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# Out at Home: Why the Major League Baseball Advanced Media Agreement May Violate Antitrust Law

Sally E. Schoenvogel\*

*Major League Baseball Advanced Media (MLBAM or BAM) has created one of the most successful technology platforms for broadcasting professional baseball games online. BAM is extremely profitable, but its exclusive online broadcast of professional baseball games through MLB.tv may violate antitrust law. Conventional wisdom may suggest MLBAM would be exempt from antitrust law under the judicially created baseball exemption, but the online broadcast of professional baseball games likely does not fall under the baseball exemption. Therefore, an antitrust suit could be brought against BAM for its online broadcasts. In an antitrust suit, BAM would not be considered a single entity because of its similarities to NFL Properties in American Needle. BAM's MLB.tv product significantly restrains trade in a relevant market. BAM, however, will likely prevail in arguing that maintaining competitive balance amongst its teams is a procompetitive justification. Less restrictive alternatives exist, however, that may yet put BAM in violation of antitrust law.*

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\* The author is a student at UCLA School of Law and will be starting as an associate at Proskauer Rose in the fall. She would like to thank Professor Steve Derian for his valuable insight and guidance in writing this Comment.

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## I. INTRODUCTION

While some see baseball as the sport most reluctant to change, Major League Baseball (MLB) is at the forefront of technology through its creation of Major League Baseball Advanced Media (BAM). It may be hard to believe now, but MLB did not have a formal marketing department until 1999.<sup>1</sup> Today, MLB spends more than \$20 million per year on its national marketing campaigns.<sup>2</sup> BAM has been touted as “one of the most innovative and successful investments in any U.S. sports league.”<sup>3</sup> The advancement of BAM, however, has not been without its share of legal challenges.

This Comment addresses whether BAM’s online broadcasts of MLB games violate antitrust law. Part II looks at the history of BAM. Part III examines how BAM operates today. Part IV provides an overview of how antitrust law is applied to sports leagues. Part V examines whether BAM is exempt from antitrust scrutiny through the baseball exemption<sup>4</sup> or under the Sports Broadcasting Act.<sup>5</sup> Part VI analyzes BAM’s restriction on online broadcasting under the Rule of Reason; the relevant questions include: (1) whether BAM would be treated as a single entity under § 1 of the Sherman Act,<sup>6</sup> (2) what the relevant market is, (3) whether there is a legitimate procompetitive justification for BAM’s broadcast restraints, and (4) whether less restrictive alternatives to BAM’s procompetitive purposes exist. Ultimately, the existence of less restrictive alternatives may put BAM in violation of antitrust laws.

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<sup>1</sup> Andrew Zimbalist, *In the Best Interests of Baseball: The Revolutionary Reign of Bud Selig* 233, n.42 (2007).

<sup>2</sup> *Id.* at 191. This is in addition to the individual clubs’ budgets for marketing activities. *Id.*

<sup>3</sup> *Id.* at 190.

<sup>4</sup> The Supreme Court ruled in *Federal Baseball v. National League* that baseball is exempt from federal antitrust laws. 259 U.S. 200, 209 (1922).

<sup>5</sup> 15 USC § 1291 (2006).

<sup>6</sup> 15 U.S.C. § 1 (2004) (herein referred to as Sherman § 1).

## II. THE HISTORY AND CREATION OF MAJOR LEAGUE BASEBALL ADVANCED MEDIA (BAM)

BAM was created in 2000 when Jerry Reinsdorf, owner of the Chicago White Sox, met with Paul Beeston, then-MLB president.<sup>7</sup> This meeting took place during the height of the dot-com bubble, and Reinsdorf and Beeston were concerned that the large market teams would harness the power of the web, further widening the economic gap between the small market teams and the large market teams.<sup>8</sup> Before the creation of BAM, each team owned and operated its own website.<sup>9</sup> The quality of the sites varied, making it difficult for MLB to coordinate national marketing efforts.<sup>10</sup> It became clear that the teams could generate more revenue by combining their efforts.<sup>11</sup> Reinsdorf and Beeston presented Commissioner Bud Selig with the idea that a central entity should run the team websites with revenue split among the teams.<sup>12</sup> While some of the owners were concerned about jeopardizing their television broadcast deals, the owners nevertheless voted unanimously to pool their interactive media rights and form BAM.<sup>13</sup> Through BAM, MLB centralized all of its Internet rights and took control of the team websites.<sup>14</sup>

BAM would not have been possible without Commissioner Selig's tireless lobbying.<sup>15</sup> Selig thought the creation of BAM was "akin to NFL Commissioner Pete Rozelle getting football's owners to share TV revenue in the 1960s."<sup>16</sup> Reinsdorf, however, viewed it differently: "A lot of [MLB] clubs thought, Okay, we'll go along. We don't think this will amount to much."<sup>17</sup>

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<sup>7</sup> Chuck Salter, *MLB Advanced Media's Bob Bowman is Playing Digital Hardball. And He's Winning.*, FAST COMPANY (Mar. 19, 2012), available at <http://www.fastcompany.com/magazine/164/major-league-baseball-advanced-media-bam>.

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

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

<sup>10</sup> David M. Carter, *Money Games: Profiting from the Convergence of Sports and Entertainment* 100 (2010).

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

<sup>12</sup> Salter, *supra* note 4.

<sup>13</sup> *Id.* This occurred through the Internet Media Rights Agreement among the thirty MLB clubs. Zimbalist, *supra* note 1, at 234 n.44. The Internet Media Rights Agreement is not publicly available, so the author will use the term "interactive media" to refer to the rights affected by that agreement.

<sup>14</sup> Maury Brown, *MLBAM: The Stealthy Money Machine*, *Hardball Times* (Dec. 5, 2005), available at <http://www.hardballtimes.com/main/article/mlbam-the-stealthy-money-machine/>.

<sup>15</sup> Zimbalist, *supra* note 1, at 190.

<sup>16</sup> Salter, *supra* note 4.

<sup>17</sup> *Id.*

To begin operations, each team invested \$1 million per year over a four-year period.<sup>18</sup> MLB.com began generating excess revenue in its second year of operations, so the teams' combined initial investment turned out to be \$70 to \$75 million instead of the targeted \$120 million.<sup>19</sup> This meant that each club's initial investment amounted to only \$2.6 million—an extremely low sum considering that is about what a team would pay for a back-up infielder.<sup>20</sup> MLB President Bob Dupuy persuaded eight team owners to serve without pay on BAM's board,<sup>21</sup> and nine months later, Bob Bowman was named CEO.<sup>22</sup>

### III. BAM TODAY

Today, BAM is responsible for a wide variety of online responsibilities for the clubs and for MLB. The definition of BAM on MLB's website demonstrates the breadth of the organization:

MLB Advanced Media, L.P. (MLBAM) is the interactive media and Internet Company of Major League Baseball. MLBAM manages the official site, www.MLB.com, each of the 30 individual Club sites, and delivers live online streaming audio and video of every game as well as the most complete real-time baseball information and interactivity on the Internet and wireless devices.<sup>23</sup>

BAM is a "separate entity, owned by the thirty clubs."<sup>24</sup> It has an eight-person board of directors, which includes MLB's COO and seven owners.<sup>25</sup> While Bowman is able to control the direction of BAM's products and services, he still reports to BAM's board of directors.<sup>26</sup> BAM completely controls and centralizes MLB's online products and services.<sup>27</sup>

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<sup>18</sup> Brown, *supra* note 11.

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

<sup>20</sup> Carter, *supra* note 7, at 100.

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

<sup>22</sup> *Id.* Bowman had an interesting resume coming into BAM. He graduated from Harvard College and University of Pennsylvania's Wharton School of Business. He became the state treasurer of Michigan at age twenty-seven, served as the CFO of Sheraton Hotels, and was also the president of ITT. *Id.*

<sup>23</sup> MLB Advanced Media, available at <http://mlb.mlb.com/careers/index.jsp?loc=mlbam> (last visited Nov. 7, 2012).

<sup>24</sup> Zimbalist, *supra* note 1, at 190. Zimbalist does not give any other insights into the nature of BAM as a "separate entity," but relies on the fact that MLBAM is a "separate company." This may refer to BAM's status as a separate legal entity. *Id.* at 234 n.43.

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

<sup>26</sup> Salter, *supra* note 4.

<sup>27</sup> Brown, *supra* note 11. BAM "was the start of a focused effort to completely control and

Ironically, baseball has taken such strides technologically despite its reputation as a slow-moving entity, hesitant to change. As Bowman explains, “Remember, baseball was the first [sport] to be on radio, the first to be on TV, on cable, and now digital media. . . . Think back to 1950 when the three sports that mattered were baseball, boxing, and horse racing. Two of them disappeared. Not baseball.”<sup>28</sup>

### A. *Products Offered*

The main products and services offered by BAM are MLB.com, MLB.tv, and the At Bat App, which is available for download on mobile phones.<sup>29</sup> MLB is the only league that still separates digital rights from the rest of the media, meaning that a provider must pay for the regular television rights and then purchase the digital rights separately from BAM.<sup>30</sup> Thus, none of MLB’s television rights holders, like FOX or the regional sports networks, have a significant BAM deal for online streaming rights.<sup>31</sup> BAM utilizes both free content models, such as MLB.com, and content for which subscribers must pay, such as MLB.tv.<sup>32</sup>

MLB.tv is the primary product offered by BAM. Most in the industry agree that BAM has “built the best video streaming platform in sports.”<sup>33</sup> The technology platform developed by BAM for MLB.tv is

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centralize all products and services provided on the Internet by MLB.” *Id.* A BAM press release stated BAM “is the interactive media and Internet company of Major League Baseball.” *MLB Advanced Media Licenses Major League Baseball Internet Rights in Korea to Kim Sports International*, PRNEWswire (Jul. 24, 2012) available at <http://www.prnewswire.com/news-releases/mlb-advanced-media-licenses-major-league-baseball-internet-rights-in-korea-to-kim-sports-international-70829482.html>.

<sup>28</sup> Salter, *supra* note 4.

<sup>29</sup> The At Bat App is the official app for MLB and allows users to see highlights, scores, and statistics for MLB games. See <http://mlb.mlb.com/mobile/atbat/>.

<sup>30</sup> Terry Lefton & John Ourand, *MLB’s Split Squad*, SPORTS BUSINESS JOURNAL (Nov. 15, 2010) available at <http://www.sportsbusinessdaily.com/Journal/Issues/2010/11/20101115/This-Weeks-Issue/MLBs-Split-Squad.aspx>. This has also caused tension between the networks, MLB, and BAM. See Lefton article for more details.

<sup>31</sup> *Id.*

<sup>32</sup> Carter, *supra* note 7, at 102. According to Bowman, “95 percent of our content is free, but 5 percent of it is paid.” *Id.* Subscribers for MLB.tv paid between \$80-\$110 per season in 2008. *Id.* The MLB At Bat App is free to download from iTunes and delivers “2013 schedules, 2012 scoreboards, and complete Winter Meetings news and expert analysis of all 30 MLB Clubs.” iTunes, available at <https://itunes.apple.com/us/app/mlb.com-at-bat/id493619333?mt=8&ign-mpt=uo%3D4> (last visited Nov. 25, 2012). Subscribers can pay \$3.99 on iTunes to upgrade to the At Bat 12 Season premium service. *Id.*

<sup>33</sup> Mike Ozanian, *Why Baseball’s Streaming Technology Is Used By ESPN, CBS Sports and Glenn Beck*, FORBES (Sept. 3, 2012), available at <http://www.forbes.com/sites/mikeozanian>

not only used by MLB, but also by other BAM clients such as ESPN, CBS Sports, and Glenn Beck.<sup>34</sup> Created in 2002, the cornerstone to MLB.tv's success is its ability to broadcast MLB games live on the Internet.<sup>35</sup> With only a few limitations, nearly every game is available to view on MLB.tv.<sup>36</sup> Subscribers pay a fee each season and have access to virtually every MLB game. Because the majority of the Houston Astros games will not be broadcast in the Los Angeles area, for example, this service allows an Astros fan living in Los Angeles to watch all of the team's games online. In 2008, MLB.tv had nearly a half-million subscribers who paid between \$80 and \$110 per season.<sup>37</sup> In 2009, MLB launched its own television network, which helped the production capabilities of BAM.<sup>38</sup> MLB was the first major professional sports league to air its content live on the Internet, which separates it from other major sports leagues.<sup>39</sup> The NFL began doing this with Sunday Night Football in 2008 and later with DirectTV, and the NBA broadcasts games through NBA League Pass Broadband.<sup>40</sup>

There are a few limitations on games aired online through MLB.tv in order to appease television broadcasters. Games on MLB.tv are not available to fans in local markets, nor are they available in any other area where a game is televised. Thus, if an Astros fan living in Houston wants to watch an Astros game that is being broadcast on local television, that game is not available on MLB.tv.

