competition.<sup>84</sup> Therefore, the draft unreasonably restrained trade in violation of Section 1 of The Sherman Act.<sup>85</sup>

### ***B. The Non-Statutory Labor Exemption in Sports***

The U.S. Supreme Court created the non-statutory labor exemption to accommodate Congressional policies favoring collective bargaining under the National Labor Relations Act and free competition in business markets.<sup>86</sup> Union-employer agreements and some aspects of the collective bargaining process have thus been accorded a non-statutory exemption from antitrust sanctions.<sup>87</sup>

In the 1976 case of *Mackey v. National Football League*,<sup>88</sup> the Eighth Circuit established a three-pronged test to determine when the non-statutory labor exemption should apply. This test, now known simply as the *Mackey* test, requires courts to consider

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<sup>79</sup> *Id.* at 92.

<sup>80</sup> *Id.* at 101-03.

<sup>81</sup> *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

<sup>82</sup> *Id.* at 1174.

<sup>83</sup> *Id.* at 1180.

<sup>84</sup> The NFL Draft included a "no-tampering" rule under which, as it existed in 1968, precluded teams from negotiating with eligible draftees prior to the draft. *Id.* at 1183.

<sup>85</sup> *Id.*

<sup>86</sup> Collectively, the Clayton Act of 1914, the Norris-Laguardia Act of 1932 and the National Labor Relations Act of 1935 make up the non-statutory labor exemption.

<sup>87</sup> Unions are combinations of individuals that seek to preclude an employer from negotiating with individual employees.

<sup>88</sup> *Mackey* involved a challenge to the NFL's *Rozelle* Rule, which provided that once a player's contract expired and he signed with another team, his new team had to provide compensation to the previous team. If the teams couldn't reach an agreement, the Commissioner could step in and provide compensation in the form of players and/or draft picks as he deemed "fair and equitable." The plaintiffs argued that the rule "constituted an illegal combination and conspiracy in restraint of trade, denying professional football players the right to freely contract for their services." In applying its test, the court found that the rule did not satisfy the third prong because the rule was unilaterally imposed, rather than the product of bona fide arm's-length negotiation. Therefore, the *Rozelle* Rule did not qualify for non-statutory exemption. Consequently, the court went on to find that the rule violated the Sherman Act under a rule of reason analysis. *See Mackey*, 543 F.2d at 606-08 (8th Cir. 1976).

whether (1) the restrictions affect only parties to the collective bargaining relationship; (2) the restrictions concern a mandatory subject of collective bargaining; and (3) the restrictions are a product of *bona fide* arm's-length bargaining.<sup>89</sup> Pursuant to the National Labor Relations Act, "mandatory" subjects of collective bargaining here pertains to "wages, hours, and other working conditions of employment."<sup>90</sup>

However, in 1991 the Supreme Court in *Brown v. Pro Football, Inc.*<sup>91</sup> did not apply the *Mackey* test. In fact, the Court did not adopt any specific test for applying the exemption, refusing to draw a line between what should and should not be covered by it. The Court did state that the collective bargaining process should be protected from antitrust scrutiny.<sup>92</sup> The Court also recognized the apparent conflict between antitrust and labor law: antitrust law seeks to prohibit unreasonable restraints on trade, yet labor law will allow some anticompetitive agreements "conducive to industrial harmony."<sup>93</sup> This conflict of laws, combined with the lack of a specific test to follow, makes determining when the non-statutory labor exemption should be applied a rather speculative task.

The NFL and NBA are unionized leagues, with their players represented by the National Football League Players Association (NFLPA) and the National Basketball Players Association (NBPA), respectively.<sup>94</sup> The leagues and player associations negotiate the terms of employment and memorialize them in a collective bargaining agreement (CBA), which periodically expires and is renegotiated.<sup>95</sup> Due to the non-statutory labor exemption, most restrictions included in CBAs are likely to withstand judicial scrutiny.<sup>96</sup> In *Clarett II*, the Second Circuit held that the NFL's eligibility rule fell within the scope of the non-statutory labor exemption.<sup>97</sup> Similarly, in *Wood v. National Basketball Association*<sup>98</sup> the court all but immunized the NBA Draft from antitrust attacks where the draft rules were the result of collective bargaining.<sup>99</sup>

If an athlete barred by the age restrictions were to challenge the leagues' rules in the future, a different circuit court could very well disagree with the Second Circuit and find that the non-statutory labor exemption does not apply. This would likely be due to a decision to use the *Mackey* test and a finding of failure of either the first or second prong. The *Clarett I* trial judge found that neither prong was met in that case,<sup>100</sup> though this finding did not withstand appeal. The first prong, that the restrictions affect only the

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<sup>89</sup> *Id.* at 614.

<sup>90</sup> 29 U.S.C. § 158(d) (2010); *see also* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

<sup>91</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

<sup>92</sup> Since labor and management had attempted to come to an agreement on a mandatory subject of collective bargaining (salary), the Court was not willing to step in and create its own solution. *Id.* at 240-41.

<sup>93</sup> *Id.*

<sup>94</sup> These players' associations are trade unions for NBA and NFL athletes and operate under the guidelines of the National Labor Relations Act.

<sup>95</sup> Daniel A. Applegate, *The NBA Gets a College Education: An Antitrust and Labor Law Analysis of the NBA's Minimum Age Limit*, 56 CASE W. RES. L. REV. 825, 825-54 (2006).

<sup>96</sup> Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players From the NFL Draft*, 3 VA. SPORTS & ENT. L.J. 113, 196 (2004).

<sup>97</sup> *Clarett II*, 369 F.3d 124 (2d Cir. 2004).

<sup>98</sup> Leon Wood attacked the NBA Draft as "an agreement among horizontal competitors, the NBA teams, to eliminate competition for the services of college basketball players." *Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954, 959-62 (2d Cir. 1987).

<sup>99</sup> *Wood*, 809 F.2d at 963

<sup>100</sup> *Clarett I*, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

bargaining parties, might fail because underage prospects and other potential league members are affected by the agreement yet are not parties to it.<sup>101</sup> Under the second prong, certain restrictions might be invalid if not classified as a mandatory subject of the collective bargaining.

Due to confusion and a lack of clearly articulated standards from the U.S. Supreme Court, a court might find that the exemption simply does not apply for other reasons. This is a realistic possibility because, over time, the interpretations of the non-statutory labor exemption and the decisions as to how much protection from antitrust scrutiny it should provide have varied.<sup>102</sup> The holding in *Clarett II* was the opinion of but one federal court of appeals. It is possible that the next time a challenge to a professional sports leagues' age-based eligibility rules is brought, the exemption will not apply. For the remainder of this paper, it is assumed that at least one of these scenarios holds true, and that the non-statutory labor exemption does not apply to the leagues' draft restrictions.

#### IV. APPLYING THE RULE OF REASON TO THE DRAFT RESTRICTIONS

##### A. *Basic Framework of a Rule of Reason Analysis*

The leagues' age eligibility rules are a concerted action barring players' entry into their respective professional sport.<sup>103</sup> Such rules would be illegal under a *pro se* analysis due to violations of antitrust laws.<sup>104</sup> However, assuming the non-statutory labor exemption does not apply, a court would analyze the restrictions under a rule of reason analysis. This requires weighing the anticompetitive effects of the restraint against its pro-competitive justifications. Doing so should lead to a finding that the leagues' age-based eligibility restrictions violate antitrust laws.

In order to establish a claim under a rule of reason analysis, a plaintiff first must show there is an agreement. There is no question that an agreement to restrain trade exists in this situation. The teams collectively agreed in their respective CBAs to implement the minimum age limits. Next, a plaintiff must make a showing of harm in the relevant market. The relevant market here is the market for professional basketball and football player services, over which the NBA and NFL have virtually limitless control. By not permitting some players to compete in the NBA and NFL, those players are largely precluded from earning a living playing professionally in their home country. Moreover, insofar as players are sellers of talent and professional teams are the buyers of that talent, age restrictions act as a purchaser's bar on an entire class of sellers, which harms competition in the absence of an comparable alternative markets.

When dealing with the NBA and NFL, there are no comparable leagues. The NBA currently has no other professional basketball league in direct competition with it.

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<sup>101</sup> It is important to note that job "applicants" can typically be constrained by collective bargaining agreements. *See, e.g.,* *Reliance Ins. Co. v. NLRB*, 415 F.2d 954, 959-62 (2d. Cir. 1987).

<sup>102</sup> Pitts, *supra* note 16, at 440.

<sup>103</sup> *See* Jason Abeln et al., *Lingering Questions After Clarett v. NFL: A Hypothetical Consideration of Antitrust and Sports*, 73 U. CIN. L. REV. 1767, 1781-90 (2005).

<sup>104</sup> Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 103, 125 (2005).

Even international leagues are in a different market due to lower skill levels and salaries.<sup>105</sup> Numerous attempts have been made to establish and maintain major professional football leagues in the U.S. One example was the Arena Football League, which recently folded.<sup>106</sup> Currently, the NFL is the only major professional football league in existence in the United States.<sup>107</sup> The closest competitor to the NFL is the Canadian Football League (CFL).<sup>108</sup> However, only a handful of CFL players earn more than the NFL minimum salary.<sup>109</sup> As the district court in *Clarett I* stated, “The League’s suggestion that one of the other professional football leagues in North America is a fair substitute for the NFL cannot be taken seriously.”<sup>110</sup> The NFL clearly represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition.<sup>111</sup> For these reasons, the NFL and NBA have no reasonably comparable employers. These leagues dominate the global market, and therefore have market power not just in the United States, but throughout the world. Such market power enhances the likelihood of anticompetitive effects.<sup>112</sup> For reasons discussed below, barring student-athletes from competition based on age harms both the labor market and the consumer market.<sup>113</sup>

### ***B. Anticompetitive Effects on the Individual***

The harm to a student-athlete excluded from the leagues based on age alone flows from a harm to competition.<sup>114</sup> Anticompetitive effects on the individual athletes are numerous and severe, and they stem directly from the leagues’ age-based eligibility restrictions. First and foremost, eighteen-year-old adults are allowed to participate in various other activities that are even more inherently dangerous than playing professional basketball or football. The most blatant example being that these men can and do fight and die for our country in wars. Also, often overlooked are other professional sports that are arguably more dangerous than football, such as hockey or boxing, that allow young athletes to compete.<sup>115</sup>

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<sup>105</sup> McCann, *supra* note 96, at 214-15.

<sup>106</sup> Tom Mix, *Economy woes threaten sports*, COLUMBUS TELEGRAM (Jan 4, 2009), [http://columbus.telegram.com/sports/article\\_077c715c-9fb0-55f0-b2c7-c59a3f79981f.html](http://columbus.telegram.com/sports/article_077c715c-9fb0-55f0-b2c7-c59a3f79981f.html) (“The Arena Football League was forced to fold and cancel the 2009 season.”).

<sup>107</sup> New professional football leagues in the United States include the United Football League (UFL), which began play in 2009, and the All American Football League (AAFL), which is set to begin play in the spring of 2011.

<sup>108</sup> The Canadian Football League was founded in 1958; it is currently located entirely in Canada, after an unsuccessful attempt to expand into the United States from 1992-1996; *see* <http://www.cfl.ca/> (last visited Dec. 3, 2009).

<sup>109</sup> *Clarett I*, 306 F. Supp. 2d 379, 383-84 (S.D.N.Y. 2004).

<sup>110</sup> *Id.* at 407.

<sup>111</sup> *Id.* at 384.

<sup>112</sup> Pitts, *supra* note 16, at 466-67.

<sup>113</sup> *Cf.*, Symposium, Panel II: *Maurice Clarett’s Challenge*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391, 405 (2005).

<sup>114</sup> *Clarett I*, 306 F. Supp. 2d at 401.

<sup>115</sup> Jamie Fitzpatrick, *NHL Draft Day Basics*, ABOUT.COM, [http://procehockey.about.com/cs/prospects/a/nhl\\_draft\\_basic.htm](http://procehockey.about.com/cs/prospects/a/nhl_draft_basic.htm) (last visited Dec. 16, 2010); World Pro. Boxing Fed., *Youth Rules*, <http://www.wpbfc-usbc.org/frame/Youths%20Rules.htm> (last visited Dec. 16, 2010).

Perhaps most importantly is that the leagues' restrictions deny the individual athletes the right to pursue their calling. It has long been held that antitrust law will not tolerate a contract "which unreasonably forbids anyone to practice his calling."<sup>116</sup> These age-based rules are a complete, albeit temporary, bar to entry into the market, which is the type of injury that the antitrust laws were designed to prevent.<sup>117</sup> Along with this barrier to pursue one's calling comes the inability to earn enormous financial incentives for the individual athletes and their families. The average NBA salary in 2007-08 was \$5.356 million,<sup>118</sup> while the NFL's average salary is \$1.1 million.<sup>119</sup> Players who make the jump from high school to the pros are not necessarily earning league minimum salaries, either, because their lack of experience is overshadowed by their immense potential. In the NBA, the players drafted straight from high school who are currently playing have a higher median salary than the median NBA salary as a whole.<sup>120</sup> In fact, high school players who entered the NBA make more money, and do so at a faster rate, than any other age group within the league.<sup>121</sup> Also important is that these players become unrestricted free agents sooner by making the jump directly to the NBA, which oftentimes allows them to demand even more money sooner in their second contract now that they have more experience.<sup>122</sup> By not allowing a student-athlete to join the NBA out of high school, the player is not only denied the ability to make millions of dollars right away, but he will also be locked into the nearly non-negotiable rookie salary scale for one more year.<sup>123</sup>

A recent example of a heralded high school basketball player being forced to uproot his family overseas to earn a living is Brandon Jennings. In 2008, Jennings was the top high school prospect in the nation, winning all the major high school player of the year awards and was named a McDonald's All-American.<sup>124</sup> After signing a letter of intent to play college basketball at the University of Arizona, Jennings changed his mind and decided to play professionally in Europe instead.<sup>125</sup> He became the first American

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<sup>116</sup> *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949).

<sup>117</sup> *Clarett I*, 306 F. Supp. 2d at 382.

<sup>118</sup> S.F. Heron, *The average salaries of NBA players*, HELIUM, <http://www.helium.com/items/923616-the-average-salaries-of-nba-players> (last visited Dec. 15, 2010). The league minimum in 2009-20 was \$457,588. *Minimum Annual Salary Scale*, NBA.COM, [http://www.nba.com/news/cba\\_minimalsalary\\_050804.html](http://www.nba.com/news/cba_minimalsalary_050804.html) (last visited Dec. 15, 2010).

<sup>119</sup> *NFL Hopeful Frequently Asked Questions*, NFL PLAYERS ASSOC., <http://nflplayers.com/> (last visited Oct. 25, 2010) ("This year, the average NFL salary was \$1.1 million. Qualifying players also receive a wide variety of fringe benefits including pre-season pay, life, dental and medical insurance, severance pay, disability benefits and pension coverage.").

<sup>120</sup> McCann, *supra* note 96, at 325-26.

<sup>121</sup> *Id.* at 326.

<sup>122</sup> An unrestricted free agent is free to sign with any team, though some unrestricted free agents have options on their existing contracts that, if exercised, may impact their choices.

<sup>123</sup> In 2009-10, the NBA Rookie Scale for the first overall pick was \$4,152.9 for the first-year salary, \$4,464.4 for the second-year salary, and \$4,775.9 for the third-year option salary. *See 2009-10 NBA Rookie Scale*, HOOPSWORLD, [http://www.hoopsworld.com/Story.asp?story\\_id=9301](http://www.hoopsworld.com/Story.asp?story_id=9301) (last updated July 20, 2008).

<sup>124</sup> *Brandon Jennings*, ESPN.COM, [http://espn.go.com/mens-college-basketball/recruiting/player/\\_/id/43264/brandon-jennings](http://espn.go.com/mens-college-basketball/recruiting/player/_/id/43264/brandon-jennings) (last visited Dec. 16, 2010).

<sup>125</sup> *Brandon Jennings*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/j/brandon\\_jennings/index.html](http://topics.nytimes.com/top/reference/timestopics/people/j/brandon_jennings/index.html) (last updated Nov. 15, 2009).

high school basketball player to skip college to play for a European professional team.<sup>126</sup> Jennings, his mother, and his brother all moved to Italy together. Jennings signed a three-year deal with Lottomatica Virtus Roma, which guaranteed him \$1.65 million.<sup>127</sup> While in Italy, Jennings did not produce as expected. He only played seventeen minutes per game, while averaging less than six points per game.<sup>128</sup> If anything, his time in Europe hurt his “draft stock.” After one year overseas, Jennings entered the 2009 NBA draft. He was fortunate enough to be selected tenth overall by the Milwaukee Bucks, landing a five-year, \$4.5 million deal.<sup>129</sup> The \$2.1 million Jennings made in his first year in the NBA is far more than the \$1.65 million he would have made over three years in Europe. While Jennings was able to acquire an endorsement deal with Under Armor during his time in Italy, there likely would have been many more commercial opportunities for him in the United States. If not for the arbitrary age rule that prohibited him from entering the 2008 NBA Draft, Jennings would have been able to increase his income exponentially. Jennings continues to prove his worth in the NBA, where in November 2009 he set the single game scoring record for a Milwaukee Bucks rookie with 55 points.<sup>130</sup>

Aside from off-the-field financial opportunities such as endorsements, a professional athlete can only make money based on their performance for as long as they are physically able to play at a high level. As an athlete’s skills deteriorate, typically so does their paycheck. In fact, the professional athlete’s career is much shorter than many perceive. For example, the average NBA career lasts only five years.<sup>131</sup> The average NFL career is even shorter, lasting just three-and-a-half years.<sup>132</sup> By not allowing an athlete to enter the NBA for one year, a player will lessen the likelihood that his playing career will extend beyond, or even meet, the league average. That lost year impacts their financial earning capacity, including the delayed ability to become a free agent. The NFL, by delaying entry for three years, could even eliminate the entire career of a potential player.

One example of the NFL age restriction leading to the elimination of a professional career is the tragedy of Maurice Clarett. While most people know of his successes on the football field in college and his subsequent failure in the courtroom, many people do not know the story of what happened to Clarett after he was denied entry into the NFL Draft. He had lost his college eligibility, and thus sat out for two full football seasons.<sup>133</sup> In 2005, Clarett came to the NFL pre-draft workouts out of shape.<sup>134</sup>

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<sup>126</sup> Chris Broussard, *Exchange Student*, ESPN.COM, <http://sports.espn.go.com/espnmag/story?id=3715746> (last visited Dec. 16, 2010).

<sup>127</sup> *Id.*

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

<sup>129</sup> *Jennings* (N.Y. TIMES), *supra* note 124.

<sup>130</sup> *Id.*

<sup>131</sup> Arn Tellem, *Pro and Con of Permitting Teenage Pros in the N.B.A.: THE AGENT; Proposed Age Limit is Hollow Altruism*, N.Y. TIMES May 13, 2001, at 11, available at <http://www.nytimes.com/2001/05/13/sports/pro-con-permitting-teenage-pros-nba-agent-proposed-age-limit-hollowaltruism.html?pagewanted=1>.

<sup>132</sup> *NFL Hopeful Frequently Asked Questions*, NFL PLAYERS ASSOCIATION, <http://nflplayers.com/> (last visited Oct. 25, 2010) (“The average length of an NFL career is about 3 and a half seasons. Although there are some exceptional players who have long careers that extend 10 or twelve seasons and beyond, most players only stay active for about three seasons. Players leave the game because of injury, self-induced retirement, or being cut by the team. This also means that while players may make more money than most people, they are only making it for an average of three and a half years.”).

<sup>133</sup> *Clarett I*, 306 F. Supp. 2d 379, 388 (S.D.N.Y. 2004).

He ran a very disappointing 4.82-second forty-yard dash.<sup>135</sup> Clarett, or “Slow Mo” as he was called then, was fortunate enough to be selected with the 101<sup>st</sup> pick by the Denver Broncos.<sup>136</sup> He showed up to training camp overweight, and was soon released by the team without having played a single down in the NFL.<sup>137</sup> Due in large part to his legal challenge of the NFL’s age-eligibility rule, Clarett was over one million dollars in debt and in and out of employment.<sup>138</sup> This led to an incident in January of 2006 in which Maurice attempted to rob a couple at gunpoint outside a nightclub in downtown Columbus, Ohio.<sup>139</sup> Seven months later, after making an illegal U-turn, he led police on a high-speed chase.<sup>140</sup> The chase ended when Clarett’s vehicle ran over a police spike strip.<sup>141</sup> After being subdued, police discovered Clarett was wearing Kevlar body armor.<sup>142</sup> Inside the car were loaded guns and an open bottle of vodka.<sup>143</sup> He accepted a plea bargain and was sentenced to seven and a half years in prison, with the possibility of early release after three and a half years.<sup>144</sup> While it is possible that Maurice Clarett would have had both personal and legal issues even if his NFL rule challenge had been successful, the situation may have been completely avoided. If not for the age-based eligibility restriction, Maurice may have gone straight to the NFL, had a successful career, and would still be making millions to this day. Instead, he is blogging from a federal prison cell in Toledo.<sup>145</sup> While much of this is ultimately no one’s fault but

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<sup>134</sup> Steve Wilstein, *Williams Walks Through Door Clarett Opened*, NBC SPORTS (Feb. 28, 2004), <http://nbcsports.msnbc.com/id/4377775/> (“Out of shape and away from competition for a year, he left scouts shaking their heads when he passed up a chance to show off his talents at the NFL combine workouts last week. He’ll be lucky to be drafted in the first two or three rounds.”).

