Selected Laws Governing the Broadcast of Professional Sporting Events

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Summary

Professional sports are a multi-billion dollar industry in the United States. One of the biggest ways that professional sports organizations like the National Football League (NFL), National Hockey League (NHL), National Basketball Association (NBA), and Major League Baseball (MLB) generate revenue is through licensing the rights to telecast (or, more colloquially, broadcast) their games to the public. These broadcasts may occur on over-the-air broadcast stations or over cable or satellite systems, and, now, over the Internet.

The licensing rights for the telecast of professional sports programming are treated in a somewhat unique way under federal law. There are special provisions that apply only to sports programming that exist in order to support a number of policy goals. Some of these goals include ensuring the availability of the games of local teams to local audiences and preserving the competitive nature of professional sports leagues. However, these statutory and regulatory provisions come under fire occasionally. They are cited as the cause for certain games being "blacked out" (meaning unable to be broadcast to the public) in some areas of the country when certain conditions are met. They are also cited as a reason that licensing professional sports programming has become so expensive that it may be partially responsible for the rising prices of cable and satellite bills. This report will discuss some of the important federal provisions that specifically affect the telecasting of professional sporting events.

Contents

Contacts

Introduction

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Antitrust Exemptions

Two of the most important federal provisions that apply to the telecast of professional sports programming are the antitrust exemptions for the pooled licensing of sponsored telecasting of games by most professional sports organizations and the judicially created antitrust exemption that applies to Major League Baseball. Professional sports teams and their associated leagues are participants in a unique market. Technically, each team is competing against the other teams. In most markets, like a market for selling personal computers, each participant would be trying to create a better product in order to lure more customers away from their competitors. To some extent, this is the case in professional sports, but it is not entirely analogous.

At the most basic level, a sports team needs someone with whom to play the game. It is essential to the existence of the Boston Red Sox that the New York Yankees also exist for the Red Sox to play against. However, it is not enough for the Yankees or the Washington Nationals to exist. They must also be able to play on roughly the same level as the Red Sox. Said in a different way, if the Philadelphia Eagles won the Super Bowl in a landslide game every year, the entire sport of

[1] When referring to negotiating the rights to transmit games to the public, this report will refer to the transmission as a telecast. The term "broadcast' will be reserved for telecasts that occur via over-the-air broadcast outlets.

[2] See, John Ourand, How High Can Rights Fees Go, Sports Business Daily (June 6, 1011), http://www.sportsbusinessdaily.com/Journal/Issues/2011/06/06/In-Depth/Rights-Fees.aspx.

[3] See, e.g., Michael McCarthy, FCC Reviewing Sports Blackout Rules, USA Today (January 12, 2012), http://content.usatoday.com/communities/gameon/post/2012/01/fcc-reviewing-sports-tv-blackout-rules-nfl-federal-communications-commission/1#.Ua4HAMpxnXk. See also, 47 C.F.R. §§76.111 – 76.130.

[4] Derek Thomson, Mad About the Cost of TV? Blame Sports, The Atlantic (April 2, 2013), http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575/.

professional football would suffer as the losing teams would likely lose revenue, and fans, in general, would almost certainly lose interest. Such circumstances could lead to the end of weaker franchises, and possibly the end of the entire league.

The professional sports leagues and Congress have found that professional sports teams do best overall when competition among the teams is more even. Sometimes ensuring more even competition among the teams means ensuring more even distribution of revenue among the competitors in the league. However, occasions in which competitors in a marketplace agree to share revenue or pool their resources may raise antitrust concerns.[5] In order to allay the concerns of professional sports teams that feared running afoul of the antitrust laws, certain antitrust exemptions allow professional sports leagues to act in concert, in certain contexts, without fear of violating the antitrust laws' prohibitions against collusion among competitors.

