Marquette Sports Law Review

Volume 23
Issue 2 *Spring*

Article 6

Analysis of the NCAA Rule Prohibiting a School- or Conference-Owned Television

Brandon Leibsohn

COMMENTS

ANALYSIS OF THE NCAA RULE PROHIBITING A SCHOOL- OR CONFERENCE-OWNED TELEVISION NETWORK FROM TELEVISING HIGH SCHOOL SPORTS EVENTS

BRANDON LEIBSOHN*

I. INTRODUCTION

The latest trend in collegiate sports is the establishment of conference and university television networks.[1] National Collegiate Athletic Association (NCAA) conferences have recognized the significant financial and publicity benefits they can gain from owning and operating their own television networks and from providing cost-effective programming on these networks.[2] In particular, the Big Ten Network acquired over 30 million subscribers after only one month of being on the air.[3] Since its debut, the Big Ten Network has accrued over 42 million subscribers, reaching over one-third of the United States and allowing viewers to watch and enjoy conference sports events.[4] In 2011 alone, the Big Ten Network collected $242 million in revenues with $79.2 million in profits to be split among Big Ten schools.[5]

The Pac-12 recently launched its own conference network after noting the Big Ten Network's success.[6] Last year, the Pac-12 began broadcasting on a

---

* Brandon Leibsohn is a third-year law student at Marquette University Law School. Upon graduation in May 2013, he will earn a Certificate in Sports Law from the National Sports Law Institute. Brandon graduated from Hamilton College in 2010, where he earned a B.A. in Psychology. Brandon currently serves as a Comment Editor of the *Marquette Sports Law Review*.

1. *See* Joe Drape, *Big Ten Network Alters Picture of College Athletics*, N.Y. TIMES, Oct. 2, 2010, at D1.

2. *See id.*

3. *About Us*, BTN, http://btn.com/about/ (last visited Mar. 19, 2013).

4. Drape, *supra* note 1.

5. Stu Durando, *Big Ten Network Had Record Revenue in 2011*, STLTODAY.COM (May 21, 2012), http://www.stltoday.com/sports/college/illini/big-ten-network-revenue-grows-again/article_e05a998c-a390-11e1-99b2-001a4bcf6878.html.

6. Seth Davis, *Pac-12 Network Looking to Change College Sports Landscape*, SI.COM (Aug.

national network and six regional networks covering each of its member schools.[7] The University of Texas has also reached a $300 million partnership deal with ESPN to have its own network, the Longhorn Network.[8] All of these networks provide around-the-clock coverage of their respective schools' sports events.[9] The significant ratings result from football and men's basketball games; however, the spotlight the other sports receive is equally important for the conferences and schools because of the potential for increased fanfare and revenues in those sports.[10]

One of the more interesting topics to emerge from the growth of these networks is the idea of covering high school sports events, particularly football. When originally formed, the Longhorn Network intended to broadcast live high school games along with highlights of high school sports events.[11] Controversy arose when Texas initiated this idea because other NCAA schools felt that Texas would gain an unfair advantage in recruiting.[12] In particular, Texas and other schools and conferences with their own network would be able to offer recruits the chance to spotlight their talents for the country to see even before they make it to college.

With the emergence of the Longhorn Network and issues relating to showcasing high school games and events, the NCAA issued an interpretation on August 12, 2011, to essentially ban youth programming on school- and conference-owned networks.[13] The interpretation states:

> The academic and membership affairs staff determined it is not permissible for an institution- or conference-branded network to broadcast (audio or video) programming involving prospective student-athletes.
>
> [References: NCAA Constitution 2.11 (the principle governing recruiting) and NCAA Bylaws 13.2.1 (general regulation), 13.4.3.1 (recruiting advertisements), 13.10.3 (radio/TV show), 13.10.3.1 (announcer for broadcast of prospective student-athlete's athletics contest), 13.10.3.2

31, 2012), http://sportsillustrated.cnn.com/2012/writers/seth_davis/08/30/Pac-12-Network/index.html.

7. *Id.*

8. *Texas, ESPN Announce New Network*, ESPN (Jan. 19, 2011), http://sports.espn.go.com/espn/news/story?id=6037857 [hereinafter *Texas*].

9. *See* Drape, *supra* note 1.

10. *See id.*

11. *Texas*, *supra* note 8.

12. Michael Hiestand, *How Texas Is Steering College TV Sports*, USA TODAY, Aug. 12, 2011, at 1A.

13. NCAA, STAFF INTERPRETATION: BROADCASTS OF YOUTH PROGRAMMING ON INSTITUTIONAL- OR CONFERENCE-BRANDED NETWORKS (2011) [hereinafter INTERPRETATION].

> (game broadcast/telecast), 13.15.1 (prohibited expenses) and 13.15.1.2 (fundraising for high school athletics program)].[14]

The NCAA's interpretation banning youth programming has created a situation where conference- and school-owned networks are prevented from pursuing cost-effective broadcasting despite the fact that high school sports broadcasts are cheap to produce and televise.[15] Although there has been no legal challenge to the interpretation as of yet, the purpose of this Comment is to present a hypothetical case that a conference- or school-owned network could bring to challenge the NCAA's interpretation in an antitrust suit. Part II details the need for universities and their conferences to capitalize on revenue-producing sources such as high school content. Part III describes the basics of antitrust law and how parties have tried to challenge the NCAA with antitrust suits in the past. Part IV discusses the hypothetical framework a network could use in an antitrust suit against the NCAA for its interpretation that bans high school content. Part V concludes.