<sup>135</sup> Don Banks, *Not so fast: Clarett plummets down draft board with bad 40*, SI.COM (Feb. 26, 2005), [http://sportsillustrated.cnn.com/2005/writers/don\\_banks/02/26/clarett.combine/](http://sportsillustrated.cnn.com/2005/writers/don_banks/02/26/clarett.combine/) (“In his two cracks at the 40 on Saturday at the RCA Dome, Clarett false-started, then ran a glacier-like 4.82 [-second forty-yard dash] and followed it up with a slightly improved 4.72.”).

<sup>136</sup> Eddie Pells, *Troubled Back Looks Forward to Starting Anew*, USA TODAY, Apr. 24, 2005, available at [http://www.usatoday.com/sports/football/2005draft/2005-04-24-broncos-clarett\\_x.htm](http://www.usatoday.com/sports/football/2005draft/2005-04-24-broncos-clarett_x.htm).

<sup>137</sup> See Michael Wilbon, *The Clarett Saga is a Wake-Up Call for Us All*, WASHINGTON POST, Aug. 10, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080902074.html>; see also Tom Friend, ABC News, *Maurice Clarett’s Last Call, Possibly, As a Free Man: NFL Running Back’s Arrest Just the Latest in Long Downward Spiral*, ABC NEWS, Aug. 9, 2006, available at <http://abcnews.go.com/Sports/story?id=2297018&page=1>.

<sup>138</sup> Jason Cole, *Rookie RB Brown keeps ego in check*, THE MIAMI HERALD, Sept. 7, 2005 (“According to two sources, Clarett is already \$1 million in debt from legal fees for his fight with the NFL and other costs.”).

<sup>139</sup> *Ex-Ohio State Star Clarett Appears in Court, Post \$50K Bond*, CBS SPORTS LINE (Jan. 2, 2006), <http://www.sportslines.com/print/collegefootball/story/913826>.

<sup>140</sup> Associated Press, *Clarett Agrees to Plea Deal, Will Serve 3 ½ Years*, ESPN.COM (Sept. 18, 2006), <http://sports.espn.go.com/espn/print?id=2593068&type=story>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Maurice Clarett, *The Mind of Maurice Clarett* (May 25, 2009), <http://mauriceclarett.wordpress.com/> (“I can’t hold these feelings in anymore. I want to play football again. I have a deep desire to play. I love the game. I have so much penitentiary aggression pinned up inside of me. I want to hit someone. I want to run the ball. I want to tackle someone. I want to play. I am going to play somewhere. I cannot accept how things ended. I won’t accept how they ended. I am 220, rock solid. I am moving swift, running fast, and jumping high. My mind is right and my life is in order. I am 25 but I feel like I am 18. I am still young.”)

Clarett's, it would nonetheless be a shame if a future star athlete were barred from earning a living by the leagues' age restrictions and suffered a similar fate.

Aside from the shortening of a professional athlete's career, there are other financial considerations regarding the risks players must face due to their inability to enter the leagues. The two most considerable risks are injury and the dropping of draft "stock." Some athletes are so talented at the age of eighteen that NBA coaches and scouts feel they are good enough to be selected high in the draft immediately out of high school.<sup>146</sup> In fact, prior to the current NBA rule, many players were.<sup>147</sup> Such players include stars like Moses Malone, Darryl Dawkins, Kevin Garnett, Kobe Bryant, Jermaine O'Neal, Tracy McGrady, Al Harrington, Rashard Lewis, Tyson Chandler, Amare Stoudemire, LeBron James and Dwight Howard.<sup>148</sup> It only takes one look at either the 2009 NBA Finals rosters or the 2009 NBA All-Star game rosters to realize the effect these players have on the game today. Between the two teams competing in the Finals, five players began playing professional basketball prior to when they would be allowed to under the current NBA rule.<sup>149</sup> In the All-Star game, eight of the twenty-four players fit this description, as well as three of the five players selected to the 2009-2010 All-NBA first team.<sup>150</sup>

Recent NBA Drafts also provide evidence that teams who have the top picks are still willing to draft younger players based on potential over older, more experienced players. In 2007, the top two picks were college freshmen Greg Oden<sup>151</sup> and Kevin Durant.<sup>152</sup> Oden and Durant were ranked one and two, respectively, in the 2006 high

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Those who do support me deserve and want to see me out there playing again. I play with some pretty good athletes back here. In the penitentiary you could say basketball is football. Back here everything is aggressive. Everything is intense. I know I am an asset to someone's locker room on so many levels. I've survived some of life's worst struggles. I am not a statistic. I am still here and I am still living. I didn't and won't give up. I am a winner. I am optimistic. I am inspirational. I am alive. I want to play for the love and the respect. I want to play for the underdogs. I want to play because I know how to really well. Hopefully, they'll open these gates soon and I'll be able to get out on the field again. I am healthy mentally and physically. I am rock solid. I train hard. I go hard. I'm HERE.")

<sup>146</sup> Fourteen high school seniors were drafted with a top ten pick by NBA teams from 1995-2005. Interestingly, Kobe Bryant was not one of them, as he was selected with the 13<sup>th</sup> pick in the 1996 NBA Draft.

<sup>147</sup> Forty-five high school players were drafted by NBA teams between 1962 and 2005.

<sup>148</sup> For a complete list of high school players who have entered the NBA Draft, see *High School Players and the NBA Draft*, RIVALDS.COM, <http://ssbasketballold.rivals.com/content.asp?SID=1132&CID=356192> (last visited Dec. 15, 2010).

<sup>149</sup> The Los Angeles Lakers faced the Orlando Magic in the 2009 NBA Finals; the five players on the rosters who began playing professional basketball prior to turning nineteen were, for the Magic: Hedo Turkoglu, Rashard Lewis and Dwight Howard, and for the Lakers: Andrew Bynum and Kobe Bryant. See John Saraceno, *Non-College players dominate NBL Finals rosters*, USA TODAY, June 12, 2009, available at [http://www.usatoday.com/sports/basketball/nba/2009-06-12-non-college-players\\_N.htm](http://www.usatoday.com/sports/basketball/nba/2009-06-12-non-college-players_N.htm).

<sup>150</sup> The eight 2009 NBA All-Stars who began playing professional basketball prior to turning nineteen included: LeBron James, Kevin Garnett, Dwight Howard, Kobe Bryant, Amare Stoudemire, Rashard Lewis, and international players Dirk Nowitzki and Tony Parker. That same year, LeBron James was named League MVP, and Dwight Howard was named Defensive MVP. *2009 All-Star Rosters*, NBA.COM, <http://www.nba.com/allstar2009/players/> (last visited Dec. 16, 2010).

<sup>151</sup> Greg Oden played at Ohio State for one season, leading them to a Big Ten Championship and National Runner-Up; he was drafted with the first pick in the 2007 NBA Draft by the Portland Trailblazers.

<sup>152</sup> Kevin Durant played one season at the University of Texas, where he was named the 2007 National College Player of the Year; he was selected second overall in the 2007 NBA Draft by the Seattle

school basketball recruiting rankings.<sup>153</sup> Similarly, in the 2008 NBA Draft, four of the top five players selected were college freshmen, and the fifth was just a sophomore.<sup>154</sup> Like Oden and Durant, those four freshmen were among the top six of the 2007 high school basketball recruiting rankings.<sup>155</sup> In comparison, only five college seniors were drafted in the entire first round.<sup>156</sup> In 2010, the University of Kentucky alone had a record four freshmen selected in the first round of the NBA Draft, including the first overall pick.<sup>157</sup> Arguably, all of these college freshmen chosen high in the drafts would have been drafted at or about the same spot the year prior had the age rule not barred them from participating. While their draft “stocks” may not have dropped due to the one year they spent in college, they are still harmed. They were not able to earn a paycheck for that year, they will become free agents one year later, and their professional careers have been shortened by a year.

The popular counterargument to this is that for every success story, such as Kobe Bryant, there are multiple failures, such as Kwame Brown.<sup>158</sup> However, this argument is of little merit because there are also plenty of highly touted high school recruits who choose to attend college and never live up to the lofty expectations. “[H]igh school players [do so] so well in the NBA because they knew they would . . . ; otherwise, they would not have declared.”<sup>159</sup> The facts illustrate the truth, which is that there are far more “prep-to-pro” successes than failures. Of the forty-eight American players who entered the NBA Draft right out of high school prior to the implementation of the new rule, forty-two were drafted.<sup>160</sup> Twenty-nine of those forty-two were first-round picks.<sup>161</sup> Of the forty-four high school players drafted since 1995, only six are no longer playing in the NBA,<sup>162</sup> while six others were selected to play in the 2009 NBA All-Star Game.<sup>163</sup>

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Supersonics; after his first season in the NBA, he was named Rookie of the Year. *Kevin Durant*, NBA.COM, [http://www.nba.com/playerfile/kevin\\_durant/bio.html](http://www.nba.com/playerfile/kevin_durant/bio.html) (last visited Dec. 16, 2010).

<sup>153</sup> *The Rivals 150 2006 Prospect Ranking*, RIVALDS.COM, <http://rivals.yahoo.com/naaa/basketball/recruiting/rankings/rank-1428> (last updated June 8, 2006).

<sup>154</sup> College freshmen Derrick Rose, Michael Beasley, O.J. Mayo and Kevin Love were selected with the first, second, third, and fifth picks, respectively; sophomore Russell Westbrook was selected with the fourth pick. *Draft 2008*, NBA.COM, <http://www.nba.com/draft2008/> (last visited Oct. 28, 2010).

<sup>155</sup> *The Rivals 150 2007 Prospect Ranking*, RIVALDS.COM, <http://rivals.yahoo.com/naaa/basketball/recruiting/rankings/rank-1611> (last updated Nov. 7, 2007).

<sup>156</sup> *Draft 2008*, *supra* note 154.

<sup>157</sup> See MyNBADraft.com, *2010 Draft Results Round 1*, <http://www.mynbadraft.com/NBA-Draft-Results> (last visited Dec. 18, 2010).

<sup>158</sup> Kwame Brown was a McDonald’s High School All-American; he committed to the University of Florida, but later decided to enter the 2001 NBA Draft straight out of high school where he was the first overall pick by the Washington Wizards; he has largely failed to live up to the high expectations, averaging only seven points per game over his nine year career. *Kwame Brown Info Page*, NBA.COM, [http://www.nba.com/playerfile/kwame\\_brown/](http://www.nba.com/playerfile/kwame_brown/) (last visited Oct. 30, 2010).

<sup>159</sup> See McCann, *supra* note 96, at 162.

<sup>160</sup> It should also be noted that, while six high school seniors went undrafted, one of those six, Jackie Butler, was signed by the New York Knicks during the 2004-2005 season. *Knicks Sign Jackie Butler*, NBA.COM (Feb. 27, 2005), [http://www.nba.com/knicks/news/butler\\_050227.html](http://www.nba.com/knicks/news/butler_050227.html).

<sup>161</sup> These reflect the author’s own calculations, with information gathered in part from *Draft NY 08*, NBA.COM, [http://www.nba.com/history/draft\\_index.html](http://www.nba.com/history/draft_index.html) (last visited Dec. 3, 2010).

<sup>162</sup> *Id.*

<sup>163</sup> *2009 All Star Roster*, NBA.COM, <http://www.nba.com/allstar2009/players/> (last visited Dec. 16, 2010) (LeBron James, Kevin Garnett, Dwight Howard, Kobe Bryant, Amare Stoudemire and Rashard Lewis).

Every year there are top high school prospects who are forced to either attend college or move overseas because of the draft rule. The 2009 draft was no exception, as most NBA scouts believed that University of Kentucky freshman John Wall would have been the first overall pick in that year's draft had he been allowed to enter it.<sup>164</sup> Blake Griffin of the University of Oklahoma was selected with that pick and was handsomely rewarded with a rookie salary scale contract of \$16,071,840.<sup>165</sup> If Wall had suffered a career-ending injury playing for the Wildcats during the 2009-2010 season, he would have never seen a dime of what he could have earned had he been given the opportunity to participate in the draft one year earlier. Similarly, if Wall had suffered even a minor injury, it may have cause his draft "stock" to drop. Even if Wall played all year long injury-free, as he did, his performance at the college level might not have lived up to expectations. This would have caused his draft stock to fall, decreasing his potential earnings in the NBA. As Brandon Haywood, a star basketball player at the University of North Carolina who played all four years, put it, "the longer you stay, the more they're going to criticize your game. The shorter you stay, the more they'll draft on potential."<sup>166</sup> The long history of successful players in the NBA who have made the jump directly from high school illustrates that certain athletes are willing and able to compete at the professional level. Furthermore, scouts have become proficient at identifying them. Given the risks these players face by having their careers delayed, they should be allowed to compete directly out of high school.

The leagues, as well as much of the public, are convinced that since age-based restrictions "allow" student-athletes to pursue higher education and attend college, these rules are inherently a positive thing for the athlete, the leagues, and society as a whole.<sup>167</sup> Unfortunately, this is not true. By enforcing these rules, athletes are not given a choice. Were there no such rules, a player could freely choose whether to join the leagues, or go to college. With the current rules in place, they have no such choice. The exceptional student-athlete today essentially has two options: move to a foreign country and play professionally, or go to college and play for no pay. Taking a year off is not a viable option, as these players' elite skills and physiques are likely to deteriorate, as was the case with Maurice Clarett. Playing professional football in the Canadian Football League or professional basketball overseas means less money, less publicity, and uprooting to a foreign country. Therefore, most highly skilled high school athletes choose the college route.

Since these athletes essentially have no other option, many go to college when they do not want to. Players might not meet the academic requirements of educational institutions, which can lead to cheating and NCAA rules violations. A recent example of

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<sup>164</sup> Jason King, *Behind John Wall*, YAHOO! SPORTS (Dec. 4, 2009), <http://rivals.yahoo.com/ncaa/basketball/news?slug=jn-wall120409&prov=yhoo&type=lgns> ("Most NBA analysts say he would've been the top overall selection in last year's draft had he been eligible to submit his name straight out of high school.").

<sup>165</sup> Darren Rovell, *NBA Draft: By The Numbers*, CNBC.COM (June 26, 2009), [http://www.cnbc.com/id/31566641?\\_\\_source=RSS\\*blog\\*&par=RSS](http://www.cnbc.com/id/31566641?__source=RSS*blog*&par=RSS).

<sup>166</sup> Michael Murphy, *Going Straight from High School to the Pros was Once Unheard of, but the Success of Players like Kobe Bryant and Kevin Garnett has More Teens Trying to Make the Leap*, HOUSTON CHRON. (June 24, 2001), § 2, at 17, available at [http://www.chron.com/CDA/archives/archive.mpl?id=2001\\_3314916](http://www.chron.com/CDA/archives/archive.mpl?id=2001_3314916).

<sup>167</sup> Isamu Bae, *High School Athletes Should go to College, Not the Pro Level*, SILVER CHIPS ONLINE (June 1, 2004), <http://silverchips.mbhs.edu/story/3626>.

this is Derrick Rose.<sup>168</sup> Rose was a star basketball player at his Chicago high school.<sup>169</sup> He was barred entry into the NBA due to the current age rule, so he attended the University of Memphis.<sup>170</sup> He played just one year at Memphis, leading the Tigers to the National Championship game, before declaring for the 2008 NBA Draft where he was the first overall selection by the Chicago Bulls.<sup>171</sup> Less than a year later, an NCAA investigation revealed that Rose cheated on his SAT exam to gain entrance into Memphis.<sup>172</sup> As a result, Memphis was forced to vacate its entire 2008 season.<sup>173</sup> Had the NBA age rule not been in effect, Rose likely would have gone straight to the NBA, and this embarrassing sequence of events would have been avoided.

Similarly, players who are forced to play college ball and not earn a paycheck seek other forms of monetary gain. This too can lead to NCAA rules violations, the likelihood of which is increased considering the fact that a majority of the elite NCAA athletes come from impoverished families.<sup>174</sup> A recent example of this is Reggie Bush.<sup>175</sup> Bush led the University of Southern California football team to two National Championships.<sup>176</sup> Bush was also the recipient of college football's highest individual honor, the Heisman Trophy.<sup>177</sup> After following the NFL's age-eligibility requirement, Bush decided to forego his senior year and entered the NFL Draft where the New Orleans Saints selected him with the second overall pick.<sup>178</sup> After leaving USC, reports surfaced that Bush and his family may have been receiving substantial gifts in violation of NCAA

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<sup>168</sup> Derrick Rose was the top-rated point guard prospect in the class of 2007. See *The Rivals 150 2007 Prospect Ranking*, *supra* note 155.

<sup>169</sup> *Id.*

<sup>170</sup> *Derrick Rose*, RIVALDS.COM, <http://rivals.yahoo.com/ncaa/basketball/recruiting/player-Derrick-Rose-30307> (last visited Nov. 1, 2010).

<sup>171</sup> Andy Katz, *Bulls go for Rose over Beasley in NBA draft; Mayo, Love swap places*, ESPN.COM (June 26, 2008), <http://sports.espn.go.com/nba/draft2008/news/story?id=3462594>.

<sup>172</sup> Steve Wieberg, *NCAA vacates Memphis' '07-08 season record, Final Four run*, USA TODAY, Aug. 21, 2009, available at [http://www.usatoday.com/sports/college/mensbasketball/2009-08-20-memphis-ncaa-penalties\\_N.htm](http://www.usatoday.com/sports/college/mensbasketball/2009-08-20-memphis-ncaa-penalties_N.htm).

<sup>173</sup> *Id.*

<sup>174</sup> Kwame Brown, for example, was the youngest of eight children from a poor family. Michael Wilbon, *Stern Wants Age Limit; NBA Commissioner Says He'll Work With Union*, WASH. POST, June 14, 1999, at D1. Leon Smith was in part motivated to declare for the NBA Draft because of his family's poverty. Greg Wallace, *NBA Drain a Pain*, CHATTANOOGA TIMES, Dec. 13, 2001, at D1.

<sup>175</sup> Reggie Bush was a highly recruited running back out of high school; he attended the University of Southern California; while there he played running back, wide receiver, and punt returner; Bush was named an All-American all three years while at USC.

<sup>176</sup> USC was named National Champions in 2003 and 2005; see *University of Southern California Official Athletic Site*, USCTROJANS.COM, <http://www.usctrojans.com/sports/m-footbl/archive/usc-m-footbl-archive.html>.

<sup>177</sup> Associate Press, *USC's Bush wins Heisman by monumental margin*, ESPN.COM (Dec. 11, 2005), <http://sports.espn.go.com/ncf/news/story?id=2255184>.

<sup>178</sup> On January 12, 2006, Reggie Bush elected to forgo his senior season at USC and declared himself eligible for the NFL draft. Since it was predicted that he would be the first overall pick in the 2006 NFL Draft, held by the Houston Texans, Houston was expected to obtain Reggie Bush. However, in a surprising move on the night before the draft, the Texans signed Mario Williams, a defensive end from North Carolina State. The New Orleans Saints selected Reggie Bush with their #2 pick in the draft. *Reggie Bush Online*, REGGIEBUSHONLINE.COM, <http://www.reggiebushonline.com/reggie-bush-biography.php> (last visited Oct. 20, 2010).

rules.<sup>179</sup> In June 2010, the NCAA determined that Bush and his family were indeed guilty of these violations.<sup>180</sup> If the NFL age-eligibility requirement had not been in place, Reggie Bush could have gone directly to the NFL from high school, or perhaps he could have entered the NFL Draft after one or two years of college, before any gifts were made to his family. Reggie Bush is just one example of the many student-athletes who have tried to procure financial incentives while attending college and been prohibited from entering their respective professional league due to the age restrictions.<sup>181</sup> While encouraging NCAA rules violations alone may not be a justification for striking down the leagues' age restrictions, it is yet another example of how the restrictions harm the individual athletes and college athletics.

While in college, these athletes spend an average of forty hours per week working on their game.<sup>182</sup> This leaves limited time to work on their academics. The best players, although forced to attend college, typically leave well before they graduate. In the 2009 NBA Draft, only six of the thirty first round picks were college seniors.<sup>183</sup> Perhaps even more telling, none of the first ten draft picks were seniors.<sup>184</sup> In the 2009 NFL Draft, less than half of the first round picks were college seniors.<sup>185</sup> Kevin Garnett's agent, Arn Tellem, provides clear evidence of why these athletes should choose the pros over college: "In Garnett's case, those four extra years of college could have cost him as much as \$100 million."<sup>186</sup> Given the financial incentives and risks discussed above, the "smart" thing for most star athletes to do is to join the professional leagues, not attend college. Athletes can always return to school later in life if they want to earn their degree, after they have made their millions. However, they cannot turn back the clock and return to their athletic "prime."

