

# The NFL’s Anti-Trust Problem in the Streaming Era

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## I. INTRODUCTION

Without question, the National Football League (NFL) is the leader of the United States’ entertainment industry. The league’s televised games post record numbers in viewership,<sup>1</sup> its television contracts post record numbers in revenue,<sup>2</sup> and its teams have

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1. Cecilia Kang, *Want to Watch Football Online Without Cable or Satellite? You’ll Have to Wait Longer*, WASH. POST (Aug. 29, 2014, 11:41 AM), <https://www.washingtonpost.com/news/technology/wp/2014/08/29/want-to-watch-football-online-without-cable-or-satellite-youll-have-to-wait-longer/> [https://perma.cc/LM8G-XNUV] [hereinafter, Kang, *Want to Watch Football*].

2. Mike Hendricks & Steve Vockrodt, *Kansas City Chiefs’ Tax Returns Provide Rare Look Inside the Business of Pro Football*, KAN. CITY STAR (Feb. 6, 2019, 3:44 PM), <https://www.kansascity.com/sports/nfl/kansas-city-chiefs/article225279155.html> [hereinafter Chiefs].

entrenched themselves in the entertainment industry as multi-billion-dollar giants.<sup>3</sup>

Yet, the NFL originated from humble beginnings. Originally playing second fiddle in popularity to college football, the NFL only resonated with fans from Midwest working towns.<sup>4</sup> Telecasting helped give the NFL its first boost to big (and stable) business, because teams could then reach new fans and provide quality entertainment at a low cost.<sup>5</sup>

Congress later helped the NFL by providing an exception for the NFL to the Sherman Antitrust Act.<sup>6</sup> This allowed the league to negotiate broadcasting contracts as a whole instead of each team negotiating separately.<sup>7</sup> Consequentially, each team was guaranteed a portion of the revenues before a single game was played.<sup>8</sup>

The Sports Broadcasting Act (SBA) exception to the Sherman Antitrust Act has been subject to litigation as viewing mediums have changed.<sup>9</sup> Originally intended for over-the-air antennae television, the SBA does not cover cable and satellite television.<sup>10</sup>

In 2021, the NFL signed a new television deal valued at over \$100 billion with Amazon, CBS, Fox, NBC, ABC, and ESPN—potentially the last deal with the TV networks as the primary carriers.<sup>11</sup> Future deals will likely focus on the future of live television: web-streaming.<sup>12</sup> This Note will analyze the SBA exception in the future and potential antitrust problems for the NFL with regards to web-streaming. This Note will recommend courses of action which could limit liability for the NFL, promote business, and potentially remedy wrongs that have been created by the past exception.

## II. BACKGROUND

Before evaluating future antitrust problems with the NFL, this Note will present the relevant historical context of the league beginning with the origins of American Football and the NFL. Next, this Note will discuss the rise of telecasting in the NFL and the subsequent telecasting antitrust disputes with the Department of Justice (DOJ). Finally, the evolution of the NFL will be reviewed prior to analyzing how the law has, and may, apply to changes in telecasting.

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3. *Id.*

4. Michael Oriard, *Gridiron Football*, BRITANNICA (Jan. 29, 2021), <https://www.britannica.com/sports/gridiron-football>.

5. *Id.*

6. 15 U.S.C. §§ 1291–95 (1988).

7. *Id.*

8. H.R. REP. NO. 93-483, at 2035 (1973).

9. *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1147–49 (9th Cir. 2019).

10. *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999).

11. Joe Flint & Andrew Beaton, *NFL's Media Deals Bring Thursday Night Football to Amazon, Super Bowl to ABC*, WALL ST. J. (Mar. 18, 2021), [https://www.wsj.com/articles/nfl-feeds-streaming-platforms-with-media-deals-valued-at-over-100-billion-11616097902?mod=searchresults\\_pos4&page=1&mod=article\\_inline](https://www.wsj.com/articles/nfl-feeds-streaming-platforms-with-media-deals-valued-at-over-100-billion-11616097902?mod=searchresults_pos4&page=1&mod=article_inline); see also Gregory Bailey, *Streaming Is the Name of the Game: Why Sports Leagues Should Adapt to Consumers and Follow Ad Dollars Towards Live Streaming*, 26 JEFFREY S. MOORAD SPORTS L.J. 323, 361 (2019) (discussing the potential shift in broadcasting to internet companies). Brandon Katz, *Will Netflix Ever Win Broadcast Rights to the Super Bowl? Maybe Sooner Than You Think*, OBSERVER (Feb. 1, 2019), <https://observer.com/2019/02/nfl-tv-nbc-cbs-fox-espn-netflix-amazon-apple/>.

12. Katz, *supra* note 11. NFL Commissioner Roger Goodell referred to the Amazon deal as “a seminal moment.” Flint & Beaton, *supra* note 11. “They are going to find new ways to reach fans and change the way people watch football.” *Id.*

### A. American Football: A Brief History

While American Football has become “America’s Game,”<sup>13</sup> it is helpful to know the game’s story to contextualize the game now and what the game will become. Starting in the late 1800s, students at prestigious American universities created football as a mix between rugby and soccer.<sup>14</sup> The game quickly evolved under the leadership of students, and many rule changes were made to improve the game’s safety.<sup>15</sup> After World War I, college football dominated the sport with the greatest athletes, fanfare, and attendance.<sup>16</sup>

During college football’s heyday, professional football was really just a working-class spectator sport in middle-sized Midwestern cities like Akron, Dayton, Racine, and Rockford.<sup>17</sup> In fact, professional football had equivalent popularity (and respectability) to professional wrestling.<sup>18</sup>

Through the 1930s and 1940s, the NFL began to merge with up-start leagues and added teams in major cities, like New York, Baltimore, and San Francisco.<sup>19</sup> Then, due in large part to television in the 1950s, professional football began its meteoric rise to become a national sport.<sup>20</sup>

### B. 1951 By-Law Amendment

In the early 1950s, each National Football League team managed its own telecasting rights because each team had property rights over its respective telecast.<sup>21</sup> Thus, each team

13. “A regular season NFL game has about 18 million viewers. The average NBA [pro basketball] game is 1.2 million. The average MLB [pro baseball] is 0.9 million. The average NHL [pro hockey] is 0.4 million. The Super Bowl last year [2013] had 161 million viewers.” Kang, *Want to Watch Football*, *supra* note 1.