II. ECONOMICS OF CONFERENCE- AND SCHOOL-OWNED TELEVISION NETWORKS

The vast majority of NCAA school athletic departments fail to turn a profit.[16] Given these economic shortfalls, television revenue is highly important. Conferences and schools are creating television networks because of the significant financial and exposure benefits these networks can generate.[17] However, these networks require more than conference or school sports events to provide quality programming at all times since games are not played at all hours of the day. One potential option for fresh programming is televising high school sports events.[18]

The growing appetite for televised high school broadcasts emerged during LeBron James's senior year in high school.[19] Of all households watching television during one of LeBron James's high school games broadcast on ESPN2, nearly two percent of those households were watching James that

---

14. *Id.*

15. *See* Wis. Interscholastic Athletic Ass'n v. Gannett Co., 658 F.3d 614, 617 (7th Cir. 2011).

16. Associated Press, *NCAA Report: Economy Cuts into Sports*, ESPN (Aug. 23, 2010), http://sports.espn.go.com/ncf/news/story?id=5490686. The exact number of athletic departments earning or losing money each year is a heavily debated topic, but it is clear that many schools do fail to earn a profit. *Id.*

17. *See* Hiestand, *supra* note 12; Davis, *supra* note 6.

18. *See* Kevin P. Braig, *A Game Plan to Conserve the Interscholastic Athletic Environment After LeBron James*, 14 MARQ. SPORTS L. REV. 343, 346 (2004).

19. *Id.*

night.[20] Since that broadcast, ESPN increased its high school sports coverage to include thirty-three high school football games in 2011.[21] In 2012, during the high school football season opening weekend, ESPN broadcasted thirteen high school games.[22] Likewise, Fox Sports recently struck a deal with Texas high schools to broadcast all ten of the championship games from the state.[23] These decisions are clearly being driven by television ratings, fan support, and cost-effectiveness because the networks do not have to pay high broadcast rights fees for the sports events.[24]

When Texas announced its plan to show high school sports events on its Longhorn Network, the plan was met by significant criticism from other schools and the NCAA.[25] On August 22, 2011, the NCAA hosted a broadcasting summit to discuss high school sports.[26] Following the summit and a panel meeting at the NCAA Convention in January 2012, the NCAA reinforced its interpretation banning youth programming on conference- and school-owned networks.[27] The NCAA's interpretation refers to seven NCAA bylaws and one article in the NCAA Constitution.[28] Each of the references relates to the principles of recruiting by schools, but none specifically refer to conference- or school-owned broadcast networks. This interpretation negatively impacts the ability for these networks to utilize content as freely as they could in the open market, and thus, the NCAA has subjected itself to legal challenges such as antitrust claims.

Accordingly, the plaintiffs that would have standing to bring such a suit against the NCAA would be a conference- or school-owned network desiring

---

20. *Id.*

21. Rick Cantu, *TV Jumping as Audience Clamors for More Preps*, AUSTIN AM.-STATESMAN (Tex.), Sept. 17, 2011, at C01.

22. Christopher Parish, *ESPN HS Football Kickoff Schedule*, ESPNHS (Aug. 20, 2012, 9:00 AM), http://espn.go.com/blog/high-school/football/post/_/id/5919/schedule-released-for-third-annual-espn-high-school-football-kickoff.

23. Cantu, *supra* note 21.

24. *See id.*; Wis. Interscholastic Athletic Ass'n v. Gannett Co., 658 F.3d 614, 617 (7th Cir. 2011). For example, an ESPNU game of two high school powerhouse football teams in Indiana only cost ESPN $500 to gain rights to broadcast the game. Cantu, *supra* note 21. Central Texas teams appearing on the local KBVO affiliate did not receive any monetary compensation. *Id.* Further, the Wisconsin Interscholastic Athletic Association only charges $250 for a live stream of a football game for one camera and $1500 if more than one camera is used. *Wis. Interscholastic*, 658 F.3d at 617.

25. Hiestand, *supra* note 12.

26. Michelle Hosick, *NCAA Hosts Discussion About Youth-Sport Telecasts*, NCAA (Aug. 22, 2011), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/NCAA+hosts+discussion+about+youth-sport+telecasts.

27. *New-Age Battle: Haves vs. Have-Nots*, NCAA (Jan. 17, 2012), http://www.ncaa.com/news/ncaa/article/2012-01-17/new-age-battle-haves-vs-have-nots.

28. INTERPRETATION, *supra* note 13.

to broadcast youth programming such as high school football games. Currently there are only four networks owned by a conference or school that could serve as potential plaintiffs: the Big Ten Network, the Pac-12 Network, the Longhorn Network, and BYU Television.[29] When the issue of youth programming first was brought up last year, the Big Ten Network declared that it would "'refrain from telecasting high school games for at least the next couple years.'"[30] The Pac-12 Network and BYU Television have not issued stances on broadcasting youth programming, but they have not made any plans on their schedules to promote such content.[31] That leaves the Longhorn Network as the only potential plaintiff who currently would like to utilize such content.[32] It is clear that cheap programming enhances the bottom line for profits for networks and if the potential gains become large enough, it is possible that any of these networks or others that are created in the near future could look to use high school programming.

III. PRIOR APPLICATION OF ANTITRUST LAW TO NCAA REGULATORY AUTHORITY

Prior to a school- or conference-owned network challenging the NCAA on its denial of high school content, the network should examine the Sherman Antitrust Act to ensure that the network's claim meets all of the antitrust criteria.[33] The network must prove that the NCAA is engaging in concerted action that unreasonably restrains trade involving interstate commerce.[34] In crafting its argument, the network should look at precedent established in key cases challenging the NCAA for antitrust violations.