BAM has several other products and services besides MLB.tv. The GameDay tracker allows fans to track the scores of games without paying for video streaming on MLB.tv.<sup>41</sup> Currently, the GameDay tracker averages over 50 million unique visitors a month, making it "one of the most visited sports sites in the world."<sup>42</sup>

In November 2004, BAM acquired Tickets.com, which allows for better control and efficiency in selling MLB tickets.<sup>43</sup> This acquisition

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nian/2012/09/03/why-baseballs-streaming-technology-is-used-by-espn-cbs-sports-and-glenn-beck/.

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

<sup>35</sup> CARTER, *supra* note 7, at 101.

<sup>36</sup> *Id.*

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

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

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

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

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

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

<sup>43</sup> Brown, *supra* note 11.



made sense because BAM had signed a deal with MLB in 2003 to cover the ticket sales for MLB.com.<sup>44</sup> Currently, more than one-third of all MLB game tickets are purchased through BAM, equaling nearly 30 million tickets per year.<sup>45</sup> BAM also sells more than \$80 million of team merchandise annually.<sup>46</sup>

BAM is also diversifying outside of baseball. It owns a ten percent share in the World Championship Sports Network (WCSN), which is known for sports such as track and field, rowing, wrestling, and gymnastics.<sup>47</sup> BAM also has deals with rock bands and musicians such as Bon Jovi and former Creed singer, Scott Stapp.<sup>48</sup>

### B. Revenue

The thirty major league clubs share equally in BAM's revenues.<sup>49</sup> The revenues reported by BAM can be astounding and are a huge source of revenue for the MLB clubs.<sup>50</sup> From 2004 to 2005, sales on MLB.com rose 220 percent.<sup>51</sup> MLB.com racked up an estimated \$25 million in 2005 just from sales and auctions of licensed merchandise and collectibles.<sup>52</sup> Last year, 2.2 million people bought the At Bat iPhone and iPad apps, which are among the top grossing on iTunes, or paid \$120 to subscribe to MLB.tv.<sup>53</sup> BAM sold more than 35 million tickets in 2011, which is more than half the league's inventory.<sup>54</sup> When you add up tickets, ads, apps, and streaming subscriptions, BAM's yearly revenue is approximately \$620 million.<sup>55</sup> In 2012, MLB and ESPN agreed to an 8-year, \$5.6 billion agreement for broadcasting rights, with approximately \$23.3 million of this revenue going to

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

<sup>45</sup> CARTER, *supra* note 7, at 100.

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

<sup>47</sup> Brown, *supra* note 11.

<sup>48</sup> *Id.*

<sup>49</sup> CARTER, *supra* note 7, at 100.

<sup>50</sup> Brown, *supra* note 11.

<sup>51</sup> *Id.*

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

<sup>53</sup> Salter, *supra* note 4.

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

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

BAM.<sup>56</sup> This is an increase from the prior deal's \$10.2 million per year.<sup>57</sup>

In 2005, club owners considered an initial public offering (IPO) for BAM.<sup>58</sup> The BAM IPO was valued at between \$2 billion and \$2.5 billion, and the profit from the IPO would have been split among the teams.<sup>59</sup> MLB ultimately decided not to go forward with the IPO to avoid having to open its books to the public.

### C. *Teams' Concerns over BAM*

BAM has clearly shown there is a large amount of revenue that can be unlocked through digital technology. This has led some owners, especially large market teams, to become fearful that MLB.tv will start to cannibalize the revenues the teams generate from local broadcasts.<sup>60</sup> This was the biggest concern from the beginning because local television broadcast deals provide a significant portion of teams' revenue.<sup>61</sup> Local broadcasting rights can generate more than \$2 billion a year.<sup>62</sup> To address this concern, BAM has blacked out games in the team's home television territory in order to avoid competing with local television broadcasts.<sup>63</sup> This is why an Astros fan living in Los Angeles can watch Astros games on MLB.tv, but an Astros fan living in Houston cannot watch Astros games on MLB.tv.

Even though BAM and television broadcast rights generate a large amount of revenue for teams, "plain old fashioned ticket selling remains the single largest source of revenue in the industry."<sup>64</sup> BAM sold nearly 35 million MLB tickets online in 2011.<sup>65</sup> That accounts for

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<sup>56</sup> Maury Brown, *ESPN Reaches Largest Broadcast Deal Ever for MLB*, *The Biz of Baseball*, (Aug. 28, 2012, 15:14), available at [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=5725:espn-reach-largest-broadcast-deal-ever-for-mlb&catid=57:television&Itemid=122](http://bizofbaseball.com/index.php?option=com_content&view=article&id=5725:espn-reach-largest-broadcast-deal-ever-for-mlb&catid=57:television&Itemid=122).

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

<sup>58</sup> Brown, *supra* note 11.

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

<sup>60</sup> CARTER, *supra* note 7, at 105.

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

<sup>62</sup> Salter, *supra* note 4.

<sup>63</sup> *Id.*

<sup>64</sup> Pete Toms, *Last Week in Bizball: The Challenge of Secondary Ticketing for MLB*, *The Biz of Baseball*, (Dec. 19, 2011), available at [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=5556:lwib-the-challenge-of-secondary-ticketing-for-mlb-plus-tickets&catid=67:pete-toms&Itemid=155](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=5556:lwib-the-challenge-of-secondary-ticketing-for-mlb-plus-tickets&catid=67:pete-toms&Itemid=155).

<sup>65</sup> Salter, *supra* note 4.

more than half the league's inventory, and the revenue from those sales is distributed evenly among the teams.<sup>66</sup>

The secondary market for ticket reselling has always been a big problem for teams. Ticket resellers were profiting by scalping MLB tickets at a higher price than that at which they purchased the tickets, and MLB was not seeing any of those profits. The main culprits were season ticketholders because season tickets are often sold at a discount. In 2011, ninety-two percent of the baseball tickets sold on StubHub were from season ticket accounts.<sup>67</sup> In 2007, BAM signed a deal with StubHub to be MLB's official ticket reseller to try and capture some of that profit for itself.<sup>68</sup> BAM receives more than half of the fees and commissions StubHub collects on baseball tickets, and BAM then re-distributes those profits to the teams.<sup>69</sup> StubHub also sponsors the league and twenty-two teams.<sup>70</sup> Based on the whole package, the deal with StubHub amounted to \$60 million in 2011.<sup>71</sup>

The problem is that buyers are no longer going to team websites to buy tickets, but instead are heading straight to StubHub. The clubs have pressured Commissioner Selig to look into the issue, and he has commissioned a group of executives from six teams and the League to look at the future of ticketing.<sup>72</sup> Teams are growing increasingly concerned about the secondary ticket market after seeing a continuous drop in season tickets being sold. As Derek Schiller, executive vice president of sales and marketing for the Atlanta Braves stated, "I don't believe there is any bigger obstacle or issue, any bigger threat to the professional team sports marketplace and industry as a whole. . . . The amount of dollars at risk is growing nearly exponentially."<sup>73</sup> In 2011, almost 8 million MLB tickets were sold on StubHub, an increase from 2 million the year before.<sup>74</sup> There is a vast difference among teams,

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<sup>66</sup> *Id.*

<sup>67</sup> Bill King & Eric Fisher, *Second Thoughts*, Sports Bus. J., (Oct. 24, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/10/24/In-Depth/Main.aspx?hl=secondary%20ticketing&sc=1>.

<sup>68</sup> Toms, *supra* note 59.

<sup>69</sup> King & Fisher, *supra* note 62.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Several team websites redirect viewers directly to StubHub to resell their tickets. The buyer pays a small fee to StubHub, and StubHub gives approximately half of those fees back to BAM. *Id.* The StubHub arrangement gives buyers and sellers the comfort of knowing the system is legitimate since customers are dealing with MLB's official ticket reseller, and there are lots of tickets available to purchase.

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

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

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

but on average, MLB clubs had about ten percent of their average gate sales move to StubHub.<sup>75</sup> The StubHub deal expires at the end of 2012.<sup>76</sup>

Some teams welcome the partnership with StubHub. Teams that routinely sell out, like the San Francisco Giants, see the StubHub partnership as a benefit.<sup>77</sup> Their tickets can sell for more than three times their face value, which allows those teams to continue to see revenue long after the season tickets have been sold out.<sup>78</sup> Other teams, however, like the Houston Astros and Los Angeles Angels, often see their tickets going for below face value on StubHub. Robert Alvarado, Vice President of Marketing and Ticket Sales for the Angels, was frustrated with the StubHub deal and sees it as a real detriment to his club.

StubHub was a smaller player. And we blew it up. They're legitimate now. And it's killing us. It's killing us. Location. Price. Just about every advantage we had over the secondary market is gone. It's the blurring of the lines. Because, in my opinion, we failed to do our due diligence before we jumped into bed with StubHub.<sup>79</sup>

The Angels were vocal opponents of the deal with StubHub when it was proposed, because the Angels were already operating their own resale site.<sup>80</sup> Similarly, the Boston Red Sox chose not to participate in the StubHub deal when it was first announced, as they had a partnership with Ace Tickets.<sup>81</sup> The Red Sox signed a one-year deal in 2010 to be a part of the StubHub/MLB deal, but stated that they remain "cautious" about the secondary market.<sup>82</sup>

Another concern for the teams is control over the rights for live, in-market streaming of games online. Currently, BAM controls the rights to stream games online.<sup>83</sup> This puts BAM at odds with many owners who have invested in regional sports networks that control the local

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

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

<sup>77</sup> *Id.*

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

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

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

<sup>81</sup> Toms, *supra* note 59.

<sup>82</sup> *Id.* The secondary ticketing practices of MLB and BAM could pose another set of anti-trust issues for the clubs, but that issue is beyond the scope of this Comment.

<sup>83</sup> Pete Toms, *An In Depth Look at MLB Advance Media*, BIZ OF BASEBALL (Mar. 15, 2010), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=4186:lwib-an-in-depth-look-at-mlb-advanced-media-plus-tidbits&catid=67:pete-toms&Itemid=155](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=4186:lwib-an-in-depth-look-at-mlb-advanced-media-plus-tidbits&catid=67:pete-toms&Itemid=155).

television rights for their teams.<sup>84</sup> Despite years of negotiations, BAM, the teams, and the regional sports networks, only the Yankees and the Padres were ready to stream live in-market games in 2010.<sup>85</sup>

Some owners are also unhappy with the lack of control they have over their team websites and their inability to craft online marketing campaigns accordingly. “[BAM] really needs to help us with our local needs because every team knows its own market and they all differ,” said Jamie McCourt, then-chief executive of the Dodgers, in 2009.<sup>86</sup> Some teams realize the value of BAM, however, and know they could not effectively exploit their online rights on their own. “We have our fights now and then,” says Bill Schlough, CIO of the San Francisco Giants.<sup>87</sup> “It’s just the way it is. We have to recognize that we’re a one-thirtieth owner in this entity and we have to respect each other. I know the value and equity produced by BAM is worth any of the smaller struggles.”<sup>88</sup>

#### D. *Antitrust: One Way Teams Could Take Back Their Individual Online Revenue*

As more activities move online, BAM will increasingly encompass MLB’s online presence, from ticket sales and merchandise to generating advertising revenue. Currently, anything done online must be approved by BAM. MLB is the only major sports league that “sells digital and marketing rights separately.”<sup>89</sup> MLB sponsors must buy their league rights from two places: BAM sells the interactive rights to use MLB marks (i.e., online, in mobile marketing, and on any MLB league or team website advertisements), while MLB corporate sells the right to use MLB marks in any advertising not done online and in connection with events like the All-Star Game and the World Series.<sup>90</sup>

For example, if State Farm wants to be a sponsor for the Atlanta Braves and hosts a ticket giveaway online and at its stores, State Farm must buy the interactive media rights for the online contest from BAM and all of the rights to use the Braves’ marks in its stores from

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

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

<sup>86</sup> CARTER, *supra* note 7, at 105.

<sup>87</sup> Salter, *supra* note 4.

<sup>88</sup> *Id.*

<sup>89</sup> Terry Lefton & John Ourand, *MLB’s Split Squad*, SPORTS BUS. J. (Nov. 15, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/11/20101115/This-Weeks-Issue/Mlbs-Split-Squad.aspx>.

<sup>90</sup> *Id.*

MLB. Some sponsors believe this structure is confusing and may hinder clubs that are looking to get more sponsorship dollars through their existing sponsors. Corporations also see the value in reaching customers through digital technology, so it can have the effect of discouraging sponsors. Greg Via, global director of sports marketing at Gillette stated,

[MLB] should control all their marks under one roof, like any other property. . . . [I]t's very difficult for me to explain to [brand managers] why you have to do another deal for digital MLB rights and why a competitor can ambush you with [MLB] digital rights. That's difficult when every brand is being asked to do more with less dollars.<sup>91</sup>

This additional cost may make other major sports that do not have these restrictions more attractive than baseball sponsorships.<sup>92</sup> As the success of BAM shows, new media is becoming more and more profitable for MLB teams and the corporations that sponsor them.