14. Oriard, *supra* note 4.

15. *Id.* In fact, at one point, President Theodore Roosevelt had to bring leaders of college football to the White House for a conference due to the large number of deaths (18) in the past year (1905). *Id.*

16. *Id.* A reason for this is that college football was connected with the universities as a form of community with cheerleaders, pep rallies, bonfires, alumni reunions, and dances (much like the present-day high school football). *Id.* After the war, large colosseum-like stadiums were built, and radio and newspaper introduced the masses to the game. On the other hand, ironically, people disliked “professionalism” because it opposed the sport’s amateur principles (despite the fact that the college games were being played in front of nearly 120,000 people). Oriard, *supra* note 4.

17. *Id.*

18. *Id.* This was due, in part, to the stigma of professionalism, the lack of rivalries (due to new teams), and the lack of “youthful enthusiasm” and other “pageantry.” *Id.*

19. *Id.*

20. Oriard, *supra* note 4. “The televised championship game between the Baltimore Colts and New York Giants in 1958, decided in sudden death overtime, is widely recognized as the turning point in professional football’s embrace by a national audience.” *Id.* It is also worth noting how college football and the NFL differed in regard to television in the 1950s. College football leaders “fretted over television” likely concerned with its clash with amateurish principles. *See id.* (noting the obligation of college authorities to build character and maintain educational standards). In contrast, the NFL “embraced it immediately,” quickly signed television contracts guaranteeing money, and carefully managed potential drops in game attendances by congressionally approved “blackouts” which blacked out local game coverage if the stadium had not sold out. *Id.*

21. *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1346 (2d Cir. 1988).

would negotiate with networks to televise their games.<sup>22</sup> In the league's young and vulnerable state, the NFL amended Article X of its bylaws to prevent teams from telecasting in another team's territory if the territorial team was playing that week (home or away).<sup>23</sup> The NFL hoped this broadcast limit would prevent competition from stealing local fans/viewers and driving teams out of business.<sup>24</sup> Soon after, in 1951, the DOJ sued the NFL, alleging a violation of the Sherman Antitrust Act.<sup>25</sup> In doing so, the DOJ claimed the collusion among the teams unreasonably restrained trade.<sup>26</sup>

The district court applied the rule of reason in its analysis of a Sherman Act Section 1 violation and found only part of the broadcast limit was legal.<sup>27</sup> The court found restricting telecasts in another team's territory when the team had a home game was legal.<sup>28</sup> It was reasonable because, at the time, it helped protect home ticket revenues which was the largest share of the team's revenues.<sup>29</sup> However, all other competitive restrictions of telecasts were found to be illegal as unreasonable restraints on trade.<sup>30</sup>

For the next few years, like competing on the field, the NFL teams competed in broadcasting. Eleven teams had contracts with Columbia Broadcasting Systems (CBS), two teams had contracts with National Broadcasting Company (NBC), and the Cleveland Browns created its own network.<sup>31</sup>

### C. Competition with the AFL

Founded in 1959, the American Football League (AFL) was a serious challenger to the NFL's survival.<sup>32</sup> The court enjoined the NFL from restricting the sale of telecasts (other than the mentioned allowance for restrictions during home games); however, the AFL was free to do so.<sup>33</sup> Thus, the AFL negotiated deals with networks as a league as opposed to team by team.<sup>34</sup>

In an effort to compete with the upstart AFL, the NFL signed a television deal with CBS in 1961, pooling all of the NFL's television rights, selling it as one package, and filing a petition in the Eastern District of Pennsylvania to uphold the contract's validity.<sup>35</sup> However, in response to the NFL's petition to uphold the new television contract, the district court held the NFL's contract violated its 1953 ruling.<sup>36</sup> In a subsequent 1961 ruling, the court held this agreement would have "eliminated competition among

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22. *Id.*

23. *United States v. Nat'l Football League*, 116 F. Supp. 319, 321 (E.D. Pa. 1953).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Nat'l Football League*, 116 F. Supp. at 321.

29. *Id.* The theory was the NFL would black out NFL television reception in the area around the home game if the game was not sold out in order to incentivize people in the home area to go to the game. H.R. REP. NO. 93-483, at 2036 (1973).

30. *Nat'l Football League*, 116 F. Supp. at 321.

31. H.R. REP. NO. 93-483, at 2035 (1973).

32. *Id.*

33. *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1343 (2d Cir. 1988).

34. *Id.*

35. *United States v. Nat'l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

36. *Id.*

themselves in the sale of television rights to their games,”<sup>37</sup> which was directly contrary to the 1953 ruling preventing telecast restrictions.<sup>38</sup>

#### *D. 1961 Injunction and the Sports Broadcasting Act*

Rather than appeal, the NFL went to Congress for help. Congress quickly acted, and the Sports Broadcasting Act (SBA) was passed within two months after the district court’s 1961 decision.<sup>39</sup> The SBA “was specifically designed to establish parity between the National Football League and the American Football League.”<sup>40</sup> The relevant language of the SBA is as follows:

The antitrust laws, as defined in section 1 of the [Sherman] Act . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football . . . by which any league of clubs participating in professional football . . . transfers all or any part of the rights of such league’s member clubs in the sponsored telecasting of the games of football . . . as the case may be, engaged in or conducted by such clubs.<sup>41</sup>

Thus, the SBA allowed professional sports teams to create joint agreements with networks.

In 1962, Commissioner Rozelle<sup>42</sup> negotiated a TV network deal worth \$4.65 million with the revenue to be shared equally among the teams.<sup>43</sup> Until the late 1980s, the NFL sold its games as a single package to networks (usually CBS, Fox, or ABC) who distributed the game to customers for free.<sup>44</sup> This form of negotiating television packages with major networks (CBS, Fox, and ABC) has continued to present day.

#### *E. The Game Today*

##### *1. Financial State*

The NFL has changed quite a bit from its modest roots. The teams, while often keeping their records private, now gross large amounts of money—with large expenses as well.<sup>45</sup> A rare look inside the Chiefs’ tax returns showed gross revenues between \$230 and \$300 million between 2008 and 2010.<sup>46</sup> Notably, there was little correlation between the

37. *Id.* at 447.

38. *Id.*

39. 15 U.S.C. §§ 1291–95 (1988).

40. H.R. REP. NO. 93-483, at 2036 (1973).

41. 15 U.S.C. § 1291.