A. Foundation of Antitrust Law

Congress passed the Sherman Antitrust Act to ensure that marketplaces

---

29. *See About Pac-12 Enterprises*, PAC-12, http://pac-12.com/AboutPac-12Enterprises/AboutPac-12Enterprises.aspx (last visited Mar. 19, 2013); *About Us*, *supra* note 3; *Get BYUtv*, BYUTV, http://byutv.org/getbyutv/ (last visited Mar. 19, 2013); *About*, LONGHORN NETWORK, http://espn.go.com/longhornnetwork/about (last visited Mar. 19, 2013).

30. Brian Bennett, *Delaney: BTN Won't Air High School Games*, ESPN (July 28, 2011, 6:55 PM), http://espn.go.com/blog/bigten/post/_/id/29739/delany-btn-wont-air-high-school-games (quoting league commissioner Jim Delaney).

31. *See About Pac-12 Enterprises*, *supra* note 29; *Overview*, BYUTV, http://www.byutv.org/about (last visited Mar. 19, 2013).

32. Mike Finger & Brent Zwerneman, *Longhorn Network Still Has High School Football in Its Plans*, MYSA (Aug. 18, 2011), http://www.mysanantonio.com/sports/college_sports/longhorns/article/Longhorn-Network-still-has-high-school-football-2122892.php.

33. 15 U.S.C. § 1 (2006).

34. *See id.*

are competitive and that consumers can benefit from open competition.[35] Specifically, § 1 of the Sherman Antitrust Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[36] Courts look at three elements when analyzing this law.

First, courts consider whether there is concerted action, such as an agreement made between parties who would otherwise be competitors.[37] Recently, the U.S. Supreme Court reaffirmed that concerted action prevents competition from having independence in decision-making and pursuing activities in the marketplace.[38] In the sports context, the case of *American Needle, Inc. v. NFL* illustrates how the aggregation of team intellectual property rights constitutes concerted action.[39] In this case, the court concluded that each of the NFL teams were independently owned and operated and that each team could be considered an "'independent center[] of decision[-]making.'"[40] The Court also found that pooling separately owned trademarks and granting licenses for their use removes the independent nature of decision-making and impacts competition.[41] The Supreme Court rejected National Football League Properties' (NFLP) argument that it was a single entity because the teams each have their own individual interests and "separate, profit-maximizing entities."[42] Even though the NFLP was acting as the promoter of the trademarks and pursuing the common interests of the teams, cooperation is not a relevant factor when determining if there is concerted action.[43] Without the agreement by the teams to combine their trademark licenses, each team would be able to make decisions on granting licenses of its trademarks.[44] Thus, this case shows that concerted action can be proven if the actors in the marketplace would be free to make decisions and perform actions without an agreement to cooperate with their competitors.[45]

Second, courts look at the reasonableness of the restraint and whether the

---

35. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 238 (2d ed. 2009).

36. § 1.

37. *See* MITTEN ET AL., *supra* note 35, at 250.

38. Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2209 (2010).

39. *See generally id.*

40. *Id.* at 2213 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).

41. *Id.*

42. *Id.*

43. *Id.* at 2214.

44. *Id.* at 2214–15.

45. *See id.*

procompetitive justifications of the restraint outweigh potential anticompetitive effects.[46] To determine the legality of potential antitrust violations under the reasonableness of the trade restraint element, courts utilize either the per se rule or rule of reason test.[47] The per se rule presumes that an action is unreasonable because the action has clear anticompetitive effects.[48] An example of such a violation is price-fixing because, when competitors fix prices, they inhibit free and open competition and hurt consumers.[49] However, the court can choose not to apply the per se rule if the court determines that certain actions, which would otherwise be considered unreasonable, are necessary for the sustainability of the market.[50] The court has this option because competition in some markets is dependent upon cooperation among competitors, who give up certain rights individually to make the overall product better for the consumers.[51] For instance, the NCAA is composed of universities and schools around the country whose cooperation is necessary to ensure competitive balance within each sport and to establish uniformity in the rules and regulations each university must follow.[52] These factors combine to enhance the public's interest in college sports, meaning the per se rule application would undoubtedly harm consumers if used in such a context.[53]

For cases involving sports law, most courts apply the rule of reason test to address whether an action violates the Sherman Antitrust Act.[54] As shown in *American Needle*, when sports leagues require some cooperation to produce a quality product, such as scheduling games and setting rules to protect competitive balance, these justifications make the cooperation reasonable and necessary to ensure the league can actually exist.[55] In utilizing the rule of reason test, courts make a fact-based determination on the actual anticompetitive effects of the restraint and balance those effects with the

46. NCAA v. Bd. of Regents, 468 U.S. 85, 97–98 (1984); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998); *see also , e.g.*, Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1588 (2003).

47. *Bd. of Regents*, 468 U.S. at 103–04.

48. *Id.* at 100.

49. *See* Konsky, *supra* note 46, at 1588.

50. *Bd. of Regents*, 468 U.S. at 100–01.

51. *Id.*

52. *Id.* at 101.

53. *Id.* at 117.

54. *E.g.*, *id.*; Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998); Richard J Hunter, Jr. & Ann M. Mayo, *Issues in Antitrust, the NCAA, and Sports Management*, 10 MARQ. SPORTS L.J. 69, 82 (1999).

