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Brody Shea

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Running a Different Route: How YouTube TV Plans to Avoid Antitrust
Violations
Brody Shea*

On December 22nd, 2022, the National Football League (“NFL”) and Google, who owns YouTube TV, reached a seven-year agreement costing \$2.5 billion annually for the NFL’s Sunday Ticket package of games.¹ With this deal, YouTube TV viewers, for an additional fee, will be permitted to stream most of the NFL games on Sunday next season, except for those that air on traditional television in their local markets.² Before this deal, DirecTV, the satellite TV provider, has retained the rights to NFL Sunday Ticket since the program’s inception in 1994.³ Switching from traditional cable television like DirecTV, to streaming services like YouTube TV is logical for the NFL because streaming, as of July 2022, now represents a 34.8% share of total television consumption in the United State, compared to cables 34.4% share.⁴

It’s more curious, however, that YouTube TV reached this deal with the NFL despite the pending class action litigation against DirecTV alleging that the Sunday Ticket package of games violates the Sherman Anti-Trust Act.⁵ The class action plaintiffs argued that the Sunday Ticket package prevents each distinct-NFL team from competing against one another for a

*J.D. Candidate, May 2024, St. Louis University School of Law

¹ Benjamin Mullin, Ken Belson, and Nico Grant, *YouTube Reaches Deal for N.F.L. Sunday Ticket*, THE N.Y. TIMES, (Dec. 22, 2022), <https://www.nytimes.com/2022/12/22/business/youtube-nfl-sunday-ticket.html>.

² *Id.*

³ Lillian Rizzo, *NFL ‘Sunday Ticket’ goes to YouTube in seven-year, \$2 billion annual deal*, CNBC, (Dec. 22, 2022), <https://www.cnbc.com/2022/12/22/nfl-sunday-ticket-youtube-tv.html>.

⁴ Daniel Arkin, *Streaming viewership overtakes cable TV for the first time*, NBC NEWS, (Aug. 18, 2022), <https://www.nbcnews.com/business/consumer/streaming-viewership-overtakes-cable-tv-first-time-rcna43704>.

⁵ *Supreme Court Petitioned to Review Anti-Trust Claim Involving NFL Sunday Ticket*, PACE INTELL. PROP., SPORTS AND ENT. L. F., (Mar. 23, 2020), <https://pipself.blogs.pace.edu/2020/03/23/supreme-court-petitioned-to-review-anti-trust-claim-involving-nfl-sunday-ticket/>.

larger market share.⁶ The putative class action has already survived a motion to dismiss in *In Re National Football League*, with the 9th Circuit holding that NFL Sunday Ticket subscribers plausibly alleged that NFL teams monopolized the football telecasts in violation of the Sherman Anti-Trust Act.⁷ In response, the NFL and DirecTV petitioned the U.S. Supreme Court to overturn the 9th Circuit's ruling, but the Supreme Court refused to hear arguments, effectively moving forward the lawsuit and increasing the likelihood of a settlement that would partially reimburse subscribers.⁸

The Sport's Broadcasting Act of 1961 ("SBA") is the best starting point in an examination of sports broadcasting law.⁹ In response to lobbying from professional sports leagues, Congress codified the SBA.

The antitrust laws, as defined in Section 1 of the [Sherman] Act ... shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league ... sells or otherwise transfers all or any part of the rights of such league's member clubs in the *sponsored telecasting* of the games ... engaged in by such clubs.¹⁰

As a result, the major U.S. sports broadcast market is dominated by CBS, NBC, FOX, and ABC because professional sports leagues are given the legal opportunity to pool together their broadcasting rights and sell them to these

⁶ *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1143 (9th Cir. 2019).

⁷ *Id.* at 1137.

⁸ Jan Wolfe, *U.S. Supreme Court rejects NFL, DirecTV appeal in TV package suit*, REUTERS, (Nov. 2, 2020), <https://www.reuters.com/article/usa-court-nfl-idINKBN27I1VH>.

⁹ George Bailey, *Streaming is the Name of the Game: Why Sports Leagues Should Adapt to Consumers and Follow Ad Dollars Towards Live Streaming*, 26 Jeffrey S. MOORAD SPORTS L.J. 323, 334 (2019).