Sports Broadcasting Act of 1961

Congress passed the Sports Broadcasting Act in 1961 in order to enable member teams of professional sports leagues to pool their separate rights to broadcast their games and to share the revenue from the pooled sale of those rights, without fear of violating the antitrust laws.[6] The operative portion of the act states that the antitrust laws

> shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.[7]

The perceived need for the explicit exemption arose from court decisions that had prevented the NFL from pooling the rights to broadcast the games of member teams. Cases brought against the NFL by the Department of Justice (DOJ) had declared such pooling by the NFL a violation of the antitrust laws.[8] The cases created an anomalous situation in which the MLB, NBA, and NHL could pool the rights to broadcast their games and enter into contracts with broadcast networks on that basis, but the NFL could not.[9]

Congress responded to this disparity with the Sports Broadcasting Act (SBA). The House Judiciary Committee report on the bill that enacted the SBA reveals that Congress was particularly concerned about preserving parity among professional sports teams.[10] Allowing teams to pool and then share revenue from the rights to telecast the games was considered essential to preserving team parity by providing adequate amounts of income from television rights for games

[5] The Sherman Antitrust Act prohibits collusion among competitors that unreasonably restrains trade. 15 U.S.C. §1.

[6] P.L. 87-331, 87th Cong.

[7] 15 U.S.C. §1291. Section 1291 of the act was also subsequently amended to allow for the merger of the National and American Football Leagues in 1966.

[8] U.S. v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953); U.S. v. National Football League, 196 F. Supp. 445 (E.D. Pa. 1961).

[9] See, U.S. Congress, House Committee on the Judiciary, *Telecasting of Professional Sports Contests*, report to accompany H.R. 9096, 87th Cong., 1st sess., H. Rept. 1178, at 3 (1961).

[10] *Id*.

played by all teams, including less lucrative clubs, and for games played away from home for all clubs.

According to the report, "the [Judiciary Committee] believe[d] that the public interest in viewing professional league sports [warranted] some accommodation of antitrust principles in order to avoid" the possibility that weaker teams could founder without adequate income from television rights, an effect which could threaten the structure of professional sports leagues.[11] The committee viewed the exemption in the SBA to be a minor and narrow exemption from antitrust laws that would create a public benefit by preserving competition among teams in professional sports leagues.

The first section of the SBA is likely the most important. It is the section that authorizes professional sports teams to pool their "sponsored telecasting" rights, as quoted above, and exempts these joint agreements made by the leagues from the antitrust laws.[12] Various judicial interpretations have clarified the scope of this exemption. According to a 1988 decision by the Second Circuit, the exemption does allow for multiple pooled-rights contracts.[13] In other words, the exemption does not mean that a league must license the rights to all of its games to only one programming provider; instead, a league may separate different groups of games and license those rights to different programming providers as the league sees fit.

It is also important to note that the exemption appears to apply only to joint agreements made by a league. According to a district court case, the SBA does not apply to the rights an individual team might negotiate to license the right to broadcast its games on broadcast stations.[14] Furthermore, according to the court, the SBA also does not apply to any attempts by a league to limit the ability of individual teams to license the telecast of games independently of the league. Individual team licenses of telecasts and any attempt by leagues to limit them, therefore, appear to remain covered by the antitrust laws.[15]

Lastly, the exemption is limited to the pooled sale of the rights to "sponsored telecasts."[16] In general, the term "sponsored telecasts" appears most clearly to mean telecasts that are paid for by the sale of advertisements, and offered free to the public via over-the-air broadcast, and via retransmission of those broadcast signals by cable and satellite service providers. There exists some question as to whether the phrase "sponsored telecasting of the games" also covers pooled sales of the telecasting rights to cable channels, like the pooled sale of the rights to telecast Monday Night Football to ESPN.[17]

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[11] *Id*. The Senate Judiciary Committee expressed similar concerns in its report, as well. U.S. Congress. Senate Committee on the Judiciary, *Telecasting Professional Sports Contests*, report to accompany H.R. 9096, 87th Cong., 1st sess., S.Rept. 1087, at 3 (1961).