55. *See* Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216–17 (2010).

procompetitive benefits.[56] In the current hypothetical case, the plaintiff, the network, has the burden to prove the existence of anticompetitive effects, while the defendant, the NCAA, has the burden to prove that its action has procompetitive benefits outweighing those anticompetitive effects.[57]

The courts will assess and balance the anticompetitive and procompetitive effects. One of the first steps courts will pursue is looking at the direct anticompetitive effects and comparing what a free market would look like if the restraints were to take effect.[58] For example, courts examine whether the output of products and services decrease in conjunction with a price increase and if the market becomes unresponsive to consumer demand.[59] Of primary concern is whether the courts will utilize a quick-look rule of reason or full-blown rule of reason analysis. The difference between the quick-look and full-blown analysis is that the quick-look analysis does not need to examine market power because the anticompetitive effects are clear and obvious.[60] If courts fail to find a direct effect on the competitiveness of the market, they assess the market power of the parties involved under the full-blown rule of reason analysis.[61] Courts determine market power by examining the relevant product market and deciding whether a reasonable substitute could be implemented for the service or product that consumers would find as attractive.[62] If a party has significant control over the market share and geographical area, courts are likely to declare an action as having an effect on the competitiveness of the market.[63] Next, if the nature and quantity of the anticompetitive effects are significant, then the defending party must show legitimate procompetitive interests and justifications to overcome an antitrust challenge.[64] If the defendant can show this, the burden shifts back to the plaintiff to then demonstrate that the action is not the least restrictive alternative, meaning that the interests and objectives could be accomplished in another less harmful manner.[65]

---

56. *See Bd. of Regents*, 468 U.S. at 113.

57. *See id.*

58. *See id.*

59. Claire E. Trunzo, Comment, *Ancillary Restraints in a Competitive Global Economy: Does the Possibility Exist for an Ancillary Restriction to Be Reasonable in Light of Section 1 of the Sherman Act?*, 29 DUQ. L. REV. 291, 299 (1991).

60. Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999).

61. *See* Trunzo, *supra* note 59, at 299.

62. *See id.*

63. *See id.*

64. Konksy, *supra* note 46, at 1588.

65. *Id.*; *see generally* Renee Grewe, *Antitrust Law and the Less Restrictive Alternatives Doctrine: A Case Study of Its Application in the Sports Context*, 9 SPORTS LAW. J. 227 (2002).

Finally, courts determine if the party's restraint on trade affects interstate commerce.[66] The application of interstate commerce focuses on the effects of the restraint including the transportation, purchase, and sale of commodities across states.[67] Contracts that make services available across multiple states such that there is a nationwide operation can constitute interstate commerce, particularly when the primary goal of the transaction is to earn profits across the country.[68] The U.S. Supreme Court declared in the case of *United States v. International Boxing Club of New York, Inc.* that when sports leagues "make a substantial utilization of the channels of interstate trade and commerce" through actions like negotiating the sale of television rights across the country, then the sports league's actions can be considered interstate commercial activity, especially if the significant portion of the overall revenue from the action arrives from these television rights.[69]

Thus, a school- or conference-owned network could better argue its antitrust case by utilizing the arguments made in other antitrust suits and incorporating each of the three antitrust considerations in its claim.

B. Understanding Antitrust Law Through Seminal NCAA Case Law

Over the past thirty years, the NCAA has been sued for numerous potential violations of the Sherman Antitrust Act.[70] In each of the successful challenges, the plaintiffs have demonstrated that the NCAA unreasonably overstepped its authority in trying to create fair competition.[71] The NCAA's desire to regulate issues such as television broadcasting, uniform logos, coaching salaries and positions, and eligibility rules are all well-intentioned to protect the integrity and amateurism of collegiate sports. However, when the impact of those NCAA rules exceeds the nature of their intentions or fails to achieve their intended goals in the least restrictive manner, then those rules are subject to being considered unreasonable restraints and violations of antitrust law.[72]

The landmark decision in *NCAA v. Board of Regents* demonstrates that the NCAA is accountable for its rules and regulations.[73] This case importantly

66. United States v. Int'l Boxing Club of N.Y., Inc., 348 U.S. 236, 240–41 (1955).

67. *See id.*

68. *See id.* at 241.

69. *See id.*, app. at 247.

70. *See generally, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85 (1984); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); *see also* Hunter & Mayo, *supra* note 54, at 73–76.

71. *See, e.g., Bd. of Regents*, 468 U.S. at 117–20; *Law*, 134 F.3d at 1021–24.

72. *See Bd. of Regents*, 468 U.S. at 117–20; *Law*, 134 F.3d at 1021–24.

73. *See generally Bd. of Regents*, 468 U.S. 85.

determined that when the NCAA tried to restrict the number of televised broadcasts for its member schools, its rationale for supporting its restriction could not overcome the anticompetitive nature of the restriction.[74] The NCAA's plan restrained the price and output of collegiate football games because there was clear evidence of consumer demand for televised football games and additional money for schools to generate.[75] Further, the NCAA's market power was strong because football games were uniquely attractive to sponsors and advertisers providing television revenue.[76] The Court dismissed the NCAA's justifications of increasing attendance at games, creating equality in broadcasts per school, and maintaining competitive balance.[77] Therefore, because the NCAA failed to meet its burden of providing procompetitive justifications for the restriction on the output of televised football games, the Court ruled that the NCAA violated antitrust law.[78]

