

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

RESTORING THE MARKET FOR OUT-OF-MARKET BASEBALL Testimony of Professor **Stephen F. Ross** Direct **or, Penn State Institute for Sports Law, Policy and Research**

The Pennsylvania State University

Before the

Senate Committee on Commerce, Science and Transportation

March 27, 2007

□

Mr. Chairman and Members of the Committee:

It is an honor and privilege to be invited to join a panel of industry leaders to offer an independent view, based on over two decades of scholarship and teaching concerning sports and competition policy, in discussing the impediments to the free flow of interstate commerce as millions of Americans seek ways to take advantage of technological advances to watch non-local Major League Baseball games in their homes.

General Thoughts on Exclusive Dealing

The issue before the Committee today is whether the exclusive dealing arrangement between Major League Baseball (MLB) and DirecTV, whereby DirecTV becomes the only source for out-of-market games not shown on national networks, is in the public interest. As the Supreme Court has recognized,

¹

exclusive dealing arrangements are both legitimate and indeed can have pro-competitive effects. In traditional markets where consumers have free access to retail markets, the Court has declared that, as a matter of antitrust law (in my view, this reasoning also applies to sound regulatory policy), these arrangements should only be questioned when there is a serious risk that they will foreclose access to supply or outlet by other firms.

²

Thus, an agreement by Sears to exclusively sell Levi's blue jeans is unlikely to harm consumers; there are ample other retail outlets for Levi's rivals, and ample other jean manufacturers for Sears' competitors. If there are efficiencies in exclusivity, the likely market response is for Lee to reach an exclusive deal with Macy's, etc. Consumers unhappy with Sears' selection are only harmed to the extent they have to walk across the shopping mall.

Harm to baseball fans

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

In contrast, baseball fans face significant harm because of various pre-existing agreements as well as the recently announced exclusive MLB/DirecTV deal. Those who have other reasons to prefer DishNetwork or cable must either forego quality telecasts of out-of-market baseball games,

3

or suffer exploitation by subscribing to multiple multi-channel video distribution platforms that require the purchase of duplicate programming and unnecessary equipment. The exclusive deal reinforces the harm that already befalls the millions of Americans who do not live within the local media market of their favorite team, because of a horizontal market division agreement entered into by MLB owners that, in the context of football, has been illegal for over 50 years.

4

There is no public interest justification in forcing consumers to purchase a distribution platform that is inferior for their needs, or duplicate platforms, just to watch their favorite teams. These consumers include:

- Residents in areas with heavy thunderstorm activity (such as Florida) who prefer cable because of concerns about weather-related interference with important sports broadcasts
- Residents of local markets (like metropolitan Philadelphia and southern New Jersey) who are fans of local basketball and hockey teams but out-of-market baseball teams, and would under planned agreements be required to subscribe to cable for some teams and satellite for others

- Virtually all residents of states without a local team (like Alaska, Hawaii, or Nevada) or states with many retirees from other states (like Florida, California, or Arizona): there is no reason that the only way they can watch games of their favorite teams is to acquire a single product, MLB ExtraInnings™, from a single retailer, DirecTV
- Consumers in multi-residence dwellings who are not allowed to select their preferred retailer, and where the landlord, homeowners' association, or other decision-maker is insufficiently interested in baseball to switch to DirecTV

(Select [Read More](#) to see the rest of Ross' opening statement) **Restraints on Interstate Commerce: Horizontal Market Division**

To be clear, the agreement that sparked this hearing did not arise from the free market. First, there is the horizontal market division by MLB owners. Under the common law, the home team owns a property right in the radio and television rights to baseball games.

5

However, the MLB owners have agreed to significant limitations on these common law rights. Each club will only broadcast games in its assigned geographic territory, licensing the visiting club for the purpose of broadcasting games in its own home territory, and assigning to MLB the exclusive right to sell games not only to free-to-air networks (a right protected by the Sports

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

Broadcasting Act) but most significantly the exclusive right to sell non-network games to satellite or cable only through MLB Extralnnings
TM

(which is
not
exempt from antitrust scrutiny).