[12] 15 U.S.C. §1291.

[13] U.S. Football League v. National Football League, 842 F.2d 1335, 1353 (2d Cir. 1988).

[14] Chi. Prof'l Sports v. National Basketball Assoc., 754 F. Supp. 1336, 1352 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992), *reh. den.; cert. den.*, 506 U.S. 954 (1992).

[15] *Id*.

[16] 15 U.S.C. §1291.

[17] See, Dean A. Rosen, Back to the Future Again: An Oblique Look at the Sports Broadcasting Act of 1961, Entertainment Law Reporter, Volume 13, No. 5 (October 1991); Philip R. Hochberg, The Case of the Lost Exemption: Antitrust Law May Apply to the NFL/ESPN Deal, Entertainment Law Reporter, Volume 10, No. 2 (July 1988).

This question arises because cable channels, like ESPN, receive revenue from two sources: the sponsors of the programming and a per subscriber fee from the cable and satellite companies that carry the channel's programming. It is unclear whether a program that is not funded exclusively by sponsors of the programming will qualify as "sponsored telecasting" under the statute. Though the Department of Justice never challenged the Monday Night Football contract with ESPN as a violation of the antitrust laws, an Assistant Attorney General, in a letter to Senator Arlen Specter in 1988, declared that the view of the DOJ at the time was that the contract was not covered by the SBA antitrust exemption, and was therefore subject to the antitrust laws.[18] Furthermore, at least one district court has also construed the meaning of "sponsored telecasting" narrowly to include only over-the-air broadcasts, and denied the application of the exemption to cable telecasts of games because cable telecasts were not "sponsored telecasts."[19] Specifically, the court said that the SBA exemption was available only to "free commercial television" and not to "subscription television."[20] The case eventually settled out of court.[21] In another case that also eventually settled out of court, a different federal district court, along with the Third Circuit Court of Appeals, refused to apply the antitrust exemption in the SBA to the NFL's sale of a programming package to a satellite television company.[22]

As a result, while the question of whether "sponsored telecasts" under the SBA includes cable and satellite telecasts remains unsettled, it appears that courts and the DOJ are inclined to construe the exemption narrowly and refuse to apply the exemption to the pooled sale of telecast rights to cable and satellite television providers. However, it should be noted, that simply because the antitrust laws may *apply* to the pooling and licensing of these rights to cable and satellite television providers, that does not mean that these licensing agreements necessarily *violate* the antitrust laws. The determination of whether a particular contract or agreement *violates* the antitrust laws can only be made by a court following a trial on the merits of a particular case.

The other sections of the SBA carve out important limits on the antitrust exemption described above. The first preserves the ability of sports leagues to institute some blackouts of games in the home territory of any team, while still availing themselves of the SBA antitrust exemption.[23] The act states that the exemption does not apply to contracts that limit a buyer's right to telecast games into any territory unless the prohibition applies to the telecasting of a game into a team's home territory when the team is playing a home game. The second attempts to preserve Friday night as the night reserved for high school games and Saturday as the day for college games by making the exemption unavailable to contracts that permit the telecast of professional games on those days, as long as the high school and college game schedules were announced by a particular day each year.[24] Lastly, the SBA makes clear that the antitrust exemption granted by the act is

[18] *Id*.

[19] Chi. Prof'l Sports v. NBA, 808 F. Supp. 646, 649-50 (1992). This decision is a part of a series of decisions in this case, one of which is also cited *supra*, note 14.

[20] *Id*.

[21] For further discussion of this case and the history of court interpretation of the term "sponsored telecasting" in the SBA, see Lacie L. Kaiser, Note and Comment: Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act For All Professional Sport Leagues, 54 DEPAUL L. REV. 1237 (2005).

[22] Shaw v. Dallas Cowboys Football Club, Ltd., No. 97-5184, 1998 U.S. Dist. LEXIS 9896, at 1 (E.D. Pa. June 19, 1998), *aff'd*, 172 F.3d 299 (3d Cir. 1999).