### ***C. Anticompetitive Effects on the Market***

In *Haywood v. National Basketball Association*,<sup>187</sup> which was the seminal sports eligibility case prior to *Clarett*,<sup>188</sup> the plaintiff argued that the NBA's then four-year rule

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<sup>179</sup> Associated Press, *Reggie Bush Denies Allegations He Took Money From Marketing Agents*, FOXNEWS.COM (Sept. 16, 2006), <http://www.foxnews.com/story/0,2933,214133,00.html> ("Allegations that they accepted gifts, money and other benefits worth more than \$100,000 from two marketing agents during his career at Southern California.").

<sup>180</sup> As a result of these violations, USC had to vacate its 2004 National Championship win, as well as all of its wins during the 2005 season. The school is excluded from participating in the 2010 and 2011 bowl seasons, and it lost thirty scholarships. In September 2010, Bush forfeited his 2005 Heisman Trophy. Steve Yanda, *After NCAA violations, times have changed for USC football*, WASHINGTON POST, Sept. 15, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/14/AR2010091403791.html>.

<sup>181</sup> Eamonn Brennan, *Brandon Jennings: Go east, young man*, RIVAL.COM (June 24, 2008), [http://rivals.yahoo.com/ncaa/basketball/blog/the\\_dagger/post/Brandon-Jennings-Go-east-young-man?urn=ncaab,89942](http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/Brandon-Jennings-Go-east-young-man?urn=ncaab,89942) ("The NBA's one-year rule is producing some truly strange new situations. In the case of O.J. Mayo, we got to see what happens when people stop being polite, are forced to go to college for one year, take a bunch of money from shady agents, leave for the NBA, don't have to face the repercussions of their actions, and start getting real.").

<sup>182</sup> Michael Wilbon, *Graduation Rates Deceive*, WASH. POST, Mar. 28, 2002, at D1.

<sup>183</sup> *Draft NY 09*, NBA.COM, <http://www.nba.com/draft2009/> (last visited Oct. 20, 2010).

<sup>184</sup> *Id.*

<sup>185</sup> *Draft 2009*, NFL.COM, <http://www.nfl.com/draft/2009> (last visited Oct. 20, 2010).

<sup>186</sup> Tellem, *supra* note 131.

<sup>187</sup> *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1206 (1971).

constituted a “group boycott” in violation of the Sherman Act.<sup>189</sup> The district court concluded that the rule would inflict “irreparable harm” on Haywood because he only had a limited window of time to play professional basketball.<sup>190</sup> Conversely, the NBA would not endure any substantive harm from allowing Haywood to enter the league.<sup>191</sup> The court found that the boycott victimized excluded players by not allowing them to enter the desired market and that the ban injured competition within that market since the excluded players could not sell their services.<sup>192</sup> Simply put, by imposing an arbitrary age restriction, the leagues are not allowing the *best* players to play.

Eighteen-year-old men should be allowed to compete for positions within the market. The best example of this is LeBron James.<sup>193</sup> He entered the NBA right out of high school at the age of eighteen, and he was arguably the best player in the NBA the second he stepped on the court. Players out of high school help, rather than hurt, the NBA. The NBA players who make the jump from high school are among the most popular players in the league. Not allowing them to play hurts the market of professional basketball. Professional sports leagues rely on the popularity of their players. Perhaps the best measurement of an individual player’s popularity is by analyzing jersey sales. The most popular jerseys in 2008-2009 were: (1) Kobe Bryant, (2) Kevin Garnett, and (3) LeBron James.<sup>194</sup> The three highest-selling jerseys in the entire NBA were those of players who came straight out of high school.<sup>195</sup> Perhaps even more telling is the all-time jersey sales list. Three of the top six selling NBA jerseys of all time are those of high school players: Kobe Bryant, LeBron James and Tracy McGrady.<sup>196</sup>

Players who go straight to the NBA from high school also tend to provide the league with increased publicity. Players like Kevin Garnett, Kobe Bryant, LeBron James and Sebastian Telfair have all graced the cover of Sports Illustrated while still in high school.<sup>197</sup> The interest these players create greatly boosts jersey sales and publicity. Other positive effects that are likely to follow are increased ticket sales, television ratings, and competition as a whole. While some may argue that the NBA benefits from having well-known college players drafted instead of relatively little known high school players, the truth is that the college players do not create anywhere near the buzz the high school

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<sup>188</sup> *Clarett II*, 369 F.3d 124 (2d Cir. 2004).

<sup>189</sup> *Haywood*, 401 U.S. at 1206.

<sup>190</sup> *The Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

<sup>191</sup> *Id.* at 1058.

<sup>192</sup> *Id.* at 1061.

<sup>193</sup> Nicknamed “King James,” LeBron was named Mr. Ohio Basketball three times in high school; at eighteen he was selected with the number one overall pick by the Cleveland Cavaliers; James signed a \$90 million Nike shoe contract before ever playing a game in the NBA; James was named NBA Rookie of the Year in 2003-2004 and NBA Most Valuable Player twice, in 2008-2009 and 2009-2010; he has been an All-Star every season since 2005.

<sup>194</sup> Ryne Nelson, *Kobe Tops NBA Jersey Sales, Again*, SLAM ONLINE (Jan. 28, 2009, 3:51 PM.), <http://www.slamonline.com/online/nba/2009/01/kobe-tops-nba-jersey-sales-again/> (Prep-to-pro players Derrick Rose and Dwight Howard were also in the top twelve).

<sup>195</sup> John Kelly, *Top Selling NBA Jerseys 2008-2009 Season*, ASSOC. CONTENT (Mar. 4, 2009), [http://www.associatedcontent.com/article/1532033/top\\_selling\\_nba\\_jerseys\\_20082009\\_season.html?cat=14](http://www.associatedcontent.com/article/1532033/top_selling_nba_jerseys_20082009_season.html?cat=14).

<sup>196</sup> Kobe Bryant’s jersey sales were second all-time behind Michael Jordan, LeBron James’ jersey was already at number four after being on sale for just five years. Darren Rovell, *NBA 10 year Jersey Sales List – Guess Who’s Number One!*, CNBC.COM (Mar. 26, 2008, 11:14 AM), <http://www.cnbc.com/id/23810523>.

<sup>197</sup> *SI Classic Covers Collection*, SICOVERS.COM, <http://www.sicovers.com/> (last visited Oct. 20, 2010).

players do. Fans want to see what these high school kids can do in the NBA, and they will watch them play, even if just to see if they will fail. Consider the anticipation of LeBron James' first NBA game in 2003 versus that of college star Tyler Hansbrough's<sup>198</sup> in 2009. LeBron James made his home debut before a sellout crowd at Gund Arena.<sup>199</sup> In 2009, Hansbrough's Pacers had the seventh worst home attendance record and failed to sell out a single game.<sup>200</sup>

#### ***D. League Justifications and Pro-Competitive Benefits***

The leagues offer multiple justifications and allege several pro-competitive benefits of the age-based eligibility rules. All of these can be classified under one of the "3 P's": (1) Paternalistic, (2) Pecuniary, or (3) Product. Most of the leagues' justifications fall into the paternalism or pecuniary categories, while the pro-competitive benefits relate more to the product.

##### *1. Paternalistic Justifications*

One of the reasons offered by NBA commissioner David Stern for the necessity of the age limit is that it keeps unscrupulous agents and runners from misleading players into false hope of NBA stardom and fortune.<sup>201</sup> Marty Blake, the Director of Scouting Services for the NBA, stated that "the kids are getting bad advice in some cases. Some just can't play."<sup>202</sup> However, if greedy agents were tricking vulnerable high school athletes who did not possess NBA-caliber talent into entering the NBA, there would have been a larger number of players making the jump. Further, more high school graduates who did declare would not have been selected in the draft, and more would flop at the professional level. Research done in 2002 showed that, of high school players entering the NBA Draft, sixty-six percent were drafted in the first round, while seventeen percent were selected in the second round, and only seventeen percent were not drafted.<sup>203</sup> These statistics suggest that, contrary to David Stern and Marty Blake's beliefs, high school players entering the NBA Draft are typically not given bad advice. Furthermore, the greedy agent theory does not succeed because NBA agents simply do not make much money off rookie contracts. The standard commission an agent would earn on the player's rookie contract is, at most, a mere four percent.<sup>204</sup> Due to the NBA rookie slotting system, the agent is unable to do much negotiating. The real money for NBA

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<sup>198</sup> Tyler Hansbrough played four years at the University of North Carolina where he swept all major individual honors in men's college basketball, winning six national player of the year awards; he was drafted by the Indiana Pacers with the thirteenth pick in the 2009 NBA Draft.

<sup>199</sup> ROGER GORDON, *TALES FROM THE CLEVELAND CAVALIERS: THE ROOKIE SEASON OF LEBRON JAMES* xi (Sports Publishing LLC, 2004).

<sup>200</sup> See *2009-2010 NBA Attendance Report*, ESPN.COM, [http://sports.espn.go.com/nba/attendance?sort=home\\_avg&year=2010&seasonType=2](http://sports.espn.go.com/nba/attendance?sort=home_avg&year=2010&seasonType=2) (last visited Oct. 20, 2010).

<sup>201</sup> Desmond Conner, *Bynum Has a Test Left*, HARTFORD COURANT, May 29, 2005, at E5.

<sup>202</sup> Ethan J. Skolnick, *Ready or Not, Here they Come*, PALM BEACH POST, June 27, 1999, at 14C.

<sup>203</sup> McCann *supra* note 96, at 159.

<sup>204</sup> Bob Kravitz, *Minimum Age Requirements Don't Add Up*, INDIANAPOLIS STAR, June 22, 2001, at 1D.

agents comes with the second contract.<sup>205</sup> Therefore, if the high school player is not good enough to excel in the NBA and earn a lucrative second contract, the agent would be wasting both time and money.

A second justification for the age rule offered by Stern is that time in college can help serve the players by advancing life skills as well as promoting the obtainment of a college degree.<sup>206</sup> This argument is not persuasive for the reasons explained in detail above, including: players not wanting to go to college, potential NCAA rules violations, lack of interest in academics, lack of ability to succeed in the classroom, lack of time to commit to studies, leaving school prior to earning a degree, and the ability to go back to college after a professional career. The rule does not promote obtainment of a college degree, but rather it promotes spending one year in college. Simply put, a player does not need a college degree to dunk a basketball.

Perhaps the most paternalistic of all the NBA's justifications for the age rule is the desire to protect the mental, emotional and physical well-being of young student-athletes.<sup>207</sup> This justification is not valid because the student-athletes who made the jump to the NBA prior to the imposition of the current rule and failed did so because of their talent level, not because of their physical frailty or emotional instability. If, on the other hand, the concern is with off-the-court issues, then this justification still falls short. No NBA player who came straight from high school has been the subject of a major negative media headline. NBA athletes who have been involved in such turmoil include Allen Iverson, who spent two seasons at Georgetown University,<sup>208</sup> Latrell Sprewell, a University of Alabama graduate,<sup>209</sup> and Ron Artest, who played three seasons at St. Johns University.<sup>210</sup>

According to a 2005 study, of the eighty-four total NBA players who had ever been arrested, forty-eight had gone to college for four years, while only four of those arrests were of players who had not gone to college at all.<sup>211</sup> In other words, over forty-one percent of NBA players went to college for four years, and over fifty-seven percent

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<sup>205</sup> Darren Heitner, *Still Want To Be An NBA Agent?*, SPORTS AGENT BLOG (July 7, 2009), <http://www.sportsagentblog.com/2009/07/07/still-want-to-be-an-nba-agent/> ("The first time [agents] will make [a substantial] commission on a team deal will be in the second contract, which will be very lucrative for those rookies who outperform the competition.").

<sup>206</sup> Marc J. Spears, *NBA Leaders: Q&A NBA*, DENVER POST, Feb. 11, 2005, at D1.

<sup>207</sup> McCann, *supra* note 96, at 178-82.

<sup>208</sup> In 1997, Iverson pleaded no contest to a gun charge after police in Richmond stopped a car in which he was a passenger and found a gun belonging to Iverson and two marijuana cigarettes; In 2002, Iverson faced fourteen felony and misdemeanor offenses for forcing his way into a West Philadelphia apartment and confronting two men, threatening them with a handgun. *Allen Iverson surrenders Tuesday*, CBS SPORTS (July 16, 2002, 1:37 AM), <http://www.cbc.ca/sports/story/2002/07/11/iverson020711.html>.

<sup>209</sup> Mike Puma, *Sprewell's Image Remains in a Chokehold*, ESPN.COM (Aug. 21, 2003), [http://espn.go.com/classic/biography/s/Sprewell\\_Latrell.html](http://espn.go.com/classic/biography/s/Sprewell_Latrell.html) ("During a Golden State Warriors practice in 1997, Sprewell snapped, choking P.J. Carlesimo before returning about 20 minutes later to continue the assault.").

<sup>210</sup> Artest ran into the stands and exchanged punches with fans; he was suspended thirty games for his actions. Nick Fortuna, *Pacers' Ron Artest Suspended 30 Games for Fight*, BLOOMBERG.COM (Nov. 21, 2004, 3:00 PM), <http://www.bloomberg.com/apps/news?pid=10000103&sid=ayGTq68qWykY&refer=us>.

<sup>211</sup> See Michael McCann, *NBA Players That Get In Trouble With the Law: Do Age and Education Level Matter?*, SPORTS LAW BLOG (July, 20, 2005), [http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with\\_20.html](http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with_20.html).

of those players were arrested.<sup>212</sup> Meanwhile, just over eight percent did not go to college, and less than five percent of those players were arrested.<sup>213</sup> This study helps prove that players who enter the NBA out of high school are just as prepared mentally, emotionally and physically to endure the rigors that come with competing at such a high level as those players who spend four years in college.

The NFL's paternalistic justifications include preventing injuries to young players who may not be physically or mentally ready for the level of play in the NFL, protecting young adolescents trying to reach the NFL from overtraining and using performance enhancing drugs, and preventing steroid use by young athletes.<sup>214</sup> In discussing the NFL's age rule, one author explains, "The three-year rule promotes competition and future players' preparation for entry in the most physically rigorous and financially successful professional sports leagues in the United States."<sup>215</sup> The NFL certainly has a better argument here than the NBA, based solely on the physicality of the game. However, while these may be laudable intentions, much like the NBA's paternalistic justifications, they do not suffice as "pro-competitive."<sup>216</sup> They do not show that "the challenged restraint enhances competition."<sup>217</sup>

## 2. *Pecuniary Justifications*

The NBA has also put forth a few financial justifications for its age restrictions. These include keeping NBA coaches and general managers from having to travel to high school gyms, keeping the costs of scouting down, and reducing the teams' risks involved in drafting young players.<sup>218</sup> As Professor Rick Karcher,<sup>219</sup> an expert in the field of sports law, put it: "Even though it's only a one year difference, it's so much better for the clubs because they don't have to spend the resources scouting high school games, and they get to see the kids in a much more competitive (division one) environment, so it eliminates a lot of the risk that's involved in scouting (and) assessing high school talent."<sup>220</sup> Similarly, Donnie Walsh, the President of Basketball Operations for the New York Knicks, believes that drafting eighteen-year-olds, rather than nineteen-year-olds, is too unpredictable, and therefore unfairly burdens NBA managers, coaches and scouts. Walsh stated, "If a general manager is going to get judged – and judged harshly – for missing the next Kobe, then he's going to have to (scout) eighth grade. In fact, he'd get fired if he weren't and missed a player."<sup>221</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Clarett I*, 306 F. Supp. 2d 379, 408 (S.D.N.Y. 2004).

<sup>215</sup> Cf. Peter Altman, *Stay Out for Three Years After High School or Play in Canada – And for Good Reason, an Antitrust Look at Clarett v. National Football League*, 70 BROOK. L. REV. 569, 600-04 (2004).

<sup>216</sup> *Clarett I*, 306 F. Supp. 2d at 408 ("While these may be reasonable concerns, none are reasonable justifications under the antitrust laws.").

<sup>217</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

<sup>218</sup> McCann, *supra* note 96, at 224.

<sup>219</sup> Director, Florida Coastal School of Law Center for Law and Sports.

<sup>220</sup> Michael McCann, *NBA Draft Age Ban Discussion*, SPORTS LAW BLOG (June 25, 2005), <http://sports-law.blog.spot.com/2005/06/nba-draft-age-ban-discussion.html>.

<sup>221</sup> Sam Farmer, *Early Risers*, LA TIMES, June 26, 2001, § Sports, at 1.

Much like the NBA's beliefs of evil agents and having too many unsuccessful high school players, this justification does not withstand factual scrutiny. While it is true that NBA executives are fired for misjudging talent, it happens at every level of play, whether it is with high school, college, or professional players.<sup>222</sup> Even with the current ban in place, some teams are successful while others are not, and the executives of the unsuccessful teams still get fired.<sup>223</sup> Therefore, prevention of team executives having to scout high school athletes does not stand as a valid justification. Paralleling this is the argument that the NBA teams will be able to prevent having to spend valuable scouting resources on high school players. While limiting the talent pool would surely decrease overall scouting costs, this is still a weak argument. NBA executives already spend time traveling the nation, and even the world, scouting potential draftees.<sup>224</sup> It is hard to believe that sending a scout to a handful of local high school gyms would be more costly than sending multiple scouts overseas for weeks at a time to watch hundreds of international players. Very few high school players have the talent to play at the NBA level and actually declare for the NBA Draft, while there are thousands of college and foreign players.<sup>225</sup> If NBA scouts could draft high school players, there would be less of a need to scout foreign talent. Even if banning players due to their age actually cut resources, the district court in *Clarett* correctly pointed out that a league's "desire to keep its costs down is not a legitimate pro-competitive justification."<sup>226</sup>

Furthermore, even with the current age rule in place, while NBA scouts and general managers may not be actively scouting exceptional high school players like they once did, they still follow them.<sup>227</sup> Nineteen-year-old players are drafted on potential just as much as eighteen-year-old players are. Every year there are standout college basketball players drafted who are unsuccessful in making the transition to the NBA game, including college seniors such as Michael Olowokandi,<sup>228</sup> Eric Montross<sup>229</sup> and Bryant

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<sup>222</sup> McCann, *supra* note 96, at 183.

<sup>223</sup> In November of 2009 alone, New Orleans Hornets head coach Byron Scott and New Jersey Nets head coach Lawrence Frank were fired; Scott had been named NBA Coach of the Year in 2008; Frank was the longest-tenured coach in the NBA's Eastern Conference and had the most wins for a head coach in Nets history. Marc Stein, *Nets fire Frank amid trip, 0-16 start*, ESPN.COM (Nov. 29, 2009), <http://sports.espn.go.com/nba/news/story?id=4697789>.

<sup>224</sup> Hamza Hendawi, *NBA scouts scour Europe*, CBC SPORTS (Sept. 3, 2001), <http://www.cbc.ca/sports/story/2001/09/03/eurobasketball010903.html>.

<sup>225</sup> McCann, *supra* note 96, at 115 ("[H]igh school players who enter the NBA Draft are a small, self-selected group, comprised almost entirely of exceptionally talented players.").

<sup>226</sup> *Clarett I*, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004); see *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1022 (10th Cir. 1998) ("cost-cutting by itself is not a valid pro-competitive justification.").

<sup>227</sup> Before the NBA instituted its age rule, scouts had to concern themselves with high school players who had enough talent to make the jump directly to the NBA; now that the rule is in place, they still have to be acutely aware of those high school players who are likely going to attend college for only one year before declaring themselves eligible for the NBA Draft.

<sup>228</sup> After his senior year, Olowokandi was drafted with the first overall pick of the 1998 NBA Draft by the Los Angeles Clippers; Olowokandi is considered by many to be one of the biggest busts in NBA history because he was selected ahead of star players such as Vince Carter, Antawn Jamison, Dirk Nowitzki, Paul Pierce, Mike Bibby, and Rashard Lewis, and because of his injuries; In 2005, Sports Illustrated ranked him third on a list of NBA draft busts. See *NBA Draft Busts*, SI.COM, [http://sportsillustrated.cnn.com/multimedia/photo\\_gallery/2005/06/24/gallery.nbabusts/content.18.html](http://sportsillustrated.cnn.com/multimedia/photo_gallery/2005/06/24/gallery.nbabusts/content.18.html) (last visited Oct. 25, 2010).

