

# The NFL Network Versus Cable Providers: Throwing a Penalty Flag on the Fans

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But compromise, if not the spice of life, is its solidity. It is what makes nations great and marriages happy.<sup>1</sup>

## INTRODUCTION

During economic crises, most businesses feel a pinch.<sup>2</sup> One of the very few businesses that appear unaffected is professional sports.<sup>3</sup> Professional football—the American version—is one of the most lucrative professional sports enterprises in the world.<sup>4</sup> On any given Monday night during the football season, it is likely more Americans are watching *Monday Night Football* than any other sporting event on television.<sup>5</sup>

“The NFL Network was launched in 2003 as a vehicle to broadcast films, clips, and thousands of hours of footage owned by the NFL.”<sup>6</sup> In other words, the NFL Network is a “premium” football channel.<sup>7</sup> Football is already widely watched, and the NFL Network tries to attract the huge fan base.<sup>8</sup>

So what exactly is the NFL Network? In its words: “It is every football fan’s dream. Seven days a week, 24 hours a day, 365 days a year, a television network solely devoted to the most popular sport in

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<sup>1</sup> PHYLLIS MCGINLEY, *A SHORT WALK FROM THE STATION 13* (1951).

<sup>2</sup> See Press Release, U.S. Post Office, Madison Post Office Announces Route Changes (Mar. 9, 2009), available at <http://www.nbc15.com/home/headlines/40964297.html> (“The current economic downturn has affected every business in the country.”).

<sup>3</sup> See Matt Jaffe, *Is the Sports Business Recession Proof?*, ABC NEWS.COM, Mar 5, 2009, <http://abcnews.go.com/Business/Economy/story?id=7010282&page=1> (noting that even as off-the-field layoffs continue, players are recording multi-million dollar contract deals).

<sup>4</sup> See, e.g., MARK YOST, *TAILGATING, SACKS AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY 1* (2006) (noting that league revenues at the start of the 2005 season were \$5.2 billion; additionally, merchandising was worth \$3.4 billion, and the League had just entered four new television contracts worth an estimated \$3.75 billion per year). See also MICHAEL ORIARD, *BRAND NFL 166* (2007) (noting that by the winter of 2005–2006, league revenues were close to \$6.0 billion).

<sup>5</sup> See, e.g., Street & Smith’s Sports Business Daily, *Final Nielsen Ratings from Recent Sports Events*, Sept. 26, 2008, <http://www.sportsbusinessdaily.com/article/124293> (showing that televised NFL events had a larger market share and more viewers than any other sporting events for the week of September 20, 2008, and noting that the lowest rated football game in recent history (23.4 HH Nielsen rating) easily outperformed one of the highest rated New York Mets games in recent history (5.73 HH Nielsen rating)). *Monday Night Football* had 18.6 million viewers compared with 3.07 million viewers for a New York Yankees versus Baltimore Orioles game. *Id.* One explanation is that the coverage area correlates directly with viewership, but NFL games appear to draw more viewers per capita regardless.

<sup>6</sup> GIL FRIED, TIMOTHY J. SHAPIRO & TIMOTHY D. DESCHRIEVER, *SPORT FINANCE* 259 (2d ed. 2007).

<sup>7</sup> Wilton D. Alston, *The NFL Network: You’re Kidding, Right?*, STRIKE THE ROOT, Dec. 12, 2007, <http://www.strike-the-root.com/72/alston/alston4.html>.

<sup>8</sup> Street & Smith’s, *supra* note 5.

America, professional football.”<sup>9</sup> While that is not entirely true—after all, commercials do take up some airtime—the Network is indeed devoted to “All Things Football.”<sup>10</sup>

The “NFL Network launched on Nov. 4, 2003,”<sup>11</sup> and within two years, expanded its viewership rapidly.<sup>12</sup> According to the Network, “Both AT&T and Verizon now offer video service and make NFL Network available as part of their expanded basic package. NFL Network in 24 months reached subscriber totals on par with other successful networks in their fifth year.”<sup>13</sup> According to its own data, the Network has been successful in its short history.<sup>14</sup> “Counting all cable channels launched, the average subscriber numbers at the end of five years is 30.3 million. NFL Network reached this number in less than two years.”<sup>15</sup> But the success has not been without conflict. And a battle with the cable companies wages on in court.

As will be discussed in more detail later in this Note, the Network and the cable companies have been battling over carriage and contract issues.<sup>16</sup> The most contentious relationship appears to be between the Network and Comcast Cable.<sup>17</sup>

The dispute between the Network and Comcast grows increasingly bitter. The NFL<sup>18</sup> has even set up a webpage where fans can contact government officials and complain about cable companies, like Comcast, that do not offer NFL Network as part of basic or expanded basic programming.<sup>19</sup> The page also assists fans in switching to a programming provider that provides the NFL Network free of additional charge.<sup>20</sup> The page provides links to recent news articles concerning the NFL Network, and numerous other links that arguably vilify the cable industry and downplay the NFL’s role in the lack of carriage.<sup>21</sup> Just visiting the page could make football fans a little peeved with the cable provider who fails to provide the NFL Network free of charge.

But is the NFL Network really doing all it can to bring its programming to viewers? The Network would certainly like us to think so. But the truth is the NFL charges certain cable providers a substantial fee to receive its programming.<sup>22</sup> Granted, it is not an astronomical fee,<sup>23</sup> but cable providers

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<sup>9</sup> NFL.com, *Inside the NFL Network*, <http://www.nfl.com/nflnetwork/about> (last visited Mar. 6, 2009).

<sup>10</sup> See e.g., Curtis Eichelberger, *NFL Network Expanding Beyond Pro Football to College, Preps*, NORTHWEST HERALD (Ill.), July 17, 2007, <http://www.nwherald.com/articles/2007/07/11/sports/nfl/doc4694c3865e8c9364750208.txt> (Charles Coplin, vice president of programming for the NFL Network, commenting that “the college preview show is an extension of the network’s ‘All Things Football’ mantra and a harbinger of its expansion into college and high school programming”).

<sup>11</sup> NFL.com, *supra* note 9.

<sup>12</sup> NFL.com, *About NFL Network*, <http://www.nfl.com/nflnetwork/fastfact> (last visited Mar. 6, 2009).

<sup>13</sup> *Id.*

<sup>14</sup> NFL.com, *supra* note 9.

<sup>15</sup> NFL.com, *supra* note 12.

<sup>16</sup> See discussion *infra* Part I.C.

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

<sup>18</sup> Throughout this Note, textual references to “NFL” should be taken to refer to NFL Enterprises, LLC—the parent company of the NFL Network—unless otherwise indicated.

<sup>19</sup> NFL Enterprises, LLC, *I Want My NFL Network!* <http://iwantnflnetwork.com/> (last visited Mar. 6, 2009).