Large market teams contribute to a larger portion of this success in new media than smaller market teams. Since the revenues from BAM are split equally, the smaller market teams are getting just as much revenue as the large market teams. Teams like the New York Yankees have large fan bases that probably are responsible for a lot of BAM's revenue online, either through online ticketing sales, merchandise purchases, or simply more traffic to the teams' websites. New York is also a tech savvy metropolitan areas whose residents are more likely to adopt new technology and stay ahead of the curve.<sup>93</sup> It is likely that these large market teams could afford to finance their own online operations and collect large revenues that the club would not have to share with the other teams.<sup>94</sup>

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

<sup>92</sup> *See id.* The NFL and NHL package both traditional sponsorship rights and digital rights together. *Id.*

<sup>93</sup> The New York Yankees created the YES Network in 2001. It was the first television network created and owned by a team to broadcast baseball games. This shows New York's ability to adapt to technology, as well as its investment capabilities. Goldman Sachs – YES Network, <http://www.goldmansachs.com/our-firm/progress/yesnetwork/index.html> (last visited June 27, 2013).

<sup>94</sup> For example, New York and San Diego were the first teams to start providing online streaming of games in 2010. Pete Toms, *An In Depth Look at MLB Advance Media*, BIZ OF BASEBALL (Mar. 15, 2010), [http://www.bizofbaseball.com/index.php?option=com\\_content&view=article&id=4186:lwib-an-in-depth-look-at-mlb-advanced-media-plus-tidbits&catid=67:pete-toms&Itemid=155](http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=4186:lwib-an-in-depth-look-at-mlb-advanced-media-plus-tidbits&catid=67:pete-toms&Itemid=155).

Based on this dichotomy, large market teams may reach a point where they feel BAM is undercutting their ability to compete in the marketplace for sponsorship and other revenue. In order to take back their individual interactive media rights, large market teams could sue MLB, alleging that the BAM agreement violates antitrust law. While several causes of action may exist, including restraints on team websites, online ticketing, and online merchandise sales, this Comment will focus only on BAM's restraint on online broadcasting of MLB games through MLB.tv.

#### IV. OVERVIEW OF ANTITRUST LAW IN SPORTS CASES

To address the concerns that corporate giants in the late 1800s were abusing competition, Congress enacted the Sherman Antitrust Act of 1890.<sup>95</sup> Under the Sherman Act, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."<sup>96</sup> Sherman § 1 and the "Rule of Reason" have served as the main focus for antitrust cases in sports.

The Rule of Reason has its roots in *Standard Oil of New Jersey v. United States*.<sup>97</sup> In evaluating Sherman § 1 in *Standard Oil*, the U.S. Supreme Court stated that there must be an "exercise of judgment" when evaluating agreements under Sherman § 1.<sup>98</sup> Since no standard is given in the legislation, the Court held that the "standard of reason," which applied at common law, should be used to determine whether an agreement violates the Sherman Act.<sup>99</sup>

The Rule of Reason was further refined in *Chi. Board of Trade v. United States*.<sup>100</sup> There, Justice Brandeis rejected a rule of per se illegality and laid out factors to be considered under the Rule of Reason:

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because

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<sup>95</sup> 15 U.S.C. § 1 (2004). Hereinafter, this Comment refers to the relevant provision as Sherman § 1.

<sup>96</sup> *Id.*

<sup>97</sup> See *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>98</sup> *Id.* at 60.

<sup>99</sup> *Id.*

<sup>100</sup> See *Bd. of Trade of the City of Chi. v. United States*, 246 U.S. 231, 238 (1981).

a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.<sup>101</sup>

More recently, in a sports-related case involving the NCAA's restrictions on television broadcasts, the Court reiterated that the Sherman Act "was intended to prohibit only unreasonable restraints of trade."<sup>102</sup>

The Rule of Reason analysis is used today to evaluate most sports-related antitrust cases.<sup>103</sup> In order to perform the analysis, first, there must be an agreement in order to fall under Sherman § 1.<sup>104</sup> Next, the court must determine whether the agreement unreasonably restrains trade in the relevant market.<sup>105</sup> If the agreement does significantly restrain trade in the relevant market, then the court must consider whether there is a legitimate procompetitive justification for the restraint.<sup>106</sup> If the defendant cannot articulate a legitimate procompetitive justification, the court will generally grant summary judgment to the plaintiff.<sup>107</sup> If there is a legitimate procompetitive justification, the plaintiff must prove that the restraint is not reasonably necessary to accomplish that legitimate procompetitive justification.<sup>108</sup> If the restraint is not reasonably necessary, the court must determine whether a less restrictive alternative exists.<sup>109</sup>

Sports cases are unique in that the structures of leagues and the nature of the business are significantly different from other corporate entities. For instance, courts usually do not consider a sports league as a single entity for purpose of Sherman § 1.<sup>110</sup> Determining the relevant market, legitimate procompetitive justifications, and less restrictive alternatives can also be particularly difficult in the sports market. For example, the relevant market in player restraint cases brought against

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<sup>101</sup> *Id.* at 238.

<sup>102</sup> *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 (1984).

<sup>103</sup> *See id.*

<sup>104</sup> *See American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183; 130 S. Ct. 2201, 2208 (2010).

<sup>105</sup> *See NCAA*, 468 U.S. at 111.

<sup>106</sup> *Id.* at 114.

<sup>107</sup> *Id.* at 119-20. Because the NCAA did not articulate a pro-competitive justification for its television broadcast plan, the court found the restraints on broadcasts necessarily violated the Rule of Reason and affirmed summary judgment in favor of the Board of Regents.

<sup>108</sup> *Mackey v. Nat'l Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

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

<sup>110</sup> *See American Needle*, 130 S. Ct. at 2206-07. Whether courts consider BAM a single entity will be explored in more depth below. *See infra* section VI A.



the NFL or the NBA is usually the market for major league players' services in the United States,<sup>111</sup> but sometimes courts find a larger relevant market.<sup>112</sup>

In general, courts have found higher prices, decreased output, and lower quality to be signs of an anticompetitive impact.<sup>113</sup> An anticompetitive impact, however, can be cured if there is a justification for the restriction that promotes competition. Some procompetitive justifications are unique to sports. For example, the Supreme Court has held that competitive balance within sports leagues is a legitimate procompetitive justification.<sup>114</sup> Making teams competitive on the field makes for a more valuable product, which increases the league's value as a whole.

#### V. WOULD BAM BE EXEMPT FROM ANTITRUST SCRUTINY?

If the large market clubs decided to sue MLB alleging that the BAM agreement violates Sherman § 1, a court would first need to determine whether the baseball exemption applied.

##### A. *History of the Baseball Exemption*

In *Federal Baseball Club v. National League*, the Supreme Court held that baseball is exempt from federal antitrust laws.<sup>115</sup> The Court determined that for-profit baseball games are not interstate commerce within the meaning of the Sherman Act, and therefore the Act does not apply to baseball.<sup>116</sup> *Federal Baseball* was followed in *Toolson v. New York Yankees*<sup>117</sup> and *Flood v. Kuhn*.<sup>118</sup> The Court in *Flood* noted both that the *Federal Baseball* Court's determination that baseball was not interstate commerce was clearly outdated and that many commentators had called for baseball's antitrust exemption to be repealed. Neverthe-

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<sup>111</sup> *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1185 (D.C. Cir. 1978) (stating the relevant market was graduating college players).

<sup>112</sup> In *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002), the court found the relevant market was not Division I soccer players in the United States. Rather, the relevant market was broader because MLS soccer teams must compete for players outside of Division I and outside of the United States. *Id.* at 62-62.

<sup>113</sup> *Id.* at 106-07.

<sup>114</sup> *NCAA*, 468 U.S. at 101.

<sup>115</sup> 259 U.S. 200, 209 (1922).

<sup>116</sup> *Id.* at 208-09.

<sup>117</sup> 346 U.S. 356 (1953) (per curiam). In *Toolson*, the Court reiterated its determination that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Id.* at 357.

<sup>118</sup> 407 U.S. 258 (1972).

less, the *Flood* Court decided that since Congress had not acted to change baseball's antitrust exemption, the Court must continue to uphold it.<sup>119</sup>

The Court has not extended baseball's exemption from antitrust laws to other sports.<sup>120</sup> Likewise, the Court has repeatedly clarified the narrowness of its holding in *Federal Baseball*. For example, in *Radovich v. National Football League*, the Court declared: “[W]e now specifically limit the rule . . . established [in *Federal Baseball* and *Toolson*] to the facts there involved, i.e., the business of organized professional baseball.”<sup>121</sup>

Lower courts have taken two different approaches to the baseball exemption and its interpretation. In *Piazza v. Major League Baseball*, a federal district court narrowed *Flood* by finding that the “antitrust exemption created by *Federal Baseball* is limited to baseball's reserve system.”<sup>122</sup> *Piazza* examined the rationales put forth in *Federal Baseball*, *Toolson*, and *Flood*, and reasoned that the holdings in those cases were limited to baseball's reserve system.<sup>123</sup> Since the reserve system was not at issue in *Piazza*, MLB was subject to antitrust laws in that case.<sup>124</sup>

While *Piazza* provides an interesting analysis, the majority of courts follow the holding in *Finley v. Kuhn*.<sup>125</sup> In *Finley*, the issue was whether the Commissioner had the authority to disapprove player assignments, even though there was no violation of a Major League rule.<sup>126</sup> The *Finley* court found the baseball exemption applied to the

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<sup>119</sup> *Id.* at 282. “We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.” *Id.* at 283-84. Congress's “positive inaction” refers to Congress's failure to statutorily repeal the exemption despite many calls for it to be repealed.

<sup>120</sup> See *United States v. International Boxing Club*, 348 U.S. 236 (1955) (boxing), *Radovich v. National Football League*, 352 U.S. 445 (1957) (football).

<sup>121</sup> 352 U.S. 445, 451 (1957).

<sup>122</sup> 831 F. Supp. at 438. The reserve system refers to the MLB rule that confines a player to the club with which he first signs a contract for the rest of his baseball career. *Flood*, 407 U.S. at 289.

<sup>123</sup> *Piazza*, 831 F. Supp. at 436-38. In *Piazza*, the plaintiffs claimed that the National League owners' rejection of their proposed purchase of the Giants and relocation to Tampa Bay was a violation of the antitrust laws. *Id.* at 421.

<sup>124</sup> *Id.* at 438.

<sup>125</sup> 569 F.2d 527 (7th Cir. 1978).

<sup>126</sup> *Id.* at 530.

“business of baseball” and not just the reserve system,<sup>127</sup> stating that “The Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.”<sup>128</sup>

B. *Analysis of the Baseball Exemption as Applied to BAM*

In light of the baseball exemption’s interpretative history, MLB could argue that BAM should be included under the baseball antitrust exemption because online rights clearly fall within the “business of baseball” under *Finley*. BAM is responsible for bringing in tremendous amounts of revenue every year.<sup>129</sup> There is no denying that BAM is a crucial part of MLB’s business, as well as the business of each of the clubs.<sup>130</sup>

The clubs, however, could compellingly argue that the baseball exemption should not apply because BAM generates revenue from outside parties. A congressional committee distinguished the outside business aspects of baseball, stating that upholding the baseball exemption for advertising, television rights, the concession industry, and other aspects of baseball’s business activities “could not be granted without substantially repealing the antitrust laws.”<sup>131</sup>

Several cases have differentiated revenue generated from outside parties versus revenue generated within the game of baseball.<sup>132</sup> Two circuit courts have found the baseball exemption covers MLB’s dealings with umpires<sup>133</sup> and the minor leagues.<sup>134</sup> The baseball exemption does not cover concessionaires<sup>135</sup> and merchandisers, however.<sup>136</sup>

In *Henderson Broadcasting Corp. v. Hous. Sports Ass’n*, a radio station sued the Houston Astros for antitrust violations surrounding ra-

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<sup>127</sup> *Id.* at 541. “[I]t appears clear from the entire opinions in the three baseball cases, as well as from *Radovich*, that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.” *Id.* at 541.

<sup>128</sup> *Finley*, 569 F.2d. at 541.

<sup>129</sup> BAM’s estimated annual revenue is \$620 million. Salter, *supra* note 4.

<sup>130</sup> See *infra* part III B.

<sup>131</sup> H. Subcomm. Rep. No. 2002, “Organized Baseball,” 82d Cong., 2d Sess., 230 (quoted in *Henderson Broadcasting Corp. v. Hous. Sports Ass’n*, 541 F. Supp. 263 (S.D. Tex. 1982)).

<sup>132</sup> See *Twin City Sportservice Inc. v. Finley*, 365 F. Supp. 235 (N.D. Cal. 1972); *Fleer v. Topps Chewing Gum & Major League Baseball Players Ass’n*, 658 F.2d 139 (3d Cir. 1981).

<sup>133</sup> See *Salerno v. Am. League*, 429 F.2d 1003 (2d Cir. 1970).

<sup>134</sup> See *Portland Baseball Club v. Kuhn*, 491 F.2d 1101 (9th Cir. 1974).