Based on the *Board of Regents* ruling, it is clear that in antitrust cases against the NCAA, courts must determine if the NCAA's actions promote commercial interests or competitive interests for the benefit of its fans (consumers). To ensure that a case can be brought forward, the cases of *Adidas America, Inc. v. NCAA*[79] and *Metropolitan Intercollegiate Basketball Ass'n v. NCAA*[80] highlight the need for a plaintiff to establish a marketplace where the NCAA's actions have an adverse effect on competition. Although Adidas was unable to plead and prove that there was a defined relevant market for the promotional rights of NCAA schools on athletic apparel,[81] the Metropolitan Intercollegiate Basketball Association (formerly responsible for the National Invitation Tournament) overcame summary judgment because it defined the relevant market as amateur college basketball tournaments, where the market share of the NCAA's March Madness tournament included over 99% of television revenue from the postseason tournaments, thereby demonstrating that the NCAA controlled the market.[82] The major factors in defining the market include looking at the fungibility of the product and the available substitutions.[83] The *Board of Regents* case declared that there is a

74. *See id.* at 120.
75. *Id.* at 111.
76. *Id.*
77. *Id.* at 114–19.
78. *Id.* at 120.
79. 64 F. Supp. 2d 1097 (D. Kan. 1999).
80. 339 F. Supp. 2d 545 (S.D.N.Y. 2004).
81. *Adidas*, 64 F. Supp. 2d at 1102–03.
82. *Metro. Intercollegiate*, 339 F. Supp. 2d at 549–50.
83. *See Bd. of Regents*, 468 U.S. at 111–12.

separate market for college football broadcasts because there was no substitute for advertisers to reach their target audience or for fans to gain their desire for collegiate football on television.[84] The fact that advertisers acknowledged that they would be willing to pay premium prices to reach these fans indicated that the product of college football broadcasts is itself a unique and separate market.[85] These cases emphasize the importance of establishing that a true market exists before bringing forth an antitrust claim against the NCAA.

Once a true market is established "or a horizontal agreement to fix prices" is shown, the NCAA is subject to scrutiny over its rules.[86] The burden shifts to the NCAA to prove procompetitive justifications when there are anticompetitive effects in the marketplace.[87] Anticompetitive effects occur when the freedom to operate in the marketplace is taken away from competitors.[88] Thus, actions by the NCAA typically remove that freedom because the schools lose their ability to act independently in the market of college sports. Of the few successful antitrust challenges to the NCAA's rules, the *Board of Regents* and *NCAA v. Law* cases highlight how the typical procompetitive justification of competitive balance offered by the NCAA is not absolute.[89] In particular, these cases show that the NCAA will advocate competitive balance.[90] The courts acknowledge this goal as legitimate, but the NCAA's rules must actually achieve competitive balance if they are to be upheld.[91] In *Board of Regents*, the ban on televised broadcasts did not equalize the competitiveness of all schools because the ban did not cap spending by schools on their football teams or dictate how revenues from the teams were to be spent.[92] In *Law*, the NCAA's restriction on earnings and positions for college basketball staffs failed to protect competitive balance because more experienced coaches could still stay on the staff at the low salary, and the schools were not prohibited from spending the savings on other areas of their teams.[93] Accordingly, the NCAA's actions must actually maintain or improve competitive balance as opposed to merely putting a Band-Aid on a small issue.

---

84. *Id.*
85. *Id.*
86. *See* Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998).
87. *Id.* at 1020–21.
88. *Bd. of Regents*, 468 U.S. at 106–07.
89. *See Bd. of Regents*, 468 U.S. at 117–20; *Law*, 134 F.3d at 1023–24.
90. *See Bd. of Regents*, 468 U.S. at 117–20; *Law*, 134 F.3d at 1023–24.
91. *Bd. of Regents*, 468 U.S. at 117.
92. *Id.* at 117–19.
93. *Law*, 134 F.3d at 1024.

Additionally, the NCAA has asserted the preservation of amateurism as a main procompetitive interest.[94] In *Gaines v. NCAA*, the NCAA's rule prohibiting athletes who declared for the draft and hired an agent from regaining collegiate eligibility was upheld by the district court as necessary for the preservation of its amateur competition.[95] According to the court, the protection of amateurism is not a derivative of promoting commercial interests.[96] Rather, amateurism interests ensure that college football is not a professional sport and that student-athletes act in the interests of themselves, their fellow classmates, and schools.[97] In reinforcing the draft eligibility rules, the court determined that the NCAA enhanced its product by protecting stability and integrity within its system.[98]

Part IV of this Comment provides for a hypothetical framework that a school- or conference-owned television network could utilize in an antitrust suit against the NCAA, as well as addressing the likelihood of success of such a suit.

IV. ANTITRUST ANALYSIS OF NCAA PROHIBITION AGAINST TELEVISING HIGH SCHOOL SPORTS

Of primary concern for a conference- or school-owned television network is illustrating all of the antitrust requirements established in § 1 of the Sherman Antitrust Act. First, the network must show that the NCAA is engaging in a concerted action by trying to control the network's content.[99] Second, the network must demonstrate that the NCAA's action involves interstate commerce.[100] Finally, the network must prove that the NCAA's concerted action is unreasonable by showing anticompetitive effects and the NCAA's market power.[101] If the network can illustrate anticompetitive effects or show that the NCAA has significant market power over conference- and school-owned television network content, then the NCAA will have to provide procompetitive justifications for its interpretation. The networks will then have to establish that the NCAA's ban on high school sports broadcasts is not the least restrictive alternative to achieve its goals.[102] A final decision as to an

94. *See* Gaines v. NCAA, 746 F. Supp. 738, 743 (M.D. Tenn. 1990).