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

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

<sup>22</sup> See Shira Springer, *Pressure from Fans, Legislators got NFL to Act*, BOSTON.COM, Dec. 27, 2007, [http://www.boston.com/sports/football/patriots/articles/2007/12/27/pressure\\_from\\_fans\\_legislators\\_got\\_nfl\\_to\\_act/](http://www.boston.com/sports/football/patriots/articles/2007/12/27/pressure_from_fans_legislators_got_nfl_to_act/) (noting that the NFL Network charges cable companies about seventy cents per subscriber for the service); Alston, *supra* note 7 (noting that the fee, estimated at eighty cents per customer, would make the NFL Network “the 5th most expensive cable channel out of the over 150 that currently exist”).

are not likely to provide something they get charged for at no cost to the consumer—Economics 101, my friends.<sup>24</sup> Unlike HBO or Showtime, whose costs are passed on to consumers who opt to receive the programming, the NFL Network expects to be carried on basic tiers and to be paid a hefty per-subscriber fee.<sup>25</sup>

The NFL Network is the exclusive provider for certain games,<sup>26</sup> and based on where “home” games are, the Network lets basic broadcast channels in “home markets” carry the games.<sup>27</sup> But “home markets” connotes much broader coverage than fans actually realize.<sup>28</sup>

During late 2007, when the New England Patriots were vying “for a historic perfect regular season,” fans and legislators were able to pressure the NFL into providing one of the team’s final games against the New York Giants on free broadcast television.<sup>29</sup> According to the NFL, “home market” ordinarily includes only the team’s associated city, so the game mentioned above would only have been broadcast on the NFL Network and in the teams’ “home cities” of New York and Boston.<sup>30</sup> Although fans and legislators were successful in pressuring the NFL to relinquish its control for that one game, the NFL had indicated that this would not happen again.<sup>31</sup> The basic thrust of the NFL’s position is that the

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<sup>23</sup> Springer, *supra* note 22.

<sup>24</sup> See, e.g., HENRY CLAY, *ECONOMICS: AN INTRODUCTION FOR THE GENERAL READER* 113 (1920) (explaining the basic supply and demand dichotomy).

<sup>25</sup> See Alston, *supra* note 7:

The league not only wants to have its own cable network, it wants to be paid \$0.80 per cable subscriber. That amount—according to a recent USA Today piece—would make the NFL Network the 5th most expensive cable channel out of the over 150 that currently exist. However, here’s the real “kicker”—pardon the pun—the NFL wants cable suppliers to package the NFL network in their normal offerings.

*Id.*

<sup>26</sup> See, e.g., Danielle Leigh, *Broncos Game Limited to NFL Network*, KXRM FOX21.COM, Nov. 8, 2008, [http://www.kxrm.com/news/news\\_story.aspx?id=219168](http://www.kxrm.com/news/news_story.aspx?id=219168) (explaining that the NFL Network has exclusivity over certain games during the football season).

<sup>27</sup> *Id.*

<sup>28</sup> See *id.* (Denver is the only “home market” for the Broncos); John Eggerton, *Vermont Legislators ask NFL to Widen Market*, BROADCASTING & CABLE, Dec. 17, 2007, <http://www.broadcastingcable.com/article/CA6513390.html> (explaining that Massachusetts and Vermont Legislators had asked the NFL to expand coverage of what they call the NFL’s “unduly narrow” home-market definition).

<sup>29</sup> See Springer, *supra* note 22 (noting that the NFL had agreed to “an unprecedented three-way (NFL Network, CBS, NBC) national simulcast of the game”). Interestingly, this event led EchoStar, the parent company of Dish Network, to drop the NFL Network to a lower tier. Linda Moss, *Judge: Amended Dish Carriage Deal Lead [sic] to Live Game Package for NFL Network*, MULTICHANNEL NEWS, Jan. 16, 2009, [http://www.multichannel.com/article/162263-](http://www.multichannel.com/article/162263-Judge_Amended_Dish_Carriage_Deal_Lead_To_Live_Game_Package_for_NFL_Network.php)

[http://www.multichannel.com/article/162263-Judge\\_Amended\\_Dish\\_Carriage\\_Deal\\_Lead\\_To\\_Live\\_Game\\_Package\\_for\\_NFL\\_Network.php](http://www.multichannel.com/article/162263-Judge_Amended_Dish_Carriage_Deal_Lead_To_Live_Game_Package_for_NFL_Network.php). This meant the Network lost about four million subscribers. *Id.*

<sup>30</sup> See Letter from Christopher Dodd (D-Conn.) and five other U.S. Sens. and Cong. Reps. to Roger Goodell, Comm’r, Nat’l Football League, Dec. 19, 2007, *available at* [http://courtney.house.gov/UploadedFiles/NFL\\_Letter.pdf](http://courtney.house.gov/UploadedFiles/NFL_Letter.pdf) (noting that Patriot fans in Boston and Giants fans in New York City would be able to view the game, but Connecticut fans of either team would not be able to without subscribing to the NFL Network).

<sup>31</sup> Greg Bishop, *In Letter, Goodell Blames Cable Operators for Impasse*, N.Y. TIMES, Nov. 5, 2008, at B18, *available at* <http://www.nytimes.com/2008/11/05/sports/football/05nfl.html>.

cable companies are to blame for limited coverage because the cable providers refuse to carry the network on basic or expanded basic tiers.<sup>32</sup>

This Note proposes that the NFL Network work with the cable companies in order to provide coverage to consumers who choose to opt-in. In order to provide wide coverage, the cable companies need not offer the Network for free, but could implement a reasonable per-customer surcharge for NFL Network access based on the number of subscribers who opt to receive the service. Because the NFL charges seventy to eighty cents per subscriber, the proposed solution places less of a burden on consumers who are not interested in the NFL Network. If the NFL Network is placed on basic cable, then consumers—many who might have not the least interest in football or the NFL Network—will have to pay for the network, whether that want it or not. By placing a reasonable surcharge on NFL Network service—as opposed to including it on basic cable—the cable companies will be able to provide more personalized service without having to transfer unwanted costs to subscribers. People who want just the NFL Network in addition to their basic cable would be able to get it without paying for an entire sports package. Similarly, the NFL Network can also be included—as it currently is by some providers—in a sports package for those who want extensive sports coverage.

Part I of this article discusses the NFL's exemption from antitrust law as far as selling pooled rights to broadcasters and analyzes the NFL's contracts with Comcast, which have been one of the primary sources of the controversy between the parties. Part I also discusses the history and current state of the NFL's litigation with the cable companies to provide the reader with useful background. Part II develops the reader's understanding of the issues by discussing the various social and economic considerations at play, and some of the external pressures—from consumers, legislators, and commentators—that have played a part in this controversy. Part III suggests possible solutions and weighs the strengths and weaknesses of each approach.

## I. BACKGROUND

### A. *The NFL's Unique Position*

Like many businessmen of genius he learned that free competition was wasteful, monopoly efficient. And so he simply set about achieving that efficient monopoly.<sup>33</sup>

Although the quote beginning this section is from a fictional work about a Mafia family, some have argued that the NFL is a state-sanctioned or even an illegal monopoly.<sup>34</sup> Section One of the Sherman Act<sup>35</sup> prohibits any “contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . .”<sup>36</sup> “The Sherman Act forms the basis of our antitrust laws and contains . . . basic prohibitions against monopoly and monopolization.”<sup>37</sup> At first blush, it might seem that an agreement between several professional sports teams to pool their broadcast rights and sell those rights to the highest bidder is precisely the kind of restraint on trade that the Sherman Act prohibits. But such is not the case.