<sup>229</sup> At the University of North Carolina, Montross helped the Tarheels win the 1993 National Championship; he was named an All-American in both his junior and senior years; Montross was selected

Reeves.<sup>230</sup> The NBA teams also have pre-draft workouts, camps, and combines at their disposal. These give the teams an opportunity to watch, scout, analyze, and simply get to know potential draftees up close and in person. At the weeklong NBA Pre-Draft Combine, players undergo medical testing, skills workouts, anthropometric testing, strength and agility testing, and individual interviews.<sup>231</sup> This combine is in addition to the individual team workouts. Perhaps most importantly, the combine and workouts come at little to no costs to the teams, since the individual players, or their families, must fund the travel and related expenses.<sup>232</sup> These same points help defeat the NBA's "risk" argument. The statistics prove that no matter how much college education players have, or how old they are, there is just as good of a chance that they will not be successful NBA players, both on and off the court.<sup>233</sup> Players such as Kevin Garnett, Kobe Bryant, Amare Stoudemire, Dwight Howard and LeBron James have helped prove, beyond any doubt, that high school players can both compete and excel at the NBA level. Even if the facts proving this lack of risk were ignored, and teams believed that high school players actually did present an increased risk, there would still be NBA teams willing to take that calculated risk and draft a high school graduate, as many teams have done in the past.

Similar to the NBA's justification is the desire of the NFL to keep its scouting costs down. However, as with the NBA's argument, "cost cutting by itself is not a valid pro-competitive justification."<sup>234</sup>

### *3. Product Justifications*

Concerns for the welfare of players and adolescents alone do not suffice as pro-competitive justifications.<sup>235</sup> In order to suffice under a rule of reason analysis, the proffered justifications must show that, when balanced, "the challenged restraint enhances competition."<sup>236</sup> Therefore, the NBA attempts to establish three additional pro-competitive justifications that relate to the "product" of professional basketball: (1) that high school graduates dilute the "product" of NBA basketball; (2) that barring these

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with the ninth overall pick in the 1994 NBA Draft; he went on to play for six different teams in less than ten years in the NBA; Montross retired having averaged less than five points per game.

<sup>230</sup> After an outstanding collegiate career at Oklahoma State University, where Reeves averaged 21.5 points per game as a senior and led OSU to the 1995 Final Four, Reeves became the Grizzlies' first-ever draft choice, selected sixth overall in the 1995 NBA Draft; weight-control problems and injuries led to his retirement.

<sup>231</sup> The NBA Draft Combine consists of medical testing and examinations, light skills workouts (shooting, ball-handling, position-specific drills), anthropometric testing (height, weight, wingspan) strength & agility testing (3/4 court sprint, bench press, vertical jump, and pro lane agility drill), and league organized player interviews.

<sup>232</sup> *NBA Draft and Agents, Key information for student-athletes to retain their eligibility*, OHIOSTATEBUCKEYES.COM, [http://www.ohiostatebuckeyes.com/fls/17300/pdf/compliance/agentnba.pdf?DB\\_OEM\\_ID=17300](http://www.ohiostatebuckeyes.com/fls/17300/pdf/compliance/agentnba.pdf?DB_OEM_ID=17300) (last visited Oct. 30, 2010).

<sup>233</sup> See McCann, *supra* note 211.

<sup>234</sup> *Clarett I*, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

<sup>235</sup> *Id.* at 408. ("While these may be reasonable *concerns*, none are reasonable *justifications* under the antitrust laws.") (emphasis in the original).

<sup>236</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

student-athletes from competition promotes a positive league “brand;” and (3) that the age rule enhances college basketball.<sup>237</sup>

Under a rule of reason analysis, none of these vague pro-competitive justifications advanced by the NBA would suffice to outweigh the anticompetitive effects. Only factors that affect economic competition may be considered in determining the legality of a restrictive practice under antitrust laws.<sup>238</sup> The statistics illustrate that high school players do not “dilute” the quality of the NBA product.<sup>239</sup> If anything, they enhance it. The number of talented players in the NBA who successfully made the jump from high school is telling. The most popular teams are led by the most popular players, almost all of who did not attend a single year of college, and who would not be permitted to enter the NBA under the current rule. Ticket sales, merchandise sales and television ratings all increase due to the effect these players have on the fans. In fact, the NBA experienced notable financial growth during the time period in which the most high school players were entering the league straight out of high school.<sup>240</sup> Fans want to watch the best of the best, and not allowing the best athletes to compete harms the market.

Another product dilution argument is that, because NBA teams have limited roster space, it may hurt competition to have teams use that roster space on younger players who are currently unable to compete at the necessary level, but whose teams are hoping will develop into quality players. The argument follows that if a team lacks the talent to win games, it might not be able to attract fans and make money, which could lead to a team folding or relocating, thus harming competition.<sup>241</sup> However, teams are better off having younger potential stars on their bench rather than older aging ones. Younger players, especially those with enough talent to be drafted out of high school, will likely become stars. In fact, by their third year in the NBA, most do.<sup>242</sup> Older veterans, on the other hand, will never return to their “prime.” It is very rare that an older player gets any better as they age. An NBA player enters his “prime” at about the age of twenty-seven,<sup>243</sup> while the average age of an NBA player is just under twenty-seven years old.<sup>244</sup> Currently, the oldest player on an active NBA roster is thirty-eight, and only four players are thirty-seven years old.<sup>245</sup> Clearly, professional basketball favors the young over the old.

The argument that, by allowing younger players on a roster, teams might suffer more losses, be harmed financially, and lead to the injuring of competition as a whole is even further flawed when you consider the fact that the NBA actually promotes this. If a

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<sup>237</sup> McCann, *supra* note 96, at 116.

<sup>238</sup> National Society of Professional Engineers v. United States, 435 U.S. 679, 690 (1978).

<sup>239</sup> See McCann, *supra* note 96, at 189.

<sup>240</sup> Chad Ford, *Contract Length a Deal Breaker?*, ESPN.COM (May 20, 2005), [http://insider.espn.go.com/nba/columns/story?columnist=ford\\_chad&id=2062067&num=0](http://insider.espn.go.com/nba/columns/story?columnist=ford_chad&id=2062067&num=0).

<sup>241</sup> Applegate, *The NBA Gets a College Education: An Antitrust and Labor Law Analysis of the NBA's Minimum Age Limit*, *supra* note 96, at 846.

<sup>242</sup> McCann, *supra* note 96, at 337.

<sup>243</sup> Lacy C. Banks, *Armstrong May Be First Pick in Draft*, CHI. SUN TIMES, June 22, 1995, at 128.

<sup>244</sup> As of November 21, 2007, the average age of an NBA player was 26.89. *2006-07 Player Survey: Age*, NBA.COM, [http://www.nba.com/news/survey\\_age\\_2007.html](http://www.nba.com/news/survey_age_2007.html) (last visited Oct. 25, 2010).

<sup>245</sup> As of November 22, 2009, Lindsey Hunter, born December 3, 1970, was the oldest active player in the NBA; Grant Hill, Kurt Thomas, Shaquille O'Neal and Brent Barry were the only active NBA players who were thirty-seven years old. See *Top Ten Older Players in the NBA*, SPORTIGE.COM, <http://sportige.com/top-10-oldest-players-nba-2009-2010/> (last visited Dec. 3, 2010).

team is struggling to win games, the typical solution is to get better by drafting younger players, not by trading away young talent for older veterans. The NBA Draft Lottery is set up to allow those teams who have the worst records to have the best chance at acquiring young talent in the draft by means of having the highest picks.<sup>246</sup> Professional sports teams, particularly in the NBA, are more focused on the future and the potential of players than they are on a player's history and past accomplishments. Lastly, if a team wanted to add a veteran player, it would likely have to spend more money in free agency, or give up more in a trade, than if the team drafted a young player instead, due to the NBA's rookie salary slotting system.<sup>247</sup> For example, the Cleveland Cavaliers paid LeBron James, arguably the best player in the NBA, a total of \$12.96 million for his first three seasons in the league.<sup>248</sup> A former Cleveland teammate and current Miami teammate, Zydrunas Ilgauskas, an aging center and average NBA player, made \$11.54 million per year, almost three times as much as James.<sup>249</sup> One would be hard pressed to find an NBA team who would not take three rookie LeBrons over one Ilgauskas.

The NBA's most valid argument is that of protecting its product image, also known as "branding." The reasoning behind this alleged pro-competitive justification is this: by not allowing high school graduates to enter the NBA, and essentially forcing them to attend college, the league is promoting the athletes' obtainment of a higher education. However, as noted above, the best players simply leave college after the one year required under the rule. Even if they do not leave after one season, most star college basketball players will leave for the NBA prior to graduating.<sup>250</sup> According to the most recent graduation rates published by the NCAA, twenty-eight percent of the 312 sports teams that graduated fewer than half of their athletes were men's basketball teams.<sup>251</sup> Of those teams, twenty-three competed in the sixty-five team NCAA tournament, including two of the tournaments' four #1 seeds, the University of Connecticut (twenty-seven percent) and the University of Louisville (thirty-eight percent).<sup>252</sup>

Bob Knight, who has more all-time wins than any other Men's Division One College Basketball coach, calls the NBA's rule "the worst thing that's happened to college basketball."<sup>253</sup> Knight points out that "now you can have a kid come to school for a year and play basketball and he doesn't even have to go to class . . . he would not have to attend a single class the second semester to play through the whole second semester of

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<sup>246</sup> The fourteen non-playoff teams participate in the Draft Lottery; it is weighted so that the teams with the worst records have the best chance to obtain a higher draft pick; the lottery process determines the first three picks of the draft, while the rest of the first-round draft is done in reverse order of the teams' win-loss record from the previous year.

<sup>247</sup> See 2009-2010 NBA rookie scale, *supra* note 123.

<sup>248</sup> Darren Rovell, *Matching the hype*, ESPN.COM (Apr. 16, 2004), <http://sports.espn.go.com/nba/news/story?id=1782852> ("Of course, one of the biggest beneficiaries of the LeBron economy were the Cavaliers, who thanks to the NBA's rookie salary scale are paying James a combined \$12.96 million for his first three seasons.").

<sup>249</sup> Chris Tomasson, *Ilgauskas May Retire After This Season*, FANHOUSE (Oct. 7, 2009), <http://nba.fanhouse.com/2009/10/07/ilgauskas-may-retire-after-this-season/>.

<sup>250</sup> McCann, *supra* note 96, at 329-30.

<sup>251</sup> Libby Sander, *Athletes' Graduation Rates Hit Another High, NCAA Says*, THE CHRONI. OF HIGHER EDUC. (Nov. 18, 2009), <http://chronicle.com/article/Athletes-Graduation-Rates-Hit/49202/>.

<sup>252</sup> *Id.*

<sup>253</sup> Associated Press, *Knight rips NBA's minimum-age rule*, NBC SPORTS (Feb. 19, 2007), <http://nbcsports.msnbc.com/id/17231772/>.

basketball.”<sup>254</sup> Obviously, if the NBA really had an interest in promoting a college education, the rule would require a player to be four years out of high school, or even to have earned a college degree

***E. The True Motivation Behind the Leagues’ Rules***

The true motivation behind the age rule is likely the use of the NCAA as a free farm system. The NBA does not have a minor league system like Major League Baseball<sup>255</sup> because the NCAA acts as the NBA’s minor league. Best of all for the NBA, this farm system comes at no cost to the league. The NBA tries to hide this under the guise of “enhancing college basketball.”<sup>256</sup> The NFL made a similar argument in *Clarett* when it argued that, by excluding the most talented college players from the NFL, it was sustaining “the NCAA’s ability to compete in the entertainment market.”<sup>257</sup> This justification did not succeed because it was simply sacrificing competition in one market, the NFL, for the sake of increased competition in another market, the NCAA.<sup>258</sup> The current NBA age restriction merely allows the league’s teams to watch a player and see how he competes at the college level and develops over his freshman season. This is to the detriment of the player who is not eligible to make a living and is essentially forced to work for nothing, all while risking injury and a drop in draft stock.

The only possible pro-competitive justification the NFL can put forth is that allowing younger athletes to enter their league would result in a dilution of the quality of play. However, like the NBA, the real reason for the age-based restriction is to continue using the NCAA as a free minor league system.<sup>259</sup> The NFL does so by using college football as an “efficient and free farm system for the NFL by preventing players from selling their services to the NFL until they have completed three college seasons.”<sup>260</sup> Age requirements in professional sports do not benefit young athletes, nor do they improve the professional sports leagues. They exist solely so that three very powerful and very profitable athletic organizations (the NBA, the NFL and the NCAA) can turn a

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<sup>254</sup> *Id.*

<sup>255</sup> See generally The Official Site of Minor League Baseball, MILB.COM, <http://web.minorleaguebaseball.com/index.jsp> (last visited Oct. 24, 2010).

<sup>256</sup> Chris Mannix, *Age Before Beauty: Union Stance Against NBA Age Limit Misses Benefits of Time, Maturity*, SI.COM (Dec. 1, 2004), [http://sportsillustrated.cnn.com/2004/writers/chris\\_mannix/12/01/age.limit/index.html](http://sportsillustrated.cnn.com/2004/writers/chris_mannix/12/01/age.limit/index.html) (arguing that an NBA age limit would make the college game better because college fans would be exposed to top prospects, and these top prospects would have the chance to develop their talent against a lower level of competition).

<sup>257</sup> *Clarett I*, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

<sup>258</sup> *Id.* at 408-09 (“the League may not justify the anticompetitive effects of a policy by arguing that it has precompetitive effects in a different market) (original emphasis); see also *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972).

<sup>259</sup> Darrel Trimble, *NFL’s arguments against Clarett is weak*, ESPN.COM (Sept. 25, 2003), <http://insider.espn.go.com/insider/story?id=1623318> (suggesting that Clarett was more than ready for the NFL, pointing out that the rule has nothing to do with age and everything to do with college experience).

<sup>260</sup> Complaint ¶ 17, *Clarett I*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03-CV-7441), available at <http://news.findlaw.com/hdocs/docs/nfl/claretnfl92303cmp.pdf>.

profit, and do so at the expense of the athletes, the very individuals the NCAA was established to protect.<sup>261</sup>

**F. *The NBA vs. the NFL***

While many of the leagues' arguments are the same or very similar, the major difference between the NBA's and the NFL's is that the NFL has more paternalistic justifications due to a higher risk of serious bodily injury. A plaintiff seeking to challenge the age-based eligibility rules of the leagues would thus likely have a much better chance succeeding against the NBA than the NFL. While the three-year rule imposed by the NFL may cause more irreparable harm, the difference is that we have seen many high school athletes make the jump from high school directly to the NBA and have long, successful careers. From Moses Malone to Dwight Howard, there is a long history of student-athletes who have proven that they can compete at a high level in the NBA. However, this has not been the case in the NFL. For example, when Clarett presented his antitrust case for entry into the NFL, he was arguing a hypothetical. On the other hand, when Haywood challenged the NBA's four-year rule, he was considered a "Super Star."<sup>262</sup> Not only had he played on the U.S. Olympic Basketball Team, leading it to a gold medal while being named the outstanding player in the Olympic basketball games, but he also received Rookie of the Year and Most Valuable Player honors after his one season in the ABA.<sup>263</sup> This made Haywood a much more sympathetic plaintiff and provided additional justification for finding the NBA's four-year rule in place at the time to be in violation of antitrust laws. While it is unlikely that a basketball player competing in a professional league other than the NBA will bring such a suit, the difference between Haywood's and Clarett's situations is analogous to the difference between eighteen-year-old athletes succeeding in the NBA as opposed to in the NFL. Simply put, if a high school graduate were to bring an antitrust claim against the NBA, and the non-statutory labor exemption did not apply, a court would be more likely to find success than if a similar suit were brought against the NFL, such as *Clarett*.<sup>264</sup>

However, some newfound potential for a claim against the NFL has arisen from the success of Amobi Okoye.<sup>265</sup> Okoye entered the 2007 NFL Draft and was selected tenth overall by the Houston Texans.<sup>266</sup> At the time, he was only nineteen years old.<sup>267</sup> He made the transition to the NFL successfully. In just the first month of his rookie season, Okoye became the youngest player to ever be named Defensive Rookie of the Month.<sup>268</sup> Admittedly, Okoye did play four years at and graduate from the University of Louisville

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<sup>261</sup> Greg Bianchi, *Age Requirement in Professional Sport*, THE SPORT JOURNAL, <http://www.thesportjournal.org/article/age-requirement-professional-sport> (last visited Oct. 29, 2010).

<sup>262</sup> *The Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049, 1052 (C.D. Cal. 1971).

<sup>263</sup> *Id.*

<sup>264</sup> See *Clarett II*, 369 F.3d 124, 124 (2d Cir. 2004).

<sup>265</sup> Okoye tested into ninth grade at twelve years old; at the age of fifteen, he enrolled at the University of Louisville, even though he had been accepted to Harvard University.

<sup>266</sup> Len Pasquarelli, *No. 1 pick Okoye agrees on deal with Texans*, ESPN.COM (July 27, 2007), <http://sports.espn.go.com/nfl/news/story?id=2951088>.

<sup>267</sup> *Id.*

<sup>268</sup> Jim Corbett, *Nineteen-year-old Okoye ready to be NFL's youngest player*, USA TODAY, Feb. 24, 2007, available at [http://www.usatoday.com/sports/football/draft/2007-02-24-amobi-okoye\\_x.htm](http://www.usatoday.com/sports/football/draft/2007-02-24-amobi-okoye_x.htm).

prior to being drafted, which is why he was eligible at just nineteen.<sup>269</sup> However, he shows that age is just one of many factors that can determine a player's readiness for the NFL. As one of the NFL's own affiants in *Clarett* conceded, "The timeframe for a player's physical and psychological maturation varies from individual to individual."<sup>270</sup> Surely, Okoye is not the only nineteen-year-old on the planet with such a timeframe.

### **G. A Less Restrictive Alternative**

Less restrictive alternatives to the current rule that are less harmful to competition do exist. Both leagues should allow players to enter the draft when they are adults, at the age of eighteen. The best available alternative is simply making a case-by-case determination of each athlete who wishes to enter the leagues. Teams do not want to waste money on players who will not cut it in their respective league, no matter what their age upon entry. Potential draft picks already undergo extensive physical and medical examinations, mental evaluations, and interviews to determine if, and when, a player should be drafted.<sup>271</sup> Teams employ scouts, doctors and psychologists to test these athletes and determine whether they will be able to compete at the professional level. These pre-draft processes should suffice to allow a team to make a determination on whether to draft a certain player, based on the individual team's determination of mental and physical readiness, and what amount of risk they are willing to tolerate. As Michael McCann,<sup>272</sup> an expert on the subject explained, "It does not make sense to conduct exhaustive pre-draft evaluations of prospective draft picks, and then impose an arbitrary, absolute rule that may exclude the optimal group of prospective draft picks."<sup>273</sup> The existence of a less restrictive alternative helps prove that there are no pro-competitive justifications for the draft rules, and therefore that they violate antitrust laws.<sup>274</sup>

### **H. The Future of the Leagues' Collective Bargaining Agreements**

Changes to the collective bargaining agreements of both the NFL and NBA are likely coming, as both are set to expire soon. In May 2008, NFL owners exercised their opt-out option, effectively shortening the term of the current CBA by two years. Therefore, the NFL's CBA will expire after the 2010 season, rather than 2012. The owners and the player's union have until March 2011 to agree on a new collective bargaining agreement. If no agreement is reached, the players will be locked out, and the NFL will suffer its first work stoppage since 1987. Similarly, the NBA's current CBA

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<sup>269</sup> Pasquarelli, *supra* note 266.

<sup>270</sup> *Clarett I*, 306 F. Supp. 2d at 410.

<sup>271</sup> Potential NFL draftees must complete the Wonderlic Exam, a twelve minute test which includes fifty common knowledge questions; during the NFL Combine players are put through a series of drills, tests and interviews with more than 600 NFL personnel including head coaches, general managers and scouts.

<sup>272</sup> Michael McCann is a nationally recognized expert in the fields of sports law and antitrust. He is an Associate Professor at Vermont Law School, is a Legal Analyst for Sports Illustrated, and was on Maurice Clarett's legal team.

<sup>273</sup> McCann & Rosen, *supra* note 4, at 751.

<sup>274</sup> The antitrust laws do not tolerate a policy that restrains trade – even if there is some pro-competitive benefit – when a policy that results in less prejudice to competition would be equally effective. *See Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir.1993).

will expire on July 1, 2011. The NBA has only locked out its players once, during the 1998-99 season, which reduced the number of regular season games to fifty.

Numerous issues need to be worked out between the owners and players of the NBA and NFL in order to reach acceptable collective bargaining agreements and avoid league lockouts. The main issue of any collective bargaining agreement is usually the same: money. NFL team owners are unsatisfied with the league's current revenue-sharing policy, under which the league gets forty percent of "total" revenue, while the players receive sixty percent.<sup>275</sup> The owners would like to decrease the amount the players receive to roughly forty-eight percent. The players are reluctant because the NFL has recently been experiencing its most profitable years ever. Meanwhile, the players want to force teams to "open their books." While the NFLPA knows what the total league revenue is, since that is what is used to calculate the salary cap, it is unknown how much of that revenue is expenditure and how much is operating profit.<sup>276</sup> Therefore, the NFLPA does not know what its share should actually be, and it must trust that the revenue is what the owners say it is. Other issues include the rookie pay scale, reimbursement for money earned before player misconduct that prevents them from playing, benefits for retired players, and increasing the number of regular season games. However, due to the recent overwhelming success of the NFL, it is highly unlikely that there will be a work stoppage.