95. *Id.* at 741, 747–48.

96. *Id.* at 744.

97. *Id.* at 746.

98. *Id.*

99. *See* 15 U.S.C. § 1 (2006).

100. *See id.*

101. *See id.*

102. *See* Konksy, *supra* note 46, at 1588.

antitrust violation will be decided by a jury.[103] The procompetitive justifications that will enable the NCAA to prevail against an antitrust challenge by a conference- or school-owned network are promoting amateurism, maintaining competitive balance, and emphasizing academics over athletics.

A. NCAA Concerted Action

To challenge the NCAA on its interpretation banning high school sports programming being broadcast, a conference- or school-owned network must show concerted action taken by the NCAA that unreasonably restrains trade affecting the network.[104] The network could argue that the NCAA has engaged in concerted action to ban high school sports broadcasts on conference- and school-owned networks because the NCAA's rule is a product of an agreement by the member schools allowing the NCAA to act as a body representing member schools that would otherwise be competitors.[105] Thus, the network would be able to show the NCAA's ban on such content eliminates what its member schools could do if able to make their own rules.

B. Interstate Commerce

The easiest portion of the antitrust lawsuit the network would need to prove is that the NCAA's restriction of youth programming broadcasts involves interstate commerce. Provided that the network is available for broadcast in multiple states,[106] which is the case for all current conference- and school-owned networks, then the revenues generated by the network would come across state lines. For example, the network could show that since it is broadcast on major television providers such as AT&T U-Verse, DIRECTV, Dish Network, Time Warner, and Verizon FiOS, where it collects carriage fees from consumers in different states, the commercial aspect of its network impacts those states in which its network is available. Fundamentally, if consumers from around the country are paying for cable and the network is available through their television provider, then the network is receiving its revenue through interstate commerce. Therefore, the network's main concern would move towards the unreasonableness of the NCAA's

103. Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 33 (2008).

104. MITTEN ET AL., *supra* note 35, at 238.

105. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 98–99 (1984); MITTEN ET AL., *supra* note 35, at 250.

106. *About Us*, *supra* note 3; Davis, *supra* note 6; *Get BYUtv*, *supra* note 29; Ben Kercheval, *LHN Officially Adds AT&T U-Verse to Carriers*, NBC SPORTS (Sept. 1, 2012), http://collegefootballtalk.nbcsports.com/2012/09/01/lhn-officially-adds-att-u-verse-to-carriers/.

restriction of high school sports broadcasts.

C. Per Se Rule Analysis

To determine unreasonableness, courts decide whether to employ the per se or rule of reason analysis.[107] As described in *Board of Regents*, the NCAA will generally not be held to the per se standard.[108] To ensure competitive balance among the NCAA's schools, the NCAA needs to make some horizontal restraints that would otherwise be considered illegal under the Sherman Antitrust Act.[109] To challenge such a notion, a network would have to show that the NCAA's interpretation, which bans broadcasting of high school sports events, is a clear restraint on the network's market, especially in light of the fact that there are no current NCAA bylaws that specifically detail the nature of conference- and school-owned networks. Yet, it is very likely that the NCAA could overcome this argument, primarily based on its need to protect competitive balance, but also on its mission to protect amateurism of its sports.[110]

D. Rule of Reason Analysis: Unreasonable Restraint and Market Power

Consequently, the network should be prepared to argue under the rule of reason test for the NCAA's potential violation of antitrust law. The network must establish that the NCAA's interpretation banning high school broadcasts produces anticompetitive effects in the marketplace. By restricting output of high school sports broadcasts and reducing revenue streams for the network, the network could demonstrate the anticompetitive effects of the NCAA's ban on high school content, which would be sufficient to justify the quick-look rule of reason analysis. However, if the court chooses to use the full-blown rule of reason analysis, then the network would need to show that the NCAA has market power over televised high school sports events because of its control over revenue streams for its member schools and conferences. Yet, the network should be aware that the NCAA is likely to prevail against these anticompetitive effects and market power arguments because of its procompetitive justifications for protecting amateurism, competitive balance, and the value of education.

---

107. *See Bd. of Regents*, 468 U.S. at 103–04.

108. *See id.* at 100–01.

109. *See id.*

110. *See id.* at 117, 120; *see also* Law v. NCAA, 134 F.3d 1010, 1023–24 (10th Cir. 1998); Gaines v. NCAA, 746 F. Supp. 738, 743, 747–48 (M.D. Tenn. 1990).

1. Anticompetitive Effects

The court could utilize the quick-look or full-blown rule of reason analysis in determining that the NCAA's interpretation prohibiting high school sports broadcasts is clearly anticompetitive.[111] Regardless, first the network must show that the anticompetitive effects of the NCAA's action prevent high school sports events from being broadcast on school- or conference-owned networks.[112] It is clear that such a ban restricts output of televised high school sports events. Although the NCAA is not responsible for ensuring that such content can be broadcast, the network could show that the ban on the youth programming negatively impacts the market. To make such a claim, the network would need to conduct a study or survey sports fans and television viewers to see the effect that high school programming would have on their desire and commitment to watch the conference- or school-owned network if the high school sports events were available. This type of study would undoubtedly be expensive and time-consuming but nonetheless would provide one of the most accurate pieces of evidence. This data could show that the NCAA's interpretation prevents the network from meeting consumer demand, which is more high school sports events on television.