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<sup>32</sup> *Id.*

<sup>33</sup> MARIO PUZO, *THE GODFATHER* 213 (1969).

<sup>34</sup> See Sanjay Josè Mulick, *Browns to Baltimore: Franchise Free Agency and the new Economics of the NFL*, 7 MARQ. SPORTS L. J. 1, 25 (1996) (“The reason the professional football teams exert such inordinate leverage over cities today is because the NFL is a monopoly, a monopoly sanctioned by Congress.”); John A. Gray & Stephen J.K. Walters, *Is the NFL an Illegal Monopoly?*, 66 U. DET. L. REV. 5, 30–32 (1988–89) (discussing the NFL's monopoly-like power and accompanying arguments, but concluding that the NFL is not an illegal monopoly).

<sup>35</sup> 15 U.S.C. § 1 (2006).

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

<sup>37</sup> STANLEY EUGENE BOYLE, *THE ARTIFICIAL RUBBER INDUSTRY IN THE UNITED STATES* 235 (1959).

Under the Sports Broadcasting Act of 1961<sup>38</sup> and the 1966 AFL–NFL Merger Act,<sup>39</sup> the NFL can claim an exemption to antitrust law when it sells “package deals to broadcasting companies for the exclusive telecast or transmission of league games.”<sup>40</sup> This puts the NFL (and other professional sports leagues) in a truly unique and enviable position. One commentator has argued the Sports Broadcasting Act is no more than “special interest legislation meant to protect the professional sports leagues for which it was passed.”<sup>41</sup>

The Sports Broadcasting Act was Congress’s response to a federal district court’s rulings in two cases that, for a short-lived period, would have subjected the NFL’s pooling of broadcast rights to antitrust law.<sup>42</sup> The case that set the stage was decided in 1953 by Judge Alan K. Grim of the United States District Court for the Eastern District of Pennsylvania, and “allowed contractual restriction on the telecasting of games into a member club’s ‘home territory’ when that team played at home.”<sup>43</sup> Eight years later, expanding on his 1953 decision, Judge Grim ruled that the NFL “was prohibited from entering into an agreement to sell the pooled rights of its member clubs.”<sup>44</sup> Judge Grim’s ruling invalidated a contract negotiated by newly-elected NFL commissioner Alvin Rozelle that “eliminated television competition among NFL teams and, instead, divided television income equally among league members.”<sup>45</sup>

“The NFL quickly appealed to Congress for legislation to negate Judge Grim’s antitrust ruling.”<sup>46</sup> Congress was compliant, and quickly passed the Sports Broadcasting Act of 1961.<sup>47</sup> The Act gives the NFL and other professional sports leagues a taste of the antitrust exemption that Major League Baseball has enjoyed since 1922.<sup>48</sup>

Some of the congressmen who passed the Act may have thought they were helping to protect collegiate sports because the Act “prohibited the pros from playing on Friday night and Saturday afternoon, the traditional times for college football.”<sup>49</sup> This meant, theoretically, that the NFL’s televised games would not detract from the collegiate fan base.<sup>50</sup> Although the restriction on game times may have softened the effect of the “legal television monopoly for professional football” that the Act created, most agree that the Act was “legislation written for the benefit of pro football . . . .”<sup>51</sup>

Based on his interpretation of legislative intent at the time the Sports Broadcasting Act was passed, Stephen F. Ross, a leading sports law and antitrust scholar, surmises that “Congress acted to

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<sup>38</sup> 15 U.S.C. §§ 1291–95 (2006).

<sup>39</sup> *Id.* § 1291.

<sup>40</sup> David L. Anderson, *Sports Broadcasting Act: Calling It What It is—Special Interest Legislation*, 17 HASTINGS COMM. & ENT. L.J. 945, 946 (1995).

<sup>41</sup> *Id.* at 947.

<sup>42</sup> RONALD A. SMITH, *PLAY-BY-PLAY: RADIO, TELEVISION, AND BIG-TIME COLLEGE SPORT* 95 (2001) (discussing the events leading to the Sports Broadcasting Act).

<sup>43</sup> Anderson, *Sports Broadcasting*, *supra* note 40, at 946 (quoting *United States v. Nat’l Football League*, 116 F. Supp. 319, 325 (E.D. Pa. 1953)).

<sup>44</sup> *Id.* at 946 (citing *United States v. Nat’l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961)).

<sup>45</sup> SMITH, *supra* note 42, at 95.

<sup>46</sup> *Id.* at 195–96.

<sup>47</sup> 15 U.S.C. §§ 1291–95 (2006). SMITH, *supra* note 42, at 95.

<sup>48</sup> *See Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Base Ball Clubs*, 259 U.S. 200, 209 (1922) (holding that baseball games are not interstate “trade of commerce in the commonly accepted use of those words” and thus not subject to antitrust law).

<sup>49</sup> SMITH, *supra* note 42, at 96.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* *See also* Anderson, *supra* note 40, at 946.

promote, not restrict, viewership of games—especially the games fans care about most, those of their local teams.”<sup>52</sup> From this premise, Ross argues that the Act was intended to apply to over-the-air broadcast television, and that pooling contracts between sports leagues and cable channels should not receive an automatic exemption under the Act, but should be subject to rule-of-reason analysis.<sup>53</sup> In other words, a pooling contract, such as the type the NFL makes with various entities to televise its games, would be exempted from antitrust law only if it effectively increased viewership.

While Ross’s analysis certainly has merit, it has not been adopted generally.<sup>54</sup> The rule remains that a professional sports league may pool its teams’ broadcasting rights and sell those exclusive rights to the highest bidders.<sup>55</sup> In this regard, the NFL has a unique bargaining chip—it holds a product in high demand and it is apparently the only entity that can sell it. Thanks to the Sports Broadcasting Act of 1961 and the 1966 AFL–NFL Merger Act, what might otherwise be an illegal monopoly is a perfectly lawful business.

### ***B. The Contracts***

On the road from the City of Skepticism, I had to pass through the Valley of Ambiguity.<sup>56</sup>

The NFL’s contracts with Comcast should serve as something of a cautionary tale. As most people familiar with contract law know, “different standards in different agreements can create a problem.”<sup>57</sup> And create a problem they will—especially when the parties have different ideas about what provisions constitute the agreement.

The NFL approached Comcast in 2004 “with an offer which culminated in two letter agreements, both entered on August 11, 2004.”<sup>58</sup> The two letter contracts—an “Out-of-Market Package Letter of Understanding” (Letter of Understanding) and an “NFL Network Affiliation Agreement” (Affiliation Agreement)—were not necessarily straightforward.<sup>59</sup> The two agreements dealt “with both the distribution of the NFL Network by Comcast, and Comcast’s potential rights to negotiate to acquire telecast rights to live football games.”<sup>60</sup>

The Affiliation Agreement contained a provision arguably allowing Comcast to place the NFL Network on a sports tier.<sup>61</sup> The relevant paragraph stated that if the parties did not reach an agreement

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<sup>52</sup> Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 469 (1990).

<sup>53</sup> *Id.* at 476–82.