<sup>135</sup> See *Twin City Sportservice*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev’d on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

<sup>136</sup> See *Fleer*, 658 F.2d 139 (3d Cir. 1981).

dio broadcasting.<sup>137</sup> The Supreme Court has never ruled on whether the baseball exemption covers radio broadcasting.<sup>138</sup> In its previous baseball exemption cases, the Court implied that “the exemption covers only the aspects of baseball, such as leagues, clubs and players which are integral to the sport and not related activities which merely enhance its commercial success.”<sup>139</sup> The court in *Henderson* refused to extend the baseball exemption to radio broadcasts because the radio broadcast only brings revenue to the teams.<sup>140</sup> The court observed that “[i]f the contract of a concessionaire, whose programs, advertising and food are not part of the spectators’ experience of the baseball game, is not covered by the baseball exemption, then neither should the broadcasting contract which provides transmission of merely an aural version of the game across the airwaves.”<sup>141</sup> The *Henderson* court reasoned that the Supreme Court cases on the baseball exemption “implied that broadcasting is not central enough to baseball to be encompassed in the baseball exemption.”<sup>142</sup>

Based on the different treatment given to outside parties responsible for generating revenue and the holding in *Henderson* that broadcasting is not central enough to be considered part of the business of baseball, BAM would not be eligible for baseball’s antitrust exemption. *Henderson* provides strong arguments that broadcasting games is part of the revenue process, not part of the game itself. Similarly, in streaming games, BAM is just broadcasting games over the Internet. MLB.tv provides a way for fans to watch games in the same way that radio broadcasts provide fans the ability to listen to games. MLB could argue that the presentation of games to its fans is central to its business. This argument would not hold up under the rationale in *Henderson*, however. The *Henderson* court noted that the Supreme Court upheld the baseball exemption despite the nature of interstate commerce apparent in the broadcasting of games.<sup>143</sup> This implied that broadcasting is not central enough to qualify for the baseball exemp-

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<sup>137</sup> See *Henderson Broad. Corp. v. Hous. Sports Ass’n*, 541 F. Supp. 263, 264 (S.D. Tex. 1982).

<sup>138</sup> *Id.* at 265.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 270.

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

<sup>142</sup> *Id.* at 265.

<sup>143</sup> *Id.* at 268-69.

tion.<sup>144</sup> If the radio broadcasting of games is not central enough to the business of baseball, then neither is BAM's online streaming of games.

*Henderson* distinguished between the Astros as a "team" and the Astros as a "network." The Astros were being sued as a network, which also favored not giving them the antitrust exemption.<sup>145</sup> The same can be said for BAM and its thirty teams. BAM is operated as a separate entity that is focused on broadcasting games. It is not related to the playing of the game; it gives no advice to teams on how to draft players or run their clubs. *Henderson* also noted that baseball was included, along with the other major sports, in the Sports Broadcasting Act.<sup>146</sup> If the baseball exemption applied to broadcasting, then Congress would not have included baseball in this legislation.

Allowing BAM an exemption from antitrust law creates a loophole that could be used to avoid liability. It would greatly expand the holdings in *Flood* and *Finley* and would conflict with the holding in *Henderson*. This was not the intent of the antitrust legislation, and the congressional history cited in *Henderson* warns that expanding the baseball exemption would greatly undermine the antitrust laws. Therefore, BAM should not fall within the baseball antitrust exemption.

*C. BAM's Online Broadcasts Would Not be Exempt from Antitrust Scrutiny Under the Sports Broadcasting Act (SBA).*

Television broadcast rights seem similar to the online broadcasting rights that BAM controls, so MLB may argue BAM is exempt from antitrust liability under the Sports Broadcasting Act (SBA). A court deciding an antitrust suit against BAM would likely look closely at other cases concerning similar broadcasting rights.

The precursor to the SBA was *United States v. National Football League*, which found the NFL's packaging and selling of games to CBS violated Sherman § 1.<sup>147</sup> Initially, the NFL allowed each team to contract on its own for local television broadcast rights for any games in which the team was playing.<sup>148</sup> The NFL's bylaws prohibited teams from broadcasting their games in the home territories of other teams, however.<sup>149</sup> The U.S. alleged that this home territory prohibition vio-

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

<sup>145</sup> *Id.* at 271.

<sup>146</sup> *Id.* at 269.

<sup>147</sup> *United States v. Nat'l Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>148</sup> *Id.* at 321.

<sup>149</sup> *Id.*

lated Sherman § 1.<sup>150</sup> The court found that this prohibition was a contract in restraint of trade because the teams were agreeing not to project their games into the home territories of other teams.<sup>151</sup> This gave teams exclusive rights within their home territories, thereby cutting out any potential competition from other team broadcasts.<sup>152</sup> This was a “clear case of allocating market territories among competitors, which is a practice generally held illegal under the anti-trust laws.”<sup>153</sup> Just because the teams were allocating geographic territories did not necessarily mean it was illegal, however. To be illegal, the agreement “must cause both a restraint of trade and an *unreasonable* restraint of trade.”<sup>154</sup>

The court first evaluated the provision that prevents the telecasting of outside games into the home territories of other teams on days when the other teams are playing at home.<sup>155</sup> For example, if the Pittsburgh Steelers were playing at home, the San Francisco 49ers game could not be broadcast in Pittsburgh. The court found this restraint was not an unreasonable restraint of trade. In order for the league to survive, teams must be competitive with one another, and there must not be a drastic financial gap between teams.<sup>156</sup> The NFL has numerous provisions to avoid this dichotomy, such as allowing weaker teams to draft players first and mandating salary caps.<sup>157</sup> These restrictions are necessary for the league to function and remain an entertaining sport.<sup>158</sup> Winning teams receive more revenue in gate sales because more people want to attend their games.<sup>159</sup> With these additional funds, winning teams can spend more money on players and facilities.<sup>160</sup>

Studies show, however, that broadcasting a home game into a team’s home territory adversely affects attendance at the game.<sup>161</sup> Home attendance also decreases when outside games are broadcast into

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 322.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 323 (emphasis added).

<sup>155</sup> *Id.* at 326.

<sup>156</sup> *Id.* at 324.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 325.

<sup>159</sup> *Id.* at 324.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 325.

home territories.<sup>162</sup> Therefore, if outside games are allowed to be broadcast into the weaker team's home territory during home games, then the weaker teams do not receive the same revenue from gate sales.<sup>163</sup> This increases the financial gap between winning teams and losing teams, which potentially would force the losing teams out of business and end the league.<sup>164</sup> Thus, the court found that, while the NFL's home broadcast provision restrained trade, it did not do so unreasonably.<sup>165</sup>

The court then evaluated the provision that restricted broadcasting outside games in home territories when the home teams were playing away games and telecasting them in their home territories.<sup>166</sup> For example, if the Pittsburgh Steelers were playing an away game, the San Francisco 49ers game could not be broadcast in Pittsburgh if the Steelers away game was being broadcast in Pittsburgh. The court evaluated this restriction also based on gate sales and attendance at home games.<sup>167</sup> When there is no home game, broadcasting outside games will likely not affect attendance or gate sales.<sup>168</sup> Simultaneous broadcasts of an outside game and an away game in the home area of the team playing away would divide the television audience.<sup>169</sup> This makes the television rights for the home team's away games less valuable.<sup>170</sup> The court restricted its antitrust analysis to gate sales and attendance, finding that restricting the broadcast of outside games in home territories when the home team played away games and broadcast those games in their home territories was an "unreasonable and illegal restraint of trade."<sup>171</sup>

In response to *United States v. NFL*, Congress enacted the Sports Broadcasting Act of 1961 (SBA), which allowed professional sports leagues to be exempt from antitrust laws when the leagues pooled together and sold their broadcasting rights.<sup>172</sup> The SBA exempts from antitrust laws

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

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 326.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

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

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 326-27.

<sup>172</sup> 15 U.S.C. § 1291 (2006).

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 . . . 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.<sup>173</sup>

Lawmakers crafted this legislation primarily because the NFL wanted to pool its television rights in order to increase its television revenues and equally distribute the funds among the clubs.<sup>174</sup> The SBA is the first ever antitrust exemption created for sports by the legislative branch of the government, and it covers professional football, baseball, basketball, and hockey.<sup>175</sup>

In a theoretical suit brought by the teams against BAM, a court would likely hold that the SBA exemption does not apply to online broadcasting of baseball games. While the SBA clearly covers baseball, courts have interpreted the statute narrowly. In *Shaw v. Dall. Cowboys Football Club*, several fans brought a class action suit against the NFL, claiming that the NFL's agreement to broadcast all of its game through NFL Sunday Ticket on DirecTV violated antitrust law.<sup>176</sup> The fans argued that they should be able to make deals directly with the teams instead of with the entire NFL.<sup>177</sup> The Third Circuit ruled that the SBA only covered "sponsored telecasters" and did not apply to "subscription satellite broadcast."<sup>178</sup> Therefore, the NFL's deal with DirecTV was not immune from antitrust liability.<sup>179</sup>

Similarly, in *Chi. Professional Sports v. NBA*, the court ruled that the SBA did not exempt the NBA's contracts with NBC or Turner Network Television (TNT) from antitrust liability.<sup>180</sup> The NBA had a rule that only twenty-five games could be broadcast over a "superstation."<sup>181</sup> The Chicago Bulls and WGN (the Bulls' superstation)

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<sup>173</sup> *Id.* (emphasis added).

<sup>174</sup> PAUL C. WEILER ET AL., SPORTS AND THE LAW 653 (4th ed. 2010).

<sup>175</sup> 15 USC § 1291 (2006).

<sup>176</sup> *Shaw v. Dall. Cowboys Football Club*, 172 F.3d 299, 300 (3d Cir. 1999).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 301-02.

<sup>179</sup> This case was eventually settled in early 2001 for \$8.5 million. However, the settlement did not protect the NFL from future lawsuits challenging the NFL's future television, cable, or Internet deals. WEILER ET AL., *supra* note 168, at 662.

<sup>180</sup> 961 F.2d 667, 671 (7th Cir. 1992).

<sup>181</sup> *Id.* at 669.



sued the NBA when it changed this rule to twenty games.<sup>182</sup> The court's ruling did not explicitly state that superstations were not considered "sponsored telecasting" under the SBA. Rather, the court relied on the fact that neither NBC's nor TNT's contract with the NBA "transfer[red] to the network a right to limit the broadcasting of other contests."<sup>183</sup> Instead, the individual clubs held the full rights to any games that the NBA did not sell to the networks.<sup>184</sup> Since there was no "transfer," the SBA did not apply.<sup>185</sup>

BAM's MLB.tv service will likely not be exempt under the SBA because of its similarity to DirecTV's NFL Sunday Ticket. Both services allow viewers to watch all of their respective league's games, and both charge a flat subscription fee for the service.<sup>186</sup> Also, Internet broadcasting is different from television broadcasting. Internet broadcasts and sponsored telecasts are two different mediums, delivered via two distinct technologies. If the courts recognize a distinction between sponsored telecasters and DirecTV, then surely there will be a distinction between sponsored telecasters and the Internet.<sup>187</sup> Additionally, MLB argued in a recent district court case that its broadcast of games, both through telecasts and online through MLB.tv, are exempt from antitrust scrutiny under the SBA.<sup>188</sup> The district court rejected this argument and denied MLB's motion to dismiss.<sup>189</sup>

Legislative history also suggests that MLB.tv would not be covered under the SBA. When the SBA was enacted in 1961, NFL Commissioner Pete Rozelle told Congress the bill covered "only the free telecasting of professional sports contests, and does not cover pay TV."<sup>190</sup> Then-NFL counsel Paul Tagliabue told a Senate committee in 1982 that "the words 'sponsored telecasting' were intended to exclude pay and cable."<sup>191</sup> If the bill was intended to distinguish between pay and cable television, then there is likely a distinction between Internet me-

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 671.

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

<sup>185</sup> *Id.* (holding that the SBA "applies only when the league has 'transferred' a right to 'sponsored telecasting'").

<sup>186</sup> The price for NFL Sunday Ticket was \$139 per season in 1999. WEILER, *supra* note 168, at 659.

<sup>187</sup> The *Henderson* court also acknowledged that radio broadcasting was not exempt from antitrust laws under the SBA. *Henderson Broadcasting Corp.*, 541 F. Supp. at 269-70.

<sup>188</sup> *Laumann v. Nat'l Hockey League*, No. 12-01817 (S.D.N.Y. Dec. 5, 2012) at \*42-43.

<sup>189</sup> *Id.* at \*43.

<sup>190</sup> WEILER, *supra* note 168, at 660.