The NBA's CBA negotiations, like the NFL's, will focus on revenue sharing. The league owners want to reduce the player salary costs by \$750-\$800 million, or nearly thirty-five percent<sup>277</sup> Other major points of contention include imposing a "hard" salary cap, eliminating guaranteed contracts, reducing the maximum length and value of contracts, and getting rid of cap exceptions. The leagues' current age rules could change, or even be eliminated, during these negotiations. NBA commissioner David Stern would like to see the age rule increased from one year to two, or even three. On the other side of the table, Executive Director of the National Basketball Players Association, Billy Hunter, would like to see the age rule eliminated. According to Hunter, during the 2005 CBA negotiations, all of the material terms were agreed to, except the age rule. Stern was steadfast that the rule be included, and that there would be no deal without it. Hunter believes it was personal with Stern, in that Stern had made his desire for this rule public and levied so hard for it that he had to "save face" by making sure it was included. Today, Hunter claims that the owners "don't really care" about the age rule, and that the owners "want to be able to draft high school players." During the upcoming CBA negotiations, Hunter and the NBPA will push for a rule similar to that of professional

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<sup>275</sup> Jaime Aron, *NFL commissioner hopes a new collective bargaining agreement can be reached by Super Bowl*, NEWSER (Dec. 15, 2010), <http://www.newser.com/article/d9k4o6t00/nfl-commissioner-hopes-a-new-collective-bargaining-agreement-can-be-reached-by-super-bowl.html>; Jonathan Weiler, *In Coming NFL Labor War, Remember That Players Bear All the Risk*, HUFFINGTON POST, Oct. 26, 2010, available at [http://www.huffingtonpost.com/jonathan-weiler/in-coming-nfl-labor-war-r\\_b\\_772847.html](http://www.huffingtonpost.com/jonathan-weiler/in-coming-nfl-labor-war-r_b_772847.html).

<sup>276</sup> Weiler, *supra* note 275.

<sup>277</sup> Jeff Zillgitt, *NBA commish David Stern: League wants to reduce player salaries*, USA TODAY, [http://www.usatoday.com/sports/basketball/nba/2010-10-21-david-stern-player-salary-costs\\_N.htm](http://www.usatoday.com/sports/basketball/nba/2010-10-21-david-stern-player-salary-costs_N.htm) (last updated Oct. 22, 2010).

baseball.<sup>278</sup> According to Hunter, NCAA representatives also want a similar rule implemented in basketball.<sup>279</sup>

If the owners want to avoid a strike, and if the NBPA pushes hard enough, the NBA's age rule could disappear as soon as July, 2011. However, unlike the NFL, the possibility of a work stoppage for the NBA is very likely.<sup>280</sup> The NBA wants a sustainable business model, which it currently lacks. While league revenue is good, expenses are an issue, and the biggest expense is players' salaries.

## V. CONCLUSION

Age-based draft eligibility rules in the NBA and NFL deprive high school players of the freedom to choose when, where, and for how much they will play their respective sports at the professional level. This unfair and anticompetitive behavior lacks sufficient justification. If high school players are not ready for the NBA, for example, then why does the NBA need a rule that prevents teams from drafting them? A player will get drafted and paid if he is good enough. The eligibility of a player should not be based on age or the amount of time passed since his high school graduation. Rather, eligibility should be based on a multitude of factors, including talent and the ability of others to identify that talent. The leagues have illegally barred entry of a certain class of players without offering proper justification for doing so. If not for this unlawful exclusion, individual teams would be able to compete for these young players, and the players would be able to compete for jobs. Age-based eligibility rules are clearly a concerted action that prevent entry into the leagues. The harms to the individual athletes and the anticompetitive effects on the market far outweigh the leagues' justifications and alleged pro-competitive benefits. Thus, assuming the non-statutory labor exemption does not apply, the leagues' age-based draft restrictions violate antitrust laws under a rule of reason analysis.

None of the other major professional sports leagues in the U.S., such as those governing baseball, tennis, hockey, golf and boxing, prohibit these young athletes from competing directly out of high school. Basketball and football should follow suit. As Dick Vitale, the famous college basketball announcer put it, "Would you deny someone like Tiger Woods, Alex Rodriguez or Venus and Serena Williams the chance to turn pro and earn a living before turning twenty? No, because we live in America, and the right to do what you desire is one of the great gifts we have in this country. It's all about freedom, man!"<sup>281</sup>

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<sup>278</sup> Major League Baseball's First-Year Player Draft allows team to select high school players if they graduated and have not yet attended college, four-year college players who have completed at least their junior season or are 21 years old, and junior college players. The Club retains rights to the selected player until the player enters or returns to a four-year college on a full-time basis.

<sup>279</sup> Sports Law Association Annual Conference, William "Billy" Hunter, May 22, 2010.

<sup>280</sup> Associated Press, *Billy Hunter: Lockout 'Highly Probable,'* ESPN.COM (Nov. 23, 2010), <http://sports.espn.go.com/nba/news/story?id=5840275>.

<sup>281</sup> Dick Vitale, *Don't Keep Best High Schoolers Out of NBA*, ESPN.COM (Apr. 26, 2005), [http://sports.espn.go.com/dickvitale/vcolumn050425\\_ageplan.html](http://sports.espn.go.com/dickvitale/vcolumn050425_ageplan.html).

**CENSORSHIP IN THE VIDEO GAME INDUSTRY:  
GOVERNMENT INTERVENTION OR PARENTAL CONTROLS?**

By: Richard J. Hunter, Jr.,\*  
Hector R. Lozada,\*\* and  
Ann Mayo\*\*\*

“Surely this is to ‘burn the house to roast the pig.’”<sup>1</sup>  
(Justice Felix Frankfurter)

**I. INTRODUCTION**

There should be no doubt that the video game industry<sup>2</sup> is a “major player” in the American economy. Consider these facts: The percentage of households in the United States that play video games is approximately sixty-five percent.<sup>3</sup> The average time spent per week by video gamers is eighteen hours.<sup>4</sup> ABI Research notes that “[g]aming has become a mass-market entertainment industry on a par with TV, movies and music.”<sup>5</sup> United States computer and video game software sales grew six percent in 2007 to \$9.5

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<sup>1</sup> See *Butler v. Michigan*, 352 U.S. 380, 384 (1957) (holding that a Michigan penal law “arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society”).

<sup>2</sup> Ben Sawyer, President and founder of *Digitalmil*, a technology project consulting firm in Portland, Maine, has noted that the video game industry “value chain” is made up of six connected and distinctive layers:

1. Capital and publishing layer: involved in paying for development of new titles and seeking returns through licensing of the titles.
2. Product and talent layer: includes developers, designers and artists, who may be working under individual contracts or as part of in-house development teams.
3. Production and tools layer: generates content production tools, game development middleware, customizable game engines, and production management tools.
4. Distribution layer: or the “publishing” industry, involved in generating and marketing catalogs of games for retail and online distribution.
5. Hardware (or Virtual Machine or Software Platform) layer: or the providers of the underlying platform, which may be console-based, accessed through online media, or accessed through mobile devices such as the iPhone. This layer now includes non-hardware platforms such as virtual machines (e.g. Java or Flash), or software platforms such as browsers or even further Facebook, etc.
6. End-users layer: or the users/players of the games. See TERRY FLEW & SAL HUMPHREYS, *GAMES: TECHNOLOGY, INDUSTRY, CULTURE*, IN *NEW MEDIA* 101-14 (2d ed. 2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Nich Maragos, *Game Industry Revenue Expected To Double by 2011*, GAMASUTRA, [http://www.gamasutra.com/view/news/8205/Game\\_Industry\\_Revenue\\_Expected\\_To\\_Double\\_By\\_2011.php](http://www.gamasutra.com/view/news/8205/Game_Industry_Revenue_Expected_To_Double_By_2011.php) (last visited Oct. 30, 2010).

billion—more than tripling industry software sales since 1996.<sup>6</sup> In 2006, the entertainment software industry's value added to U.S. Gross Domestic Product (GDP) was \$3.8 billion.<sup>7</sup> By 2009, the industry supported over a quarter-million American jobs. Computer games sales were \$910.7 million, with 36.4 million units sold.<sup>8</sup> Video game dollar sales were \$6.46 billion (2006) and \$8.64 billion (2007).<sup>9</sup> Computer games dollar sales were \$0.98 billion (2006) and \$0.91 billion (2007).<sup>10</sup> Video game unit sales were 201.8 million (2006) and 231.5 million (2007); and computer game unit sales were 39.7 million (2006) and 36.4 million (2007).<sup>11</sup>

Global video game industry sales are expected to increase at an annual rate of 10.3% and reach \$68.3 billion in 2012, up from \$41.9 billion last year, according to data provided by PricewaterhouseCoopers' Global Entertainment and Media Outlook.<sup>12</sup> In the United States, video game industry revenue is projected to rise at a bit more modest rate of 7.9% annually, to \$17.7 billion in 2012, from \$12.1 billion last year.<sup>13</sup> Online video ad spending is expected to rise to \$4.6 billion in 2013, up from \$587 million in 2008.<sup>14</sup> Global console game sales are expected to reach \$34.7 billion in 2012, growing at a 6.9% compound annual growth rate.<sup>15</sup> Online game sales will rise at a 16.9% growth rate, from \$6.6 billion to \$14.4 billion in 2012; while mobile games will experience a 19% growth rate, from \$5.6 billion to \$13.5 billion in four years.<sup>16</sup>

At the same time as the industry has experienced a period of unprecedented (but not entirely unexpected) growth, concerns have surfaced over the content and delivery of video and computer games—especially to minors. In July 2005, in an attempt to protect minors from the dangerous impact of certain video games, the State of Illinois enacted Public Act 94-0135, the Illinois Sexually Explicit Video Game Law, which was comprised of the Violent Video Game Law (VVGL)<sup>17</sup> and the Sexually Explicit Video

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<sup>6</sup> Statistics for the video game industry are provided by the website *Grabstats*, <http://www.grabstats.com/statcategorymain.asp?StatCatID=14> (last visited Nov. 27, 2010) and *Geeks Are Sexy*, <http://www.geeksaresexy.net> (last visited Dec. 15, 2010).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Mark Hefflinger, *Report: Global Video Game Sales to Reach \$68.3 Billion in 2012*, DIGITAL MEDIA WIRE (June 18, 2008), [http://www.dmwmmedia.com/news/2008/06/18/report:-global-video-game-sales-reach-\\$68.3-billion-2012](http://www.dmwmmedia.com/news/2008/06/18/report:-global-video-game-sales-reach-$68.3-billion-2012). ABI expects revenues to reach \$65.9 billion in 2011. Maragos, *supra* note 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> For a discussion of the issues surrounding violent video games, see Timothy Dylan Reeves, *Tort Liability for Manufacturers of Violent Video Games: A Situational Discussion of the Causation Calamity*, 60 ALA. L. REV. 519 (2009); see also *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009). Plaintiffs were video game trade associations which sought declaratory relief claiming Cal. Civ. Code §§ 1746-1746.5, which imposed restrictions and a labeling requirement on the sale or rental of violent video games to minors, violated First and Fourteenth Amendments rights. The U.S. District Court for the Northern District of California granted summary judgment in favor of the associations. Defendant California state officials appealed and the Court of Appeals affirmed the decision of the District Court. The U.S. Supreme Court granted certiorari on April 26, 2010. See *Schwarzenegger v. Entm't Merchs. Ass'n*, No. 08-1448, 2010 U.S. LEXIS 3573 (2010).

Game Law (SEVGL). The SEVGL required video game retailers to place a four square-inch label with the numerals “18” on any “sexually explicit” video game.<sup>18</sup> The law also required a video game retailer to place signs on their stores explaining the video game rating system and to provide customers with brochures which explain the video game rating system.<sup>19</sup> This article primarily questions the constitutionality of the SEVGL and suggests that a recent Seventh Circuit ruling on the matter may prove to be the model for future determinations concerning regulation of the Video Game Industry for minors.

### **A. The ESRB**

The Entertainment Software Rating Board (ESRB) is an industry organization that has developed a comprehensive rating system for computer, Internet, and video games. ESRB ratings are comprised of three parts: *rating symbols* suggest age appropriateness for the game; *content descriptors* indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern; and more detailed *rating summaries* that are available through the ESRB website.<sup>20</sup> For the ESRB rating system to be effective, a parent or guardian must check the rating symbol on the front of the game box, the content descriptors on the back of the game box, and they should also read the rating summaries for the game. The following rating summaries are provided by the ESRB:



**Early Childhood (EC):** Early Childhood rated games have content that may be suitable for persons ages three and older. Titles in this category contain no material that parents would find inappropriate.



**Everyone (E):** Everyone rated games have content that may be suitable for persons ages six and older. Titles in this category may contain minimal violence and some comic mischief and/or mild language.



**Everyone 10+ (E10+):** Titles rated E10+ have content that may be suitable for ages ten and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.

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<sup>18</sup> See 720 ILL. COMP. STAT. § 5/12B-25(a) (2005), *invalidated by* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

<sup>19</sup> See 720 ILL. COMP. STAT. §§ 5/12B-30(a), 35(a) (2005), *invalidated by* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

<sup>20</sup> See Entertainment Software Board, <http://www.esrb.org/ratings/faq.jsp> (last visited Oct. 30, 2010). “The Entertainment Software Rating Board (ESRB) is a non-profit, self-regulatory body established in 1994 by the Entertainment Software Association (ESA), formerly known as the Interactive Digital Software Association (IDSA). ESRB assigns computer and video game content ratings, enforces industry-adopted advertising guidelines and helps ensure responsible online privacy practices for the interactive entertainment software industry.”

The ESRB was established in 1994 by the Entertainment Software Association (formerly the Interactive Digital Software Association). By late 2009, it had assigned nearly 18,000 ratings to titles submitted by more than 350 publishers. It is worth noting that eighty-five percent of all games sold in 2007 were rated "E" for Everyone, "T" for Teen, or "E10+" for Everyone 10+. Ninety-four percent of game players under the age of 18 reported that their parents were present when they purchased or rented games.



**Teen (T):** Teen rated games have content that may be suitable for persons ages thirteen and older. Titles in this category may contain violent content, mild or strong language, and/or suggestive themes.



**Mature (M):** Mature rated games have content that may be suitable for persons ages seventeen and older. Titles in this category may contain mature sexual themes, more intense violence and/or strong language.



**Adults Only (AO):** Adults Only rated games have content suitable only for adults. Titles in this category may include graphic depictions of sex and/or violence. Adults Only products are not intended for persons under the age of eighteen.



**Rating Pending:** Used only for advertising and/or marketing materials created for titles that have been submitted to the ESRB and are awaiting a final rating.

**Content Descriptor:** Over thirty standardized phrases that indicate content that triggered a particular rating and may be of interest or concern.<sup>21</sup>

<sup>21</sup> This list includes the following:

- **Alcohol Reference** – Reference to and/or images of alcoholic beverages;
- **Animated Blood** - Discolored and/or unrealistic depictions of blood;
- **Blood** - Depictions of blood;
- **Blood and Gore** - Depictions of blood or the mutilation of body parts;
- **Cartoon Violence** - Violent actions involving cartoon-like situations and characters. May include violence where a character is unharmed after the action has been inflicted;
- **Comic Mischief** - Depictions or dialogue involving slapstick or suggestive humor;
- **Crude Humor** - Depictions or dialogue involving vulgar antics, including bathroom humor;
- **Drug Reference** - Reference to and/or images of illegal drugs;
- **Edutainment** - Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product;
- **Fantasy Violence** - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life;
- **Informational** - Overall content of product contains data, facts, resource information, reference materials or instructional text;
- **Intense Violence** - Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death;
- **Language** - Mild to moderate use of profanity;
- **Lyrics** - Mild references to profanity, sexuality, violence, alcohol, or drug use in music;
- **Mature Humor** - Depictions or dialogue involving "adult" humor, including sexual references;
- **Mature Sexual Themes** - Explicit and/or frequent references to sex or sexuality, including nudity;
- **Nudity** - Graphic or prolonged depictions of nudity;
- **Partial Nudity** - Brief and/or mild depictions of nudity;
- **Real Gambling** - Player can gamble, including betting or wagering real cash or currency;
- **Sexual Content** - Non-explicit depictions of sexual behavior, possibly including partial nudity;
- **Sexual Themes** - References to sex or sexuality;
- **Sexual Violence** - Depictions of rape or other violent sexual acts;
- **Simulated Gambling** - Player can gamble without betting or wagering real cash or currency;

In addition to the detailed rating system, the ESRB's Advertising Review Council (ARC) has developed a list of *Principles and Guidelines* designed to provide responsible advertising practices by the video game industry. ARC is also responsible for responding to concerns or complaints raised by consumers regarding the marketing of video games.<sup>22</sup> Would these self-imposed "controls" insulate the industry from legislative action designed to protect minors from sexually explicit depictions?

***B. A Law Suit is Initiated***

Perhaps most significantly, the SEVGL criminalizes the sale or rental of sexually explicit video games to minors.<sup>23</sup> The statute imposes criminal penalties on any "person who sells, rents, or permits to be sold or rented, any sexually explicit video games to any minor . . . ."<sup>24</sup> The SEVGL defines the term "sexually explicit" video games as:

[T]hose that the average person, applying contemporary community standards would find, with respect to minors, is designed to appeal or pander to the prurient interest and depict or represent in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual conduct, an actual or simulated normal or perverted sexual act or lewd exhibition of the genitals or post-pubescent female breast.<sup>25</sup>

Associations representing video game manufacturers and retail sellers of video games, including the Entertainment and Software Association, Video Software Dealers Association, and the Illinois Retail Merchants Association, challenged the constitutionality of the law in the U.S. District Court for the Northern District of Illinois.<sup>26</sup> At the outset of the litigation, the plaintiffs moved for a preliminary injunction to stop enforcement of the law and the defendants moved to dismiss the lawsuit. The

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- Some Adult Assistance May Be Needed - Intended for very young ages;
  - **Strong Language** - Explicit and/or frequent use of profanity;
  - **Strong Lyrics** - Explicit and/or frequent references to profanity, sex, violence, alcohol, or drug use in music;
  - **Strong Sexual Content** - Explicit and/or frequent depictions of sexual behavior, possibly including nudity;
  - **Suggestive Themes** - Mild provocative references or materials;
  - **Tobacco Reference** - Reference to and/or images of tobacco products;
  - **Use of Drugs** - The consumption or use of illegal drugs;
  - **Use of Alcohol** - The consumption of alcoholic beverages;
  - **Use of Tobacco** - The consumption of tobacco products;
  - **Violence** - Scenes involving aggressive content. May contain bloodless dismemberment; and
  - **Violent References** - References to violent acts.

<sup>22</sup> Parents can also sign up for a bi-weekly list of new titles, including ratings and content summaries, in the ESRB's newsletter *ParentTools*.

<sup>23</sup> See 720 ILL. COMP. STAT. § 5/12B-15 (2005), *invalidated by* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

<sup>24</sup> *Id.*

<sup>25</sup> See 720 ILL. COMP. STAT. § 5/12B-10(e) (2005), *invalidated by* Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

<sup>26</sup> Entm't Software Ass'n v. Blagojevich 469 F.3d 641 (7th Cir. 2006).

motion to dismiss was denied, and the trial court conducted a three-day trial.<sup>27</sup> Interestingly, during the trial, the State introduced screen shots from three video games: (1) *Grand Theft Auto: San Andreas*, (2) *Leisure Suit Larry: Magna Cum Laude*, and (3) *The Guy Game: Uncut and Uncensored*.<sup>28</sup> The State maintained that each of the games contained features of various images that the State alleged were covered by the law—ranging from digital drawings of exposed breasts to digital animations of sex acts. Plaintiffs countered and introduced the game *God of War*, a video game taking place in ancient Greece that “roughly tracks Homeric themes.”<sup>29</sup> Plaintiffs contended that this game, which contained only one scene depicting two bare-chested women in Ancient Greece, was an example of a game that had been unconstitutionally criminalized by the Illinois law.<sup>30</sup> At the conclusion of the trial, the district court issued a permanent injunction against enforcement of the law<sup>31</sup> and the State of Illinois filed an appeal.<sup>32</sup>

This article concerns the decision of the Seventh Circuit in *Entertainment Software Association v. Blagojevich*,<sup>33</sup> in which the court affirmed the decision of the district court on grounds that the Illinois law was not “sufficiently narrowly tailored” to withstand constitutional challenge.<sup>34</sup> In so doing, the circuit court applied a strict scrutiny standard to the statutes in striking down both the VVGL and the SEVGL<sup>35</sup>. The decision of the Seventh Circuit is potentially critical in the development of judicial standards for the video game industry in dealing with sexually explicit materials, which while not obscene, may nonetheless be judged to be harmful to minors.