<sup>54</sup> Only one case has cited Ross’s article favorably, and that case was reversed within a year: *Postema v. Nat’l League of Prof’l Baseball Clubs*, 799 F. Supp. 1475 (1992), *rev’d*, 998 F.2d 60 (1993).

<sup>55</sup> See *U.S. Football League v. Nat’l Football League*, 634 F. Supp. 1155, 1163 (S.D.N.Y. 1986) (discussing the Sports Broadcasting Act’s legislative intent and finding that the NFL can sell pooled rights to more than one broadcaster without violating federal antitrust law).

<sup>56</sup> ADAM SMITH, *POWERS OF MIND* 207 (1976).

<sup>57</sup> TINA L. STARK, *DRAFTING CONTRACTS* 253 (2007).

<sup>58</sup> *NFL Enters., LLC v. Comcast Cable Commc’ns, LLC*, No. 603496/09, 2007 WL 1299412, \*1 (N.Y. Sup. Ct., N.Y. Cty., May 4, 2007) (unpublished decision), *aff’d in part, modified in part*, 851 N.Y.S.2d 551 (N.Y. App. Div. 2008), available at [http://decisions.courts.state.ny.us/fcas/fcas\\_docs/2007may/3006034692006002sciv.pdf](http://decisions.courts.state.ny.us/fcas/fcas_docs/2007may/3006034692006002sciv.pdf).

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

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

<sup>61</sup> *Id.* The relevant provision in Paragraph Three states:

In the event that [Comcast] or a Comcast Company does not reach an agreement with [NFL] or an NFL Company concerning carriage of (i) any package of live, out-of-market regular season NFL games (each such package, an “Out-of-Market Package”) or (ii) any package of live, nationally-

“on or before July 31, 2006,” then Comcast would not be obligated to distribute the NFL Network on a basic tier, and could distribute the NFL Network on a premium tier.<sup>62</sup> Paragraph Five of the Letter of Understanding contemplated an agreement where Comcast would carry the NFL Network on a per-customer surcharge basis.<sup>63</sup>

Comcast argued that, at the time of the agreements, the NFL Network had “limited commercial appeal.”<sup>64</sup> However, Comcast saw the opportunity to broadcast live NFL games as “extremely valuable, as only broadcasters . . . , ESPN and DirecTV, owned such rights.”<sup>65</sup> Comcast maintained that the Affiliation Agreement was intended to reward Comcast for its “help in ‘launching’ the NFL Network.”<sup>66</sup>

After the two letter agreements were executed, the parties “commenced negotiations to permit” one of Comcast’s channels to broadcast “a package of live, regular season[ ] NFL games.”<sup>67</sup> The parties never reached an agreement and, “in January 2006, NFL licensed the games package to its own NFL Network.”<sup>68</sup> Although the parties were not able to come to an agreement that would permit Comcast to broadcast games on a Comcast-owned channel, they continued to negotiate.<sup>69</sup>

“On June 15, 2006, the NFL sent Comcast a letter” offering to license an NFL Network games package to Comcast on a per-customer surcharge basis.<sup>70</sup> The letter included a thirty-day expiration period, and Comcast asked for an extension to consider the offer.<sup>71</sup> The NFL agreed to the extension in a July 14, 2006, letter, noting that “[a]ll terms, conditions and definitions in the Affiliation Agreement and the June 1, 2006 Offer letter remain in effect.”<sup>72</sup> Comcast accepted the offer on July 28, 2006, and both parties appeared to understand that the terms and conditions of the Affiliation Agreement would “remain in full force and effect.”<sup>73</sup>

Essentially, Comcast argued that the Affiliation Agreement must be read to include the Letter of Understanding, and Paragraph Five of the Letter contemplated a separate deal from that contemplated by paragraph three of the Affiliation Agreement; therefore, Comcast was not obligated to distribute the NFL Network on a high-penetrating tier.<sup>74</sup> The NFL basically argued that the agreement on July 28, 2006, rendered the exception in Paragraph Three void because the parties had come to an agreement on one of

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telecast NFL games (each such package, an “Additional Cable Package”) on or before July 31, 2006, then:

(a) [Comcast] shall not be obligated to distribute the [NFL Network] on D2 (or any higher-penetrating level of service) on any System, and may distribute [the NFL Network] on any System as part of any tier, package, or level of service (including a Sports Tier) . . . .

*Id.* (alterations in original).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*2.

<sup>64</sup> *See id.* (quoting Comcast brief at 8).

<sup>65</sup> *See id.* (omission is simply a parenthetical listing of broadcasters, i.e., ABC, CBS, and Fox).

<sup>66</sup> *See id.* (quoting Comcast brief at 8).

<sup>67</sup> *Id.* at \*2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

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

<sup>71</sup> *Id.* at \*2–3.

<sup>72</sup> *See id.* (quoting Carroll Affidavit, Ex. 7) (alteration in original).

<sup>73</sup> *See id.* (quoting Carroll Affidavit, Ex. 9).

<sup>74</sup> *Id.* at \*3–4.

the conditions contemplated before the deadline in the clause.<sup>75</sup> Perhaps this was a situation where one of those “grammatical abominations”<sup>76</sup> like “and/or” could have saved the parties a lot of time and money.

### *C. The Litigation and the FCC*

Litigation: A machine which you go into as a pig and come out of as a sausage.<sup>77</sup>

Like sausage, the litigation between the NFL Network and cable companies is a little messy. First, the NFL sued Comcast in New York state court in 2006 when Comcast placed the NFL Network on a sports tier.<sup>78</sup> Comcast moved—and the NFL cross-moved—for summary judgment.<sup>79</sup> In an unpublished decision, New York Supreme Court<sup>80</sup> judge Bernard J. Fried granted summary judgment for Comcast and denied the NFL’s cross-motion.<sup>81</sup> Judge Fried found Comcast’s argument more persuasive, and ruled that the two letter agreements, because they contained similar language and were entered into on the same day, “must be read as one agreement” as a matter of law.<sup>82</sup>

Further, Judge Fried found that the language in Paragraph Three<sup>83</sup> contemplated an agreement for carriage of NFL games by Comcast on a Comcast-owned channel, not carriage of the NFL Network.<sup>84</sup> Judge Fried did “not find any ambiguity in the various agreements.”<sup>85</sup> Thus, Judge Fried held that the carriage agreement was made under paragraph five of the Letter of Understanding and that no agreement contemplated by Paragraph Three of the Affiliation Agreement was ever made.<sup>86</sup> Comcast gains five yards—second down.

The NFL immediately appealed.<sup>87</sup> In contrast to Judge Fried’s findings, the Appellate Division of the New York Supreme Court<sup>88</sup> found that the agreements were “ambiguous with respect to the scope of the tiering provision and that neither party ha[d] established a definitive interpretation as a matter of law.”<sup>89</sup>

Again, the NFL argued that the July 28, 2006, agreement fell “within the class of agreements that extinguish Comcast’s tiering rights” under the Affiliation Agreement.<sup>90</sup> Comcast maintained that the two

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<sup>75</sup> See *id.* (outlining Comcast’s and the NFL’s basic arguments). See also text accompanying note 61 (text of the relevant paragraphs as altered by the trial court).

<sup>76</sup> BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 1.80 (2d ed. 2006).