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

dia streaming and broadcast television. Additionally, MLB.tv is a pay service, unlike broadcast television. Thus, BAM's MLB.tv service would likely not be exempt from antitrust liability under the SBA.<sup>192</sup>

#### VI. ANALYSIS OF BAM UNDER THE RULE OF REASON

If BAM is not exempt from antitrust scrutiny, the antitrust suit would be evaluated under the Rule of Reason. BAM's arrangement with the teams for online broadcasting rights would likely be considered a horizontal restraint. A horizontal restraint is "an agreement among competitors on the way in which they will compete with one another."<sup>193</sup> When an association "prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters," the members have created a horizontal restraint.<sup>194</sup> A court would likely find the BAM agreement among the MLB clubs similar to television broadcasting agreements.

Most horizontal agreements limiting output among potential competitors are considered per se violations of antitrust law.<sup>195</sup> The Supreme Court has decided to treat sports cases differently and use the Rule of Reason analysis.<sup>196</sup> The sports industry is an industry in which "horizontal restraints on competition are essential if the product is to be available at all."<sup>197</sup> Therefore, a potential antitrust suit against BAM would be evaluated under the Rule of Reason.

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<sup>192</sup> There are several other issues not addressed in this piece that could lead to an antitrust suit not moving forward. The waiver of recourse provision in the Major League Constitution prevents the teams from suing MLB over any disputes. Major League Constitution, Article VI, Section 1-2. Courts have ruled that the waiver of recourse clause did not prevent team owners from filing antitrust suits. *See Finley*, 569 F.2d at 544. In addition, the doctrine of changed circumstances could also potentially be applied in this case. When the teams agreed to sign over their online rights in 2000, the world of technology was dramatically different than it is today. This doctrine is usually used in land or family law cases, but there is an argument to apply it to sports cases as well. *See Coury v. Robison*, 115 Nev. 84 (Nev. Apr. 26, 1999).

<sup>193</sup> *NCAA*, 468 U.S. at 99.

<sup>194</sup> *Id.* at 99.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 100-101.

<sup>197</sup> *Id.* at 101.

A. *Is MLBAM Considered a Single Entity Under American Needle?*

The first step under a Sherman § 1 Rule of Reason analysis would be to determine whether there is an agreement. While some may think *American Needle v. National Football League*<sup>198</sup> makes this an easy determination,<sup>199</sup> it is unclear whether BAM would be considered a single entity for purposes of Sherman § 1.

The *American Needle* case was a major case in the world of antitrust and sports. Prior to *American Needle*, there was a question of whether a traditional sports league would be considered a single entity or a joint venture for the purposes of Sherman § 1.<sup>200</sup> The single entity question was important because if a sports league was considered a single entity, then there would be no “agreement” under Sherman § 1 and thus no antitrust suit. The majority of lower courts found that sports leagues were not single entities. In *North American Soccer League v. NFL*, the NFL was deemed a single entity by the district court, but the Second Circuit reversed, holding that the NFL was a joint venture.<sup>201</sup> While the Supreme Court denied a writ of certiorari in *NASL*, Justice Rehnquist’s dissent to the denial of certiorari claimed that “the NFL owners are joint venturers who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market.”<sup>202</sup>

After these cases were decided, the Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.* that a parent and its wholly owned subsidiary are not subject to attack under Sherman § 1 for agreements between them.<sup>203</sup> Thus, “agreements” among this type of corporate structure are exempt from antitrust claims. Confusion about how to apply *Copperweld* to sports leagues ensued. The district court in *Fraser v. Major League Soccer* concluded that MLS was a single entity and could not be sued by its players under Sherman § 1, while

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<sup>198</sup> 560 U.S. 183; 130 S. Ct. 2201 (2010).

<sup>199</sup> Avraham J. Sommer, *The National Pastime of the American Judiciary: Reexamining the Strength of Major League Baseball’s Antitrust Exemption Following the Passage of the Curt Flood Act and the Supreme Court’s Ruling in American Needle, Inc. v. NFL*, 19 SPORTS LAW. J. 325, 343-44 (2012) (describing the potential effect of *American Needle* on MLB’s antitrust exemption).

<sup>200</sup> See Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND.L.J. 25, 26-27 (1991).

<sup>201</sup> 670 F.2d 1249, 1252 (2d Cir. 1982). This was the first appellate decision on the “single entity” defense.

<sup>202</sup> *NFL v. NASL*, 459 U.S. 1074, 1077 (1982) Rehnquist, J. dissenting.

<sup>203</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

the First Circuit determined the MLS was a “hybrid arrangement” between a single company and an agreement among competitors.<sup>204</sup> The Seventh Circuit treated the NBA as a joint venture,<sup>205</sup> but then found NFL Properties was a single entity.<sup>206</sup> The court stated the single entity question should be addressed “one league at a time” and “one facet of a league at a time.”<sup>207</sup> The Supreme Court put an end to the lower courts’ confusion when it determined that NFL Properties was not a single entity and was not beyond the coverage of Sherman § 1.<sup>208</sup>

In *American Needle*, the issue before the Supreme Court was whether the NFL and NFL Properties were considered a single entity under Sherman § 1.<sup>209</sup> In 1963, the NFL teams created NFL Properties (NFLP) to “develop, license, and market their intellectual property.”<sup>210</sup> The revenues generated by NFLP are either given to charity or shared among the teams.<sup>211</sup> In 2000, NFLP decided to grant exclusive licenses to Reebok to sell trademarked headwear for all of the NFL teams.<sup>212</sup> American Needle was licensed to sell NFL headwear, but its license was not renewed after the exclusive deal with Reebok was signed.<sup>213</sup> American Needle filed suit alleging a violation under Sherman § 1.

The Supreme Court determined that an arrangement must have concerted action in order to be a “contract, combination . . . or conspiracy” under Sherman § 1.<sup>214</sup> Concerted action does not depend on whether the parties are distinct legal entities.<sup>215</sup> Instead, courts must look at “how the parties involved in the alleged anticompetitive conduct actually operate.”<sup>216</sup> Does the agreement “‘deprive the marketplace of independent centers of decisionmaking,’ and therefore of ‘di-

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<sup>204</sup> *Fraser v. Major League Soccer*, 97 F. Supp. 2d 130 (D. Mass. 2000); *Fraser v. Major League Soccer*, 284 F.3d 47, 58 (1st Cir. 2002).

<sup>205</sup> *Chi. Professional Sports Limited Partnership v. National Basketball Association*, 961 F.2d 667 673 (7th Cir. 2004).

<sup>206</sup> *American Needle Inc. v. National Football League*, 538 F.3d 736, 744 (7th Cir. 2008), rev’d, 560 U.S. 183, 130 S. Ct. 2201 (2010).

<sup>207</sup> *Id.* at 742.

<sup>208</sup> *American Needle*, 130 S. Ct. at 2206-07.

<sup>209</sup> *Id.* at 2207.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

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

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

<sup>214</sup> *Id.* at 2209.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

versity of entrepreneurial interests”<sup>217</sup> If the agreement draws together independent centers of decisionmaking, then the “entities are capable of conspiring under Sherman § 1.”<sup>218</sup>

The Court looked at many factors surrounding the relationship between the NFL teams, the NFL, and NFLP. The NFL teams compete with one another to attract fans, generate revenue, and secure players.<sup>219</sup> The NFL teams are independently owned and operated.<sup>220</sup> Additionally, the teams compete for intellectual property, as each team’s trademark is valued differently.<sup>221</sup> The Court determined that the teams’ decision to “license their separately owned trademarks collectively” to one company deprived the marketplace of “actual or potential competition.”<sup>222</sup> The Court relied on the fact that even though the teams have a common interest to promote the NFL, the teams are each separate, profitable entities, whose interests are not necessarily aligned.<sup>223</sup>

The NFL argued that the league constituted a single entity because there would be no NFL football if the teams did not cooperate with one another.<sup>224</sup> The Seventh Circuit previously held the NFL was a single entity for this reason.<sup>225</sup> The Supreme Court, however, reversed, stating that any joint venture “involves multiple sources of economic power cooperating to produce a product.”<sup>226</sup> Teams are not immune from Sherman § 1 merely because they “operate jointly in some sense.”<sup>227</sup>

The Court noted that determining whether NFLP’s decisions constitute concerted action is a much closer call than whether decisions made by the thirty-two teams is concerted action.<sup>228</sup> Based on this reasoning, it might seem that all major sports league decisions are concerted action and therefore subject to Sherman § 1. On the contrary,

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<sup>217</sup> *Id.* at 2212 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) and *Fraser v. Major League Soccer*, 284 F.3d 47, 57 (1st Cir. 2002)).

<sup>218</sup> *American Needle*, 130 S. Ct. at 2212.

<sup>219</sup> *Id.* at 2212-13.

<sup>220</sup> *Id.* at 2212.

<sup>221</sup> *Id.* at 2213 (noting that the trademarks for the Saints and the Colts compete with each other).

<sup>222</sup> *Id.*

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

<sup>224</sup> *Id.* at 2214.

<sup>225</sup> *American Needle Inc. v. National Football League*, 538 F.3d 736, 744 (7th Cir. 2008).

<sup>226</sup> *American Needle*, 130 S.Ct. at 2214.

<sup>227</sup> *Id.* (explaining that the need for cooperation among several entities does not “transform[] concerted action into independent action”).

<sup>228</sup> *Id.* (“The question whether NFLP decisions can constitute concerted action covered by § 1 is closer than whether decisions made directly by the 32 teams are covered by § 1.”).

when a sports league creates a separate entity to market some aspect of its business, that separate entity must be examined very closely to determine whether its actions are concerted action. The Court explained that NFLP is a separate corporation with its own management, and most of the revenues from NFLP are shared among the teams on an equal basis.<sup>229</sup> In the end, the Court determined NFLP was also subject to Sherman § 1, at least regarding the marketing of intellectual property owned by the teams, because “NFLP’s licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets.”<sup>230</sup>

If one or more teams bring an antitrust suit against BAM, the teams will argue that BAM is strikingly similar to NFLP and is not a single entity. BAM operates like NFLP because it is a bottom-up organization, meaning that the teams created it and granted it its authority. BAM and NFLP were both created by the teams to collectively pool the teams’ rights and license those rights to one entity in order to maximize profits. The baseball clubs agreed to hand over their interactive media rights in the same manner that the NFL teams allowed NFLP to negotiate licensing deals for their intellectual property. NFLP was a separate corporation with its own management.<sup>231</sup> Similarly, many describe BAM as a “separate entity” from MLB.<sup>232</sup> MLB teams share in the revenue of BAM just as NFL teams share in the revenue of NFLP. The fact that NFLP was a separate legal entity and that the NFL teams shared in NFLP’s revenue weighed heavily in the Court’s decision to treat NFLP as a separate entity under Sherman § 1. The Court noted that NFL teams have a common interest in making the league successful and profitable, just as MLB teams have a common interest in making BAM profitable. The Court hinted that while some restrictions on direct competition between teams may be justifiable under the Rule of Reason analysis, they are nonetheless concerted activity subject to Sherman § 1 scrutiny.<sup>233</sup> In fact, a recent district court opinion involv-

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> ZIMBALIST, *supra* note 1, at 190. While MLB has its offices on Park Avenue in Midtown Manhattan, BAM actually operates out of its own offices in the Chelsea area in New York City. *Id.*

<sup>233</sup> *American Needle*, 130 S. Ct. at 2217 (positing that competitive balance may justify the NFL’s restraint on intellectual property licenses).

ing MLB.tv rejected MLB's arguments that the League should be considered a single entity.<sup>234</sup>

The management structure of BAM also illustrates that it is a bottom-up organization. In *United States v. Sealy*, the Court examined Sealy's management structure to determine whether price fixing and exclusive territorial licenses were antitrust violations.<sup>235</sup> The Sealy "licensees" owned substantially all of Sealy's stock, and the board of directors was made up solely of licensees.<sup>236</sup> The board's control did not exist "only as a matter of form"—the board exercised its control daily by granting, maintaining, and terminating these exclusive territorial licenses.<sup>237</sup> This structure created a horizontal arrangement among the licensees, which violated antitrust law.<sup>238</sup> Sealy's structure is similar to BAM's management structure. While BAM's management is separate from MLB and the teams, its board is made up of seven team owners and MLB's COO.<sup>239</sup> The seven owners that sit on the board likely influence the direction of BAM, making BAM accountable to the teams through those board members. Similarly, while BAM is not a publicly traded company, the teams could argue that they own substantially all of BAM's "stock." BAM was created by the teams all contributing money, and the teams share equally in the profits of BAM. Similarly, NFLP had its own management, and the teams shared equally in NFLP's profits. MLB may argue that the seven team owners on BAM's board are able to play dual roles and separate their teams' individual interests from BAM's. The Court has declared, however, that it is "moved by the identity of the persons who act, rather than the label of their hats."<sup>240</sup> Based on the similarities of BAM's structure to Sealy's structure, BAM would most likely be considered a bottom-up organization controlled by the teams.

To make its case, MLB would need to argue that BAM is not like NFLP, so it is not subject to Sherman § 1. One distinction between BAM and NFLP may come from the ownership of each baseball teams' interactive media rights. Each of the thirty-two NFL teams comprising NFLP "actually owns its share of the jointly managed as-

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<sup>234</sup> *Laumann v. Nat'l Hockey League*, No. 12-01817 (S.D.N.Y. Dec. 5, 2012) (denying MLB's motion to dismiss and citing *American Needle* (130 S. Ct. at 2206)).