¹⁰ 15 U.S.C. §1291.

network affiliates.¹¹ In 1961, the SBA ensured that professional sports teams who were less successful would have a broadcasting partner which created a competitive sports league.¹² Today, the SBA has been criticized as doing little more than enabling professional sports leagues the privilege of selling increasingly expensive pooled television rights to broadcast networks without fear of antitrust scrutiny.¹³ The SBA has not been updated since 1961, and critics have suggested an update is necessary to include today's media business models, which focus on cable, subscriber fees, and streaming.¹⁴

Sponsored telecasting likely does not apply to channels that charge a monthly subscription fee, such as DirecTV and YouTube TV. In *Shaw v. Dallas Cowboys Football Club, Ltd.*, the 3rd Circuit held that the phrase "sponsored telecasting" refers only to broadcasts which are financed by business enterprises in exchange for advertising time and transmitted free to the general public.¹⁵ Further, DirecTV and the NFL did not even argue on appeal that the SBA applies to satellite broadcasting and to the NFL-DirecTV Agreement.¹⁶

Therefore, DirecTV and YouTube TV likely will not benefit from the protection of the SBA, and will be subject to the Sherman Act. The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade, and any monopolization, attempted monopolization, or conspiracy or combination to monopolize."¹⁷ The current NFL Sunday Ticket may

¹¹ *Over the Top: The Future of Sport Broadcasting Business Models (Part 1/2)*, GLOB. SPORTS PARTNER, (May 16, 2018), <https://intelligence.globalsportsjobs.com/over-the-top-the-future-of-sport-broadcasting-business-models-part-1->.

¹² Thomas Francis Moran, *The Sports Broadcasting Act: Is an Update Needed?*, (2013) *Law School Student Scholarship*. 273, 279. https://scholarship.shu.edu/student_scholarship/273.

¹³ Stephen W. Ditmore, Brett Hutchins, *Privilege Over Innovation: Sports Broadcasting, Mobile Television and the Case of Aero*, 27 *Legal Aspects Sport* 3, 3 (2017).

¹⁴ *Id.* at 3-4.

¹⁵ *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3rd Cir. 1999).

¹⁶ *In re Nat'l Football League*, 933 F.3d at 1149.

¹⁷ *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

violate the Sherman Act because the NFL is preventing its teams from selling their out of market rights individually in favor of Sunday Ticket.¹⁸

If NFL Sunday Ticket was found to be in violation of the Sherman Act, each NFL team could make its own broadcasting arrangements and choose to contract with either satellite, internet carriers or competing networks.¹⁹ By allowing each NFL team this option, competition would increase because a greater number of telecast would be more accessible to more viewers at lower prices.²⁰ This option runs the risk of smaller market NFL teams from getting an even share of the broadcasting rights as compared to the higher market NFL teams.²¹ For example, if every football team had to make its own broadcasting deal, that could lead to subscriber not having access to particular games if there are not enough subscribers for their team in the area to make a deal worthwhile for that team.²²

YouTube TV likely has a plan to avoid similar litigation that is plaguing DirecTV. YouTube TV could offer single-team or even single-game options, as opposed to a subscriber buying all the out of market games at once.

This option would be similar to a recent broadcast rights dispute in the National Hockey League (“NHL”). NHL subscribers were forced to buy costly bundles of games for teams they did not support, instead of spending less to buy games of their preferred NHL team.²³ The NHL and subscribers

¹⁸ Andrew Bucholtz, *NFL Sunday Ticket Plaintiffs are looking for class certification*, AWFUL ANNOUNCING, (Aug. 8, 2022), <https://awfulannouncing.com/nfl/nfl-sunday-ticket-class-certification.html>.

¹⁹ *In re Nat'l Football League*, 933 F.3d at 1149.

²⁰ *Id.*

²¹ Bucholtz, *supra* note 18.

²² *Id.*

²³ *NHL, broadcasters settle lawsuit over TV blackouts*, YAHOO SPORTS, (June 11, 2015), https://sports.yahoo.com/news/nhl-broadcasters-settle-lawsuit-over-tv-blackouts-202943391--nhl.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAALuRCs4GYb18jDbN0hA2g5d3fFeolWE039lvCeeIzVNU8NkAjivp3zQhTXhVyGxIL6UEronioWb47p3YC53C--WdkZHMxU4tEFwdaKLRpHx-

settled the class action, enabling subscribers to buy single team packages for at least 20 percent below the cost of bundled packages, after a United States District Judge Shira Scheindlin determined the class could pursue antitrust claims as a group.²⁴

While YouTube TV and their new deal with NFL Sunday Ticket will likely not be protected by the SBA, YouTube TV has the benefit of learning from the mistakes of DirecTV and other professional sports leagues bundles that required subscribers to buy all out of market games to their own detriment. By providing subscriber's more options to watch their preferred sports teams, YouTube TV will likely not violate the Sherman Act.

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²⁴ Laumann v. National Hockey League, 907 F.Supp.2d 465, 492 (S.D.N.Y. 2012).