<sup>77</sup> See ANTHONY L. DEWITT, *THE RESPIRATORY THERAPIST’S LEGAL ANSWER BOOK* 325 (2005) (quoting Ambrose Bierce, 20th Century American author and satirist).

<sup>78</sup> *NFL Enters.*, 2007 WL 1299412 at \*1.

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

<sup>80</sup> Lest there be any confusion, New York’s general civil trial courts are “Supreme Courts,” its intermediate appeals courts are “Appellate Terms of the Supreme Courts, 1st & 2nd Departments,” followed by “Appellate Divisions of the Supreme Courts.” New York’s highest court is the “Court of Appeals.” N.Y. State Unified Court System, *Court Structure*, <http://www.courts.state.ny.us/courts/structure.shtml> (last visited Mar. 6, 2009).

<sup>81</sup> *NFL Enters.*, 2007 WL 1299412, at \*7.

<sup>82</sup> *Id.* at \*6.

<sup>83</sup> *Id.* at \*1. See also text of note 61, *supra* (text of relevant paragraphs of the Affiliation Agreement).

<sup>84</sup> *NFL Enters.*, 2007 WL 1299412 at \*6.

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

<sup>86</sup> See *id.* (noting that “there is nothing to indicate that Paragraph 3 is meant to incorporate agreement under Paragraph 5”).

<sup>87</sup> *NFL Enters., LLC v. Comcast Cable Commc’ns, LLC* (*NFL Enters.* 2), 851 N.Y.S.2d 551 (N.Y. App. Div. 2008).

<sup>88</sup> See *supra* note 80. (N.Y. Court System).

<sup>89</sup> *NFL Enters.* 2, 851 N.Y.S.2d at 551–52.

<sup>90</sup> *Id.* at 554.



letter agreements must be read together.<sup>91</sup> The court found neither argument persuasive.<sup>92</sup> The court found the two agreements “substantively different” and noted “obvious textual inconsistency” between the Affiliation Agreement and the Letter of Understanding.<sup>93</sup> The court noted that while Paragraph Five of the Letter of Understanding contemplated a deal for broadcasting on a “Comcast-owned network,” paragraph three of the Affiliation Agreement “include[d] no such limitation.”<sup>94</sup> The court modified the judgment on the law and remanded the case to Judge Fried for further proceedings.<sup>95</sup> As of this writing, the case is in mediation.<sup>96</sup>

In the meantime, Comcast sued the NFL in New York state court for breach of contract.<sup>97</sup> Comcast alleged that “the NFL has been encouraging its customers to drop its service, essentially ‘destroying’ Comcast’s right to put the channel on the sports tier, which the NFL agreed to in its contract.”<sup>98</sup> As noted above, whether the parties actually agreed to this remains in dispute.<sup>99</sup> Comcast also cited mass e-mailings that the NFL Network sent out encouraging consumers to switch from Comcast to cable providers that provide the network for free.<sup>100</sup> This case is also pending.<sup>101</sup>

During the New York state court proceedings, the NFL also brought a complaint against Comcast with the Federal Communications Commission (FCC).<sup>102</sup> The NFL alleged that Comcast: (1) discriminated against the NFL Network in favor of its own channels in violation of FCC rules,<sup>103</sup> and (2) “required a financial interest in the NFL’s programming as a condition for carriage of the NFL Network, in violation of” FCC rules.<sup>104</sup> Although Comcast argued that the case should be dismissed on four procedural grounds,<sup>105</sup> the FCC rejected the procedural arguments and found that the NFL had presented

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<sup>91</sup> *Id.* at 555.

<sup>92</sup> *Id.* at 555–57 (discussing the parties’ claims).

<sup>93</sup> *Id.* at 555.

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

<sup>95</sup> *Id.* at 557–58.

<sup>96</sup> Ted Hearn, *Comcast, NFL Seek Mediation*, MULTICHANNEL NEWS, July 7, 2008, <http://www.multichannel.com/article/CA6575978.html>.

<sup>97</sup> John Eggerton, *Comcast Sues NFL Alleging Breach of Contract*, BROADCASTING & CABLE, Dec. 13, 2007, <http://www.broadcastingcable.com/article/CA6512850.html?industryid=47170> (“Comcast filed a breach of contract suit against the National Football League in the New York State Supreme Court.”).

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

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

<sup>100</sup> *Id.*

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

<sup>102</sup> *In re Herring Broad.*, 23 F.C.C.R. 14787 (Oct. 10, 2008) (memorandum opinion and hearing designation order) *modified by erratum* (Oct. 15, 2008).

<sup>103</sup> *Id.* at 14790. The first section of the FCC rule that Comcast allegedly violated is 47 C.F.R. § 76.1301(c) (2008), which reads:

Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

<sup>104</sup> *Herring Broad.*, 23 F.C.C.R. at 14790. The other section of the FCC rule that Comcast allegedly violated is 47 C.F.R. § 76.1301(a) (2008), which reads: “Financial interest. No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator’s/provider’s systems.”

<sup>105</sup> *Herring Broad.*, 23 F.C.C.R. at 14819–22. Comcast argued that the case should be dismissed (1) as “barred by the program carriage statute of limitations”; (2) because of the pending litigation in New York state court; (3) because

sufficient evidence to establish a prima facie case.<sup>106</sup> The Media Bureau Chief ordered an Administrative Law Judge (ALJ) to hold a hearing on both claims and “return the matter to the Commission within 60 days.”<sup>107</sup>

The matter was sent to ALJ Arthur I. Steinberg, who ruled<sup>108</sup> that the case could not be resolved within the time frame mandated by the Media Bureau Chief.<sup>109</sup> The various defendants<sup>110</sup> argued that the time frame dictated by the Media Bureau Chief was unfair.<sup>111</sup> In his memorandum opinion, Judge Steinberg notes that the sixty-day deadline “cannot be achieved. This is an extremely complex proceeding involving six separate program carriage complaints, three Complainants, and four Defendants.”<sup>112</sup> Steinberg also said that “it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60-day timeframe.”<sup>113</sup> The defendants argued that the timeframe was “unrealistic, inconsistent with past practice, and insufficient.”<sup>114</sup> Some saw Steinberg’s ruling as a win for Comcast.<sup>115</sup> And so it goes—the court and administrative battles wage on as the fans wonder why some games are not on certain channels.

Just five days after Steinberg’s ruling, it was announced that he would resign from the FCC in January 2009, after forty-two years of service.<sup>116</sup> “Steinberg is resigning effective [January 3, 2009], but chief administrative law judge Richard Sippel is taking over the Comcast-NFLN dispute, as well as several others, immediately.”<sup>117</sup> One might have difficulty believing that Steinberg’s resignation was anything but political.

“The announcement came less than a week after Steinberg made important rulings in favor of Comcast that pushed back against FCC chairman Kevin Martin’s apparent attempt to tilt the dispute in the NFL Network’s direction.”<sup>118</sup>

Martin has been criticized as having an “anti-cable bias”<sup>119</sup> and was targeted in a congressional probe that inquired into whether Martin was abusing his authority.<sup>120</sup> Martin declined repeated invitations

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the NFL’s complaint did not state “with specificity” the relief sought, (quoting 47 C.F.R. § 76.6(a)(1) (2008)); and (4) because the complaint did not comply with “signature and verification requirements” applicable to the claim.