[23] 15 U.S.C. §1292.

[24] 15 U.S.C. §1293.

narrow, and does not exempt the professional sports leagues from the application of the antitrust laws in any other way.[25]

Major League Baseball Antitrust Exemption

Baseball is the only professional sport that enjoys a general exemption from the antitrust laws. The exemption appears to be a result of an historical accident, related to judicial interpretation, rather than a deliberate act of Congress to grant a statutory exemption to baseball. Nonetheless, the exemption persists. In 1922, in a case captioned *Federal Baseball v. National League*, the Supreme Court held that the business of displaying "exhibitions of baseball" did not fall under the definition of commerce for the purposes of the antitrust laws.[26] Since this decision, the Court has repeatedly affirmed the existence of the exemption, but has also repeatedly expressed that the exemption is an anomaly that perhaps should no longer exist.[27] Nonetheless, the Court has stated that the "inconsistency or illogic" of the antitrust exemption for baseball is an issue that should be resolved by Congress, rather than the Court.[28]

While Congress has considered repealing baseball's antitrust exemption in the past,[29] it has never taken the final step of enacting legislation. As a result, baseball continues to exist outside of the reach of the antitrust laws, while all other professional sports leagues are subject to the antitrust laws, but for the narrow exemption provided by the Sports Broadcasting Act.

As discussed above, there may be controversy over whether the antitrust exemption provided in the SBA for the pooled licensing of telecasting rights applies to the licensing of these rights to cable programming providers, on the theory that such a sale may not fall within the SBA's requirement for "sponsored telecasts." If it is the case that sponsored telecasting does not include the sale of pooled telecasting rights to cable channels in the antitrust law exemption, then the general antitrust exemption enjoyed by Major League Baseball could cover the MLB's pooled sale of telecasting rights to cable and satellite television providers. However, most courts are reluctant to interpret baseball's antitrust exemption so broadly, particularly considering the fact that it is the only professional sport to enjoy such an exemption. Instead, most courts interpret the exemption to cover only actions the league takes to support and protect the structure of the league.[30] In a case examining whether the broadcasting of baseball over the radio was covered by the antitrust exemption, the Southern District of Texas determined that radio broadcasting was not so essential to baseball as to warrant application of the exemption.[31] This reasoning appears to extend to the cable and satellite telecasting context, and courts appear willing to entertain antitrust suits against the MLB for the pooled sale of their broadcasting rights to MVPDs.[32] Therefore, it

[25] 15 U.S.C. §1294.

[26] 259 U.S. 200 (1922).

[27] See, Toolson v. New York Yankees, Inc., 346 U.S. 256, 357 (1953); Flood v. Kuhn, 407 U.S. 258, 284 (1972).

[28] Flood, 407 U.S. at 284.

[29] See, House Select Committee on Professional Sports, 94th Cong, Inquiry into Professional Sports (January 3, 1977) at 60.

[30] Joseph R. McMahon, Jr. and John P. Rossi, A History and Analysis of Baseball's Three Antitrust Exemptions, 2 VILL. SPORTS & ENT. L. FORUM 213 (1995).

[31] Henderson Broadcasting v. Houston Sports, Assoc., 541 F. Supp. 263 (1982).

[32] See, e.g., Laumann v. NHL, 907 F.Supp. 2d 465 (SDNY 2012) (refusing to dismiss a complaint filed against the NHL and MLB for violations of the antitrust laws in the sale of the rights to out-of-market games).

seems that the antitrust exemption for baseball may not apply in the context of the telecasting of baseball games.