## II. APPLICATION OF STRICT SCRUTINY: A BRIEF RETROSPECTIVE

“Strict scrutiny” is the most rigorous standard utilized by the U. S. Supreme Court and other federal courts in exercising their role of judicial review of constitutional challenges to a statute or administrative rule or regulation.<sup>36</sup> The strict scrutiny standard is a part of a descending hierarchy of standards that courts have employed in order to weigh an asserted governmental interest against an asserted constitutional right or principle. In addition to the strict scrutiny standard, courts have also employed a lower standard of review, termed “rational basis” review, and an intermediate level of scrutiny in certain constitutional cases.

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<sup>27</sup> *Id.* at 644.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *State to Pay \$510,000 Over Video Game Bans*, L.A. TIMES (Aug. 12, 2006), available at <http://articles.latimes.com/2006/aug/12/nation/na-briefs12.2>. At the conclusion of the trial, Judge Kennedy ordered the State of Illinois to pay \$510,000 to the Illinois video game industry to cover the costs of plaintiffs’ attorneys’ fees. Of course, the name of the defendant has now become famous—but in a very different context! See generally *Entm’t Software Ass’n*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

<sup>32</sup> *Entm’t Software Ass’n v. Blagojevich* 469 F.3d 641, 644 (7th Cir. 2006).

<sup>33</sup> See *Entm’t Software Ass’n v. Blagojevich* 469 F.3d 641 (7th Cir. 2006).

<sup>34</sup> *Id.* at 650.

<sup>35</sup> *Id.* at 651.

<sup>36</sup> See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

**A. Rational Basis Analysis**

The rational basis test is a standard of review that examines whether a legislature had a reasonable—and not an arbitrary—reason or ground for enacting a particular statute or law. The U. S. Supreme Court has articulated the rational basis test in cases where a plaintiff alleges that the legislature has made an arbitrary or irrational decision. As a practical matter, the employment of the rational basis test usually results in the court upholding the constitutionality of the law or governmental policy, because the test gives great deference and weight to decisions of the legislative branch.<sup>37</sup> It provides a strong presumption that the law or policy under review is valid.<sup>38</sup> The burden of proof in rational basis analysis falls on the party making the challenge to a law or policy to show that the law or policy is unconstitutional. In order to meet this burden, the party making the challenge must demonstrate by a preponderance of the evidence that the law or policy does not have a rational or reasonable basis.<sup>39</sup>

The U.S. Supreme Court first articulated the rational basis test under the Equal Protection Clause of the Fourteenth Amendment in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*.<sup>40</sup> The Court stated that "it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification."<sup>41</sup> However, the Court continued, it must appear that a classification is "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."<sup>42</sup> Where a constitutionally suspect classification such as race, religion, alienage, or national origin are *not* at issue, nor are any fundamental constitutional rights at stake, "[when] the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed."<sup>43</sup> In *Lindsley v. National Carbonic Gas Co.*,<sup>44</sup> the Court outlined this rather deferential approach to most government regulation based on the rational basis standard of review:

The equal protection clause [does] not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety, or because

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<sup>37</sup> See, e.g., *Baccus v. Karger*, 692 F. Supp. 290, 298 (S.D.N.Y., 1998).

<sup>38</sup> See, e.g., *Medeiros v. Atl. States Marine Fisheries Comm'n*, 327 F. Supp. 2d 145, 151 (2004) (citing *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 314 (1993)).

<sup>39</sup> See, e.g., *Las Lomas Land Co., LLC v. City of Los Angeles*, 177 Cal. App. 4<sup>th</sup> 837, 859 (2009) (noting "Proving the absence of a rational basis can be an exceedingly difficult task. In some circumstances involving complex discretionary decisions, the burden may be insurmountable.).

<sup>40</sup> *Gulf, Colo. & Santa Fe R.R. Co. v. Ellis*, 165 U.S. 150 (1897).

<sup>41</sup> *Id.* at 155.

<sup>42</sup> *Id.* at 165-67.

<sup>43</sup> See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)).

<sup>44</sup> *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

in practice it results in some inequality. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.<sup>45</sup>

In addition, the Court does not require a legislature to articulate its reasons for enacting a statute, holding that "[i]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."<sup>46</sup> The Court stated that a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."<sup>47</sup> In effect, this means that a court is permitted to find a rational basis for a law, even if it is one that was not articulated by the legislature.

The Supreme Court has explained the purpose behind an application of the rational basis test. As stated by Justice Clarence Thomas in *Beach Communications*:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.<sup>48</sup>

Justice Thomas continued: "Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'"<sup>49</sup> He concluded: "This standard of review is a paradigm of judicial restraint."<sup>50</sup> In *Vance v. Bradley*,<sup>51</sup> the Court stated: "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."<sup>52</sup>

This rather benign view of the role of the courts in a constitutional challenge to a statute, rule, or practice is not universally shared. For example, in *Royster Guano Co. v.*

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<sup>45</sup> *Id.* at 78-79.

<sup>46</sup> *See* *FCC v. Beach Commc'n, Inc.*, 508 U.S. 307, 315 (1993).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 313 (*citing* *Sullivan v. Stoop*, 496 U.S. 478, 485 (1990) (upholding the Secretary of Health and Human Services regarding children's insurance benefits); *Bowen v. Gilliard*, 483 U.S. 587, 600-603 (1987) (upholding the welfare reform law); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-179 (1980) (upholding a section of the Railroad Retirement Act); *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding Maryland's Aid to Families With Dependent Children Act)).

<sup>49</sup> *Id.* (*citing* *Beach Commn's*, 508 U.S. at 313-314); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. at 179)).

<sup>50</sup> *Id.*

<sup>51</sup> *Vance v. Bradley*, 440 U.S. 93 (1979).

<sup>52</sup> *Id.* at 97.

*Virginia*,<sup>53</sup> the Supreme Court suggested a different role for the judiciary. The Court noted a slightly different approach and stated: “[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>54</sup> Is this a distinction without a difference?

### ***B. Intermediate Scrutiny***

Intermediate scrutiny is the standard under the Equal Protection Clause that federal courts utilize to assess the constitutionality of government action based on sex (gender) and illegitimacy. This type of analysis is also referred to as “heightened” or “semi-suspect” scrutiny. An application of the intermediate scrutiny standard requires that governmental action be “substantially” related to an “important” government interest. The “important government objective” which is offered to justify a categorization based on gender must be genuine—not one that is hypothetical. The government’s justification must not rely on overly broad generalizations about males and females. As an example of cases which one passed Supreme Court scrutiny before the adoption of the higher “intermediary” standard of proof, we may cite *Bradwell v. Illinois*,<sup>55</sup> where the Court, in upholding a law denying women the right to practice law, explained: “[the] natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfil [sic] the noble and benign offices of wife and mother. This is the Law of the Creator.”<sup>56</sup> In *Muller v. Oregon*,<sup>57</sup> the Supreme Court upheld a law barring factory work by women for more than ten hours a day, reasoning that “as healthy mothers are essential to vigorous offspring, the physical well-being of a woman becomes an object of public interest and care.”<sup>58</sup>

Intermediate scrutiny differs from both strict scrutiny and rational basis scrutiny in determining whether governmental classifications under the Equal Protection Clause

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<sup>53</sup> F.S. Royster Guana Co. v. Com. of Virginia, 253 U.S. 412 (1920).

<sup>54</sup> *Id.* at 415.

<sup>55</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1873).

<sup>56</sup> *Id.* at 141.

<sup>57</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>58</sup> *Id.* at 421; *see also* *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a law denying a bartender’s license to most women, reasoning that “the fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic”); *Hoyt v. Florida*, 368 U.S. 57, 62 (sustaining a law placing women on a jury list only if they made special request, stating that “woman is still regarded as the center of home and family life”).

In contrast, *See United States v. Virginia*, 518 U.S. 515 (1996) (invalidating a state military school’s policy of admitting only men); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating a state law that preferred men over women as between persons otherwise equally qualified under state law to administer estates); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating a federal statute limiting a servicewoman’s right to a dependency benefit for her husband by requiring proof of actual dependency upon her for support, whereas a serviceman could obtain similar benefits for his wife without such proof). Justice Brennan framed the issue quite differently than did the Court in *Bradwell*, *Cleary*, and *Muller*: “[O]ur Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage.” *Id.* at 684.

pass constitutional muster. Intermediate scrutiny analysis dates from 1976, and may be found in the U.S. Supreme Court's decision in *Craig v. Boren*,<sup>59</sup> where the Court stated: “[T]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>60</sup>

Justice Sandra Day O’Connor wrote the opinion and cast the deciding vote in *Mississippi University for Women v. Hogan*,<sup>61</sup> making it clear that the Equal Protection Clause of the Constitution provides strong protection against sex discrimination in government policies and programs. Justice O’Connor, considered by many as the leading proponent of the “heightened scrutiny” standard, reaffirmed the standard of “heightened scrutiny” for sex discrimination. Justice O’Connor emphasized the Court’s prior decisions holding that a law discriminating on the basis of sex requires “an exceedingly persuasive justification.”<sup>62</sup> The Court ruled 5-4 that this standard was not met by a state university that excluded men from admission to its nursing school based on gender stereotypes.<sup>63</sup>

### ***C. Strict Scrutiny Applied***

The application of a strict scrutiny standard was an important element of the determination of the Seventh Circuit in striking down the Illinois statutes as unconstitutional.

The notion of "levels of judicial scrutiny," including strict scrutiny, was introduced into constitutional parlance in footnote 4 to *United States v. Carolene Products* in 1938.<sup>64</sup> Strict scrutiny was first applied in the controversial opinion of Justice

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<sup>59</sup> *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating a law that authorized the serving of beer to females over eighteen years of age old but not to males over twenty-one and announcing that sex-based classifications were subject to stricter standards of review under the Equal Protection Clause of the Fourteenth Amendment). Noted the Court in *Boren*: “Decisions following *Reed* [have] rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications.” *Id.* at 198.

<sup>60</sup> *Id.* at 197.

<sup>61</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>62</sup> *Id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455 (1981)).

<sup>63</sup> *Id.* at 724 (“The burden is met only by showing at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”) (citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

<sup>64</sup> *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). The original text of footnote 4 (with internal footnotes as found in the original) is revealing:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. *See Stromberg v. California*, 283 U.S. 359, 369-70; *Lovell v. Griffin*, 303 U.S. 444, 452).

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, *see Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, *see Near v. Minnesota*, 283 U.S. 697, 713-14, 718-20, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra*; on interferences with

Black in *Korematsu v. United States*,<sup>65</sup> in which the U.S. Supreme Court held that racial discrimination against Japanese Americans during World War II had met the standard of

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political organizations, *see* *Stromberg v. California*, *supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-78; *Herndon v. Lowry*, 301 U.S. 242, *and see* *Holmes, J.*, in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, *see* *De Jonge v. Oregon*, 299 U.S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 284, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Compare* *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 185 n.2, and cases cited.

<sup>65</sup> *Korematsu v. United States*, 323 U.S. 214 (1944). In May 1942, 120,000 U.S. residents of Japanese ancestry who were both citizens and non-citizens of the United States were ordered into resettlement camps following Japan's December 7, 1941, attack on Pearl Harbor in Hawaii. Fred Korematsu was a U.S.-born Japanese American citizen who decided to remain in San Leandro, with his girlfriend after his parents had been removed from their home. Evidence indicated that Korematsu had knowingly violated Civilian Exclusion Order No. 34 issued by the United States Army, Korematsu contended that the Order was unconstitutional as a violation of the Fifth Amendment. The background which spawned the controversy was explained by the Court:

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan. *Id.* at 218-19.

Korematsu was tried and convicted in federal court on September 8, 1942, for a violation of Public Law No. 503, which criminalized such violations of military orders issued under the authority of Executive Order 9066. 7 Fed. Reg. 1407. He was placed on five years' probation. He and his family were placed in the Central Utah War Relocation Center situated at Topaz, Utah. Korematsu appealed his conviction to the U.S. Court of Appeals. They granted review on March 27, 1943 but upheld the original verdict on January 7, 1944. 140 F.2d 289 (9<sup>th</sup> Cir. 1943). Korematsu appealed again and brought his case to the U.S. Supreme Court, which granted certiorari on March 27, 1944. On December 18, 1944, in a 6-3 decision authorized by Justice Hugo Black, the Supreme Court held that compulsory exclusion, though constitutionally suspect, is justified during circumstances of "emergency and peril." 323 U.S. at 220. Justice Black stated further:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders as inevitably it must, determined that they should have the power to do just this. *Id.* at 223.

Without any doubt, the Korematsu Case stands as one of the most controversial and criticized cases in the modern history of the U.S. Supreme Court. *See, e.g.*, MARK TUSHNET, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 124 (2008). Korematsu's conviction for

strict scrutiny. The Supreme Court has determined that strict scrutiny review arises in two basic contexts:

- When a "fundamental" constitutional right is infringed—especially those right explicitly found in the Bill of Rights and those rights that the Supreme Court has deemed to be a fundamental right protected by the "liberty" provision of the 14th Amendment (for example, the right to vote,<sup>66</sup> the right to interstate travel,<sup>67</sup> and the right to privacy<sup>68</sup>);

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evading the internment order was ultimately overturned on November 10, 1983, after Korematsu challenged the earlier decision by filing for a writ of *coram nobis*. In a decision by Judge Marilyn Hall Patel, the United States District Court for the Northern District of California granted the writ and voided Korematsu's original conviction. Judge Patel found that in Korematsu's original case, the government had knowingly submitted false information to the U.S. Supreme Court that had a material effect on the decision of the Court. *See* *Korematsu v. United States*, 584 F. Supp. 1406 (1984). In 1988, President Reagan declared the internment a "grave injustice" and signed legislation authorizing reparations of \$20,000 each to thousands of surviving internees, including Korematsu. In 1999, President Clinton awarded Korematsu a presidential Medal of Freedom, the nation's highest civilian honor. Korematsu died on March 30, 2005 at the age of 86. Professors Lockhart, Kamisar, and Choper comment that "*Hirabayashi* and *Korematsu* have been the last instances in which the Court has failed to invalidate intentional (or "de jure") government discrimination against a racial or ethnic minority." WILLIAM B. LOCKHART, YALE KAMISAR & JESSE H. CHOPPER, *THE AMERICAN CONSTITUTION* 850 (5th ed. 1981).

<sup>66</sup> *See, e.g.,* *Dunn v. Blumstein*, 405 U.S. 330 (1972) (state durational and residency requirements of one year in the state and three months in the county in order to vote failed under a strict scrutiny analysis). In *San Antonio Ind. School Dist. v. Rodriguez*, Justice Marshall noted: "[T]he right to vote in state elections has been recognized as a 'fundamental political right,' because the Court concluded very early that it is 'preservative of all rights.'" 411 U.S. 1, 101 (1973) (Marshall, J., dissenting) (*citing* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Justice Marshall continued: "For this reason, 'this Court has made it clear that a citizen has a *constitutionally protected right* to participate in elections *on an equal basis with other citizens in the jurisdiction.*" *Id.* (*citing* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (emphasis in the original)).

<sup>67</sup> *See, e.g.,* *United States v. Guest*, 383 U.S. 745 (1966). The right to travel has been held to encompass the right of citizens (1) to enter and leave another state; (2) to be treated as welcome visitors; and (3) to be treated equally if they become permanent residents of that state. *Saenz v. Roe*, 526 U.S. 489, 490 (1999). The right to international travel has been held to be part of the "liberty" guaranteed by due process. *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (holding that the Secretary of State had exceeded its authority in refusing to issue passports to Communists for foreign travel). However, the right to international travel is not unqualified and may be regulated within the parameters of due process under the rational basis test. In general, this is an example of the courts deferring to the judgment of the political branches (executive and legislative) on matters relating to foreign policy. *See* *Regan v. Wald*, 468 U.S. 222, 223 (1984). Included in rationally based restrictions have been the denial of social security benefits when recipients are *outside* of the United States, *Califano v. Aznavorian*, 439 U.S. 170, 178 (1978) (emphasis added), revocation of a passport of a person whose conduct in foreign countries presents a serious danger to national security, *Haig v. Agee*, 453 U.S. 280, 281-82 (1981) (Secretary of State revocation of the passport of an ex-CIA employee who was exposing the identity of undercover CIA agents in foreign countries), and imposition of reasonable "area restrictions" for passports prohibiting travel to certain countries or danger zones, *Zemel v. Rusk*, 381 U.S. 1, 8 (1965) (regarding the denial of a passport to Cuba).

<sup>68</sup> *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113, 129 (1973) (holding that the right to privacy is implicit in the concept of "liberty" within the protection of the Due Process Clause). The right to privacy has been held to include the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the right to marry is a "basic civil right"), the right to procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating a law requiring the sterilization of habitual criminals), the right of parents to make decisions concerning the care, custody, and control of their children, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the right of related persons to live together in a single household, *Moore v. City of East Cleveland*, 431 U.S. 494, 505-6 (1977), and the right of fully consenting adults to engage in private intimate sexual conduct that is *not* commercial in nature. *Lawrence v. Texas*, 539 U.S. 558, 575

- When the government action involves the use of a "suspect classification" such as race<sup>69</sup> or national origin<sup>70</sup> that may render it void under the Equal Protection Clause.<sup>71</sup>

In order to pass strict scrutiny muster, the law or policy must satisfy three prongs. First, the policy or law must be justified by a "*compelling governmental interest*." Second, the law or policy must be *narrowly tailored* to achieve that goal or interest. Third, the law or policy must be the *least restrictive means* for achieving that compelling governmental interest. The SEVGL would be judged according to these standards.<sup>72</sup>

### III. CONSTITUTIONALITY OF THE SEVGL

The State of Illinois conceded that the SEVGL is a content-based restriction on speech. As such, the Appellate Court was required to apply strict scrutiny analysis in assessing the constitutionality of the Act.<sup>73</sup> In order to survive strict scrutiny analysis, the SEVGL must be "narrowly tailored to promote a compelling Government interest."<sup>74</sup> In general, a statute would meet this test "only if it targets and eliminates no more than the

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(2003) (invalidating a state law making it a crime for members of the same sex to engage in consensual sodomy and overruling *Bowers v. Hardwick*, 478 U.S. 573 (1986)).

Justice Stewart, joined by Justice Black, expressed a contrary view:

"What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy 'created by several fundamental constitutional guarantees.' I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." *Griswold*, 381 U.S. at 530 (Stewart, J., dissenting).

<sup>69</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880) (invalidating a law forbidding African-Americans from serving on grand or petit juries).

<sup>70</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating the denial of laundry licenses only to persons of Chinese origins); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (concerning discrimination against Mexican-Americans in respect to service on a jury). Generally, the application of "strict scrutiny" requires that the government exhibit a discriminatory purpose. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (challenging the implementation of a test that was failed disproportionately by African-Americans). Such discrimination may be shown on its face; through unequal administration; or where the legislative motive was to discriminate against racial or ethnic minorities. *Id.* at 239

<sup>71</sup> The Fourteenth Amendment provides (in part): "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

<sup>72</sup> Professor Brenner framed the issue as follows:

Content-based regulations are presumptively invalid and are upheld only if they survive strict scrutiny; under this test, a statute must be narrowly tailored to promote a compelling government interest, and 'if a less restrictive alternative would serve the Government's purpose . . . [it] must use that alternative.' Content-neutral regulations are upheld if they satisfy three requirements: [1] if they further 'an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; [3] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 286-87 (2003).

<sup>73</sup> *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000); *FCC v. Pacifica*, 438 U.S. 726, 751 (1978).

<sup>74</sup> *Playboy*, 529 U.S. at 811.

exact source of the ‘evil’ it seeks to remedy.”<sup>75</sup> The Supreme Court in *United States v. Playboy Entertainment Group* noted that a statute is not narrowly tailored “[if] a less restrictive alternative would serve the Government’s purpose.”<sup>76</sup>

The State of Illinois clearly identified the purpose of the SEVGL as “shielding children from indecent sexual material and in assisting parents in protecting their children from that material.”<sup>77</sup> Whatever might be the societal debate concerning the nature and effect of pornography, the legal issue has been addressed several times by the U.S. Supreme Court. As noted in *Ashcroft v. ACLU*: “[t]o be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials.”<sup>78</sup> Likewise, in *Sable Communications of California v. FCC*, the Supreme Court stated: “[w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”<sup>79</sup>

Having identified the interest of the State of Illinois as “compelling,”<sup>80</sup> the Court of Appeals correctly noted that the burden of proof fell on the State of Illinois to demonstrate that the SEVGL is *narrowly tailored* to achieving this purpose.<sup>81</sup>

### **A. Obscene vs. Indecent**

None of the parties to the dispute contended that the games affected by the SEVGL were “obscene.” Rather, the State of Illinois contended that the games were “indecent,” and thus subject to appropriate legislation which would limit their distribution to minors.<sup>82</sup> The Court of Appeals quoted with approval from the seminal case of *Interstate Circuit, Inc. v. City of Dallas*:<sup>83</sup> “[B]ecause of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.”<sup>84</sup> As a result, the State may regulate the dissemination of sexually-oriented material that is “indecent” with respect to minors, even if the material is not considered “obscene” under

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<sup>75</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

<sup>76</sup> *Playboy*, 529 U.S. at 813.