<sup>106</sup> *Id.* at 14827–29.

<sup>107</sup> *Id.*

<sup>108</sup> *In re Herring Broad., Inc. (Steinberg Ruling)*, No. FCC 08M-47 (F.C.C. Nov. 20, 2008) (memorandum opinion and order, advance copy, on file with author).

<sup>109</sup> Matthew Lasar, *Judge Throws Comcast/NFL Network Mess Back at FCC*, ARS TECHNICA, Nov. 20, 2008, <http://arstechnica.com/news.ars/post/20081120-judge-throws-comcastnfl-network-mess-back-at-fcc.html>.

<sup>110</sup> The various defendants are Time Warner Cable, Inc., Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corp. *Steinberg Ruling*, No. FCC 08M-47. Various plaintiffs—Herring Broadcasting, Inc. d/b/a WealthTV, NFL Enterprises LLC, and TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network—are involved. *Id.* However, this article is specifically concerned only with the NFL–Comcast portion of the case.

<sup>111</sup> *Steinberg Ruling*, No. FCC 08M-47, ¶ 2.

<sup>112</sup> *Id.* at ¶ 7.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at ¶ 2.

<sup>115</sup> Ted Hearn, *Judge in Comcast, NFL Network Case Retiring*, MULTICHANNEL NEWS, Nov. 25, 2008, <http://www.multichannel.com/article/CA6617573.html>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Ted Hearn, *Martin: A Record of ‘Picking on’ Cable*, MULTICHANNEL NEWS, Mar. 19, 2007, <http://www.multichannel.com/article/CA6425788.html>.

to talk with the congressmen overseeing the investigation, even when the congressional report was due to be released.<sup>121</sup> Some FCC staffers said that Martin “suppressed reports that didn’t support his agenda to change media ownership rules and purposely delayed meetings for several hours to pressure other commissioners.”<sup>122</sup> Others alleged that Martin “tried to rush through” controversial reforms and a program overhaul.<sup>123</sup>

After a year of investigation, in December 2008, the House released its report on Martin.<sup>124</sup> The Report states that there were “instances in which the Chairman manipulated, withheld, or suppressed data, reports, and information.”<sup>125</sup> The Report also suggests that Martin took a heavy-handed approach to managing the FCC and likely abused his power.<sup>126</sup>

Given Martin’s alleged bias toward cable providers and Sippel’s immediate takeover of Steinberg’s cases, eyebrows might be raised. Could Martin have “encouraged” Steinberg to step down? Only time will tell.

Martin advocated for an à la carte cable scheme: letting customers pick and choose which channels they want to subscribe to instead of paying for a bulk package.<sup>127</sup> This kind of structure would probably not be a great solution across the board because the “package” deals give the consumer more choice by virtue of “bundling.” The cable companies can offer more channels for less because the costs are offset by advertising. Martin’s proposals have drawn ire from legislators<sup>128</sup> and harsh criticism from network executives.<sup>129</sup> Yet à la carte may be the best choice on the menu for both cable providers and the NFL Network. This solution will receive greater discussion in Part III.

With a new administration in Washington and a formal nomination for Julius Genachowski as the new FCC Chief already made,<sup>130</sup> it is unclear how the dispute before the FCC will pan out. Cable executives are generally pleased with Genachowski’s appointment, and the sentiment seems to be that “anyone is better for cable than outgoing Chairman Kevin Martin.”<sup>131</sup>

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<sup>120</sup> William Triplett, *Congressional Probe Targets Martin*, VARIETY.COM, Dec. 3, 2007, <http://www.variety.com/article/VR1117976951.html?categoryid=22&cs=1>.

<sup>121</sup> Cecilia Kang, *FCC Chief is Silent in Probe*, WASH. POST, Nov. 15, 2008, at D2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> STAFF OF H. COMM. ON ENERGY & COMMERCE, 110TH CONG., DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN (Comm. Print. 2008), available at [http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc majority staff report 081209.pdf](http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf); see also Sean Mussenden, *Congressional Investigators Slam FCC Chair Martin of NC*, MEDIA GEN. NEWS SERVICE, Dec. 9, 2008, <http://www.mgwashington.com/index.php/news/article/congressional-investigators-slam-fcc-chair-martin-of-nc/2238/> (discussing the Report).

<sup>125</sup> DECEPTION AND DISTRUST, *supra* note 124, at 2.

<sup>126</sup> *Id.* at 2–4.

<sup>127</sup> Ryan Saghri, *Kevin Martin Voices Support for A La Carte Cable TV*, ORBITCAST.COM, Aug. 23, 2007, <http://www.orbitcast.com/archives/kevin-martin-voices-support-for-a-la-carte-cable-tv.html>.

<sup>128</sup> Ted Hearn, *Senators to Martin: Avoid A La Carte Mandates*, MULTICHANNEL NEWS, Sept. 8, 2008, <http://www.multichannel.com/article/CA6594066.html>.

<sup>129</sup> Matthew Lasar, *Big Media Slams Martin, FCC on “A La Carte” Cable Issue*, ARS TECHNICA, Apr. 17, 2007, <http://arstechnica.com/news.ars/post/20080417-big-media-slams-martin-fcc-on-a-la-carte-cable-issue.html>.

<sup>130</sup> See Monta Monaco Hernon, *FCC Pick Draws Kudos, Concerns*, COMM. TECH., MAR. 9, 2009, [http://www.cable360.net/ct/news/ctreports/FCC-Pick-Draws-Kudos-Concerns\\_34425.html](http://www.cable360.net/ct/news/ctreports/FCC-Pick-Draws-Kudos-Concerns_34425.html) (“The White House last week made formal its intent to nominate Julius Genachowski as the next chairman of the Federal Communications Commission”).

<sup>131</sup> *Id.*

## II. A SOCIAL AND ECONOMIC BREAKDOWN

### A. The Public Reaction

So tell me what you want, what you really really want.<sup>132</sup>

This section will focus primarily on the public's reaction to the ongoing feud between the NFL Network and the cable companies. Popular opinion can have an influence on the law,<sup>133</sup> and because here the consumer is directly affected, legislators and judges should take heed of the public's reaction to the dispute.

Many commentators have taken sides in the issue. One sports commentator writes: "It just doesn't make sense to me, with all the money the NFL makes, that they feel the need to monopolize the market even more, by forcing viewers to purchase their TV station."<sup>134</sup> Another commentator writes: "I have been waiting for the NFL Network and have been pretty offended that Comcast actually wanted me to pay more money to have it."<sup>135</sup> The public reaction is mixed, although more people appear to side with the NFL Network.<sup>136</sup> This could be due in part to the NFL Network's hard-hitting approach with its website and its over-the-top public relations strategy.<sup>137</sup> But one wonders if the fans who side with the Network's position have the whole story.<sup>138</sup>

So who is right? Both sides of the argument have merit. On the one hand, Comcast can be seen as unreasonable because it is requiring customers to pay for several channels—some of which the

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<sup>132</sup> SPICE GIRLS, *Wannabe*, on SPICEWORLD (Virgin Records 1997), lyrics available at [http://www.lyrics007.com/Spice Girls Lyrics/Wannabe Lyrics.html](http://www.lyrics007.com/Spice%20Girls%20Lyrics/Wannabe%20Lyrics.html) (last visited Mar. 11, 2009).