42. Commissioner Pete Rozelle is one of the most notorious NFL commissioners of all time. Under Rozelle, NFL franchise value increased nearly 100% (from \$1 million to \$100 million) in his 30 years (1960–1989), and the structure that he put in place (which has remained largely unchanged) continues to grow franchise value to this day. Oriard, *supra* note 4. For more information about his legacy, see *Pete Rozelle’s Legacy*, PRO FOOTBALL HALL OF FAME (Jan. 1, 2015), <https://www.profootballhof.com/news/pete-rozelle-s-legacy/> [https://perma.cc/QM4M-LQYK].

43. Oriard, *supra* note 4.

44. In the Matter of Implementation of Section 26 of the Cable Television Consumer Protection & Competition Act of 1992, 8 F.C.C.R. 4875, 4879–80 (1993).

45. Chiefs, *supra* note 2.

46. *Id.*

team's performance and the amount of money that it made.<sup>47</sup> Also, since these 2010 records were revealed, the television money has increased 150%.<sup>48</sup> Thus, for a present perspective, an extra \$150 million per year can be added to the reported \$230 to \$300 million yearly revenues. In 2018, Forbes estimated the Kansas City Chiefs were worth \$2.1 billion, designating the Chiefs the 24th most valuable team out of the 32 total teams in the NFL.<sup>49</sup>

As mentioned in the previous paragraph, expenses have risen as well. Salaries comprise a large portion of such expenses.<sup>50</sup> For example, the Chiefs spent \$150 million in 2010 on salaries alone.<sup>51</sup> In addition, now, a pre-requisite to financial success in the newly competitive NFL is a new stadium.<sup>52</sup> Unfortunately, these new stadiums are almost always largely sponsored by public taxpayers—not teams' owners.<sup>53</sup> For reference, the new Los Angeles Rams stadium is expected to cost \$4.96 billion.<sup>54</sup> The cities may also sponsor the stadium's maintenance which, like Cincinnati (having \$43 million in annual expenses), can demolish local financing when revenue from local sales taxes are insufficient to cover such costs.<sup>55</sup>

Critics argue the artificial scarcity of teams and guaranteed television revenue have caused teams to raise expenses (stadium and salary) with complete disregard for the team's success, knowing the team's fans will ultimately bear the cost.<sup>56</sup> When posed with the option, fans often choose to take on this financial burden rather than let their favorite team move to a more profitable location.<sup>57</sup>

Yet, the NFL continues to find new ways to earn revenue. As states legalize sports gambling, the NFL is estimated to earn an additional \$2.3 billion each year outside of broadcast revenues.<sup>58</sup> The NFL has been moving to spread popularity internationally. In

47. *Id.* This is largely due to the shared revenue structure in the television deals. H.R. REP. NO 93-483, at 2035 (1973).

48. Chiefs, *supra* note 2.

49. *Id.*

50. *Id.*

51. *Id.* In 2020, the largest NFL salary per player was given to Patrick Mahomes of the Kansas City Chiefs, who makes \$45 million per year. Tadd Haislop, *The NFL's Highest-Paid Players in 2020, from Patrick Mahomes to Jalen Ramsey*, SPORTING NEWS (Sept. 9, 2020), <https://www.sportingnews.com/us/nfl/news/nfl-highest-paid-players-2020-patrick-mahomes/s2560yib2yvwzjdlfsy10ox2> [<https://perma.cc/NB7J-7AT8>].

52. See Thomas A. Piraino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677, 1687 (discussing "franchise free agency"). This is in large part because of the large amounts of money which can be made in luxury and press box seating. *Id.*

53. Cecilia Kang, *How the Government Helps the NFL Maintain Its Power and Profitability*, WASH. POST (Sept. 16, 2014, 3:32 PM), <https://www.washingtonpost.com/news/business/wp/2014/09/16/how-the-government-helps-the-nfl-maintain-its-power-and-profitability/> [<https://perma.cc/9CC6-8Q8S>] [hereinafter Kang, *How the Government Helps*] ("About 30 stadiums [of 32 teams] have been built with some or all-public financing . . .").

54. Chris Chavez, *Report: Los Angeles NFL Stadium Now Expected to Cost Almost \$5 Billion*, SPORTS ILLUSTRATED (Mar. 27, 2018), <https://www.si.com/nfl/2018/03/27/los-angeles-rams-stadium-projected-cost-debt-limit-increase> [<https://perma.cc/VKJ2-HX8U>].

55. Kang, *How the Government Helps*, *supra* note 53.

56. Piraino, Jr., *supra* note 52, at 1702 ("[T]he sports leagues' monopoly leverage has created a perverse situation in which the fans must satisfy the owners instead of *vice versa*."). *Id.* at 1702–03.

57. *Id.*

58. Kevin Draper, *Sports Betting Has Arrived to Transform the N.F.L. Or Not.*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/sports/football/sports-betting-nfl.html> [<https://perma.cc/CH82-HQWP>].

2019, four games were played in London.<sup>59</sup> The rumor of a London team has been in the news as well (perhaps as early as 2022).<sup>60</sup>

## 2. Viewing Patterns

In the late 1980s, there was a technology shift from exclusively free over-the-air television (usually transmitted to an antenna) to include cable and satellite television.<sup>61</sup> The NFL signed the first cable deal with Entertainment and Sports Programming Network (ESPN) in 1987, and another deal with DirecTV for satellite television in 1994.<sup>62</sup>

Viewing technology continues to change. In 2017, more viewers watched their favorite show online rather than on traditional television.<sup>63</sup> In 2018, more than 1 million subscribers “cut the cord” from television and instead began streaming their programs.<sup>64</sup> Netflix, Hulu, ESPN/Disney, Amazon, Comcast, Apple, YouTube, Twitter, and more companies are now competing for streaming rights.<sup>65</sup> Changes in viewing behavior are also causing mergers among large television, media, and internet companies.<sup>66</sup>

The NFL remains a very popular viewing item for consumers. In 2018, five of the top ten telecasts were NFL-related.<sup>67</sup> The NFL makes approximately \$9 billion each year from broadcasting rights.<sup>68</sup> The NFL Commissioner (who makes \$44 million each year)<sup>69</sup> projected, by 2027, the yearly licensing rights will be worth \$25 billion each year.<sup>70</sup> Further, if sports gambling is legalized, the value of the broadcast rights is supposed to increase 18%.<sup>71</sup>

In addition, NFL streaming viewership increased 86% in 2018.<sup>72</sup> While the major channels (CBS, ESPN, and Fox) have online streaming sites, Twitter, Yahoo, and Amazon have also purchased NFL rights since 2016.<sup>73</sup> Most NFL teams are now also producing

59. Kevin Patra, *NFL Unveils Dates, Times for 2019 International Games*, NFL (Apr. 17, 2019, 3:00 AM), <https://www.nfl.com/news/nfl-unveils-dates-times-for-2019-international-games-0ap3000001026723> [<https://perma.cc/8K36-Z2DS>].