Copyright Issues Related to Sports Telecasts

Background on Copyright Law

Copyright is a federal grant of legal protection available to the creator or owner of certain original works of creative expression, such as books, movies, photography, art, and music, that are "fixed" in a tangible medium of expression.[33] The Copyright Act[34] frequently employs legal "terms of art," such as "fixed," that often have meanings that differ from ordinary usage in everyday language. In this case, the Copyright Act provides that "[a] work is fixed in a tangible medium of expression when its embodiment in a copy ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[35]

A "copyright holder" is usually the creator of a copyrighted work; alternatively, the copyright holder could be the employer of the creator or be assigned legal title to the copyright by the creator.[36] The Copyright Act bestows upon the copyright holder several exclusive legal entitlements, which together provide the holder with the right to determine whether and under what circumstances the protected work may be used by third parties. These exclusive rights include the right to reproduce copyrighted content, distribute copies of copyrighted material, or publicly perform copyrighted work.[37]

Therefore, a third party wishing to use copyrighted material must either (1) obtain the permission of the copyright holder (usually granted in the form of a license agreement that establishes conditions of use and an amount of monetary compensation known as a royalty fee); (2) comply with the terms of "compulsory" or statutory licenses established by law; or (3) assert that such use falls within the scope of certain statutory limitations on the exclusive rights such as the "fair use" doctrine.[38]

Copyright holders may license, transfer, or waive one or more of these "exclusive rights" through written contract.[39] Unauthorized use of a copyrighted work by a third party in a manner that implicates one of the copyright holder's exclusive rights constitutes infringement.[40] The copyright

[33] 17 U.S.C. §102(a).

[34] 17 U.S.C. §§101 et seq.

[35] 17 U.S.C. §101. Furthermore, the Copyright Act defines "copies" to mean "material objects ... in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

[36] 17 U.S.C. §201.

[37] 17 U.S.C. §106.

[38] 17 U.S.C. §107. "Fair use" recognizes the right of the public to make reasonable use of copyrighted material, in certain instances, without the copyright holder's consent. The "fair use" provision of the Copyright Act recognizes fair use "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research." *Id.*

[39] 17 U.S.C. §§201(d), 204(a).

[40] 17 U.S.C. §501.

holder may file a lawsuit against an alleged infringer for a violation of any of the exclusive rights conferred by copyright and obtain monetary and injunctive relief.[41]

Copyright and Sports Broadcasting

In the Copyright Act of 1976 (which is the current statute governing U.S. copyright law), Congress specifically extended copyright protection to sports telecasts when it provided in the act that "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' [for purposes of the Copyright Act] if a fixation of the work is being made simultaneously with its transmission."[42] Thus, for live sports telecasts to be eligible for legal protection under copyright law, the television broadcast of the sporting event must be "fixed" (that is, recorded onto videotape, film, or other media format) simultaneously with its live transmission. Once the sports broadcast is "fixed" in this manner, it would fall into the subject matter category "motion pictures and other audiovisual works" to which the Copyright Act offers protection.[43]

Among the exclusive rights granted to copyright holders, the public performance right is the one that is essential to the television broadcasting of professional sporting events. Under the Copyright Act, the right of public performance[44] means the exhibition, rendition, or playing of a copyrighted work, either directly or by means of any device or process.[45] Public performance not only covers the initial rendition, but also any further act by which the rendition is transmitted or communicated to the public. Infringement of this right would occur if a third party engages in public performance of the copyrighted work without the consent of the copyright holder.

The holder (or owner) of the copyright in telecasts of live sports programming is generally the sports leagues or individual sports clubs. However, sports teams/leagues may choose to enter into contractual agreements with television broadcasters that provide the broadcasters with a license to publicly perform (that is, broadcast) their games. The legislative history of the Copyright Act of 1976 includes several passages that appear to reveal that representatives of the sports leagues and broadcasters understood that sports leagues or teams would be entitled to own the copyright to sports telecasts. For example, Pete Rozelle, the commissioner of the NFL at the time, testified before a House Judiciary subcommittee in 1965 that "[w]e must have copyright protection if we are to reestablish our right to sell and to broadcast our programs in accordance with our proper ownership rights."[46] At a 1975 congressional hearing, the then-general counsel of the National Association of Broadcasters, John Summers, engaged in the following colloquy with Representative Robert Kastenmeier:

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[41] 17 U.S.C. §§502-505.