Were it not for this web of agreements, the MLB/DirecTV deal would raise few problems for consumers. Those interested in the convenience of a single package of all out-of-market games could purchase Extralnnings
TM

from DirecTV. A Los Angeles Dodgers fan outside southern California, or someone who simply enjoyed the final years of play-by-play from hall-of-famer Vin Scully, would likely find it possible to purchase Dodger telecasts, acquired from the Dodgers by DirecTV, DishNetwork, or the local cable company. Other intermediaries might offer a syndicate of games in competition with Extralnnings
TM

.

Antitrust precedents suggest that the MLB agreements are anti-competitive and ought to be illegal. In
United States v. National Football League

,
6

a very sophisticated district court decision that presaged by 30 years the antitrust analysis of broadcast restraints later adopted by the Supreme Court,

7

the court noted that sports leagues had a unique interest in promoting competitive balance among member teams so that, to the extent that a rival team's out-of-market telecast would significantly harm live attendance, the league could agree to prevent this. However, the court rejected the NFL's effort to bar out-of-market telecasts that simply competed with the home team's telecast of road games: the only effect there was to limit output and raise rights fees for the home team, a result that was not legitimate or pro-competitive. As later courts have recognized,

8

leagues can adequately protect competitive balance with regard to television rights sales by revenue sharing, rather than output limits.

The courts have also recognized, in antitrust litigation, that broad licenses awarded by competing copyright holders through intermediaries can be pro-competitive, when these are *non-exclusive* licenses. Thus, the Supreme Court rejected a lower court holding that Broadcast Music and ASCAP violated the Sherman Act by offering a blanket license for the vast majority of

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

copyrighted songs.

9

On remand, the court of appeals upheld the legality of the arrangement, but only after finding that potential licensees had real alternative ways of acquiring rights.

10

This was because the Justice Department had challenged, many years ago, the agreement among almost all the nation's songwriters to grant

exclusive

licenses to BMI or ASCAP – grants akin to the out-of-market assignments that individual team owners have made to DirecTV -- and the parties by consent decree had agreed to limit the license to a non-exclusive grant.

11

It is bad enough that these agreements meet the “hallmark” definition of unreasonable restraints of trade, by increasing price, reducing output, and rendering output unresponsive to consumer demand.

12

In fact, these agreements are even more inefficient and anti-competitive than would be the case if all rights to all games were assigned to a single entity. Because the additional costs of showing games to out-of-market fans is virtually zero, such an entity would likely sell, in addition to local rights and Extralnning

TM

, other packages to other consumers. For example, there are surely many fans who would pay, on a per game or per team basis, for out-of-market games. These are not authorized now, not because the sale would not be profitable, but because the MLB owners can not agree on how to divide the profits.

13

Insufficient competition in multi-channel video distribution

An analysis of the economics of rights sales for out-of-market games demonstrates that the current scheme would be implausible except for two additional deviations from the free market: (1) insufficient competition between DirecTV, DishNetwork, and cable permits excess profits from consumers of “basic premium” programming; (2) by tying the sale of Extralnning

TM

to its “Choice” package, DirecTV is able to increase its excess profits and the agreement in question reflects a sharing of those increased excess profits between DirecTV and Major League Baseball.

Although there are important differences in the economics of English football and North American sports, on both sides of the Atlantic we see leagues that offer entertainment products

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

with no reasonable substitutes selling broadcast rights to a major programmer in return for a large, fixed sum of money. Policy questions about exclusive agreements for prime sports programming have also arisen in the United Kingdom, and have been insightfully analyzed in a working paper widely distributed among sports economists.

14

Economists David Harbord and Marco Ottaviani detail the profit-maximizing strategy for the various market participants. First, they note that leagues are likely to sell rights for a fixed rather than per-subscriber fee. A fixed fee avoids the problem of the rights-purchaser tacking on its own excess profits charge to that imposed by the league.

15

Because MLB doesn't know precisely how many fans will subscribe to Extralnnings

TM

, or how effectively DirecTV will market the product, it has an even greater incentive to sell for fixed fees, as the rights-purchaser is better able to accept the risk of marketing the product effectively during the course of the contract. If the rights purchaser is effective in maximizing revenues from resale and advertising, results of which are usually reported in the trade press, the league can profit from the rights purchaser's success to secure even higher rights fees for the next contract. (For example, the NFL's first network contract with CBS gave each owner \$300,000/yr. Three years later, the second contract gave each owner \$1 million/yr.)