60. Albert Breer, *Game Plan: NFL Believes London Is Ready for Team; 2022 Target Is Doable*, SPORTS ILLUSTRATED (Sept. 21, 2017), <https://www.si.com/nfl/2017/09/21/nfl-london-team-international-series-europe-football> [<https://perma.cc/M2DV-7XSJ>].

61. *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1147 n.3 (9th Cir. 2019).

62. *Id.* at 1147.

63. Katz, *supra* note 11.

64. *Id.*

65. *Id.*

66. Bailey, *supra* note 11, at 361 (noting examples such as AT&T and Time Warner, ESPN and Disney, among others such as CBS and Viacom as well as NBC and Comcast).

67. Gary Levin, *2018 in Review: The Year's Most Popular TV Shows According to Nielsen*, USA TODAY (Dec. 17, 2018, 4:26 PM), <https://www.usatoday.com/story/life/tv/2018/12/17/2018-review-nielsen-ranks-years-most-popular-tv-shows/2339279002/> [<https://perma.cc/CVG2-34C9>].

68. Kang, *Want to Watch Football*, *supra* note 1.

69. Kang, *How the Government Helps*, *supra* note 53.

70. Brent Schrottenboer, *NFL Takes Aim at \$25 Billion, but at What Price?*, USA TODAY SPORTS (Feb. 5, 2014, 1:42 PM), <https://www.usatoday.com/story/sports/nfl/super/2014/01/30/super-bowl-nfl-revenue-denver-broncos-seattle-seahawks/5061197> [<https://perma.cc/FR3M-KPYJ>].

71. Katz, *supra* note 11.

72. *Id.*

73. Bailey, *supra* note 11, at 325–26. Steven Impey, *Yahoo Adds NFL Streaming Rights to Fantasy App*, SPORTSPRO (May 2, 2019), <https://www.sportspromedia.com/news/yahooo-nfl-streaming-rights-football-fantasy-app> [<https://perma.cc/37FW-T9UW>].

and streaming in-house video content, such as training camp episodes, interviews, and game critiques.<sup>74</sup> However, some argue the lack of enforcement of the Sherman Act provisions has slowed technological innovation within the NFL.<sup>75</sup>

The latest NFL telecast agreement is from 2014–2022 for nearly \$40 billion.<sup>76</sup> Many speculate that the 2021 deal may be the last focused on television before streaming services are the primary mode of viewership and before tech giants like Amazon, Facebook, Yahoo, and Google get more involved in the bidding.<sup>77</sup>

### III. ANALYSIS

First, the SBA must be analyzed from the courts' historic rulings and the relevant academic commentaries. Next, a 2019 ruling from the Ninth Circuit provides context to the future legal questions of web-streaming. Finally, the legal questions of two modern forms of web-streaming will be analyzed.

#### A. Historic Interpretation of the SBA

As a result of this technology change, the language of the Sports Broadcasting Act (SBA) requires re-interpretation.

The language of the SBA is as follows:

The antitrust laws, as defined in section 1 of the [Sherman] Act . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football . . . by which any league of clubs participating in professional football . . . transfers all or any part of the rights of such league's member clubs *in the sponsored telecasting* of the games of football . . . as the case may be, engaged in or conducted by such clubs.<sup>78</sup>

Courts have held that the term “sponsored telecasting” refers to broadcasts sponsored by businesses for advertising time.<sup>79</sup> “Sponsored telecasting” generally does not refer to services for which subscribers have to pay a fee, like cable television, pay-per-view, and satellite television networks.<sup>80</sup> As NFL Commissioner Pete Rozelle testified before the House Antitrust Subcommittee, the bill “covers only the free telecasting of professional sports contests and does not cover pay TV.”<sup>81</sup>

74. See generally *Cleveland Browns*, YOUTUBE, <https://www.youtube.com/channel/UCQQQO7Kdo0cu9iEb19qOoYA> [<https://perma.cc/YJD3-CB8C>] (showing one example of a team which has produced various series, documentaries, and other forms of productions which shows a capacity to expand in-house media production).

75. E.g., Stephen W. Dittmore & Brett Hutchins, *Privilege over Innovation: Sports Broadcasting, Mobile Television, and the Case of Aereo*, 27 J. LEGAL ASPECTS SPORT 3 (2017). The theory being that the NFL believes it is most profitable when staying under the guise of the SBA. *Id.*

76. Bailey, *supra* note 11, at 332.

77. See *id.* at 333 (discussing the future of sports streaming). Many television networks now have streaming services, such as Peacock (owned by NBC), DisneyPlus (owned by Disney which also owns ESPN), Paramount+ (owned by CBS), and Tubi (owned by Fox). Flint & Beaton, *supra* note 11.

78. 15 U.S.C. § 1291 (emphasis added).

79. *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999).

80. *Id.*

81. Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 470 (1990) (citing *Telecasting of Professional Sports Contents: Hearings on H.R. 8757 Before the*



In addition, there is a doctrinal point that supports the view that the SBA does not apply to past over-the-air, antennae television. Antitrust exemptions must be “strictly construed.”<sup>82</sup> In this case, a narrow interpretation would likely mean only sponsored telecasting available at the time of the SBA (antennae television) would be covered as compared to modern mediums (cable television, satellite television, web-streaming, etc.).<sup>83</sup>

Next, two original purposes of the SBA are no longer relevant. The two main purposes of the SBA were to keep the league financially viable and allow it to compete against the AFL.<sup>84</sup> Presently, the league is very successful<sup>85</sup> and faces no unfair or existential competition.<sup>86</sup> Thus, as the original purposes are no longer relevant, there is less of a reason to extend the definition of “sponsored telecasting” to other viewing mediums.

Despite the large amount of support in favor of a narrow anti-trust exception, litigators and scholars argue the difference between “sponsored television” and paid television is “meaningless today, since virtually all over-the-air and cable TV broadcasts carry advertising from commercial sponsors.”<sup>87</sup>

Thus, although a cable company may charge its subscribers a fee for the entirety of its channels, it should fall within the term “sponsored telecasting” to reflect modern-day technological change.<sup>88</sup> Such a view advocates for consumer welfare to be the SBA’s primary purpose and argues the SBA helped the NFL reach more audiences with low-cost telecasts.<sup>89</sup> If this was a leading purpose, then any reasonably priced telecast agreement helping the NFL reach more consumers could be included.<sup>90</sup> Yet, the courts have not shown a willingness to accept this broad consumer welfare purpose as sufficient to expand “sponsored telecasting.”<sup>91</sup>

*Subcomm. on Antitrust (Subcomm'n Np. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 36 (1961)).

82. Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973).

83. Chi. Pro. Sports Ltd. P'ship v. NBA, 808 F. Supp 646, 650 (N.D. Ill. 1992).

84. David L. Anderson, *The Sports Broadcasting Act: Calling It What It Is—Special Interest Legislation*, 17 HASTINGS COMM'NS & ENT. L.J. 945, 946 (1995).

85. Chiefs, *supra* note 2.

86. In regard to unfairness, at the time, Congress felt that the AFL received an unfair advantage by being able to negotiate league deals while the NFL could only negotiate team-by-team deals due to the injunction. H.R. REP. NO. 93-483, at 2034 (1973). In regard to competition, “[t]here is a graveyard of spring football leagues that hoped to replicate the NFL model, including the Professional Spring Football League, the Alliance of American Football and the XFL (twice).” Kurt Badenhausen, *New Football League, Featuring Teams Owned by Marshawn Lynch and Quavo, Puts Fans in Charge*, FORBES (Jan. 27, 2021, 9:00 AM), <https://www.forbes.com/sites/kurtbadenhausen/2021/01/27/new-football-league-featuring-teams-owned-by-marshawn-lynch-and-quavo-puts-fan-in-charge/?sh=2782b7af1648> [https://perma.cc/WY89-5EXG].

87. Chi. Pro. Sports Ltd. P'ship v. NBA, 754 F. Supp. 1336, 1364 (N.D. Ill. 1991). “While telecasting on TNT may be considered sponsored telecasting because TNT does receive some revenues from advertising in addition to subscription fees, pure subscription or pay-per-view telecasts clearly are not considered sponsored telecasting.” Chi. Pro. Sports Ltd. P'ship v. NBA, 874 F. Supp 844, 856 n.12 (N.D. Ill. 1995) (citations omitted).

88. See Anderson, *supra* note 84, at 955 (discussing the misplaced focus on Rozelle’s statement and “profound changes in the broadcast industry”).

89. Ross, *supra* note 81, at 469–70.

90. There is a bit of irony with this purpose. Commonly, “[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.” Piraino, Jr., *supra* note 52, at 1678 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107–08 (1984)). Thus, the advocates for this purpose are claiming that the NFL’s monopolistic collusion favors consumer welfare, which is a paradoxical stance.

91. See generally *Shaw v. Dall. Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999) (holding that a

Thus, currently, “sponsored telecasting” only applies to over-the-air antennae and not cable and satellite subscription packages.

### *B. In re National Football Case*

As the SBA is exclusive to over-the-air television, modern web-streaming agreements would be subject to the Sherman Antitrust Act. The Sherman Act § 1 bans “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”<sup>92</sup> The Supreme Court interpreted this as to “outlaw only unreasonable restraints” on trade.<sup>93</sup> To determine reasonableness, § 1 is analyzed under the “rule of reason” for sports leagues.<sup>94</sup> This rule considers the facts of the business, restraints history, and reasons for the restraint to determine the competitive effect.<sup>95</sup>

Similarly, for an unreasonable restraint claim to succeed, four elements must be met: (1) there must be a contract/conspiracy among two or more persons/business; (2) the contract/conspiracy is intended to harm or restrain trade or commerce; (3) the contract/conspiracy actually injures competition; and (4) the plaintiffs must have standing to bring the case.<sup>96</sup>

In 2019, a case before the Ninth Circuit Court of Appeals gave an indication of how courts will treat web-streaming in anti-trust proceedings.<sup>97</sup> The NFL admitted it had a contract between itself and DirecTV intended to restrain trade (the first and second elements).<sup>98</sup> Yet, the NFL attacked the third element by contesting the contract did not actually injure competition.<sup>99</sup>

The court held the agreement eliminated competition in the market for telecasts.<sup>100</sup> Under the agreement, no NFL team could sell its telecasting rights independently (interlocking agreement) in a way restricting the market for telecasts to a single telecast for each game.<sup>101</sup> In addition, the agreement placed an “artificial limit” on the quantity of football available.<sup>102</sup> In doing so, it injured the plaintiffs (thus, giving standing) by artificially raising prices.<sup>103</sup>

With regard to the injury to competition, the court referred generally to the analysis in a case concerning college football.<sup>104</sup> Since the SBA only applied to professional sports, the National Collegiate Athletic Association (NCAA) was still subject to the Sherman

satellite television package did not fall within the SBA).

92. Sherman Act, 15 U.S.C. § 1.

93. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

94. Section 1 also analyzes matters under per se unreasonableness as opposed to rule of reason; however, these do not apply to sports leagues because such sports “can only be carried out jointly.” *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

95. *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

96. *Brantley v. NBC Universal, Inc.* 675 F.3d 1192, 1197 (9th Cir. 2012).

97. *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1148 (9th Cir. 2019).

98. *Id.* at 1150.

99. *Id.*

100. *Id.* at 1151.

101. *In re Nat’l Football League*, 933 F.3d at 1151.

102. *Id.* at 1151–52.

103. *Id.* at 1157.

104. *See generally* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

Act.<sup>105</sup> The NCAA created a restrictive telecast agreement limiting the number of games each team could televise.<sup>106</sup> The court gave a strong preference to the NCAA ruling by stating “[h]ere, as in NCAA, ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets.’”<sup>107</sup> The court held this horizontal restraint raised prices of telecasts, lowered output (number of games available to be bought/sold), restricted the freedom of teams and networks to compete, and was unresponsive to consumer preference.<sup>108</sup>

The court also rejected the argument the joint action of telecasts was necessary (and, thus, pro-competitive) because of the nature of a competitive league.<sup>109</sup> Rather, the history of independent telecasts prior to the 1960s, in which teams competed amongst themselves, proved the league would not fail without joint action.<sup>110</sup>

The court could have extended this rejection to include more factors. The league is significantly more financially sound now than in 1960.<sup>111</sup> In fact, the idea the league would fail because of competing telecasts is facially unrealistic. The Sherman Act was not meant to protect entities from competition; it was meant to combat the problem of dangerous conspiracies—those artificially demanding more money from the public (in more ways than just telecasts)<sup>112</sup> without restraint and without competitive incentives to protect consumers.<sup>113</sup>

The court also failed to consider alternative leagues in its analysis. Since 2018, three additional professional football leagues have competed with the NFL.<sup>114</sup> Two of those leagues (the XFL and AAF) started with much fanfare and have already failed, while the newest, the FCF (Fan Controlled Football) has just recently started.<sup>115</sup> Thus, the NFL/DirectTV conspiracy not only limits competition among the teams within the league but also hurts upstart leagues because they are put at such a significant disadvantageous starting point.<sup>116</sup> By harming upstart leagues, the conspiracy is also dangerous—because

105. *In re Nat'l Football League*, 933 F.3d at 1146.