[42] 17 U.S.C. §101.

[43] 17 U.S.C. §102(a)(6).

[44] The Copyright Act defines a public performance of a copyrighted work to mean: "(1) to perform a work at a place open to the public, or at any place where a substantial number of persons outside a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance of the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public capable of receiving the performance receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101.

[45] 17 U.S.C. §§106(4), 101.

[46] *Hearing on H.R. 4347 Before the House Subcomm. No. 3 of the Comm. on the Judiciary,* 89th Cong., 1st Sess., at 1825-26 (1965) (testimony of Pete Rozelle, Commissioner of the National Football League).

> Mr. Kastenmeier: One of my questions is who, in fact, is the copyright holder? Who is the creator, author, of this work? In the case of a professional baseball game, transmitted over, let us say, a network instantaneously, whether it is ephermerally recorded or not?
>
> Mr. Summers: Well, I guess the club, or the league, is the copyright holder, but the station has purchased the right to broadcast that game, usually at a very large sum of money.[47]

Nevertheless, the federal appeals court in *National Association of Broadcasters v. Copyright Royalty Tribunal* recognized that broadcasters may have some "copyrightable interests" in the sports telecast:

> Anyone who has ever watched ABC's Monday Night Football ... knows that the commentary of the announcers and such effects as instant replay in slow motion add immensely to the quality of a sports telecast. Similarly, there is little doubt that the efforts used in juggling programs and compiling a broadcast day constitute a copyrightable interest under the [Copyright] Act.[48]

Such "copyrightable interests" are relevant when determining the broadcaster's share of royalties that are paid by cable television providers for the right to retransmit the copyrighted sports telecasts to their subscribers. Section 111 of the Copyright Act (17 U.S.C. §111) establishes a "compulsory license" that cable systems may rely upon if they wish to retransmit over-the-air television broadcast signals to their subscribers. "Compulsory" licenses are a limitation on copyright holders' "exclusive rights" to control the use of their copyrighted works. These statutory licenses compel copyright owners to allow third parties to use creative works under certain conditions and according to specific requirements, in exchange for payment of royalty fees at a rate usually determined by a federal government body known as the Copyright Royalty Board. A user of a statutory license need not obtain or negotiate permission for using a copyrighted work from the copyright owner; that permission is "compulsory." Thus, the owners of the copyright to sports telecasts (the sports teams or leagues) cannot refuse to allow such retransmission, nor are the cable operators required to voluntarily negotiate with the copyright owners to obtain their consent or to establish a royalty fee. The appellate court in *National Association of Broadcasters* described the "quid-pro-quo" of the Section 111 compulsory license as follows:

> Section 111 of the Copyright Act of 1976 ... requires cable operators to pay royalties to the creators of copyrighted program material that is used by the cable systems. Congress recognized, however, that it would be impractical to require every cable operator to negotiate directly with every copyright owner. Accordingly, the [Copyright] Act mandates two steps in this process. First, cable operators are required to obtain a copyright license and periodically pay royalty fees into a central fund (the Fund). Second, the [Copyright Royalty Board] is then required to distribute royalty fees deposited ... under section 111 and ... determine, in cases where controversy exists, the distribution of such fees.[49]

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[47] *Hearing on H.R. 2223 Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary,* 94th Cong., 1st Sess., at 785 (1975) (colloquy between Representative Kastenmeier and Mr. Summers).

[48] 675 F.2d 367, 378 (D.C. Cir. 1982) (citation omitted).

[49] *Id.* at 371 (citations omitted).