Next, Harbord & Ottaviani explain why a rights-purchaser, having paid a lump-sum to obtain rights for which there was no substitute, would want to re-sell rights on a per-subscriber basis to its cable and satellite rivals. Ordinarily, they observe, by re-selling to rivals, the rights purchaser increases the marginal operating costs for its rivals at the same time it fetches additional revenue. This "makes reselling more profitable for the firm which acquires the rights, and hence more likely to occur."

16

Re-selling on a per-subscriber basis results in higher rights fees (because the league can capture a portion of the additional profit to be obtained from reselling on a per-subscriber basis) and maximizes output (more people subscribe).

Applied to American baseball, Harbord & Ottaviani's analysis suggests that DirecTV would find it profitable to resell Extralnnings to cable networks and Dish Network, and that MLB would share in this profit through a higher lump-sum fee for the exclusive rights to out-of-market baseball games. So why have DirecTV and MLB done the opposite? We can infer from the parties' preference for an exclusive deal that DirecTV is willing to forego this opportunity, and indeed pay MLB more than the total amount that MLB might reasonably expect to receive from sales of Extralnnings through various retail outlets. This is because DirecTV would prefer to force

some

out-of-market baseball fans to switch their patronage to DirecTV, rather than obtain

all

the revenue from out-of-market fans, regardless of which "retailer" these fans patronize.

DirecTV's ability to obtain more revenue from those fans that remain with or switch to DirecTV

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

than it could by charging the full monopoly price for Extralnnings
TM

to all out-of-market fans is most likely due to their ability to obtain even greater super-competitive profits from those that switch.

Suppose one million fans would be willing to subscribe to Extralnnings
TM

at \$160 per season, but that 200,000 of these will not patronize DirecTV (perhaps they fear thunderstorms, prefer programming available only on cable, can't afford two systems in areas where local cable is unavailable, don't have a clear south-facing view on their property, must use the system subscribed by the landlord, etc.). That's \$32 million in lost revenue. The exclusive deal means that DirecTV plans on making this up by obtaining new customers from cable or DishNetwork. If 300,000 Extralnnings customers switch to DirecTV's Choice package (at \$480/yr) + Extralnnings
TM

, that's an additional \$144 million in revenue (from Choice, not MLB games, which these fans were already purchasing via cable or DishNetwork). If DirecTV's operational and programming costs in servicing the new customers was not well below \$144 million, this scheme wouldn't be profitable. Only the excess profits on the Choice package – which baseball fans are required to purchase as a condition of subscribing to Extralnnings
TM,

– is what allows DirecTV to profitably enter into an exclusive deal.

One other explanation is theoretically possible – that there are huge cost-saving efficiencies from an exclusive dealing arrangement. However, no one has, to date, seriously made this claim on behalf of MLB or DirecTV.

Summary of economic analysis

The foregoing analysis suggests that the MLB/DirecTV exclusive deal reflects the ability of these sellers to exploit baseball fans because of the lack of any substitute products, and thus impose a monopoly price and significantly reduce output. Out-of-market games will henceforth only be available on DirecTV, presumably at the monopoly price. The absence of alternative means of obtaining out-of-market games means millions of consumers will pay more. But it also means that output is substantially reduced, because of foregone purchases (all of which would be considerably above the marginal cost of production) from (i) expatriate fans of one particular team willing to pay a lower price to watch their favorite team but unwilling to pay for the Extralnnings package; (ii) avid fans who have other preferential reasons to prefer to continue to subscribe to cable or Dish Network; (iii) marginal customers of satellite programming, who otherwise prefer DirecTV's programming but decline to pay the "basic premium" price charged by DirecTV because it reflects in part the need to share profits with MLB. This is bad public policy. □ **Ways that legislation can protect consumers** There are a number of ways that existing or potential legislation could protect baseball fans against exploitation by inefficient

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

and anti-competitive broadcast agreements:

- Existing antitrust laws could be used to invalidate these unreasonable restraints of trade.
- Specific antitrust legislation could be enacted to facilitate this result.
- Regulatory legislation could minimize the excess profits that satellite and cable providers enjoy from their “basic premium” packages, or could directly prohibit the bundling essential to the exclusivity scheme by requiring “a la carte” pricing.
- Strategic legislation could also be introduced by leading members of this committee as a means of facilitating voluntary pro-consumer compliance by industry.