106. *NCAA*, 468 U.S. at 94.

107. *In re Nat'l Football League*, 933 F.3d at 1156 (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)).

108. *NCAA*, 468 U.S. at 106–07.

109. This is also known as the “single entity theory.” The theory is that the league is not 32 separate teams, but rather one business. The support for the theory is that if one team fails, then the entire league fails. Thus, one should allow the league to negotiate as one. This theory has not been accepted by the courts. *See Anderson, supra* note 84, at 951–54.

110. *In re Nat'l Football League*, 933 F.3d at 1154.

111. Chiefs, *supra* note 2.

112. *See Kang, How the Government Helps, supra* note 53 (causing an artificial scarcity of teams which causes the public to subsidize these teams’ stadiums, seating, merchandise, and more in order to keep the team in the city); *see also Dittmore & Hutchins, supra* note 75, at 4 (“[P]rofessional sports leagues [the NFL and MLB] thwarted technological innovation in favor of [antitrust] privilege and profit maximization.”).

113. Piraino, Jr., *supra* note 52, at 1678.

114. Kevin Seifert, *Can XFL 2.0 Succeed Where the AAF Couldn't? Why It Already Has a Jump Start*, ESPN (June 13, 2019), [https://www.espn.com/nfl/story/\\_/id/26958876/can-xfl-20-succeed-where-aaf-why-already-jump-start](https://www.espn.com/nfl/story/_/id/26958876/can-xfl-20-succeed-where-aaf-why-already-jump-start) [<https://perma.cc/P9QF-3THN>]; Badenhausen, *supra* note 86 (discussing failures of XFL and AAF and the new FCF league).

115. Badenhausen, *supra* note 86.

116. Seifert, *supra* note 114 (“And initially, the XFL will allow its games to be televised for free. Broadcast rights fees are the largest revenue drivers for the NFL. . . . For the NFL, that means \$7 billion per year. . . . (The

it centralizes the game's power within the NFL—preventing new leagues from making changes for player's safety.<sup>117</sup>

This ruling is a strong indication of two matters. First, Defendant DirecTV did not try to lump in Sunday Ticket as “sponsored telecasting” for SBA inclusion.<sup>118</sup> Thus, it appears media companies have punted (pun intended) on convincing the courts to take a more liberal interpretation of “sponsored telecasting.” There remains a question of whether web-streaming platforms should also punt this issue.

Second, without the inclusion under the SBA, the Ninth Circuit Court found, on its face, the current satellite and cable contracts could violate the Sherman Anti-Trust Act.<sup>119</sup> These two forms have many similarities to subscription-based web-streaming, which could indicate that subscription-based web-streaming could be at risk of violating the Sherman Anti-Trust Act.

### C. Web Streaming

The last NFL media deal focused primarily on television was signed in 2021, and web-streaming will soon become the future of NFL broadcasting.<sup>120</sup> This is important because live sports are a “cornerstone of the broadcasting industry”<sup>121</sup> as “live sport is immune to changes in viewing patterns[,]” giving the sports leagues a monopoly-like grasp on the TV industry.<sup>122</sup> The question is whether the current form of web-streaming is within the guidelines of the SBA, and if not, whether this a violation of the Sherman Anti-Trust Act.

#### 1. Subscription-Based Web Streaming

Web streaming presents a slight conundrum. Currently, most web-streaming platforms require the subscriber to pay a fee<sup>123</sup> similar to those paid by the already litigated cable-networks of ESPN, TNT, and the satellite networks.<sup>124</sup> In fact, many of these

AAF, by comparison, actually paid CBS to televise its games this spring. The league shuttered in April after a series of events left it without financing.”).

117. For example, the AAF did not have kickoffs in an effort to reduce concussions. *Id.* An interesting comparison is to the original start of football (early 1900s) when the college players controlled the rules and made numerous changes as needed in response to health scares. Oriard, *supra* note 4.

118. *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1151 (9th Cir. 2019).

119. *Id.* at 1156.

120. Flint & Beaton, *supra* note 11. See also Bailey, *supra* note 11, at 330 n.45 (citing Karl Bode, *The Rise of Netflix Competitors Has Pushed Consumers Back Toward Piracy*, MOTHERBOARD (Oct. 2, 2018, 1:21 PM), <https://www.vice.com/en/article/d3q45v/bittorrent-usage-increases-netflix-streaming-sites> [<https://perma.cc/E3T8-V2ZU>] (discussing the future of NFL and other broadcasting).

121. *Id.* at 360, n.272 (quoting Matthew Garrahan, *TV Networks Face Shaky Future in Changing Media Landscape*, FIN. TIMES (Aug. 27, 2015), <https://www.ft.com/content/15f65100-4c9c-11e5-b558-8a9722977189> [<https://perma.cc/HH5H-KGK4>]).

122. *Id.* at 360.

123. Quentyn Kennemer, *How to Watch NFL Games Online, with or Without Cable*, YAHOO FIN. (Sept. 27, 2019), <https://finance.yahoo.com/news/watch-nfl-games-online-without-191421618.html> [<https://perma.cc/VDB4-P4HD>].

124. See Bailey, *supra* note 11, at 356 (discussing NFL streaming options); Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 300 (3d Cir. 1999) (describing the expansion of football broadcasting into satellite television); see also Chi. Prof. Sports Ltd. P'ship v. NBA, 808 F. Supp 646 (N.D. Ill. 1992) (analyzing the

streaming platforms are online platforms of existing cable networks.<sup>125</sup>

If one were to predict a court's decision regarding subscription web-streaming, the narrowness of anti-trust exemptions<sup>126</sup> and similarity to uncovered subscription cable and satellite indicate that subscription web-streaming would not be covered by the SBA.