<sup>77</sup> 469 F.3d at 646 (citing Governor’s Br. at 16).

<sup>78</sup> *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004).

<sup>79</sup> *Sable Comm’n of California v. FCC*, 492 U.S. 115, 126 (1989).

<sup>80</sup> The Circuit Court simply stated: “[w]e need not spend time determining whether this is a compelling interest; it clearly is.” 469 F.3d at 646.

<sup>81</sup> *Id.* The opinion took a rather unexpected turn when Judge Williams veered into the area of First Amendment *rights* for children. *Id.* The Court stated: “[t]he Constitution also requires us to ask whether legislation unduly burdens the First Amendment rights of minors.” *Id.* This statement reflects the position enunciated in *American Amusement Machine Association v. Kendrick* that “history has shown the dangers of giving too much censorship power to the State over materials intended for young persons.” *Kendrick*, 244 F.3d 572, 577 (7<sup>th</sup> Cir. 1973) (“The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion.”). *Kendrick*, however, can be distinguished from *Entertainment Software Association* because “[v]iolence and obscenity are distinct categories of objectionable depiction” which are subject to a different constitutional inquiry and standard. *Id.* at 574.

<sup>82</sup> The Court was clear that under circumstances where the games would be considered “obscene,” the State would have no power to limit their sales to adults. See *Playboy*, 529 U.S. at 811.

<sup>83</sup> 390 U.S. 676 (1968).

<sup>84</sup> 469 F.3d at 647 (citing *Interstate Circuit*, 390 U.S. at 690).

the Court's formulation for adults—but only if the State can demonstrate that the regulation or statute in question is narrowly tailored to serve a compelling governmental interest. As the U.S. Supreme Court noted in *Sable Communications*, “[t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the *least restrictive means*.”<sup>85</sup>

**B. Ginsberg<sup>86</sup> and Miller<sup>87</sup> Revisited<sup>88</sup>**

In 1968, in *Ginsberg v. New York*,<sup>89</sup> the United State Supreme Court upheld a New York statute that criminalized the sale of certain materials to persons under the age of seventeen. The statute in question in *Ginsberg* made the distribution criminal if the material “(i) predominantly appeal[ed] to the prurient, shameful or morbid interest of minors, and (ii) [wa]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable materials for minors, and (iii) [wa]s utterly without redeeming social importance for minors.”<sup>90</sup> The Court concluded that the protection of children’s psychological health was a permissible basis for restricting minors’ access to non-obscene, sexually oriented materials as well.<sup>91</sup>

In 1973, the Supreme Court once again entered into the debate concerning the extent of governmental power in *Miller v. California*.<sup>92</sup> In *Miller*, the Court enunciated a three-prong test in order to determine whether a state could criminalize the distribution of obscene materials to adults. The Supreme Court established: “The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest,<sup>93</sup> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct

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<sup>85</sup> 492 U.S. 115, 126 (1989) (emphasis added).

<sup>86</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968). Ginsberg and his wife operated Sam's Stationery and Luncheonette in Bellmore, Long Island where they sold magazines, including those deemed at that time by the Supreme Court to be "girlie." (How times have changed!) Ginsberg was prosecuted when he personally sold two 16 year old boys involved in a "sting" operation the "girlie" magazines. Ginsberg was tried in Nassau County District Court and found guilty. The court found that the pictures were harmful to minors under the New York law.

<sup>87</sup> *Miller v. California*, 413 U.S. 15 (1973). Marvin Miller owned a small, 60-employee publishing company that printed and distributed hard-core pornographic booklets in Los Angeles, California. Sometime in 1967, Miller's company inadvertently mailed five sexually explicit booklets to a restaurant. The restaurant filed a complaint with the local police, which resulted in the filing of misdemeanor charges against the publisher for violations of California Penal Code 311 and 311.2(a), which made it a criminal offense to distribute obscene material.

<sup>88</sup> The authors have previously dealt with the broader constitutional issues surrounding obscenity and indecency in the context of regulation of the Internet. See Richard J. Hunter, Jr., Hector Lozada & Ann Mayo, *The Supreme Court as the "Grand Mediator" in Social Regulation of the Media*, 32 HASTINGS COMM. & ENT. L.J. 41 (2009).

<sup>89</sup> 390 U.S. 629 (1968).

<sup>90</sup> *Id.* at 632-33.

<sup>91</sup> *Id.* at 633.

<sup>92</sup> 413 U.S. 15 (1973).

<sup>93</sup> A dictionary definition of "prurient" is anything "causing lascivious or lustful thoughts." A similarly vague legal definition of prurient interest is a "shameful and morbid interest in nudity, sex, or excretion." See, e.g., [www.leclaw.com](http://www.leclaw.com) (last visited December 23, 2010).

specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."<sup>94</sup>

The Appellate Court in *Entertainment Software Association* noted that the *Miller* Court had rejected an earlier formulation of *Memoirs v. Massachusetts* that contained the phrase "utterly without redeeming social importance."<sup>95</sup> *Memoirs* also articulated two other prongs to its definition of obscenity. Material was obscene if "(a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; [and] (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters . . . ." <sup>96</sup> The statute in *Ginsberg* was upheld because it had appropriated the "exact language of *Memoirs*" and had appended "the words 'for minors'" to each prong of the *Memoirs* test.<sup>97</sup> The Appellate Court continued: Seemingly implicit then in the *Miller* Court's amendment of the *Memoirs* test was that the test of "obscenity for minors," or indecency, was amended to include the requirement that the material regulated "taken as a whole, do[es] not have serious literary, artistic, political, or scientific value" for minors.<sup>98</sup>

However, it was not clear what effect the *Miller* amendment of the *Memoirs* test might have on *Ginsberg*.<sup>99</sup> The Seventh Circuit concluded that the question was basically irrelevant because "either *Ginsberg* or *Miller*"<sup>100</sup> had provided the third prong in formulating an "appropriate standard for what material can be regulated in the manner of the SEVGL."<sup>101</sup> The court stated that "somewhere between *Ginsberg* and *Miller* we arrive at the basement for constitutionality of a statute criminalizing the distribution of sexually oriented materials to minors."<sup>102</sup> "Inexplicably," noted the court, "the State of Illinois chose to ignore both *Ginsberg's* and *Miller's* third prongs" in creating the SEVGL's definition of "sexually explicit."<sup>103</sup> Thus, the State of Illinois had failed to narrowly tailor the statute as required under a strict scrutiny analysis and had created a statute that was unconstitutional and thus unenforceable.

### **C. *Miller and Ginsberg Applied to the SEVGL: The Fatal Flaws***

While the court recognized that the SEVGL's definition of "sexually explicit" was modeled after the first two prongs of the *Ginsberg/Miller* test, the SEVGL did not include either the "utterly without redeeming social importance for minors" language of *Ginsberg* or the "taken as a whole, do not have serious literary, artistic, political, or scientific value" language of *Miller*. Both omissions were fatal flaws to the enforcement

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<sup>94</sup> *Miller*, 413 U.S. at 24.

<sup>95</sup> 383 U.S. 413, 418 (1966).

<sup>96</sup> *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 648 (7th Cir. 2006) (citing *Memoirs*, 383 U.S. at 418).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (citing *Miller*, 413 U.S. at 24).

<sup>99</sup> See *Pacifica*, 438 U.S. at 767 (Brennan, J., dissenting) ("[w]e have not had the occasion to decide what effect *Miller*... will have on the *Ginsberg* formulation"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.10 ("In *Miller*... we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had the occasion to decide what effect *Miller* will have on the *Ginsberg* formulation.").

<sup>100</sup> *Entm't Software Ass'n*, 469 F.3d at 648.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 648-49.

<sup>103</sup> *Id.* at 649.

of the SEVGL.<sup>104</sup> As a result, this deficiency, combined with the SEVGL's lack of incorporation of the third *Ginsberg-Miller* prong, made it likely that there would be criminal prosecutions for the sale of video games that were "beyond the scope of the State's compelling interest—games that have 'social importance for minors.'"<sup>105</sup>

The Seventh Circuit cited the example of the game *God of War* as an illustration of the potential criminalization of a game that featured exposed breasts without taking into consideration of the game in its entirety, including its potential social value for minors. The distribution of *God of War* would be potentially illegal and criminal—in spite of the fact that the game tracked the Homeric Epics found in the *Odyssey* in both content and theme.<sup>106</sup> Pointedly, the Circuit Court noted that it would be highly unlikely that a statute which potentially criminalizes distribution of a work that contained only brief—and quite frankly, peripheral—flashes of nudity, would meet the test of being "narrowly tailored." What seems clear is that the Seventh Circuit was adopting the view found in *Cohen v. California*<sup>107</sup> that: "It is clear, however, that under any test of obscenity to minors not all nudity would be proscribed. Rather, to be obscene 'such expression must be, in some significant way, erotic.'"<sup>108</sup>

Judge Williams commented that the SEVGL allowed criminal prosecution solely on the basis of applying "contemporary community standards" with regard to alleged lasciviousness of any depiction of "post-pubescent female breasts."<sup>109</sup> While it is certainly true that *Miller* had reaffirmed the inclusion of a "contemporary community standards" test, Judge Williams commented further that the point of *Miller* was to free individuals from the possibility of criminal prosecution based on widely divergent local standards. Quoting from *Ashcroft*, Judge Williams attempted to bring a proper *focus* and an important *limitation* to the development of the "contemporary community standards" test: "The serious value requirement 'allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.'"<sup>110</sup>

#### IV. A RETURN TO THE IDEA OF "LESS RESTRICTIVE ALTERNATIVES"

The real import of *Entertainment Software Ass'n v. Blagojevich* may lie in its return to what are sometimes called "first principles"—that is, that the choice and selection of what minors may view should be left to their parents or other "responsible adults"—and not to the government through regulation or legislation. Although the case

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<sup>104</sup> See *Ashcroft v. ACLU*, 542 U.S. 656, 679 (2004) (Breyer, J., dissenting) (describing the words "lacks serious literary, artistic, political, or scientific value" as "critical terms").

<sup>105</sup> 469 F.3d at 650 (citing *Reno v. ACLU*, 521 U.S. 844, 865-66 (1997)).

<sup>106</sup> *God of War* is a video game for the PlayStation 2 console. It was released on March 22, 2005. It is an action adventure game based on Greek mythology. *God of War* was developed by Sony Computer Entertainment's Santa Monica division.

<sup>107</sup> *Cohen v. California*, 403 U.S. 15, 26 (1971) (noting that "absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

<sup>108</sup> See *Erznoznik*, 422 U.S. at 214 n.10 (quoting *Cohen v. California*, 403 U.S. at 20)).

<sup>109</sup> See 720 ILL. COMP. STAT. ANN. § 5/12B-10(e) (2005)

<sup>110</sup> 469 F.3d at 650 (citing *Ashcroft v. ACLU*, 535 U.S. at 579 and quoting *Reno v. ACLU*, 521 U.S. at 873)).

did not deal with issues of indecency, the Circuit Court cited with approval the opinion of the U.S. Supreme Court in *Liquormart, Inc. v. Rhode Island*, where the Court stated: “It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance . . . educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.”<sup>111</sup> In addition, it is clear that the Circuit Court preferred the approach found in *Linmark Assocs., Inc. v. Willingboro Twp.* where the Court had suggested that as an alternative to speech regulations, the municipality might “continue ‘the process of education’ it has already begun” through sponsored speech targeted at raising awareness of the municipality’s views on the local housing market.<sup>112</sup>

In *Ashcroft v. ACLU*, the U.S. Supreme Court indicated that “when plaintiffs challenge a content-based speech regulation, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.”<sup>113</sup> The *Ashcroft* Court reiterated what some call the “*more speech*” solution to many issues involving the First Amendment. As Supreme Court Justice Louis Brandeis commented in his oft-quoted opinion in *Whitney v. California* in 1927: “If there is time to expose through discussions the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>114</sup>

What may have convinced the Seventh Circuit that the SEVGL could not withstand a constitutional challenge was the district court’s finding that the voluntary ratings regime was effective. The district court found that eighty-three percent of the video games purchased for minors had parental involvement—in effect, the parents were “speaking” in support of proper standards for their children<sup>115</sup>. Illinois had options available to it in order to increase parental involvement and awareness of the ESRB system through the use of a “wide media campaign.”<sup>116</sup> Judge Williams concluded incisively: “Nothing on the record convinces us that this proposal would not be at least as effective as the proposed speech restrictions. In short, the SEVGL is overbroad, it is not narrowly tailored, and it cannot survive strict scrutiny.”<sup>117</sup>

## V. CONCLUSIONS AND OBSERVATIONS: LESSONS FOR THE FUTURE— MODELING REGULATION OF THE VIDEO GAME INDUSTRY

It is clear that the State has a “compelling interest” in shielding children from indecent sexual material on both physical and psychological grounds. As well, states like Illinois have made it plain that it is a core function of the government to assist parents in

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<sup>111</sup> *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, at 507 (1966) (law banning the advertisement of alcohol except at the place of sale held unconstitutional as a violation of the First Amendment on grounds that the state lacked a compelling interest in enacting the ban).

<sup>112</sup> *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85 (1977) (finding that restricting the posting of “for sale” and “sold” signs on real estate within the town violated the First Amendment to the U. S. Constitution protections for commercial speech).

<sup>113</sup> 469 F.3d at 651 (*citing* *Ashcroft*, 542 U.S. at 665).

<sup>114</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>115</sup> 469 F.3d at 651.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

protecting their children from the negative effects of such materials through dissemination of timely, accurate, and objective information.

But not all measures taken or adopted by states will pass judicial muster. We know, for example, that a state bears a heavy constitutional burden in attempting to ban certain video games or in criminalizing their sale in demonstrating that any law is “narrowly tailored” to achieving this legitimate purpose. In the end and with due deference to the legitimate rights of producers to make and develop a wide range of video products as well those of individuals—including minors—to view materials of *their* choosing—and *not* the government—to regulate the content of otherwise constitutionally protected speech, the states must choose the least restrictive means at their disposal.

What courts, and especially the Seventh Circuit, have clearly stated is that both *Ginsberg* and *Miller* are relevant—especially their so-called “third prong” in determining the constitutionality of a regulation or a criminal statute: whether the work, “taken as a whole, do[es] not have serious literary, artistic, political, or scientific value” [*Miller*] or that the material be “utterly without redeeming social importance for minors” [*Ginsberg*].

Finally, and perhaps more critical from a societal perspective, a state should indeed focus on an important first principle: the choice and selection of what minors should view should be left to educated and well-informed parents or other responsible adults through a verifiable system that in fact has been shown to be working.

**AMERICAN NEEDLE V. NFL: LEGAL AND SPONSORSHIP IMPLICATIONS**

By John A. Fortunato\* &  
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**I. INTRODUCTION**

Application of antitrust laws to the professional sports industry and resolution of whether professional leagues should be exempt from antitrust laws continue to receive judicial review. The debate centers on whether professional sports leagues are a collective, singular economic entity or if teams are individual businesses even when they cooperate on joint or collective business relationships.

This question was addressed by the U.S. Supreme Court in *American Needle Inc. v. NFL*.<sup>1</sup> In 2000, National Football League (NFL) Properties entered into an agreement with Reebok on a ten-year, \$25 million contract to be the league's exclusive licensee for the manufacture and sale of trademark headgear for all thirty-two NFL teams. Due to the exclusive nature of the contract with Reebok, the NFL did not renew its contract with American Needle, a suburban Chicago clothing manufacturer who had been manufacturing and selling headgear with NFL team logos for more than twenty years. American Needle filed suit in Federal District Court for the Northern District of Illinois, claiming the agreement between NFL Properties and Reebok violated the Sherman Antitrust Act.<sup>2</sup> NFL Properties claimed it was not capable of conspiring to violate Antitrust Laws because it is a collective, singular economic entity.<sup>3</sup> In *American Needle v. New Orleans Louisiana Saints*, the district court found the NFL "should be deemed a single entity rather than joint ventures cooperating for a common purpose."<sup>4</sup> The U.S. Court of Appeals for the Seventh Circuit affirmed the decision.<sup>5</sup> American Needle petitioned and was granted that the case be heard by the Supreme Court. The NFL joined the case hoping to receive a broader exemption that could reduce lawsuits on antitrust grounds.<sup>6</sup> This article reviews the economic backdrop of the Court's holding, then analyzes the Court's holding itself and the implications it presents to the NFL and related entities.

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<sup>1</sup> *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (U.S. 2010).

<sup>2</sup> *Am. Needle Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Am. Needle v. NFL*, 538 F.3d 736, 736 (7th Cir. 2008).

<sup>6</sup> See Bill King, *Supreme Court weighs a game changer*, STREET & SMITH'S SPORTS BUS. J., Jan. 4, 2010, at 1, 8-10, available at <http://www.sportsbusinessjournal.com/article/64469>.

## II. THE RELATIONSHIP BETWEEN SPONSORS AND SPORTS LEAGUES

Corporate sponsorship has become an essential component of the sports industry business model. Researchers have identified the core components of a sponsorship agreement as an investment by the corporate sponsor in exchange for the exploitable commercial potential associated with the sports event or property.<sup>7</sup> For sports leagues and teams the benefits are obvious. On entering into sponsorship agreements they add another major revenue stream to their business. For the sponsoring companies, they enter into sponsorship agreements with sports properties for a multitude of reasons, including brand exposure, brand image association, and the potential to influence consumer purchase behavior.<sup>8</sup> Sponsorship can take on many different forms (i.e., stadium naming rights, stadium signage, ticket or hospitality opportunities, pouring rights). What makes sponsorship such an attractive strategy for many corporations is that all of the parameters of the deal are negotiable and bound only by what the sponsor and the sponsored property agree upon.<sup>9</sup>

One of the negotiated characteristics of a sponsorship is exclusivity for the sponsoring corporation within its particular product category. Sports leagues sell exclusivity in a variety of product categories, i.e., airlines, automobiles, and financial services. Exclusivity eliminates any competition from a rival within that product category at the sponsored event or location.<sup>10</sup> Exclusivity avoids competitive interference that would be incurred in other media contexts.<sup>11</sup> For some industries, such as beer, soda, and credit cards, the characteristic of exclusivity provides not only brand exposure but the additional advantage of selling their product through point-of-purchase at the stadium without competition. Other exclusivity agreements could include an athlete only using his or her sponsors' equipment, i.e., Tiger Woods only using Nike golf balls, or a league only using its sponsors' product or service, i.e., the NFL only having Reebok manufacture its licensed headwear.

Teams, too, derive substantial revenue by selling sponsorships. Teams sell sponsorships in a similar manner, creating exclusivity in a variety of product categories.

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<sup>7</sup> See Tony Meenaghan, *The Role of Sponsorship in the Marketing Communications Mix*, 10 INT'L J. OF ADVER. 35 (1991); LESA UKMAN, *IEG'S COMPLETE GUIDE TO SPONSORSHIP: EVERYTHING YOU NEED TO KNOW ABOUT SPORTS, ARTS, EVENT, ENTERTAINMENT AND CAUSE MARKETING* (1996).

<sup>8</sup> See T. Bettina Cornwell & Isabelle Maignan, *An International Review of Sponsorship Research*, 27 J. ADVER. 1 (1998); Dwane Hal Dean, *Associating the corporation with a charitable event through sponsorship: Measuring the effects on corporate community relations*, 31 J. ADVER. 77 (2002); Bill Harvey, *Measuring the effects of sponsorship*, 41 J. ADVER. RES. 59 (2001); Richard L. Irwin et al., *Cause-Related Sports Sponsorship: An Assessment of Spectator Beliefs, Attitudes, and Behavioral Intentions*, 12 SPORT MKTG. Q. 131 (2003); Robert Madrigal, *The influence of social alliances with sports teams on intentions to purchase corporate sponsors' products*, 29 J. ADVER. 13 (2000); BERNIE MULLIN ET AL., *SPORT MARKETING*, (3d ed. 2007); MATTHEW SHANK, *SPORTS MARKETING: A STRATEGIC PERSPECTIVE* (4th ed. 2008).

<sup>9</sup> JOHN A. FORTUNATO & ANGELA E. DUNNAM, *The negotiation philosophy for corporate sponsorship of sports properties*, in SHARING BEST PRACTICES IN SPORTS MARKETING: THE SPORTS MARKETING ASSOCIATION'S INAUGURAL BOOK OF PAPERS 73 (Brenda G. Pitts ed. 2004).

<sup>10</sup> *Id.*

<sup>11</sup> Anthony D. Miyazaki & Angela G. Morgan, *Assessing Market Value of Event Sponsoring: Corporate Olympic Sponsorship*, 41 J. ADVER. RES. 9 (2001).