Existing antitrust enforcement As detailed below, even vigorous enforcement of the antitrust laws by the Justice Department would face significant obstacles to quick resolution in time to protect sports fans. Unfortunately, the record of the current Antitrust Division leadership does not lead to a confident prediction of such enforcement. The obstacles to private litigation to effectively protect consumers are even greater. For these reasons, reliance on existing law is unlikely to constitute an adequate public policy response by this Congress.

A government enforcement action should be able to rely on the precedents discussed above to establish that the horizontal restraint among MLB clubs is an unreasonable restraint of trade. The exclusive broadcast territories are neither necessary to promote competitive balance among member teams nor to prevent any efficiency-detering free riding. The only way in which a club’s sale of their games into another geographic market could harm competitive balance would be if the additional revenue generated from these out-of-market rights fees would enable the teams to acquire enough talent to enable them to dominate the league. This scenario is implausible for a number of reasons. There is no evidence that these fees would be significant enough to affect competitive balance. More important, there is no reason why the leagues could not share these revenues, as Major League Baseball has with teams whose games are carried nationwide via locally-based superstations.

Nor can the leagues, in this context, sensibly claim that the restraint is an intra-firm restraint among the “single entity” of the league, rather than the horizontal agreement among independent clubs. Because of the economics of rights sales, a single firm would sell all rights in all games that are going to be televised to the highest bidder, who could then re-sell the games to consumers in a price discriminating manner designed to yield the greatest revenue (noting again that the marginal costs of selling a game once it is being televised is virtually zero). The Extralnnings package is the only way that out-of-market fans can get games, not because this is DirecTV’s preference, but because it is the choice of the majority of MLB clubs. DirecTV would clearly be better off if it could price discriminate by selling the Extralnnings package to those with a demand for over 1,000 baseball games, and selling a smaller package of games (or even individual games on a pay-per-view basis) to its subscribers unwilling to pay for Extralnnings. Rather, individual games are unavailable to out-of-market fans, despite the potential for profitable sales, because transactions costs prevent owners from agreeing on how

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

to divide the spoils. As a result, the interest of the league-as-a-whole in maximizing revenues from television sales is subordinated to the interests of individual teams in protecting their own local broadcast rights and preventing rivals from attaining a competitive advantage from more successful out-of-market rights sales. This is not the “unity of interest” that the Supreme Court has required to exclude agreements among formally separate entities from review under section 1 of the Sherman Act.

17

Existing precedents with regard to tying arrangements might also support a claim that DirecTV’s practice of bundling ExtraInnings

TM

with its \$40/mo. Choice package is also unreasonable. However, there are several serious obstacles to successful government prosecution of such a lawsuit. First, MLB could claim that the judicially-created baseball exemption applies to broadcast restraints. Although good arguments can be made that the exemption does not apply,

18

the result is ultimately an uncertain question likely to require ultimate resolution, after years of litigation, by the Supreme Court. Second, although DirecTV’s bundling practices would appear to be unreasonable under existing precedents,

19

these precedents have come under criticism by commentators

20

and justices.

21

Moreover, current regulation of cable and satellite practices by the FCC might be held to preclude antitrust scrutiny of this behavior.

Private enforcement is even more problematic. The obstacles stated above pose major litigation risks that would deter private antitrust attorneys from commencing expensive litigation. Because the proposed exclusive deal is prospective, treble damage relief (and accompanying attorneys fees funded by the damage award) would not be available for that aspect of the challenge. My own experience as a public interest advocate has been that private firms are unlikely to view the grant of statutory attorneys fees provided for in the Clayton Act as a sufficient economic incentive to undertake the costs of uncertain litigation. In addition, private litigation on behalf of consumers who currently patronize DirecTV would have to confront complex issues that would arise in light of the contract-by-adhesion DirecTV requires all customers that provides for disputes to be arbitrated.

New antitrust legislation This Committee could defer to your Judiciary Committee colleagues, who could consider specific legislation that amended the Sports Broadcasting Act to prohibit the sort of bundling or exclusive dealing practices identified in this testimony. There is a long history of specific legislation enacted by Congress to outlaw specific anti-competitive

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

practices: indeed, the Clayton Act was passed to specifically outlaw tying arrangements arguably illegal under the Sherman Act, over the objections of former President William Howard Taft, who left the White House to accept a chaired professorship at Yale Law School and wrote a book arguing for the adequacy of the Sherman Act on this and other points.