Sports Blackout Rules

Sports blackout is a term that refers to occasions where particular professional sports games are not available to be viewed on television in a particular market, usually the home territory of the professional sports team located within that market. They are very controversial and a source of great irritation for sports fans.[50] There are two kinds of sports blackout rules. The first are the sports blackout rules that are enforced by the Federal Communications Commission (FCC). These rules apply to a narrow subset of games. The second, and more common reason that a particular game is not available in an area, are blackout rules that are agreed upon between the league and the multivideo programming distributor (MVPD) that has purchased the right to distribute the games. These private agreements are the cause of most sports blackouts in the United States.[51]

FCC's Sports Blackout Rules

The FCC's sports blackout rules prevent cable and satellite networks from telecasting sporting events in a particular area when a local broadcast station has negotiated with the league to possess the exclusive rights to broadcast that sporting event in that area.[52] The rules apply only to cable systems with more than a thousand subscribers and satellite systems with more than 1,000 subscribers in the applicable zip code.[53] Furthermore, the blackout rules only apply to programming that has originated on a broadcast signal.[54] The circumstances in which these blackout rules may apply are narrow, and, according to the FCC, the rules are not the cause of most sports blackouts.[55] Nonetheless, some consumer groups have appealed to the FCC to repeal these regulations, and the FCC has agreed to review whether the rules should be revised or repealed.[56] The FCC proceeding to review whether the blackout rules should be repealed was open to public comment in January of 2012, and has not yet completed.

Privately Negotiated Sports Blackouts

Each sports league has different rules about when and why one of its games might be blacked out in a particular area. One of the more famous reasons for blacking out a game in an area is when tickets to the event do not sell out. In that event, the game would be blacked out in the team's home territory.[57] Such a rule was conceived, presumably, to preserve the income that attends

[50] Michael McCarthy, FCC Reviewing Sports Blackout Rules, USA Today (January 12, 2012), http://content.usatoday.com/communities/gameon/post/2012/01/fcc-reviewing-sports-tv-blackout-rules-nfl-federal-communications-commission/1#.Ua4HAMpxnXk.

[51] FCC. Sports Blackouts, http://www.fcc.gov/guides/sports-blackouts.

[52] 47 C.F.R. §§76.111 – 76.130.

[53] *Id*.

[54] *Id*.

[55] FCC. Sports Blackouts, http://www.fcc.gov/guides/sports-blackouts.

[56] FCC, Public Notice, Commission Seeks Comment on Petition For Rulemaking Seeking the Elimination of the Sports Blackout Rule, Media Bureau, MB Docket No. 12-3 (January 12, 2012) available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0112/DA-12-44A1.txt. See also, Michael McCarthy, FCC Reviewing Sports Blackout Rules, USA Today (January 12, 2012), http://content.usatoday.com/communities/gameon/post/2012/01/fcc-reviewing-sports-tv-blackout-rules-nfl-federal-communications-commission/1#.Ua4HAMpxnXk.

[57] See, Michael McCarthy, FCC Reviewing Sports Blackout Rules, USA Today (January 12, 2012), (continued...)

ticket sales to the game. However, this is not necessarily the only way or reason that games may be blacked out. The terms of these blackouts are privately negotiated between the leagues and the programming providers.[58]

As the FCC has pointed out, it has no authority to review these contracts.[59] Furthermore, the Sports Broadcasting Act allows the application of the SBA's statutory antitrust exemption to contracts that include prohibitions on the telecasting of games into a team's home territory when the team is playing a home game.[60] Therefore, it seems that federal law does allow certain privately negotiated sports blackouts, but does not provide for federal supervision of these privately negotiated contracts. According to the FCC, the best recourse, currently, for consumers who are unhappy that a game has been blacked out in their area, is for the consumer to contact the broadcast or other system that has blacked out the game in an attempt to determine why the decision was made.[61]

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[58] FCC. Sports Blackouts, http://www.fcc.gov/guides/sports-blackouts.

[59] *Id*.

[60] 15 U.S.C. §1293.

[61] FCC. Sports Blackouts, http://www.fcc.gov/guides/sports-blackouts.