Accordingly, as displayed in *In re NFL*, these subscription-based web-streaming services, like the cable and satellite subscriptions, may violate the Sherman Anti-Trust Act.<sup>127</sup>

## 2. New Forms of Web Streaming

Internet companies will likely be the emerging players and potential winners in future sports broadcasting.<sup>128</sup> In fact, internet giants such as Yahoo and Twitter have already entered the NFL sweepstakes.<sup>129</sup> New companies may have new ideas. In fact, Yahoo Sports has created a service and business model which presents a stronger case for inclusion as "sponsored broadcasting" under the SBA. As of 2019, Yahoo Sports has allowed all Fantasy Football users to stream NFL games on its mobile app.<sup>130</sup> In doing so, Yahoo Sports provides free access<sup>131</sup> to NFL games, which is subsidized by advertisements on the game and on the fantasy football platform.<sup>132</sup>

When drawing a comparison to the purpose of the SBA, the Yahoo Sports application is similar. Mainly, viewers can watch the game for no cost because it is sponsored.<sup>133</sup> In fact, since both over-the-air antennae and Yahoo streaming are free, the only major difference is the distribution method itself.

Thus, the Yahoo App is an indication of what the future of streaming may be. If this is the case, courts may be faced with assimilating free web-streaming into "sponsored telecasting" or lumping it with the subscription cable and satellite packaging.

As discussed, an expanded view of "sponsored telecasting" to include free web-streaming may be practical because the distinctions have become "meaningless."<sup>134</sup> Especially when, as in this case, a free web-streaming service would support the consumer welfare purpose of the SBA.<sup>135</sup> Yet, it is up to the judiciary as to whether "sponsored telecasting" may be reinterpreted for the modern age.

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distribution of sports programming to cable networks).

125. Bailey, *supra* note 11, at 356.

126. See *Chi. Prof. Sports Ltd. P'ship*, 808 F. Supp at 650 (stating that antitrust exemptions must be construed narrowly).

127. See *infra* Section IV.B and related discussion.

128. Bailey, *supra* note 11, at 361.

129. *Id.* at 356.

130. Andrew Cohen, *Yahoo Sports Plans to Stream NFL Games Through Fantasy Football App*, SPORTTECHIE (Apr. 30, 2019), <https://www.sporttechie.com/yahoo-sports-fantasy-streaming-nfl-football-app/> [<https://perma.cc/MRY5-4NP6>].

131. Fantasy Football application use on Yahoo Sports is free of charge. Users only need to provide an email and a password to join. Impey, *supra* note 73.

132. Cohen, *supra* note 130.

133. Impey, *supra* note 73.

134. *Chi. Prof. Sports Ltd. P'ship v. NBA*, 754 F. Supp. 1336, 1364 (N.D. Ill. 1991); see also, Ross, *supra* note 81, at 469 (stating that if "telecast" includes cable television, contracts with cable channels are within the SBA's exemption).

135. Ross, *supra* note 81, at 464.

## IV. RECOMMENDATION

The NFL needs to change how it broadcasts before facing a successful anti-trust lawsuit. First, the future of entertainment and NFL broadcasting is in web-streaming, and the SBA likely does not cover this medium.<sup>136</sup> Second, many current formats of web streaming could violate the Sherman Act.<sup>137</sup> Additionally, considering the number of actions filed against cable and satellite television in the last 20 years, it is fair to say, if the NFL does not change its web-streaming, the NFL could face future legal liability.

This Note proposes two potential solutions for the NFL—the first solution banks its robustness on the “rule of reason” analysis under the Sherman Act, and the alternative solution avoids Sherman Act liability entirely because there is no collusion among the teams in negotiating deals. This Note rejects subscription-based web-streams because it is not “sponsored telecasting” under the SBA and may violate the Sherman Act as seen in *In re NFL*.

*A. We’re All in This Together*

The first solution requires the continuation of joint negotiations; however, the NFL should alter the negotiations in a way to reduce the likelihood of a Sherman Act violation. When considering the “rule of reason” analysis, the NFL should look to maximize consumer utility.

In contrast with DirecTV Sunday Ticket,<sup>138</sup> this first solution would be a modern form of sponsored telecasting—providing free web-streams to all users funded entirely by advertisements. Like free “over the air” broadcasting in the 1960s, the consumer would only need internet to receive service. This recommendation is essentially the Yahoo model. Currently, the NFL is in a deal with Yahoo Sports for free streaming for Yahoo users.<sup>139</sup> This maximizes consumer utility because the games would be free to viewers. This approach minimizes Sherman Act liability while still allowing collusion.<sup>140</sup>

However, this approach does not offer complete protection from Sherman Act liability—the approach may still subject the NFL to scrutiny under the Sherman Act because of the sponsored telecasting’s collusive nature.<sup>141</sup> For example, businesses could argue the joint broadcasting agreements artificially drive up advertising costs. In addition, up-start leagues (the FCF or the next version of the XFL) could argue the joint broadcasting agreements prevent them from entering the broadcasting market. Likewise, if the agreement constrains viewership because of costs, the NFL could be liable.<sup>142</sup> In short, whenever the league is negotiating joint broadcasting deals, the league could be subject to

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136. Bailey, *supra* note 11, at 334.

137. See *In re Nat’l Football League’s Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1151 (9th Cir. 2019) (ruling that subscriber fee packages could violate the Sherman Act on their face).

138. Kennemer, *supra* note 123.

139. Impey, *supra* note 73.

140. Contrast this with the NFL Sunday Ticket case, in which the court noted that Sunday Ticket artificially raised prices for consumers. See generally *In re Nat’l Football League’s Sunday Ticket*, 933 F.3d (reinstating lawsuit for antitrust violations).

141. Piraino, Jr., *supra* note 52, at 1683.

142. See Ross, *supra* note 81, at 477–78 (noting that one assessment of anti-trust liability is whether viewership increases or decreases).

anti-trust liability if the “right” plaintiff arises.

### *B. The Wild, Wild West*

Another solution that would minimize lawsuit liability would be to go away from joint broadcasting deals entirely. This solution would require each team to individually establish web-streaming contracts on their own behalf—a solution theoretically similar to the NFL prior to the SBA’s enactment, when each team managed their own broadcasting rights.<sup>143</sup> Fortunately for the teams, there are a number of factors that would make this solution far easier than it was in the 1960s.

First and foremost, the league is in a much better financial situation than it was 60 years ago.<sup>144</sup> The allowance of collusion by the SBA was created primarily to keep the NFL afloat in response to the AFL’s competition.<sup>145</sup> Yet, neither the AFL nor NFL had the relative revenue-producing capabilities professional football has now.<sup>146</sup> Thus, the argument that competition among the teams would potentially destroy the league is even less valid now than it was 60 years ago.