The network should also show that the anticompetitive effect of the NCAA's ban inhibits the network from generating more revenue for cash-deprived schools and inflicts commercial restraints such as those seen in *Law*.[113] With the rising costs associated with sports programming, high school sports present a great opportunity for a network to draw in significant audiences while spending minimally to gain such viewership.[114] If no ban were in place, the network could contract with high schools to increase ratings and advertising revenue at a minimal cost.[115] As the NCAA has clearly shown through its own deal with CBS and Time Warner, maximizing revenue from television deals is vital for collegiate athletics.[116]

Accordingly, the court could decide that the anticompetitive effects are so obvious that an assessment of market power is not necessary based on the

---

111. *See Law*, 134 F.3d at 1020.

112. *See* Konsky, *supra* note 46, at 1588.

113. *See Law*, 134 F.3d at 1020–21, 1024.

114. *See* Wis. Interscholastic Athletic Ass'n v. Gannett Co., 658 F.3d 614, 617 (7th Cir. 2011); Braig, *supra* note 18, at 346–47; Cantu, *supra* note 21.

115. *See Wis. Interscholastic*, 658 F.3d at 617; Braig, *supra* note 18, at 346–47; Cantu, *supra* note 21.

116. *See CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (Apr. 22, 2010), http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement.

quick-look rule of reason analysis. However, it is unlikely that the network would engage in the necessary steps to ensure that the anticompetitive effects justify the quick-look analysis. Demonstrating consumer demand for the high school sports events inevitably would be a costly and time-consuming endeavor. Further, the network would need to show actual deals that it could strike with high school athletic associations to broadcast the events if permitted by the NCAA to prove the cost-effectiveness and savings from the programming. Thus, the amount of work that would need to go into establishing clear anticompetitive effects would entail research and negotiations that the networks might not be able or willing to undergo. If the network were able to spend the necessary resources, then the court would likely shift the burden onto the NCAA to justify the procompetitive effects of its ban.[117]

2. Full-Blown Rule of Reason Analysis: Market Power

If a court determines that the quick-look rule of reason analysis is inappropriate in the case, then the court would apply the full-blown rule of reason analysis and require the network to also show that the NCAA has significant control of the market power of televised high school sports events.[118] The network would need to prove that a market for televised high school sports events exists and that the NCAA is inhibiting the network's position in such a market in accordance with the *Adidas* case.[119] The *Adidas* court stated that the market depends on the "'interchangeability of use or the cross-elasticity of demand'" of the products.[120] Further, the network has to show that the NCAA's interpretation regulates and has an effect on the market.[121]

In addressing the relevant product market, the network would have to show that there is no interchangeability or cross-elasticity of demand between televised high school sports events and other sports broadcasts. The network would need to prove that there is no reasonable substitute for the televised high school sports events, which it could do if it showed that the high school sports events such as football are played primarily during the week while other amateur sports such as college football are played mostly on the weekend and that the other broadcasters of high school sports are unable to meet the

117. *See Law*, 134 F.3d at 1020–21.

118. *See id.*

119. *See* Adidas Am., Inc. v. NCAA, 64 F. Supp. 2d 1097, 1101–04 (D. Kan. 1999).

120. *Id.* at 1102 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)).

121. *See id.* at 1104.

demand, which the conference- and school-owned networks would be able to accomplish. Further, given that major sports broadcasters like ESPN and Fox Sports have struck deals to broadcast high school sports events, there appears to be a set of fans and consumers desiring to watch who would otherwise spend their time in some other activity.[122]

Next, the network would have to show that the NCAA interpretation has an effect on televised high school sports events. The network would have to show that the NCAA, the governing body of collegiate sports, is attempting to control the market by removing a significant portion of the televised high school sports event broadcasters, conference- and school-owned networks. If the NCAA is permitted to control the television content that conference- and school-owned networks can broadcast, then its effect on the market for televised high school sports events will be significant because it will limit the availability of high school sports event telecasts to other broadcasters that have not met the demand for the market. Assuming the conference- or school-owned network can prove that there is an additional desire for more high school sports events than already on television, it could also show potential damages in the form of lost revenues by showing the success of the Big Ten Network[123] and the new billion-dollar deals collegiate conferences have struck with entities such as ESPN and Fox Sports.[124] Thus, provided that the network establishes the NCAA's effect on televised high school sports events, then the NCAA would have to show legitimate interests and justifications for the imbalance it created.[125]

3. NCAA's Procompetitive Effects

After the court has determined whether a quick-look or full-blown rule of reason analysis is necessary, the NCAA must meet its burden of providing the procompetitive rationales regarding its ban on high school sports events.[126]

The main procompetitive justification that the NCAA has described in its interpretation, and that it is likely to offer in this case, is competitive balance. The NCAA would likely point out that allowing high school broadcasts would create a competitive disadvantage to conferences and schools unable to form their own television networks in recruiting these high school athletes and providing cost-effective programming. While the network could argue that it

122. Braig, *supra* note 18, at 346–47; Cantu, *supra* note 21; Parish, *supra* note 22.

123. Drape, *supra* note 1.

124. Diane Pucin, *Pac-12 Will Feast on New Television Deal*, L.A. TIMES, May 4, 2011, at C1; Pete Thamel, *TV Deal May Help Secure the Big 12*, N.Y. TIMES, Sept. 23, 2011, at B11.

125. *See* Konsky, *supra* note 46, at 1588.

126. *See* Law v. NCAA, 134 F.3d 1010, 1021 (10th Cir. 1998).

opens up exposure to these recruits, the star players who drive the specific games to be televised would be inherently more attracted to the network showcasing them because of the publicity they can gain from television exposure. Further, it is clear that schools such as Texas have the fanfare to generate their own television network,[127] but for most Division I schools, it would be much harder to establish such a network. Thus, unless every conference or school had such a network, the access to the athletes and the revenue produced from broadcasting their games would provide significant competitive advantages to the schools and conferences with their own networks.