<sup>235</sup> 388 U.S. 350, 352-53 (1967). The Court in *American Needle* also referred to *Sealy*.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 353.

<sup>238</sup> *Id.* at 354.

<sup>239</sup> ZIMBALIST, *supra* note 1, at 190.

<sup>240</sup> *Sealy*, 388 U.S. at 353.

sets.”<sup>241</sup> Since the Internet Media Rights Agreement (IMRA) that created BAM is not publicly available, it is unclear whether each baseball club actually owns its interactive media rights. Did the baseball teams actually retain ownership of their interactive media rights and simply lease those rights to BAM? This structure would be similar to the structure of NFLP because each NFL team continued to own its intellectual property. Or did the baseball teams give up ownership of their interactive media rights altogether? If the teams gave up their interactive media rights completely, this would bolster MLB’s assertion that BAM is structurally different from NFLP.

A court would likely find BAM is not a single entity and is subject to Sherman § 1. The facts surrounding NFLP and BAM are close enough that BAM will have a difficult time trying to distinguish itself from NFLP. At the very least, there is a factual question as to whether BAM is considered a single entity.<sup>242</sup> If BAM is not a single entity, the agreement would be subject to the Rule of Reason.

*B. Do BAM’s Restrictions on Online Broadcasting Unreasonably Restrain Trade?*

The next step in the Rule of Reason analysis is determining whether the restraint unreasonably restrains trade. The teams would have to prove that there is an actual restraint on trade for the suit to move forward. The teams would likely argue that the alleged restraint on trade is the agreement to pool interactive rights because it prevents individual teams from competing with one another in the Internet broadcast market. If BAM did not exist, the teams could stream their online games or negotiate contracts to broadcast games online. This could result in lower prices to consumers because the teams would all be competing against one another. Fans of less popular teams may be able to watch favorite team’s games for cheaper because the current price reflects the high demand for more popular teams. There is an actual restraint because the agreement between BAM and the teams does not allow the teams to broadcast their games online. All of the teams’

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<sup>241</sup> *American Needle*, 130 S. Ct. at 2214.

<sup>242</sup> The author’s access to information concerning BAM and MLB is limited to public sources. Various pieces of evidence could surface in litigation that may persuade the court to reach a different conclusion on the single entity issue. For example, the contents of the IMRA could play a major role in determining whether BAM is a single entity.



online rights rest with BAM, which restrains the teams from creating their own online products.

In a recent district court opinion, consumers alleged that MLB and the NHL restrain trade by signing league agreements that divide the broadcast of professional baseball and hockey games, both through telecast and online, and protect those agreements by anticompetitive blackouts.<sup>243</sup> MLB argued that the production and distribution of live telecasts of games “is a ‘core activity’ immune from antitrust scrutiny.”<sup>244</sup> The court rejected this argument and referred to the “longstanding precedent that agreements limiting the telecasting of professional sports games are subject to antitrust scrutiny, and analyzed under the rule of reason.”<sup>245</sup> The court found sufficient evidence that there was sufficient harm to consumers for the case to move forward under the Rule of Reason.<sup>246</sup>

Based on these arguments, a court would likely find the BAM agreement to be a restraint of trade. Just as in *NCAA v. Board of Regents*, the BAM agreement “limits members’ freedom to negotiate and enter into their own” contracts.<sup>247</sup> Because the teams are unable to negotiate their own digital broadcasting rights and manage their own websites, this would be a restraint of trade.

### C. *BAM’s Restrictions on Online Broadcasting Significantly Restrain Trade in a Relevant Market*

Before the court can determine whether the restraint on trade is unreasonable, it must determine the relevant market. Determining a relevant market will be a huge battle for the clubs and MLB, as the outcome of the case will likely turn on which relevant market is chosen. The teams will argue for a small relevant market so the restraint on trade has a bigger effect. MLB will argue for a larger relevant market to show the restraint does not have a large effect on the relevant market and, even if it does restrain trade, it does not *significantly* restrain trade.

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<sup>243</sup> *Laumann*, No. 12-01817 at \*2 (S.D.N.Y. Dec. 5, 2012).

<sup>244</sup> *Id.* at \*39 (citing defendant’s motion to dismiss).

<sup>245</sup> *Id.* at \*40 (referring to *NCAA*, 468 U.S. at 99, 114).

<sup>246</sup> *Id.* at \*46.

<sup>247</sup> *NCAA*, 468 U.S. at 98.

Courts have varied widely in determining which relevant market is appropriate in each case.<sup>248</sup> While the Supreme Court has stated the relevant market is “the markets composed of products that have reasonable interchangeability for the purposes for which they are produced,”<sup>249</sup> commentators have disagreed about how to define this market in the sports context.<sup>250</sup> There are three potential markets in sports cases: (1) the entertainment market, (2) the single-sport market, and (3) the market for sports franchises.<sup>251</sup> The entertainment market is defined broadly. Adopters of the entertainment market believe other entertainment products are interchangeable with professional sports products.<sup>252</sup> Because the entertainment market is broad, a sports league restraint within that market is less likely to be an unreasonable restraint. To have an effect on the entertainment market as a whole, the restraint on trade would need to be severe and far-reaching. A league’s market share under this definition is dramatically smaller than its market share under the single-sport definition. Examples of courts using the more broad “entertainment market” are Justice Rehnquist’s dissent in *NFL v. NASL* and *Henderson Broadcasting*.<sup>253</sup> After the Supreme Court denied certiorari, Justice Rehnquist addressed the relevant market question in a dissent to *NFL v. NASL*,<sup>254</sup> claiming that relevant market should be the entertainment market as a whole because the NFL

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<sup>248</sup> See *NCAA*, 468 U.S. at 112. (defining the relevant market as all college football broadcasts); *North American Football League v. North American Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting) (defining the relevant market as all forms of entertainment); *American Needle*, 538 F.3d at 742 (defining the relevant market as the overall entertainment market for sales of trademarked merchandise); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 988-89 (D.C. Cir. 1977). (defining the relevant market as professional football in metropolitan Washington, D.C.).

<sup>249</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

<sup>250</sup> See Daniel A. Schwartz, *Shutting the Back Door: Using American Needle to Cure the Problem of Improper Product Definition*, 110 MICH. L. REV. 295, 307-09 (2011) (using *Bulls II* and *Madison Square Garden v. NHL* to illustrate the difficulty in defining a relevant market in sports cases).

<sup>251</sup> *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U. CHI. LEGAL F. 245, 258 (2000). The “market for sports franchises” deals with franchise relocation cases, so it will not be discussed here. See *id.* at 262-76.

<sup>252</sup> *Id.* at 260.

<sup>253</sup> The Seventh Circuit in *American Needle* also defined the relevant market as the overall entertainment market. However, the Supreme Court did not consider the relevant market in its opinion.

<sup>254</sup> 459 U.S. 1074.

“competes with other sports and other forms of entertainment in the entertainment market.”<sup>255</sup>

While *Henderson* does not specify the entertainment market as the relevant market, the *Henderson* court did not differentiate between general radio broadcasts and other broadcasts of Astros games. Therefore, *Henderson* leans more towards the broadly-defined entertainment market and away from the single-sport market. In *Henderson*, KYST sued the Houston Astros for antitrust violations regarding radio broadcasts.<sup>256</sup> The Astros granted KENR an exclusive right to broadcast Astros games in Houston and cancelled its previous license with KYST.<sup>257</sup> KYST alleged the Astros and KENR were conspiring to monopolize the broadcast of and advertising for Astros games.<sup>258</sup> To determine the relevant market, the court relied on *DuPont de Nemours*, which held that control “of the relevant market depends upon the availability of alternative commodities for buyers.”<sup>259</sup> Therefore, the relevant market was “advertising spots created by radio broadcast formats that compete with the advertising spots created by the radio broadcast of the Astros baseball games.”<sup>260</sup> KYST argued that the relevant market should be “only the broadcast advertising associated with the Astros games.”<sup>261</sup> However, the court said this error was “obvious” and cited to *Bushie v. Stenocord Corp.*<sup>262</sup> In *Bushie*, the plaintiff argued that the defendant’s products distributed in Phoenix comprised the entire relevant market.<sup>263</sup> The court stated a single manufacturer’s product could be “so unique or so dominant in the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed.”<sup>264</sup> By citing *Bushie*, the *Henderson* court seemed to suggest that that radio broadcasts of Astros games were not unique enough to constitute a relevant market on their own.

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<sup>255</sup> *Id.* at 1077.

<sup>256</sup> *Henderson Broadcasting Corp. v. Hous. Sports Ass’n Inc.*, 659 F. Supp. 109 (S.D. Tex. 1987).

<sup>257</sup> *Id.* at 110.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 111 (citing *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 380 (1956)).

<sup>260</sup> *Id.* at 110.

<sup>261</sup> *Id.* at 111.

<sup>262</sup> *Id.*

<sup>263</sup> *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972).

<sup>264</sup> *Henderson*, 659 F. Supp. At 111.

The court made a factual inquiry into whether the Astros broadcasts were priced differently or controlled a large share of the market. No radio station in the Houston-Galveston area had more than a ten percent share of the listening audience.<sup>265</sup> KENR did not price Astros-related advertising differently than it priced ads during the broadcast of country music.<sup>266</sup> KENR did not gain advertising power by broadcasting Astros games nor did its profits increase by broadcasting the games.<sup>267</sup> The court concluded that because KENR did not have greater power than other radio stations in the area, it could not have conspired with the Astros to affect prices or competition in the market.<sup>268</sup>

The single-sport market is usually defined very narrowly, such as professional football games on Sundays. These narrowly defined markets are detrimental to sports leagues because they are more likely to allow a plaintiff to prove that a league-imposed restraint is unreasonable. Leagues possess a larger market share under this definition, so the restraint on trade will have a more significant effect on the market. An example of the single-sport market is *NCAA v. Board of Regents*.

In *NCAA v. Board of Regents*, the court found the relevant market was the broadcast of NCAA football games.<sup>269</sup> The NCAA signed agreements with ABC and CBS that allowed those networks to negotiate with NCAA schools for the right to televise their football games.<sup>270</sup> The contract restricted the total number of televised college football games and the number of times each team could appear on television.<sup>271</sup> The Supreme Court in *NCAA* reaffirmed that the test for determining the relevant market is “whether there are other products that are reasonably substitutable” for the product that is being restrained.<sup>272</sup>

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

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

<sup>268</sup> *Id.*

<sup>269</sup> *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 112 (1984).

<sup>270</sup> *Id.* at 92-93.

<sup>271</sup> *Id.* at 94.

<sup>272</sup> *Id.* at 111. Writing for the majority in *NCAA*, Justice Stevens defined the relevant market as the broadcast of college football games. *Id.* at 112. Justice White's dissenting opinion characterized the relevant market as the broader entertainment market. *Id.* at 132. *See also* *North American Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1260 (2d Cir. 1982) (defining the relevant market as the market for sports capital and skills); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 673 (defining the relevant market as television viewers); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League (Raiders I)*, 726 F.2d 1381 (9th Cir. 1984) (defining the relevant market as the market for football consumers).

If a team brings a suit against BAM, BAM will argue that the relevant market should be defined as the entertainment market. MLB.tv competes with all other forms of online entertainment. When a consumer is watching a baseball game on MLB.tv, she can reasonably substitute reading the *New York Times* online or watching a movie on Hulu. If the content on MLB.tv is not attractive to consumers, there are other ways to access sports and videos online, such as ESPN.com and YouTube.com. In addition to online entertainment, MLB.tv has to compete with all forms of entertainment. This includes television broadcasts, not only of baseball games, but of other sporting events and other television shows in general. Another reasonable substitute would be going to the movies or to see a play. Consumers have many ways to spend their entertainment dollars, and MLB.tv is competing with all of those other forms of entertainment.

Using advertising numbers and audience demographics could be a persuasive way for BAM to show that the relevant market should be defined as the entertainment market. The Court in *NCAA* relied heavily on the determination that college football generates a unique audience for advertisers. Similarly, the *Henderson* court stated there was not a unique product because advertising rates were the same for broadcasts of country music and Astros games. BAM could compare its online advertising practices to those of other websites. If the advertising on MLB.tv mirrors the advertising on the *New York Times* website, the court may expand the relevant market like it did in *Henderson*. Additionally, if MLB can show that other online entertainment can offer programming that attracts a similar audience, this could work in the league's favor. MLB will need to show that its product is not unique and that other programming can be reasonably substituted.

