Blacking Out League Blackout Policies? How Laumann and Garber Might Change the Future of Sports Media Rights

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Professional sports leagues have relied on televised sporting event blackouts to keep stadiums filled with spectators since the NFL successfully defended its practice of blacking out local telecasts in a 1951 antitrust lawsuit brought by the Department of Justice (Anderson, 2005).

Congress helped formalize this practice when it passed the Sports Broadcasting Act (SBA) in 1961, allowing professional sports leagues the ability to package exclusive rights to regular season games in a bundle. In so doing, Congress “provided professional sports leagues this limited antitrust exemption to protect their home ticket sales” and, essentially, preserve competitive balance (Mitten, Davis, Smith & Barry, 2005, p. 426).

Leagues such as MLB, NBA and NHL allocate territorial television rights to each club and enforce blackout provisions for these clubs. These leagues do not bundle the complete set of regular season games in the way the NFL does. Instead, they sell national television rights on both a non-exclusive and an exclusive basis. “Non-exclusive rights allow the local team to retain the right to televise its games in its local market” (Baade et al., 2012, p. 7). In these instances the national broadcast is blacked out locally if the game is televised by a local broadcaster. Exclusive rights create windows of exclusivity for national rightsholders during which time no local broadcasts can occur.

However, as technology has evolved and consumers are able to stream games directly to computers and tablets, fans have become increasingly frustrated by league blackout policies which are also enforced on these devices. Two separate lawsuits, now consolidated in one, filed in U.S. District Court in the Southern New York District, are challenging traditional blackout practices.

In the cases, Laumann v. National Hockey League et al. and Garber v. Office of the Commission of Major League Baseball et al., the plaintiffs allege major professional sports leagues, their member teams, cable and satellite broadcasters (MVPDs) and regional sports networks (RSNs) “have conspired to reduce competition and raise prices on sports broadcasts through policies that restrict what games consumers can watch” (Lacks, 2013).

The purpose of this legal research, therefore, is three-fold. First, it discusses the genesis of professional sports leagues blackout rules, including previous case law which guides the current legal and regulatory debate. Second, the paper considers the arguments being made in Laumann and Garber and how those arguments differ from previous challenges to blackout policies. Particularly noteworthy is the inclusion of Internet and streaming distribution of live games. As the case is still in discovery, a final aspect of this paper speculates whether the leagues will attempt to settle the case, what concessions the leagues might be willing to supply to the plaintiffs and how this may alter the landscape of sports media rights.

The consolidated case is relevant in that it represents the most recent attempt to change blackout rules, and focuses on streaming video, a technology not previously discussed. Previous challenges to blackout rules have emphasized different aspects of the policies.

One of the early challenges occurred in 1973 when, partially in response to President Richard Nixon’s opposition of the NFL’s practice of blacking out all nationally televised games locally where the game was played, Congress amended the SBA. This “Antiblackout Bill,” as it was termed, led to a three-year experiment ensued in which NFL games could be blacked out locally only if they were not sold out 72 hours before game time. The Federal Communications Commission (FCC) monitored the law and reported “the law was not harmful in any way to professional sport” (Lowe, 1995, p. 101). Although the law was allowed to expire, the NFL agreed to make it league policy.

Other challenges included three sports fans filing a class action lawsuit, later dismissed, against all major sports leagues and networks in August 1994 (Durkin v. Major League Baseball, 1996). Additionally, five interest groups, led by the Sports Fan Coalition, petitioned the FCC in November 2011, to eliminate the rule. The FCC did open the
issue for public comment in early 2012, prompting a 22-page comment from nine sports economists which concluded, NFL “Blackouts have no significant effect on ticket sales in the NFL and increase no-shows only when the weather is bad” (Baade et al., 2012, p. 19).

Specifically, the plaintiffs in Laumann and Garber allege the defendants entered into “agreements to eliminate competition in the distribution of [baseball and hockey] games over the Internet and television [by] divid[ing] the live-game video presentation market into exclusive territories, which are protected by anticompetitive blackouts” (Laumann v. National Hockey League, 2012).

In the consolidated case, the plaintiffs claim these illegal agreements “result in reduced output, diminished product quality, diminished choice and suppressed price competition”, violating both Sections 1 and 2 of the Sherman Act. The plaintiffs alleged four antitrust violations, three violations of Section 1 and one violation of Section 2. Section 1 of the Sherman Act prohibits unreasonable restraints of trade in a relevant market, while Section 2 prohibits exclusionary conduct designed to enable an organization to acquire or maintain monopoly power in relevant market (Sharp, Moorman, & Claussen, 2007).

U.S. District Judge Shira Scheindlin on Dec. 5, 2012 allowed the Section 1 claims to proceed against all defendants, but dismissed the Section 2 claim against RSN and MVPD defendants. The Section 2 claim against League defendants was allowed to proceed (Lacks, 2013).

The SBA has proven to be somewhat controversial in its 50-plus years as law. Critics of the SBA have suggested it is special interest legislation meant to benefit fans, but really wound up protecting sports leagues (Anderson, 1995). The arguments from Laumann and Garber seem to reinforce the notion that the SBA and league blackout policies are, in fact, benefitting the leagues at the expense of consumers. This presentation will explore those arguments in greater detail.