Another potential procompetitive justification is the same one the NCAA offered in *Gaines*: preserving amateurism.[128] The NCAA prides itself on maintaining the amateur nature of its sports events.[129] The potential problems involved with high school athletes being showcased on networks could make it even easier for schools and boosters to try to gain recruiting edges by knowing which athletes to target and offer illegal inducements to because the level of access and knowledge of recruits would increase. These inducements could come in the form of monetary payments, gifts, or other benefits, which would turn the high school athletes into professionals being compensated for their athletic abilities. Clearly the NCAA wants to maintain amateurism of its athletes, and it believes that prospective recruits should not be given special exposure as demonstrated by its bylaws 13.4.3.1, 13.10.3, and 13.15.1.2, which prohibit advertisements, interviewing or showing highlights of the recruit during a broadcast of the university's game or coach-sponsored program, and fundraising for high school teams.[130]

4. NCAA's Actions as Least Restrictive Alternative

After the NCAA offers its procompetitive justifications of competitive balance and the preservation of amateurism, the burden of proof then shifts back to the network to show that the interpretation the NCAA set forth is not the least restrictive means for accomplishing the NCAA's goals.[131] It is unlikely that the network would be able to overcome the NCAA's need to protect competitive balance and, to a lesser degree, to preserve of amateurism. Specifically, the NCAA's interpretation prohibits televised high school sports

127. *See Texas*, *supra* note 8.

128. *See* Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990); INTERPRETATION, *supra* note 13.

129. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 88 (1984).

130. 2011–2012 NCAA DIVISION I MANUAL §§ 13.4.3.1, 13.10.3, 13.15.1.2.

131. *Law*, 134 F.3d at 1019.

events outright instead of some restrictions because the schools and conferences without their own networks would not be subjected to the recruiting disadvantages associated with broadcasting high school sports events. A restriction that the NCAA could place would be to prevent the network from broadcasting games with athletes that the school or schools in the conference are recruiting, but then the concern would be how to regulate it if athletes shine in their telecasts and the schools then want to pursue them. The network would have a better case if each conference, school, or both had its own network because then the recruiting disadvantages would be minimized to a degree. However, with only four true networks currently established, the NCAA's ban appears appropriate. Further, the network could potentially utilize other cheap programming, such as debate shows or symposiums of the coaches in the conference or school on topics of interest in college sports, in lieu of the high school sports without compromising competitive balance. Thus, the network would have a hard time establishing that the NCAA's outright prohibition is not necessary to protect competitive balance.

5. Jury Determination

The final determination would be made by the jury. The jury would weigh the anticompetitive effects with the procompetitive justifications offered by the NCAA and take into consideration if the network has shown that the NCAA's ban on high school sports is not the least restrictive means of protecting competitive balance and amateurism.[132] After careful consideration, it is likely that the NCAA would prevail and show that it has not violated antitrust law in its interpretation. While there may be anticompetitive effects of reducing the availability of televised high school sports events and preventing the network from utilizing cheap and popular programming, the NCAA itself does not profit monetarily from its position. The NCAA interpretation does have an impact on the market for televised high school sports events, but the significance of the impact would have to be proven by the network. The amount of resources the network would need to expend to prove the impact would be costly and time-consuming, and thus, it would be unlikely that the network would have enough evidence to demonstrate the impact. Assuming the network could prove the impact, then the NCAA's procompetitive justifications of competitive balance and preservation of amateurism would likely hold considerable weight in the minds of the jury. Without an outright ban, the NCAA would be unable to

132. *See* Crane, *supra* note 103, at 33.

protect the competitive balance of schools and conferences without networks to broadcast the high school sports or, to a lesser degree, weed out the negative influences and illegal inducements of those athletes spotlighted on the telecasts. Accordingly, the jury would likely find in favor of the NCAA.

V. CONCLUSION

In prohibiting high school sports events from being broadcast on school- and conference-owned networks, the NCAA has subjected itself to a potential antitrust violation. Given that the NCAA has an effect on the televised high school sports events market and the networks would be able to produce cost-effective programming, the NCAA's procompetitive justifications of competitive balance and the preservation of amateurism must be accomplished in the least restrictive manner possible. Although it is likely that a court will give the NCAA strong discretion in implementing rules and regulations to achieve these goals, the NCAA should clearly define what can and cannot be done in regard to high school sports being broadcast on the networks in its bylaws and constitution.

After analyzing the NCAA's ban on high school sports through the hypothetical suit described in Part IV, it is clear that the NCAA must address the issues of conference- and school- owned television networks. Although the NCAA's interpretation lists certain bylaws already in place for the recruitment of student-athletes, there is no set of rules specifically set for school- and conference-owned networks. Even though the NCAA has attempted to quash the issue surrounding high school sports broadcasts, it is still vulnerable to an antitrust violation because of its outright ban in this and other future instances where the NCAA tries to control such programming. The NCAA must continue to host broadcasting summits like it did in August 2011 and must prepare itself to legitimately create rules and regulations on what can and cannot be done on such networks. Therefore, while the NCAA may be able to skirt past antitrust violations in this instance, it would behoove the NCAA to make sure it can effectively combat such a claim if it does arise in the future by implementing clear rules and standards for conference- and school-owned television network content that have appropriate procompetitive justifications surrounding them.