<sup>133</sup> See, e.g., Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PENN ST. INT'L L. REV. 251, 274 (2007) ("Beyond politicians tinkering with laws, there emerge situations where popular opinion suggests the adoption of domestic legal rules.").

<sup>134</sup> Chris Radez, Op-Ed., *NFL Network: I Hate You*, BLEACHER REPORT, Nov. 6, 2008, <http://bleacherreport.com/articles/78556-nfl-network-i-hate-you>.

<sup>135</sup> Editorial, *FCC Sides with NFL Network in Comcast Dispute*, THE TV REMOTE, Oct. 11, 2008, <http://www.thetvremote.com/fcc-sides-with-nfl-network-in-comcast-dispute/>.

<sup>136</sup> This is simply my observation based on extensive research in all corners of the Internet.

<sup>137</sup> See NFL Enterprises, LLC, *supra* note 9.

<sup>138</sup> As one commentator sets forth the issue:

Why would an advocate of freedom care? I care because the NFL's preferred option amounts to TV socialism, plain and simple. It's not like the NFL is new to this territory, though. This is virtually the same economic model NFL franchise owners use when they get municipalities to pay for new stadiums. All the inhabitants of a region pay for a venue that enriches a scant few and entertains a minority. Nice racket.

Let me be very clear on one other point. I feel no love for cable suppliers. They are the direct beneficiaries of poorly-planned and fundamentally-flawed regulation that creates a market where only one or two companies provides a service used, if *not* needed, by virtually everyone in a geographical region. Cable suppliers are sucking the government teat like a greedy pig just back from a vigorous romp in the mud. It is only because of the State that so few cable companies exist. Make no mistake about that.

Alston, *supra* note 7.

customers may have no interest in—in order to get NFL Network programming.<sup>139</sup> On the other hand, the NFL Network is being unreasonable because it is charging Comcast for the programming and expects Comcast to distribute it to consumers at no cost.<sup>140</sup> The NFL Network—even though it charges Comcast on a per-subscriber basis—also wants Comcast to distribute the NFL Network as part of Comcast’s basic programming.<sup>141</sup> And who ends up paying for the dispute in the end? The fans do.

### *B. The Legislative Voice*

A child can go only so far in life without potty training. It is not mere coincidence that six of the last seven presidents were potty trained, not to mention nearly half of the nation’s state legislators.<sup>142</sup>

All joking aside, the legislature has been involved with this issue. Several Senators, Congressmen, and Congresswomen have written letters and voiced opinions about the feud.<sup>143</sup> The NFL Network recently responded to legislative pressure, and “the NFL has slightly widened its carriage policy for its network’s primetime games.”<sup>144</sup> Starting November 20, 2008, the NFL “opened up [its] presentation to areas served by the over-the-air stations” covering NFL Network games.<sup>145</sup> Previously, while the NFL Network had allowed over-the-air channels in home markets to broadcast the games, when the channels were carried by cable providers “the games were blacked out in . . . outer areas.”<sup>146</sup> This small concession indicates that the legislative voice is having an effect.

And Comcast has been busy lobbying lawmakers.<sup>147</sup> In fact, Comcast spent over \$3.8 million lobbying in its fourth financial quarter in 2008, a majority of the spending related to the conflict with the NFL Network.<sup>148</sup> While the NFL has been focusing on swaying consumer sentiment, it seems that Comcast has taken a behind-the-scenes approach.

Perhaps the first “real” concession the NFL Network made to legislative pressure was at the end of the New England Patriots historic undefeated 2007–08 season.<sup>149</sup> The last game of the regular season between the Patriots and the New York Giants—who would eventually win the Super Bowl against the

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<sup>139</sup> See *NFL Enters., LLC v. Comcast Cable Commc’ns, LLC*, No. 603496/09, 2007 WL 1299412, \*2 (N.Y. Sup. Ct., N.Y. Cty., May 4, 2007) (unpublished decision), *aff’d in part, modified in part*, 851 N.Y.S.2d 551 (N.Y. App. Div. 2008), available at [http://decisions.courts.state.ny.us/fcas/fcas\\_docs/2007may/3006034692006002sciv.pdf](http://decisions.courts.state.ny.us/fcas/fcas_docs/2007may/3006034692006002sciv.pdf) (outlining Comcast’s basic position on the issue).

<sup>140</sup> See *id.* (outlining the NFL’s basic position on the issue).

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

<sup>142</sup> DAVE BARRY, BABIES AND OTHER HAZARDS OF SEX: HOW TO MAKE A TINY PERSON IN ONLY NINE MONTHS 75 (2000).

<sup>143</sup> See *infra* notes 149–56 and accompanying text.

<sup>144</sup> Mike Reynolds, *NFL Network Opens up Its Coverage—Slightly*, MULTICHANNELNEWS.COM (N.Y.), Nov. 25, 2008, <http://www.multichannel.com/article/CA6617761.html?industryid=47194>.

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

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

<sup>147</sup> Associated Press, *Comcast Spent Over \$3.8M Lobbying Government in 4Q*, THE MOTLEY FOOL, Mar. 9, 2009, <http://www.fool.com/news/associated-press/2009/03/09/comcast-spent-over-38m-lobbying-government-in-4q.aspx?testId=article:interrupt:106919&cellId=1>.

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

<sup>149</sup> See Mark Maske, *NFL Network will Allow Simulcast of Patriots-Giants*, WASH. POST, Dec. 27, 2007, at E6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/26/AR2007122601652.html> (“The NFL avoided a potential backlash by fans unable to watch the New England Patriots’ attempt to complete a perfect regular season, announcing yesterday that the NFL Network’s telecast of Saturday night’s game between the Patriots and New York Giants also will be carried by NBC and CBS.”).

Patriots<sup>150</sup>—prompted significant protest from fans and legislators when they learned that the game might only be available on the NFL Network, except in Boston or New York City.<sup>151</sup>

Massachusetts Senator John Kerry sent letters to NFL Commissioner Roger Goodell, Comcast Executive Vice President David L. Cohen, and Time Warner President Glenn A. Britt, asking that “representatives from the NFL, Time Warner and Comcast” meet with Kerry in Washington to discuss a solution to the carriage issue.<sup>152</sup> Several other legislators weighed in on the issue and encouraged the NFL to broadcast this particular game beyond its traditionally defined “home market” area.<sup>153</sup>

It was not just lack of coverage for the Patriots’ last game that had legislators upset, however. The NFL managed to convince a number of legislators that the network was being discriminated against by the cable companies. On December 18, 2007, fourteen members of the House of Representatives sent a letter to Chairman Martin of the FCC.<sup>154</sup> The letter stated that the legislators were “concerned” that the cable companies were “refusing to carry the NFL Network and other popular independently owned programming on a broadly distributed tier of service.”<sup>155</sup> The letter also cited a dispute resolution program that had “benefited consumers . . . in the Washington, D.C. market,” and asked the Commissioner to implement the “same approach” in dealing with the standoff between the NFL Network and the cable providers.<sup>156</sup>

The NFL decided to allow coverage of the Patriots–Giants matchup to extend beyond the home market coverage area for the final game of the regular season.<sup>157</sup> But then, at the beginning of the 2008–09 season, it looked as if many fans who did not live within the home market area would again go without coverage of their “home team”—unless they paid for the NFL Network.<sup>158</sup>

In a promising trend, the NFL Network expanded coverage slightly beyond its traditional definition of home market beginning November 20, 2008.<sup>159</sup> It appears the legislative voice is being heeded. Perhaps if Senate and House members continue to weigh in the issue, the fans might get to watch NFL Network games next season.