Second, there are many more broadcasting channels in existence today that would compete for the teams’ rights.<sup>147</sup> In the 1960s, there were only a couple of channels in total.<sup>148</sup> In the day of the internet, there are numerous social media sites, existing networks and their streaming sites, and web giants (such as Yahoo, Google (which also owns YouTube), and Twitter) that would likely be interested in broadcasting for a team.<sup>149</sup> There is also a very realistic option wherein the team decides to broadcast its own games rather than relying on traditional third parties. Many teams already have robust media departments producing a large amount of content.<sup>150</sup> The addition of broadcasting and selling their own games is therefore within reason.

However, one could argue that broadcasting competition would destroy the performance parity among the teams. Yet, this alleged destruction is unlikely to happen for a few reasons. First, and most importantly, different individual broadcasting rights, while potentially affecting gross revenue, would have no impact on the salary cap which controls player salaries.<sup>151</sup> Thus, unlike Major League Baseball (MLB), the product on the field would cost approximately the same amount. Second, even if the salary cap *eventually* went away (although there is little evidence to say this is likely to happen), then parity will still likely remain. One can look to the MLB and the number of successful, low-budget teams (i.e., the “Money-ball” Oakland Athletics<sup>152</sup>) to demonstrate this conclusion.

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143. See H.R. REP. NO. 93-483, at 2034 (1973) (explaining the allowance of pooled broadcasting).

144. Chiefs, *supra* note 2.

145. H.R. REP. NO. 93-483, at 2035 (1973).

146. *Id.*

147. Bailey, *supra* note 11.

148. *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1145 (9th Cir. 2019).

149. Bailey, *supra* note 11.

150. See, e.g., *Cleveland Browns*, *supra* note 74 (exemplifying the content that teams are releasing).

151. See Tyler Brooke, *How Does the Salary Cap Work in the NFL?*, BLEACHER REP. (June 10, 2013), [bleacherreport.com/articles/1665623-how-does-the-salary-cap-work-in-the-nfl](https://perma.cc/R4VR-YQBQ) [https://perma.cc/R4VR-YQBQ] (explaining how player salaries work).

152. For more reading on how the Oakland Athletics used analytics to beat much more expensive rosters,

There are many positives—and few drawbacks—from this potential solution. First, there would be increased competition among the teams driving down costs typically pushed to fans.<sup>153</sup> Second, it would increase competition among the current broadcast mediums to purchase the rights—encouraging innovation.<sup>154</sup>

There is also an argument these lowered consumer costs will also detrimentally drive down revenues for all NFL teams. However, there is little evidence individual teams would be unable to raise equivalent (or more) broadcasting revenues as compared to their current pro-rata shares—especially when the NFL is moving internationally.<sup>155</sup>

Yet, even if these lowered broadcasting-associated consumer costs negatively impact teams' revenues, perhaps, society should consider the role of professional sports and whether it continues to deserve government subsidization. It has been repeatedly proven that government's subsidization of the NFL has had many ill effects.<sup>156</sup> Teams rely heavily on taxpayers to cover the ever-increasing and arbitrary expense increases. Examples of this are public financing of new stadiums and maintenance of stadiums.<sup>157</sup> Today, in order to stay competitive with one another financially, teams must have a relatively new and spectacular stadium with a large number of luxury suites that provide cushy margins for the owners.<sup>158</sup> However, there is no evidence average consumers want these new stadiums.<sup>159</sup>

The expenses of the NFL have increased significantly over the years.<sup>160</sup> As revenues have generally increased throughout the NFL, so have player salaries and owner profits.<sup>161</sup> The salaries result from the players union (NFLPA) negotiating revenue sharing contracts with the owners.<sup>162</sup> From a normative perspective, one should debate whether society should continue to indirectly subsidize these massive salaries and profits. This is not to say elite professionals at the top of the field do not deserve a premium. Yet, the degree of that

see Michael Lewis, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2004).

153. Dittmore & Hutchins, *supra* note 75, at 9.

154. *Id.* I picture new ways to broadcast NFL games, with new camera angles (potentially using drones or helmet cameras), broadcast features (like the XFL's in-game sideline interviews), or viewing modes (virtual reality headset) as possible innovation areas.

155. Breer, *supra* note 60.

156. See Kang, *How the Government Helps*, *supra* note 53 (discussing the ill effects of the NFL's subsidization).

157. *Id.*

158. Piraino Jr., *supra* note 52, at 1687.

159. *Id.* at 1702.

The new stadiums are not being constructed because fans are demanding luxury seating, but because the owners want to enhance their profits. Fans in most cities are perfectly content with the stadiums which the owners are attempting to replace. Nevertheless, because of the scarcity of franchises, local fans feel compelled to subsidize new stadiums in order to prevent their teams from relocating. The mere threat of moving to another city is now so credible that cities are willing to meet owners' demands for new stadiums. In this era of franchise free agency, cities must take such threats seriously. Even strong local support no longer guarantees that a team will remain in a particular city. Thus, the sports leagues' monopoly leverage has created a perverse situation in which the fans must satisfy the owners instead of vice versa.

*Id.*

160. Chiefs, *supra* note 2.

161. *Id.*

162. *About the NFLPA*, NFL PLAYERS ASS'N, <https://www.nflpa.com/about> [https://perma.cc/7EFB-E9LD].



premium should be subject to relative inspection.

NFL revenues will continue to increase<sup>163</sup> further strengthening the league's position. All in all, these solutions would likely maintain the NFL's business, drive down consumer costs, and protect the taxpayers, while keeping the NFL away from costly antitrust lawsuits.

#### V. CONCLUSION

After the most recent 2021 media deal, the era of NFL television broadcasting will enter the digital age. Soon, web-streaming will be the primary form of watching the NFL. The SBA's exception to the Sherman Anti-Trust Act likely does not encompass web-streaming. Thus, the NFL should look to change how it delivers content to consumers to avoid anti-trust liability. First, the NFL may wish to continue with joint broadcasting agreements. In doing so, the NFL should look to the Yahoo Sports App, which provides inexpensive, consumer-friendly broadcasting. However, if the NFL is worried this may still subject them to liability because of anti-trust injuries to businesses and competitive leagues, then it should cease colluding and allow each team to negotiate broadcast rights for themselves. In doing so, the future of football may look a lot like how fans watched it seventy years ago.

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163. See Schrottenboer, *supra* note 70 (discussing revenue increases).