22

Regulatory legislation

As Judge Richard Posner famously observed, a “firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to. And if it blunders and does adopt such a policy, market retribution will be swift.”

23

The corollary, of course, is that firms with market power can afford to disserve consumers and market retribution will not be swift.

Either expressly, or by delegation to the FCC, this Committee could craft legislation that recognizes that market retribution is not swift in either the market for out-of-market baseball games or the market for delivery of multi-channel video distribution. A variety of regulatory approaches might be considered. I would be pleased to continue to work with you and your staff if any of these are of particular interest:

- Listed Events Legislation: A variety of other countries have enacted legislation that specifically requires a variety of important sporting events to remain on free-to-air television, for the benefit of millions of consumers.
- “A La Carte” Pricing: Satellite and cable companies could be prohibited from requiring lengthy subscriptions to their “basic premium” packages as a condition of subscription to high-demand sport programming. The analysis above suggests that DirecTV would quickly lose its incentive to pay MLB for exclusive rights if cable subscribers could, in a secondary market, acquire DirecTV equipment and then simply subscribe to Extra Innings

TM

without having to pay \$40/mo. for Choice.

- Specifically Ban Sports Exclusivity: Unlike general delegations contained in the Sherman Act or the Federal Communications Act, Congress is free to write specific legislation to deal with specific industry problems. Based on the economic analysis summarized above, the Committee could conclude that copyright holders and their licensees can fully exploit their intellectual property rights by sale and re-sale and there is no legitimate justification (sharing in excess profits from limited retail competition is not legitimate) for exclusive agreements in this area.

24

Strategic behavior – by Major League Baseball and by the Senate Commerce Committee

Both business and political actors often behave strategically – they act in a way that may or may not further immediate short-run goals in order to achieve long-run objectives. Although MLB owners are rightly accused of being short-sighted and greedy in

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

some instances, there are many other occasions where MLB owners have decided that the long-term health of the National Pastime is more important. It is possible that this is one of those occasions: that MLB owners see a strong future in the development of The Baseball Channel, and the exclusive agreement with DirecTV is simply a negotiating strategy to persuade DishNetwork and cable companies to re-sell The Baseball Channel on favorable terms.

If market retribution were swift among cable and satellite programmers, this would not be a problem. If MLB's demands were not unreasonable, then so many consumers would shift to DirecTV that rival MVPDs would have to go along. If MLB's demands were unreasonable, then DirecTV would lose so much money that it would eventually back out. However, anyone inside the Beltway is familiar with the lack of swift retribution reflected in the lengthy negotiations that were required before millions of Capital-area baseball fans could obtain Washington Nationals local broadcasts on their stations. The FCC has already recognized that market retribution is not swift in a number of non-sports contexts involving cable mergers, requiring programmers and distributors to either reach agreement on terms or submit their unresolved disputes to binding commercial arbitration.

There are a variety of situations where public policy may require government intervention, but where the best solution would be a voluntary agreement among private parties rather than direct legislation. An excellent example of that technique was recently employed by this Committee, when under Senator McCain's chairmanship there were explicit overtures to MLB owners and players to agree on new procedures for steroid testing or face federal legislative intervention. The result was a voluntary deal that is probably superior to anything Congress could have done.

25

Likewise, if it appears that the best resolution of this controversy is voluntary agreement among MLB and the various programming distributors, perhaps this Committee could proceed strategically by threatening onerous legislation (barring collective sales of sports broadcasting rights to satellite and cable, mandating a la carte programming, authorizing FCC rate regulation of premium programming, etc.) unless the parties reach a voluntary agreement or agree to submit the matter to binding commercial arbitration.

Conclusion

The MLB/DirecTV exclusive deal is not like a facially-similar contract between Sears and Levi's. Rather, the deal reflects (1) cartel behavior by MLB clubs in refusing to sell out-of-market rights to their games except via Extralnnings

TM
on DirecTV and (2) a willingness of DirecTV to share the excess profits it enjoys from its Choice package with MLB. Millions of baseball fans who no longer live near their favorite teams are harmed by their inability to watch their teams' local broadcasts except via Extralnnings

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

TM
, and harmed particularly by being forced to do so via DirecTV. This Committee has a variety of arrows in its legislative quiver to protect consumers from this sort of exploitation.