A critical characteristic of the team selling sponsorships is that this revenue is not shared with the other teams in the league.<sup>12</sup>

Conflicts can emerge between league and team sponsors where leagues and teams have different sponsors within the same product category. For example, the NFL used to have one beer sponsor for the league and all of the teams. In 2002, the league changed to a system of having one sponsor for the league, but the teams could pursue their own beer sponsors for their local markets.<sup>13</sup> Coors is the official beer sponsor for the NFL, but Anheuser-Busch and Miller had contracts with individual teams.<sup>14</sup> It must also be noted that sponsorship with the premier sports properties is very expensive and often available to only the large brands that can afford the cost.<sup>15</sup>

### ***A. Antitrust Laws and Professional Sports***

The Sherman Antitrust Act has the primary purpose of thwarting trusts, and other arrangements, that may restrain trade. Sherman Act § 1 prohibits combinations and conspiracies that are in restraint of trade.<sup>16</sup> Section two examines the practices of monopolization, with firms deemed an illegal monopoly if: (1) they have monopoly power and (2) there has been a willful acquisition or maintenance of that power through predatory or exclusionary conduct.<sup>17</sup> The language of the Sherman Act is, however, broad and ambiguous.<sup>18</sup> Viewed most broadly, one could interpret it to declare almost every type of agreement between two or more businesses as illegal. Consequently, the Supreme Court has held over the course of the last century that only those agreements that operate as an “unreasonable” restraint of trade are in violation of the law.<sup>19</sup> This has come to be known as the “rule of reason” standard. LaBletta observes that “under the rule of reason standard, courts balance all the competitive harms and benefits of a particular business arrangement before labeling it an unreasonable restraint of trade.”<sup>20</sup>

In the sports industry, antitrust questions have often centered on whether professional sports leagues are a collective, singular economic entity or if teams are their own individual businesses. Much of the courts early involvement with antitrust application into the sports industry dealt with the issue of television contracts. The first antitrust issue was raised in the 1940s when Major League Baseball (MLB) adopted a

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<sup>12</sup> James T. Reese & Mark S. Nagel, *The Relationship Between Revenues and Winning in the National Football League*, 2 INT’L J. SPORT MGMT. 125 (2001).

<sup>13</sup> John A. Fortunato & Jared Melzer, *The Conflict of Selling Multiple Sponsorships: The NFL Beer Market*, 2 J. SPONSORSHIP 49 (2008).

<sup>14</sup> Anheuser-Busch will become the official beer sponsor of the NFL in April 2011 in an agreement estimated to be \$1.2 billion over six years. See Terry Lefton, *Strong Brew: A-B flexes its Muscles with ‘big bet’ on NFL*, STREET & SMITH’S SPORTS BUS. J., May 10, 2010, available at <http://www.sportsbusinessjournal.com/article/65675>.

<sup>15</sup> John A. Fortunato & Jef Richards, *Reconciling Sports Sponsorship Exclusivity with Antitrust Law*, 8 TEXAS REV. OF ENT. & SPORTS L. 33 (2007).

<sup>16</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2010).

<sup>17</sup> *Id.* at § 2.

<sup>18</sup> ROSS D. PETTY, *THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY* (1992).

<sup>19</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

<sup>20</sup> Nicole LaBletta, *If per se is Dying, why not in TV Tying? A case for Adopting the rule of Reason Standard in Television Block-Booking Arrangements*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 197 (2001).

rule prohibiting one team from broadcasting a game in another team's home territory or from another stadium without the home team's consent as a way to protect the home team's attendance.<sup>21</sup> The NFL adopted a similar policy. Fearing creation of a broadcast system without competition, the Justice Department became interested in the issue and filed suit against the NFL. In *United States v. NFL*, Judge Allan K. Grim upheld the NFL's policy preventing broadcasts of an outside game in a third team's home territory when that team had a home game.<sup>22</sup> Horowitz explains, "the court found that such a restraint was reasonable because of the adverse effects that competitive outside telecasts would be likely to have on the home club's attendance."<sup>23</sup>

In the 1950s and into 1960 the NFL teams made their own individual deals with television networks to broadcast their games. For example, CBS had agreements with nine teams, while NBC had contracts with the Baltimore Colts and Pittsburgh Steelers, and the Cleveland Browns had their own independent network. For the 1961 season, the NFL decided to move to a system of having one network televise all the league's games and share the revenue equally among all teams. The NFL signed a contract with CBS. The NFL sought further interpretation of the 1953 ruling from the courts. Judge Grim, however, ruled that by pooling television rights, the teams eliminated competition among themselves in the sale of these rights and therefore deemed the television contracts to be a violation.<sup>24</sup>

Having failed in the courts, the league petitioned Congress for permission to pool and sell the broadcast rights to television networks. The system of sports leagues selling broadcast rights to television networks in the United States was legally established in 1961 when President John F. Kennedy signed the Sports Broadcasting Act into law.<sup>25</sup> The law provides leagues with an antitrust exemption that allows them to collectively pool the broadcast rights to all of their teams' games and sell them to the highest bidding television network.<sup>26</sup> The Sports Broadcasting Act has been described as "special interest legislation, a single-industry exception to a law designed for the protection of the public."<sup>27</sup>

The main argument of professional sports leagues for their need of an antitrust exemption is that sports leagues need competitive balance to thrive. Pete Rozelle was the Commissioner of the NFL from 1960 to 1989. Rozelle is credited with convincing NFL owners to share their television revenue, thus developing the economic business model that is the standard for modern professional sports.<sup>28</sup> Rozelle believed that fans in every city needed to have the belief that their team, if managed properly, could compete and

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<sup>21</sup> See Ira Horowitz, *Sports Broadcasting*, in GOVERNMENT AND THE SPORTS BUSINESS 275-83 (Roger G. Noll, ed. 1974).

<sup>22</sup> *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>23</sup> Horowitz, *supra* note 21, at 281.

<sup>24</sup> *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961), *superseded by statute as stated in Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 2002-11 (S.D. Cal. Feb. 1, 2002).

<sup>25</sup> Sports Broadcast Act § 15 U.S.C. § 1291 (1961).

<sup>26</sup> *Id.*

<sup>27</sup> *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992).

<sup>28</sup> JOHN A. FORTUNATO, COMMISSIONER: THE LEGACY OF PETE ROZELLE (2006); PAUL ATTNER, *The Power of Persuasion: The Most Powerful People in Sports for the 20<sup>th</sup> Century*, THE SPORTING NEWS, Dec. 20 1999; MICHAEL LEWIS, *Pete Rozelle: He Hooked us on Football as Show biz and Gave Sunday (and Monday) a new Kind of Religious Significance*, TIME, Dec. 7, 1998, available at <http://205.188.238.109/time/time100/builder/profile/rozelle.html>.

win a championship.<sup>29</sup> He felt that if fans did not believe their team could win they might lose interest in the league and no longer attend or watch games.<sup>30</sup>

Rozelle thought that competitive balance was linked to the league's equitable distribution of revenues, with every NFL team equipped with the similar economic capabilities.<sup>31</sup> Large differences in revenues might allow only wealthier franchises to sign the better players, creating a system where some teams could simply not compete. Because it was television that provided the league with its greatest source of revenue, it was television money that would have to be shared equally among all franchises. Rozelle explained the rationale for this economic model for the NFL on many occasions in testifying before the United States Congress:

The shared revenues are jointly produced by all league members in co-producing their "league" product through the joint league enterprise. For the NFL, revenue sharing is essential, among other resources, to maintain high quality of the league's product through league balance and to maintain league teams in relatively small markets—avoiding the emergence of "have" and "have not" clubs. Further, the immediate effect of revenue sharing would appear to be to make the member clubs and the league itself more competitive with other sports and entertainment. The league balance resulting from revenue sharing tends to make all clubs more viable, and the league as a whole more viable.<sup>32</sup>

Currently, television money represents the NFL's most lucrative revenue source. In agreements with CBS, Fox, NBC, ESPN, and Direct-TV the NFL earns more than \$3.75 billion *per season*.

As noted above, individual teams also sell some exclusive sponsorships and keep all of the revenue themselves. Similarly, individual team broadcast revenue is also not shared. For the games that are not broadcast on national television, the rights revert to the teams. While in the NFL each game is televised by a national broadcast network, in Major League Baseball, the NBA, and the NHL the majority of games are sold by the teams to local networks to broadcast the games in that particular city. The selling of local broadcast rights in these sports creates wide disparities in revenues between teams from larger or smaller television markets.

The selling of local sponsorship and local broadcast rights are not the only areas where teams are financially independent. Teams have their own ticket revenue, the ancillary revenue that is obtained through ticket sales, from sources such as parking and concessions, and their own radio broadcast contracts. These revenue streams provide individual teams with their own level of profits and losses. Thus sports teams thrive economically not only on the revenue generated at the league level, but also very much depend on their individual revenue streams. This dual revenue structure further

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Statement of NFL Commissioner Pete Rozelle, *Professional Sports Antitrust Immunity: Hearing Before Senate Comm. on the Judiciary*, 99th Cong. (1985).

complicates the question of professional sports leagues being a collective, singular economic entity or teams being their own individual businesses.

***B. Case Law: Sports Leagues as a Single Entity or Individual Teams***

The courts have been inconsistent in their rulings as to the question of whether professional sports leagues are a collective, singular economic entity or if teams are individual businesses. For example, in support of the argument that sports leagues are a single entity, courts have found the NFL to be “a unique type of business” whose clubs “must not compete too well with each other in a business way.”<sup>33</sup> The NFL is a “unique” business organization having “some of the characteristics of a joint venture.”<sup>34</sup> And, explicitly declaring the NFL is a “single economic entity.”<sup>35</sup>

These opinions contrast with declarations of sports leagues being comprised of individual team businesses. For example, “the NFL is like any other business” and “open unfettered competition” must take place among its clubs.<sup>36</sup> The NFL Clubs are no different from ordinary business competitors.<sup>37</sup> And, finally, the NFL is not a “single business entity” and the teams are business competitors.<sup>38</sup>

Adding to the complexity of the issue, and the inconsistency of the courts on the question, is the affirming summary judgment of the District Court in the initial American Needle case.<sup>39</sup> The Court of Appeals for the Seventh Circuit held that “in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1.”<sup>40</sup>

**III. *AMERICAN NEEDLE V. NFL: SUMMARY AND ANALYSIS***

***A. The Arguments***

The petitioner, American Needle, claimed the NFL hindered competition and acted as and created a monopoly in its exclusive agreement with Reebok. In its petition to the Supreme Court, American Needle contended that “the teams are independently owned and controlled for-profit businesses that do compete, and are capable of competing, with each other in numerous ways, including in the licensing and marketing of their respective

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<sup>33</sup> United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953) *superseded by statute as stated in Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999).

<sup>34</sup> Mackey v. NFL, 543, F.2d 606, 619 (8th Cir. 1976).

<sup>35</sup> N. Am. Soccer League v. NFL, 505 F. Supp. 659, 688 (S.D.N.Y. 1980) *aff'd in part, rev'd in part*, 670 F.2d 1249 (2d Cir. 1982).

<sup>36</sup> Bowman v. NFL, 402 F. Supp. 754, 756 (D. Minn.1975).

<sup>37</sup> Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1979).

<sup>38</sup> Los Angeles Mem'l Coliseum Comm'n v. NFL, 519 F. Supp. 581, 585 (C.D. Cal. 1981).

<sup>39</sup> Am. Needle Inc, 496 F. Supp. 2d at 943.

<sup>40</sup> Am. Needle v. NFL, 538 F.3d 736, 741 (7th Cir. 2008), *rev'd* 130 S. Ct. 2201 (2010).

intellectual property.”<sup>41</sup> According to American Needle the price of NFL licensed hats increased immediately after its signing with Reebok.<sup>42</sup>

The NFL argued that it is a single entity, incapable of conspiring and that its teams cannot produce the product of NFL football games without collaboration.<sup>43</sup> In speaking specifically on the issue of its intellectual property, the NFL maintained the logos and trademarks are necessary for the promotion of NFL football.<sup>44</sup> In its brief to the Supreme Court, the NFL explained, “to protect and deploy its jointly generated value, the League controls the use of intellectual property.”<sup>45</sup> The NFL also emphasized the revenue sharing aspect of its licensing agreements and the importance in the structure of the league in its brief presented to the Supreme Court.<sup>46</sup>

Several groups submitted amicus briefs on behalf of either American Needle or the NFL. Among those briefs in support of American Needle were the players associations’ of all four major professional sports leagues as well as the NFL Coaches Association. Among the briefs in support of the NFL were the National Basketball Association (NBA), National Hockey League (NHL), Major League Soccer (MLS), and the National Collegiate Athletic Association (NCAA), as well as companies that continuously invest in sports sponsorships: Mastercard, Visa, Reebok, and Electronic Arts. Reebok pointed out that American Needle could have won the bid with the NFL. Reebok also said, “the antitrust laws are designed to protect competition – not individual competitors. Having failed to win its license renewal in the marketplace, American Needle cannot now use the antitrust laws to compel a different result.”<sup>47</sup>

## **B. Findings**

In examining the American Needle case, the Supreme Court provided a decision on the narrow issue of whether the NFL is capable of engaging in a “contract, combination . . . or conspiracy”<sup>48</sup> as defined in the Sherman Act. In delivering the opinion of the Court, Justice Stevens explained, “the question is not whether the defendant is legally a single entity or has a singular name; nor is the question whether the parties involved ‘seem’ like one firm or multiple firms in any metaphysical sense. The key is whether the alleged ‘contract, combination... or conspiracy’ is concerted action – that is, whether it joins together separate decisionmakers.”<sup>49</sup>

One major case used in the Supreme Court’s ruling in the *American Needle v. NFL* case was *Copperweld Corp. v. Independence Tube Corp.*,<sup>50</sup> a case that examined whether contract language could be construed as a “basic distinction” under the Sherman Act “between concerted and independent action.”<sup>51</sup> In applying *Copperweld* in his

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<sup>41</sup> Brief of Petitioner, *Am. Needle v. NFL*, 538 F.3d 736 (7th Cir. 2008).

<sup>42</sup> *Id.*

<sup>43</sup> Brief of Respondent, *Am. Needle v. NFL*, 538 F.3d 736 (7th Cir. 2008).

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Brief of Respondent, *Reebok Int’l Ltd., Am. Needle v. NFL*, 538 F.3d 736 (7th Cir. 2008).

<sup>48</sup> *Am. Needle Inc.*, 130 S. Ct. at 2208.

<sup>49</sup> *Id.* at 2212.

<sup>50</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

<sup>51</sup> *Id.* at 767.

opinion, Justice Stevens said the court found “that although a parent corporation and its wholly owned subsidiary are ‘separate’<sup>52</sup> for the purposes of incorporation or formal title, they are controlled by a single center of decision-making, and they control a single aggregation of economic power. Joint conduct by two such entities does not ‘depriv[e] the marketplace of independent centers of decision-making.’”<sup>53</sup> The question that emerged then in *American Needle v. NFL* was whether the agreement between the NFL and Reebok joined together independent centers of decision-making: the league and its teams.

On this central question of independent or central decision-making, Stevens wrote “the NFL teams do not possess either the unitary decision-making quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business.”<sup>54</sup> He added, “directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the ‘common interests of the whole’<sup>55</sup> league, but is instead pursuing interests of each ‘corporation itself,’<sup>56</sup> teams are acting as ‘separate economic actors pursuing separate economic interests,’ and each team therefore is a potential ‘independent cente[r] of decision-making.’<sup>57</sup> Decisions by NFL teams to license their separately owned trademarks collectively to one vendor are decisions that ‘depriv[e] the marketplace of independent centers of decision-making,’<sup>58</sup> and therefore of actual or potential competition.”<sup>59</sup>

The Supreme Court thus rejected the NFL’s argument of it being a collective singular, economic entity. On that point, Stevens wrote, “although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests are not necessarily aligned.”<sup>60</sup>

The Court also rejected the NFL’s argument of collaboration being necessary to produce the NFL product. Stevens explained, “any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action.”<sup>61</sup>

#### **IV. LOOKING AHEAD: THE IMPLICATIONS**

The *American Needle v. NFL* case was decided on the issue of centralized versus independent decision-making, and what was in the best interest of the consumer. This May 2010 decision was limited to the antitrust concern, and the opinion has already been

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<sup>52</sup> *Id.* at 769.

<sup>53</sup> *Id.*; *Am. Needle Inc.*, 130 S. Ct. at 2211.

<sup>54</sup> *Id.* at 2212.

<sup>55</sup> Brief of Respondent, *supra* note 43.

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

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

<sup>58</sup> *Id.*

<sup>59</sup> *Am. Needle Inc.*, 130 S. Ct. at 2201.

<sup>60</sup> *Id.* at 2213.

<sup>61</sup> *Id.* at 2214.

applied at least once.<sup>62</sup> When the NFL awarded the exclusive contract to Reebok, a centralized decision was made that prohibited individual teams from contracting with their own headwear manufacturers. Yet the NFL permits each team, for example, to have its own individual beer or soft-drink sponsor (with stadium pouring rights). With the *American Needle* decision the Court may be signaling the NFL, and all sports leagues, to be more consistent in the establishment of their sponsorship selling systems. Whether leagues or teams are selling the sponsorships, cost will remain a factor with only wealthier corporations able to afford these exclusive contracts.

What was left out of the *American Needle* opinion was guidance on the question of intellectual property rights in the context of antitrust concerns. Though there are cases in the lower courts concerning this nexus, there has been little help from the Supreme Court in establishing the parameters for copyrights bundled or handled in a centralized consortium of independent holders who normally would compete for the revenue.<sup>63</sup> Until the Court directly addresses this issue, lower courts and the other branches of the government will continue to float ideas, such as that recently offered by the Federal Trade Commission as it sought ways to sustain a faltering newspaper industry.<sup>64</sup> Boundless litigation will likely flow from this confusion.

What is clear in the *American Needle* case is that sponsorship revenue is an essential component of the business model of professional sports leagues and teams. Sports leagues create a system that will generate the most revenue for themselves and their teams. The NFL, as a private company, legally could and did set up a system of selling sponsorship where companies pay for the right to the exclusive partner of the NFL in their respective product categories. It is also clear that exclusivity is a characteristic that sponsors hope to obtain in their agreements with sports properties and are willing to pay for that designation.

It is this revenue provided by sponsors, television networks, and other league-wide rights holders that is shared equally by all teams with the hope that this system of revenue sharing will help achieve an asset balance. The need for competitive balance among all its members remains a pillar of the NFL's argument that as an organization in the industry of professional sports there should be exemptions from antitrust scrutiny. It is this economic model that is the basis for why the NFL views itself as a collective, singular economic entity, incapable of conspiring.

On the other hand, it is undeniable that each team has its own system of profits and losses, and has independent revenue streams that are not shared among all members of the NFL. These independent, team-specific revenue streams contribute to winning and losing as team assets are used to hire and support players, build facilities and contract with support staff. Although the NFL has had a salary cap that limited team payroll, the

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<sup>62</sup> *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2010 WL 2403355, (N.D. Ohio June 11, 2010).

<sup>63</sup> The Supreme Court has made several decisions recently about the handling of patents within the context of antitrust. *See*, for example, *Lab. Corp of Am. Holding v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006), *Fla. Prepaid Postsecondary Educ. Expense Bd. V. College Sav. Bank*, 527 U.S. 627 (1999), *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141 (1989), *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378 (1981), *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979).

<sup>64</sup> Jeremy W. Peters, *Government Takes On Journalism's Next Chapter*, N.Y. TIMES, June 13, 2010; FED. TRADE COMM'N, FTC SEEKS PUBLIC COMMENTS ON THE FUTURE OF THE NEWS MEDIA IN THE INTERNET AGE (2009), available at <http://www.ftc.gov/opa/2009/09/media.shtm>.

profits for any particular team can affect its ability to sign players. Large signing bonuses, the only guaranteed part of an NFL players' contract, often are a major factor in the ability to sign players.<sup>65</sup>

Perhaps the NFL and all sports leagues need to be more consistent in the establishment of their sponsorship selling systems. Perhaps the courts can prod sports leagues into creating a unified system of selling sponsorships when American Needle is re-examined in the lower court. Or, perhaps in antitrust cases that concern sports leagues the courts will begin to recognize a distinction based on the product category. A beer sponsorship with a team is limited by geography, for example, while a sponsorship with a clothing manufacturer has fewer limitation of that sort any more. For clothing, technology has eliminated the concept of geographical markets with consumers easily able to purchase apparel of any team through numerous websites, including nfl.com. What is clear is that the decisions of the courts will continue to impact the professional sports industry and the practices of sponsorship.

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<sup>65</sup> See David J. Sipusic, *Instant Replay: Upon Further Review, the National Football League's Misguided Approach to the Signing Bonus Should Be Overturned*, 8 SPORTS LAW. J. 207, 212 (2001) (stating the NFL signing bonus are "an extremely powerful tool" to lure players away from other teams); see also Marc D. Oram, *The Stadium Financing and Franchise Relocation Act of 1999*, 2 VA. J. SPORTS & L. 184 (2000) (arguing teams with lower revenues are less successful because they cannot offer competitive signing bonuses).