The teams will argue that the court should follow *NCAA* and recognize a single-sport market that is smaller and more narrowly tailored, such as "the online broadcast of major league baseball games." The Supreme Court narrowly defined the relevant market in *NCAA* as the broadcast of college football games. The teams will have a strong argument for recognizing a smaller relevant market because major league baseball fans are a unique demographic. While baseball fan demographics cut across age, race, and gender, they are unique because of their commitment. Baseball fans are loyal, following their favorite teams over a season that lasts more than 100 games. This also makes baseball fans extremely committed to their team and the team's brand. The Court noted in *NCAA* that because advertisers were willing to pay

a premium to reach college football viewers, that was “vivid evidence of the uniqueness of this product.”<sup>273</sup> While this information is not publicly available, it is likely that MLB.tv keeps detailed statistics about its subscribers and whether advertisers pay a premium to access MLB.tv’s audience. If MLB.tv’s subscriber numbers show that the service reaches a unique audience, inducing advertisers to pay a premium, this would favor a smaller relevant market. Additionally, the fact that subscribers will pay \$139 per season for MLB.tv shows these viewers really want access to this content, and other programming would not be a reasonable substitute. In *International Boxing Club of New York, Inc. v. United States*, championship boxing events were considered a separate market from non-championship events because they are uniquely attractive to boxing fans.<sup>274</sup> If championship versus non-championship events within the same sport are considered separate markets, then online broadcasting of major league baseball games should be considered a distinct market from all other online entertainment.

In a case against BAM, a court would need to choose whether to follow the broad entertainment market set forth in *Henderson* or the narrow single-sport market in *NCAA*. While it may seem that these two cases provide opposite choices, the two courts actually used the same factors to determine the appropriate relevant market. In both cases, the courts emphasized the pricing and uniqueness associated with the product and the audience. *Henderson* found no difference in pricing for advertising during baseball broadcasts and broadcasts for country music. Therefore, the court used a larger relevant market because the pricing and market share indicated these two products were reasonably substitutable. Because the district court found that college football fans were uniquely attractive to advertisers, *NCAA* came out the other way. The audience for college football was unique and advertisers pay a premium for access to these viewers. Therefore, it seems that the relevant market analysis may turn primarily on the factual analysis of the uniqueness of MLB.tv’s viewers and whether advertisers are willing to pay more to reach that audience rather than adopting a hard and fast definition of the relevant market.<sup>275</sup>

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<sup>273</sup> Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. at 111.

<sup>274</sup> Int’l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 249-52 (1959).

<sup>275</sup> A relevant market determination is a mixed question of law and fact, so the question may be determined by a jury. See *Raiders I*, 726 F.2d at 1394 (stating that the jury had enough evi-

It is likely that MLB.tv's audience is uniquely attractive to advertisers because most sports attract young males, a critical audience for advertisers. Online broadcasts capture an even younger audience, as young viewers are more familiar with technology and thus more likely to watch games online instead of on television. The subscribers to MLB.tv are also unique because they clearly have a strong interest in baseball or in a particular team, otherwise they would not pay the season subscription fee. It is likely that BAM keeps tabs on what games certain subscribers are watching. If someone's subscription is used ninety percent of the time to watch Red Sox games, that subscriber is clearly a devoted Red Sox fan. Advertisers may pay a premium to target fans based on such viewing data and the generalizations they may draw from them. More importantly, the advertisers are likely not catching these fans through regularly televised games. The subscriber likely lives out of the Red Sox's broadcasting territory, so he will not see any of the ads during the regular home game telecast.

Based on the uniqueness of the fan base and the likelihood that advertisers would pay a premium to access MLB.tv subscribers, a court might well find the relevant market to be the online broadcast of major league baseball games. BAM may argue that the relevant market should include online *and* television broadcasting because the uniqueness of the audience and the advertising associated with major league games is the same online and on television. This would be a factual question, but given the younger demographic that is more likely to watch things online, the television market and the online market might well be distinct. The online broadcast of major league baseball games would be a narrowly tailored definition of the market that fits within the reasoning in *Henderson* and *NCAA* because of the focus on the uniqueness of the MLB.tv audience. It is unlikely that broadcasts of other sports would be included in this relevant market, as these audiences are different in terms of their uniqueness. Sports have different audience demographics and numbers of viewers, which affects how much they can charge to advertisers.<sup>276</sup>

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dence to determine whether the NFL's rule on franchise relocation harmed competition in the relevant market).

<sup>276</sup> For example, the number of viewers for the Monday Night Football Game (Texans versus Jets) on October 8, 2012 was nearly triple the number of viewers for game two of the American League Division Series (Yankees versus Orioles) that same night. Chris Strauss, *Tebow wins: MNF game nearly triples MLB playoff viewers*, USA TODAY, Oct. 9, 2012, <http://www.usatoday.com/story/gameon/2012/10/09/mnf-destroys-mlb-ratings/1622197/>.

If the court determines the relevant market is restricted to online broadcasts of major league baseball games, BAM controls the entire universe. Because there are no substitutes, BAM's restrictions preventing the individual teams from competing in the market would significantly restrain trade, thus raising the question of whether there is some legitimate procompetitive justification for BAM's restrictions.

*D. Is There a Legitimate Procompetitive Justification for BAM's Restraint?*

Assuming the relevant market is online broadcasts of major league baseball games and that the market is significantly restrained by BAM and the loss of potential competition between teams, the next step in the Rule of Reason is to determine whether there is a procompetitive justification for the restraint. The restraint is legal if the MLB can establish such a pro-competitive justification.

1. Competitive Balance

One relevant legitimate procompetitive justification is competitive balance among MLB teams. The Supreme Court has "recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'"<sup>277</sup> Competitive balance is "unquestionably an interest that may well justify a variety of collective decisions made by the teams."<sup>278</sup>

Competitive balance will be MLB's most persuasive justification. Without BAM, the large market teams would have a huge increase in revenue from their online broadcasts of games.<sup>279</sup> With this increase in revenue, large market teams can build better stadiums, attract better talent, and be more profitable. Eventually, the gap would be so great that the weaker teams would have difficulty competing on the field and might even cease to exist, putting the entire league in jeopardy.

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While the advertising prices for the two games were not available, it is likely that advertisers paid more to air during the NFL Monday Night game than in the MLB playoffs.

<sup>277</sup> *Am. Needle, Inc. v Nat'l Football League*, 130 S.Ct. 2201, 2217 (2010) (quoting *NCAA*, 468 U.S. at 117).

<sup>278</sup> *Id.*

<sup>279</sup> An increase in revenue for large market teams could result from online ticketing, online merchandise, controlling the teams' websites, or any combination of these variables. However, this Comment focuses on BAM's online broadcasts of MLB games only.



This scenario was exactly what the court was concerned about in *United States v. NFL*.<sup>280</sup> Therein, the presiding court upheld the NFL's television policy because the policy was crucial to maintaining the league.<sup>281</sup> As the digital world becomes more mainstream, MLB could argue that online media is becoming a television substitute. By the teams pooling their online rights together, the league is making the teams more competitive in the market for players. This creates a more competitive league, which will attract even more total fans. The revenue created from BAM is spread to all the teams equally. While not as large as television revenues, the teams' revenues from BAM are still significant every year. By sharing this revenue equally among the teams, MLB is ensuring that its weaker teams do not get left behind. If teams cease to compete with one another, then the whole league might dramatically decrease in popularity, causing the loss of an important competitor in the sports and entertainment market.

Baseball has already experienced the harmful effects of a system with no competitive balance through the disparity in local broadcast revenues. MLB receives national broadcasting revenue, which is split equally among the clubs.<sup>282</sup> The teams can make their own agreements for local broadcasting, which is where teams earn a majority of their revenue.<sup>283</sup> Before the 2002 Collective Bargaining Agreement, there was no revenue sharing of this local broadcast revenue among the teams. Large market teams like the Yankees and the Red Sox received much bigger local television deals than teams like the Twins and the Royals.<sup>284</sup> In fact, the team with the richest local television deal received over four times the broadcasting revenue in 1994 than the team with the lowest grossing local television deal.<sup>285</sup>

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<sup>280</sup> 116 F. Supp. 319. The Sports Broadcasting Act was put in place to supersede the holding in *United States v. Nat'l Football League*.

<sup>281</sup> *Id.* at 324, 325.

<sup>282</sup> Jeff Friedman, *The Impact of Major League Baseball's Local Television Contracts*, 10 SPORTS LAW J. 1, 16 (2003).

<sup>283</sup> David Jacobson, *MLB's Revenue-Sharing Formula*, CBS NEWS (July 14, 2008), [http://www.cbsnews.com/8301-505125\\_162-51210897/mlbs-revenue-sharing-formula/?tag=bnetdomain](http://www.cbsnews.com/8301-505125_162-51210897/mlbs-revenue-sharing-formula/?tag=bnetdomain). This is different from the NFL where the majority of revenue is generated at the national level. The NFL splits this national revenue into 32 equal shares, and each team is set to receive \$170 million this year.

<sup>284</sup> Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 MARQ. SPORTS L.J. 323, 355 (1994). In 1992, the New York Yankees received \$61 million and the Boston Red Sox received \$40.1 million in total media revenues, while the Minnesota Twins received \$20 million and the Kansas City Royals received \$21 million.

<sup>285</sup> *Id.* at 355.

Given this history of revenue disparity, the Commissioner appointed a Blue Ribbon Panel to study the economics of Major League Baseball in 1999. The panel found that “large and growing revenue disparities exist and are causing problems of chronic competitive imbalance” and that “year after year, too many clubs know in spring training that they have no realistic prospect of reaching postseason play.”<sup>286</sup> The panel pointed to the lack of revenue sharing among the teams as the source of this imbalance.<sup>287</sup> By 1999, the top seven teams averaged more than double the revenues of the bottom fourteen teams.<sup>288</sup> During the late 1990s, none of the fourteen teams in the bottom half of payroll spending won one of the 158 postseason games played.<sup>289</sup> One of the teams with the top seven payrolls won every World Series during that time.<sup>290</sup> There are exceptions to this rule, however, such as the Oakland As, who are competitive while maintaining a low payroll.<sup>291</sup>

In order to remedy this imbalance, MLB included a major revenue sharing provision in the 2002 Collective Bargaining Agreement, the majority of which still exists today.<sup>292</sup> Under the CBA, all teams pay thirty-one percent of their local revenues into a fund, and that fund is split evenly among all thirty teams.<sup>293</sup> Therefore, the large market teams tend to pay more and the smaller market teams receive more. In 2005, after accounting for pay-ins to and pay-outs from this collective fund, the New York Yankees paid out about \$76 million while the Tampa Bay Rays, Florida Marlins, and Kansas City Royals received \$30 million each or more.<sup>294</sup> MLB also has a Central Fund that the Commissioner can disproportionately allocate to teams based on their revenue so that lower revenue teams get an even bigger share of the funds.<sup>295</sup>

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<sup>286</sup> Richard C. Levin et al., *The Report of the Independent Members of the Commissioner’s Blue Ribbon Panel on Baseball Economics*, MLB.COM (July 2000), 1, 5, [http://www.mlb.com/mlb/downloads/blue\\_ribbon.pdf](http://www.mlb.com/mlb/downloads/blue_ribbon.pdf).

<sup>287</sup> *Id.* at 1.

<sup>288</sup> Jacobson, *supra* note 272.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> Bleacher Report, *Success of Low-Payroll MLB Teams in 2012 is Good for Baseball*, Sept. 4, 2012, <http://bleacherreport.com/articles/1321840-mlb-2012-success-of-low-payroll-teams-is-good-for-baseball>.

<sup>292</sup> Jacobson, *supra* note 272.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

If each team were allowed to broadcast their games online and keep that revenue, this would return MLB to the problems of the 1990s, and the disparity between small and large market teams would be even greater. Currently, teams split the revenue from BAM, which increases the competitive balance between the teams. With more equal revenue among teams, the teams are able to pay players similar salaries and build similar facilities, which all contribute to making the teams more equal on the field. Additionally, baseball is the only major sport without a salary cap, so MLB needs these additional restraints to keep teams on equal footing.<sup>296</sup> If BAM did not exist, revenue would be taken away from the small market teams and in effect, redistributed to the large market teams. This would not further competitive balance, which courts have held is a legitimate procompetitive justification.

## 2. Increased Output and Lower Prices

Increased output and lower prices are also deemed to be legitimate procompetitive justifications. If a scheme produces procompetitive efficiencies, it “increase[s] output and reduce[s] the price” of the product.<sup>297</sup> MLB could argue that BAM allows for increased output because it makes all major league baseball games available online, regardless of where the subscriber lives. If it were left to the teams, they would likely only offer online broadcasts of their own games, and some teams may not be able to afford to broadcast games online at all. Small market teams could try to set up arrangements with their television broadcasters to stream their television feeds online for an added fee, but it is unclear whether the broadcasters would agree to those deals in low-revenue markets. Another possibility is that teams would choose to only broadcast their away games online in order to encourage fans to attend home games. This option would also decrease output because fans would only be able to watch away games online.