RESTORING THE MARKET FOR OUT-OF-MARKET BASEBALL Testimony of Professor Stephen F. Ross

Professor of Law, The Dickinson School of Law

Director, Penn State Institute for Sports Law, Policy and Research

The Pennsylvania State University

Before the

Senate Committee on Commerce, Science and Transportation

March 27, 2007

EXECUTIVE SUMMARY

1) Although exclusive dealing agreements with retailers whom consumers can access for free can often be pro-competitive, the MLB/DirecTV deal threatens to harm a wide variety of consumers

- Fans who, for other reasons, are unable or unwilling to switch to DirecTV
- Fans who would prefer to get out-of-market games other than the entire ExtraInnings™ package

2) The agreement exploits significant departures from the free market

- MLB clubs agree to only telecast games in assigned territories, contrary to a 50-year old antitrust precedent
- MVPDs face insufficient competition, allowing them excess profits for their basic premium service

3) Economic analysis shows that ordinarily, DirecTV would want to re-sell ExtraInnings to its cable and satellite rivals at a high per-subscriber charge; the exclusive deal reflects a sharing of additional excess profits DirecTV will obtain by forcing consumers to switch to its Choice or

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

higher premium packages 4) Although the conduct is arguably illegal under the antitrust laws, a number of obstacles render litigation inadequate to protect consumers

5) Congress could, alternatively, consider:

- Regulatory legislation to outlaw specific sports programming practices that harm consumers
- Amendments to the Sports Broadcasting Act to specifically outlaw anti-consumer practices
- “Strategic” legislation onerous to the industry that would facilitate voluntary compliance

¹ Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961). ² *Id.* at 334. ³ Standard antitrust analysis properly focuses on whether a product or service faces competition from “reasonable substitutes” that will draw consumers if there is a small but significant increase in price or decrease in quality of the good or service in question. Courts have generally found that major sports are sufficiently unique in consumers’ hearts – baseball is, after all, the National Pastime – that a small increase in the price of watching a favorite baseball team will not send enough fans to the library or to cricket websites to render the move unprofitable. *See, e.g.,* National Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85 (1984) (college football is a market distinct from professional football or other forms of entertainment); International Boxing Club v. United States, 358 U.S. 242 (1959) (championship boxing is a market distinct from non-championship boxing).

Likewise, the issue here concerns quality telecasts to be displayed on television sets of increasing size and clarity. Although some fans may prefer the convenience of watching webcasts of out-of-market games on their computers, or others are willing to endure the significant reduction in picture quality when subscribing to mlb.com, these webcasts are not the sort of reasonable substitutes for ExtralInnings

TM

that either antitrust doctrine or public policy ought require.

4

United States v. National Football League, 116 F.Supp. 319 (E.D. Pa. 1953).

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

5

See, e.g.,
Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490 (W.D. Pa. 1938).

6

116 F.Supp. 319 (E.D. Pa. 1953).

7

National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984).

8

Chicago Professional Sports Ltd. v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992).

9

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

10

Columbia Broadcasting System, Inc. v. American Soc'y of Composers, Authors & Publishers, 620 F.2d 930 (2d Cir. 1980).

11

CBS v. Broadcast Music,
441 U.S. at 10-11,
citing
United States v. American Soc'y of Composers, Artists & Publishers, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

12

NCAA
, 468 U.S. at 107.

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

13

There are at least two recent examples of this phenomenon. In 1992, the English Premier League, having agreed to show 60 of its 380 matches exclusively on the BSkyB satellite, rejected BSkyB's offer to show 90 matches for a 50% increase in fees. At about the same time, the National Basketball Association succeeded in strictly limiting the very popular broadcasts of the Chicago Bulls featuring Michael Jordan, despite evidence that Bulls' broadcasts had minimal effects in other markets, refusing to copy MLB's practice of taxing superstition revenue.

14

David Harbord & Marco Ottaviani, "Contracts and Competition in the Pay-TV Market," London Bus. School Dep't of Economics Working Paper No. DP 2001/5, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=289334.

15

This phenomenon is known to economists as "double marginalization." Suppose the profit-maximizing price for ExtralnningTM

is \$160/year. (Any increase in price reduces demand, unless a product is essential to life. Thus, raising the price from \$150 to \$160 will cause some marginal consumers to discontinue patronage, but if the number is small enough, the increase is profitable. If 100 consumers refuse to go along with the increase, this would cost MLB/DirecTV \$15,000. But if a 10,000 consumers are willing to pay \$160, this is an additional \$100,000. At some point, the number of consumers discontinuing purchases outweighs the additional income, just short of that point is the profit-maximizing price.) If MLB sold rights on a per-subscriber basis, they would want to fix the price at \$160 minus DirecTV's costs. If these costs were \$5/subscriber, MLB would set the rights sale at \$155. However, this would leave DirecTV with no excess profits. DirecTV would rather get some excess profits, even at the expense of losing some customers. So DirecTV would be likely to charge \$170 or more, costing MLB some customers and some profit. These problems are avoided by a lump-sum sale.

16

Harbord & Ottaviani,
supra

, at 8. To the extent that there are strategic gains from raising rivals' cost, the incentive to re-sell is even stronger.

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

17

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

18

When the Supreme Court last revisited the issue in *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court explicitly rejected its original holding that baseball was not interstate commerce, instead re-affirming the exemption because of baseball's "unique characteristics and needs" and Congress' "positive inaction" in sustaining the judicial precedents. It is clear that baseball has no unique characteristics and needs with regard to broadcasting, a fact Congress recognized by including baseball as a sport covered by the *limited* exemption for package sales to free-to-air networks contained in the Sports Broadcasting Act. Congress' positive inaction with regard to the baseball exemption, upon which Justice Blackmun relied in *Flood*, related almost entirely to labor restraints. When Congress overturned that specific aspect of *Flood* in enacting the Curt Flood Act of 1995, it is clear that continuing legislative concern almost entirely related to protecting the unique characteristics and needs of minor league baseball, not broadcasting practices that MLB shares in common with the NBA and the NHL.

In addition, lower courts have suggested that the exemption applies only to the "business of baseball" and not to the "business of broadcasting." *Henderson Broad. Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982). Especially in light of courts' explicit recognition that MLB can lawfully require clubs to share revenues from rights sales, *Chicago Professional Sports Ltd. Partnership, supra*, 961 F.2d at 675, there is no reason why subjecting television agreements to standard antitrust analysis would compromise "the business of baseball."

19

The current Supreme Court doctrine is expressed in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Firms engaged in a substantial amount of interstate commerce may not force consumers to purchase a product, service, or copyright license as a condition of purchasing a more desired license, where the seller has "market power," the arrangement requires the purchase of two "separate products," and the tying is not necessary to introduce a new product or to ensure the reliable use of either. Applying this precedent, it is clear that DirecTV has market power in the sale of Extralnnings

TM

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross
Tuesday, 27 March 2007 04:32

, as there are no reasonable substitutes for out-of-market MLB games. Forcing purchasers of ExtralnningTM

to purchase the Choice package constitutes a tied sale, because there is distinct and separate consumer demand for both products. Finally, a there is no need to tie well-established programs in the Choice package with uniquely desirable MLB games in order to penetrate a market, and there are no reliability issues in subscribing to one or the other.

20

See, e.g.,
Robert Bork, *The Antitrust Paradox* 365-381 (1978).

21

See, e.g., *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 487 (Scalia, J., dissenting);

Hyde
, 466 U.S. at 32 (O'Connor, J., concurring).

22

William Howard Taft, *The Anti-Trust Act and the Supreme Court* (1914).

23

Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th
Cir. 1982).

24

This legislation would also prevent cable companies from aggressively competing in a consumer-harming way by acquiring their own exclusive sports programming rights and refusing to re-sell to satellite outlets.

Another example, of perhaps little interest to most Americans but of keen interest to millions, especially recent immigrants from south Asia or the United Kingdom, concerns the

Opening Statement: Stephen F. Ross on DirecTV Deal

Written by Stephen F. Ross

Tuesday, 27 March 2007 04:32

rights to satellite broadcasting of international cricket matches. Thus, DishNetwork obtained exclusive rights for the International Cricket Council's World Cup contests currently being played in the West Indies, while DirecTV obtained exclusive rights to a large number of international contests throughout the year. Devoted cricket fans need to either subscribe to both or forego the ability to watch these matches in their homes.

25

The substance of the agreement, and whether the agreement or proposed legislation accurately reflects the public interest in an appropriate balance between protecting (i) players' health, (ii) the integrity of the game from health-harming, performance-enhancing behavior, and (iii) privacy rights, is of course beyond the scope of this testimony as well as my scholarly expertise.