If every team did broadcast its games online, there would not be a decrease in output. BAM could argue, however, that its product is more efficient because consumers can buy all the online broadcasts from one

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<sup>296</sup> Baseball does employ a luxury tax, which seems to promote competitive balance without a need for a salary cap. A salary cap would have to be instated in MLB’s collective bargaining agreement, which requires affirmation by the players’ union. *See* JB Blanchard, Commentary: Why Major League Baseball Needs a Salary Cap and Fewer Bad Contracts, *The Depaulia*, Feb. 10, 2013, <http://www.depauliaonline.com/sports/commentary-why-major-league-baseball-needs-a-salary-cap-and-fewer-bad-contracts-1.2987325#.UavGX5W9yBg>.

<sup>297</sup> *NCAA*, 468 U.S. at 114.

source. This efficiency argument was made in *NCAA v. Board of Regents* and *Broadcast Music v. Columbia Broadcasting System*.<sup>298</sup> In *Broadcast Music*, the question was whether awarding blanket licenses to copyrighted music was a *per se* violation of the antitrust laws.<sup>299</sup> BMI developed its blanket license to address a practical problem in the marketplace: “thousands of users, thousands of copyright owners, and millions of compositions.”<sup>300</sup> Without blanket licenses, a purchaser would have to track down who owned a copyright and get an individual license for every musical piece it wanted to broadcast. The Court found that BMI setting uniform prices for these blanket licenses was not a *per se* violation under Sherman § 1 because of the time and cost savings created.<sup>301</sup> Relying on *Broadcast Music*, the NCAA argued its television plan was more efficient because it could market the games more effectively as a pool instead of individually.<sup>302</sup>

While, the Court found that college football could be marketed more effectively without the NCAA’s television plan,<sup>303</sup> MLB may be able to succeed on this point. By providing access to every major league baseball game online, MLB.tv is doing something that no team would do on its own. Although wealthy teams may be able to provide broadcasts of all their games online, those teams would not have an incentive or the financial means to offer every major league baseball game online. Because each team is likely to limit its broadcast to that team, the consumer would be losing out on the product that BAM is providing through MLB.tv—access to every major league baseball game.<sup>304</sup> MLB.tv is similar to the product BMI provides for musical compilations. BAM is creating time and cost savings for fans by providing all MLB games online in one place. This allows the consumer to buy one product and have access to all of the games online instead of having to purchase numerous packages from numerous

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<sup>298</sup> 441 U.S. 1 (1979).

<sup>299</sup> *Id.* at 4.

<sup>300</sup> *Id.* at 20.

<sup>301</sup> *Id.* at 24.

<sup>302</sup> *NCAA*, 468 U.S. at 114.

<sup>303</sup> *Id.*

<sup>304</sup> MLB.tv offers two types of subscriptions: basic MLB.tv and MLB.tv Premium. Both offer access to all MLB games. With the Premium service, subscribers can choose to watch the home or away version of the broadcast. MLB.tv does not offer a package that allows subscribers to only watch a particular team’s games. Mark Newman, *MLB.TV ready to play ball for the 10<sup>th</sup> Season*, MLB.COM, Feb. 21, 2012, [http://mlb.mlb.com/news/article.jsp?ymd=20120209&content\\_id=26632720&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20120209&content_id=26632720&vkey=news_mlb&c_id=mlb).

teams.<sup>305</sup> Buying multiple online broadcasts of baseball games would be easier than the situation addressed in *Broadcast Music* because there are only thirty major league teams, whereas BMI represents thousands of composers. However, MLB.tv still creates efficiencies for fans. It takes less time to buy one subscription and is easier for consumers to understand. Additionally, buying one package from MLB.tv is probably cheaper than buying multiple packages from multiple teams.

Additionally, teams want to protect their lucrative local television broadcast agreements for home games. Because of these local television deals, MLB.tv blacks out games in a team's home television territory, regardless of whether the team is playing at home or away.<sup>306</sup> For example, a Pittsburgh fan living in Pittsburgh is not able to watch the Pirates online, regardless of whether it is a home or away game. This rule applies even if no one is broadcasting the Pirates on television.<sup>307</sup> Therefore, there is no current competition between online and televised broadcasts when you live in a team's home television territory. Teams could try to persuade broadcasters to stream their television feeds online in addition to the television broadcast, but it is unclear if broadcasters would do this because they currently get more revenue through television ads than Internet ads.

MLB will argue that, without BAM, there would also be an increase in price for broadcasts of online games. If fans wanted to watch multiple teams, they would likely have to buy online subscriptions from multiple teams. Similar to *Broadcast Music*<sup>308</sup> and *Madison Square Gardens*,<sup>309</sup> BAM has the advantage of economies of scale. By broadcasting every team's games online, it can more efficiently utilize its resources without having to duplicate costs such as broadcasting equipment, staff, and website maintenance. This efficiency is a pro-competitive justification for BAM's restrictions on online broadcasting.

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<sup>305</sup> See *Madison Square Garden, L.P. v. National Hockey League*, 2007 WL 3254421, at \*6 (S.D.N.Y. Nov. 2, 1997) (negotiating with the NHL instead of individual teams had the pro-competitive effect of centralizing the teams' websites).

<sup>306</sup> MLB.com Blackouts FAQs, [http://mlb.mlb.com/mlb/help/faq\\_blackout.jsp](http://mlb.mlb.com/mlb/help/faq_blackout.jsp) (last visited Nov. 30, 2012).

<sup>307</sup> *Id.*

<sup>308</sup> See *Broadcast Music*, 441 U.S. at 21 (lowering costs differentiates blanket licenses from individual licenses).

<sup>309</sup> See *Madison Square Garden*, 2007 WL 3254421, at \*6 (centralizing NHL team websites in one platform would "reduce the costs of operating thirty 'back office' website operations").

MLB may also argue that if BAM did not exist, a subscriber who wanted access to every game would pay a lot more because he would have to buy subscriptions from all thirty teams. The teams may argue that fans actually do not subscribe to MLB.tv in order to watch every major league game. Fans really only care about the one or two teams they cheer for on a regular basis and would only buy the online subscription from those favorite teams. This could have the effect of driving prices down for consumers, as a subscription for one team is likely to cost less than the MLB.tv subscription fee for all MLB games. Data on the habits of MLB.tv's current subscribers, such as whether a fan watches only his favorite team or loves baseball in general, would be helpful to determine how this argument might play out.

### 3. Higher Quality Product

Finally, MLB could argue that BAM creates a higher quality product. “[I]ncreasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice” have been recognized by courts as legitimate procompetitive justifications.<sup>310</sup> If teams had to produce their own online broadcasts, the quality of the broadcasts would vary widely. As it currently stands, BAM and MLB.tv are leading the industry in online broadcasting and marketing, and not only for sports, but for almost all forms of entertainment.<sup>311</sup> The product available on MLB.tv is unmatched among any of the other major sports leagues.<sup>312</sup>

The teams may argue that they could also create a high-quality online product, but this is likely to be true only for large market teams. Even if large market teams did provide a good product, it is highly unlikely it would match the quality currently available through BAM. It is expensive to develop the technology and maintain a product that is comparable to MLB.tv. The small market teams would likely have a very low quality online broadcast. By pooling each team's assets together, BAM can create a higher quality product for every team's fans. In *Madison Square Garden v. National Hockey League*, the court determined that assuring “minimum quality standards across team web-

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<sup>310</sup> *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

<sup>311</sup> *Salter*, *supra* note 4.

<sup>312</sup> *Id.*

sites” was a procompetitive effect.<sup>313</sup> The New Media Strategy shifted the individual team websites onto one common server and extended the NHL’s exclusive license agreement to exploit various new media rights on behalf of the teams.<sup>314</sup> Another procompetitive effect found in Madison Square Garden was the league’s ability to create a “league brand” in order to compete with other sports.<sup>315</sup> BAM could argue that MLB.tv aids its efforts to create a league brand, though these arguments might be more persuasive in a suit against BAM for controlling the individual team websites. A court may agree that MLB.tv is a higher quality product than what the individual teams would produce.

BAM gives viewers the ability to watch almost every MLB game whenever they want and however they want. BAM’s technology allows viewers to watch games on their laptops, mobile devices, iPads, and even video game consoles like Xbox 360 and PS3.<sup>316</sup> Games can be shown in high definition, and MLB.tv has a DVR-type function that enables viewers to pause and rewind live games.<sup>317</sup> Fans can choose whether to watch the home or away team’s broadcast, and subscribers can listen to the local radio coverage of games.<sup>318</sup> There is also a Multi-Game View that allows you to watch two games at once through split screen or picture-in-picture, and the Quad View allows subscribers to watch up to four games at once.<sup>319</sup> It is unlikely that every team would be able to offer this type of viewing capability. These options all involve specialized applications that take time and money to develop.

Although some of the large teams may be able to provide certain of these features, it is unlikely any team would allocate the resources to create all of these applications. For example, the ability to stream both the home and away team’s broadcast means that every team would need an agreement with every other team’s television provider to provide the level of quality the current MLB.tv provides. While teams may be able to provide some form of online broadcasts of games, it is extremely unlikely that every team would provide a product of MLB.tv’s high quality.

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<sup>313</sup> See *Madison Square Garden*, 2007 WL 3254421, at \*6.

<sup>314</sup> *Id.* at \*3.

<sup>315</sup> *Id.* at \*7.

<sup>316</sup> Newman, *supra* note 292.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

Because MLB.tv creates efficiencies for consumers and provides a higher quality product than the teams could offer individually, a court would likely find MLB can meet its burden of establishing a legitimate procompetitive justification for pooling all of the teams' interactive media rights under BAM.

*E. Is There a Less Restrictive Alternative?*

Because MLB is likely to establish a procompetitive justification for creating BAM, the teams will have one more opportunity to win their case. The teams could show that while BAM is justified, there is a less restrictive alternative that could be used in its place.

The teams could argue that the restraint is unnecessary to preserve competitive balance through BAM's broadcast restrictions because MLB has other restraints that are more effective. MLB already has revenue sharing in place for national, as well as a portion of local, television broadcasts. While BAM generates a significant amount of revenue, teams get a large majority of their funds from these broadcast deals. Since revenue sharing is already in place for television broadcasts, an additional restraint on online broadcasting is unnecessary. Instead of the current MLB.tv product, the teams could set up a system giving them individual control over their interactive media rights while still allowing them to share the revenues among the teams.<sup>320</sup> This system could mirror MLB's current system for sharing local television revenues. Each team would be required to put in a percentage of their "online broadcast revenues," and those funds could be redistributed to the teams that are not generating as much online broadcast revenue. The teams already share revenue generated by local and national television contracts. This would give teams the freedom to do what they want with their interactive media rights and still maintain the competitive balance that a successful MLB requires.

One difficulty with taxing the teams' online revenue is that it still does not solve the product quality issue. While the teams could share their online broadcast revenues, consumers would still suffer from online broadcasts that are not of equal quality, if not entirely lacking. Another difficulty is MLB's luxury tax system. The luxury tax on each team's payroll is aimed at maintaining competitive balance among the

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<sup>320</sup> *Chi. Professional Sports*, 961 F.2d at 671 (stating that the NBA could have restructured its television contracts and included revenue sharing in order to avoid antitrust liability).



teams. Given the restraints already in place, this additional restraint on interactive media rights to boost competitive balance is unnecessary.

Another alternative is to give some interactive media rights to the teams and let BAM control other interactive media rights.<sup>321</sup> It makes sense for one entity to control mlb.com, so BAM could continue to be the central marketing arm for MLB. BAM could also continue producing online broadcasts for MLB.tv, but let teams produce their own online broadcasting as well. This would foster competition and allow the large market teams to exploit their interactive media rights, but it would give small market teams the option of not creating their own online broadcasts if it is not a good business decision in their market.

A court would have to determine whether the legitimate procompetitive justifications of competitive balance, increased output with lower prices, and higher-quality product could be accomplished as well through one of these less restrictive means. In the end, the compete-but-tax revenue sharing model seems like a plausible alternative to the current BAM system. The teams would be able to exploit their interactive rights while revenue sharing would maintain competitive balance among the teams.

## VII. CONCLUSION

BAM has become a crucial part of MLB and of each of its teams. BAM's creation allows for efficiencies in marketing and has generated additional revenues for the teams. As the online world gets larger and interactive media encompass everything, however, it will grow increasingly harder for the teams to come up with creative ways to earn revenue. Currently, national and local television revenues make up such a large part of each team's revenues that they go along with BAM. However, if television contracts become less profitable or if viewer preferences begin to shift from television to online, teams could decide to use the courts to regain control of their interactive media rights, in which case the anticompetitive analysis presented above would become a major issue with far-reaching consequences for the MLB, if not the sports world generally.

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<sup>321</sup> One digital right that could be separated out is online ticket sales and merchandise. The clubs in the English Premier League have agreed to a small, centralized marketing organization, but each team is able to market products through its own club-operated website. WEILER, *supra* note 168, at 683. This model allows teams to reap the rewards of their online merchandising sales, create unique marketing opportunities, and come up with creative marketing strategies for their sponsors without having to get approval from BAM.