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<sup>150</sup> See Ralph Vacchiano, *Giants Stun Patriots to Win Super Bowl*, N.Y. DAILY NEWS, Feb. 5, 2008, [http://www.nydailynews.com/sports/football/giants/2008/02/03/2008-02-03\\_giants\\_stun\\_patriots\\_to\\_win\\_super\\_bowl-2.html](http://www.nydailynews.com/sports/football/giants/2008/02/03/2008-02-03_giants_stun_patriots_to_win_super_bowl-2.html) (reporting that the New York Giants defeated the New England Patriots to win Super Bowl XLII).

<sup>151</sup> See Mark LaFlamme, *Patriots Off Air for Most Fans*, SUN JOURNAL (Me.), Nov. 13, 2008, available at <http://www.highbeam.com/doc/1P2-19504576.html> (“Last year, the Patriots were facing off against the New York Giants in the final week. They were going for a perfect 16-0 record, but it looked as though most homes would not pick up the game.”).

<sup>152</sup> Letter from John F. Kerry, Mass. Sen., to Roger Goodell, Comm’r, National Football League, Dec. 12, 2007, available at <http://kerry.senate.gov/v3/cfm/record.cfm?id=288842>. Britt and Cohen were carbon-copied with the letter. *Id.*

<sup>153</sup> See Dodd letter, *supra* note 30.

<sup>154</sup> Joint Letter from Fourteen U.S. Cong. Reps. to Kevin Martin, Chairman, Federal Commc’ns Comm’n, Dec. 18, 2007 (on file with WILLAMETTE SPORTS L.J.)

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

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

<sup>157</sup> Maske, *supra* note 149, at E6.

<sup>158</sup> LaFlamme, *supra* note 151 (explaining that at the beginning of the 2008 season, most Patriots fans in Maine would not be able to watch a Patriots game unless they had NFL Network or DirecTV).

<sup>159</sup> Reynolds, *supra* note 144.

### C. The Economics

Football incorporates the two worst elements of American society: violence punctuated by committee meetings.<sup>160</sup>

Various economic considerations drive this controversy. For one, Comcast claims that the NFL is trying to force it into making consumers pay for unwanted programming.<sup>161</sup> This argument has some merit. The NFL wants Comcast to distribute the NFL Network as part of basic or expanded basic cable.<sup>162</sup> But the NFL still wants Comcast to pay for the programming on a per-customer basis.<sup>163</sup> This has the effect of forcing customers who may never watch football pay for football programming.<sup>164</sup> Granted, most cable customers pay for some programming they never watch, but generally, because of the cable-billing structure, the unwatched programming is low-cost or mostly advertising supported.<sup>165</sup> This is not to say the cable companies are innocent victims being bullied by the NFL, but the cable companies may not be quite as greedy as the NFL makes them out to be.

The cable companies are being greedy, however, in requiring customers to pay for an entire sports package as opposed to offering the NFL Network on a single channel subscription. Comcast charges about five dollars more per month for its “digital sports package.”<sup>166</sup>

This Note proposes that, although five dollars a month might seem like a lot to pay just for football, most die-hard football fans would be willing to spend an extra dollar or so a month for the NFL Network. If Comcast were to sell NFL Network at a reasonable per-customer surcharge<sup>167</sup> per month, viewership would likely increase, and both sides might benefit. The NFL would be closer to getting the viewership it seeks and Comcast would not have to shift the cost burden to unwilling customers or cut its profit margin to offer the Network widely. Additionally, retaining a sports-tier structure that includes the NFL Network would be attractive to those who desire extensive sports programming.

The NFL has argued that Comcast discriminates against the network in favor of its own channels.<sup>168</sup> Although this may be true on some level, simple economics dictate such a result. Some estimate the cost to the cable companies of one NFL Network game at about \$100 million.<sup>169</sup> Given the high cost—and the NFL’s proposed lack of a return—there is not a great incentive for Comcast to include the NFL Network in its basic programming.

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<sup>160</sup> ROBERT G. TORRICELLI, QUOTATIONS FOR PUBLIC SPEAKERS: A HISTORICAL, LITERARY, AND POLITICAL ANTHOLOGY (2001) (quoting George F. Will, a conservative American columnist and writer).

<sup>161</sup> See *NFL Enters., LLC v. Comcast Cable Commc’ns, LLC*, No. 603496/09, 2007 WL 1299412, \*2 (N.Y. Sup. Ct., N.Y. Cty., May 4, 2007) (unpublished decision), *aff’d in part, modified in part*, 851 N.Y.S.2d 551 (N.Y. App. Div. 2008), available at [http://decisions.courts.state.ny.us/fcas/fcas\\_docs/2007may/3006034692006002sciv.pdf](http://decisions.courts.state.ny.us/fcas/fcas_docs/2007may/3006034692006002sciv.pdf) (outlining Comcast’s basic position on the issue).

<sup>162</sup> See *id.* (outlining the NFL’s position).

<sup>163</sup> *Id.* at \*2.

<sup>164</sup> Alston, *supra* note 7.

<sup>165</sup> See AM. LEGIS. EXCH. COUNCIL, A LA CARTE: THE NEW REGULATORY NOOSE FOR CABLE & CONSUMERS 1–2 (2004) (describing the cable marketplace).

<sup>166</sup> Miriam Hill, *NFL Network Sues Comcast, Demands Scheduling Change*, REDORBIT.COM, [http://www.redorbit.com/news/entertainment/729920/nfl\\_network\\_sues\\_comcast\\_demands\\_scheduling\\_change/index.html](http://www.redorbit.com/news/entertainment/729920/nfl_network_sues_comcast_demands_scheduling_change/index.html).

<sup>167</sup> No more than a 25% markup over its cost, for example.

<sup>168</sup> *In re Herring Broad.*, 46 F.C.C.R. 104, 2008 WL 4567148, ¶ 2 (Oct. 10, 2008) (memorandum opinion and hearing designation order) *modified by erratum* (Oct. 15, 2008).

<sup>169</sup> Hill, *supra* note 166 (“The NFL reportedly wants cable companies to pay 70 cents per subscriber per month for the additional games, which would put the price of a game at about \$100 million.”).

One cannot help but wonder how much all the litigation between the NFL and the cable companies costs. A top New York attorney can bill in excess of \$1000 an hour.<sup>170</sup> Although it is unlikely Comcast or the NFL is paying that kind of hourly rate, litigation is never a bargain and one can only guess how much has already been and will be spent on this battle. In the end, of course, consumers will get stuck with the bill.

### III. LET'S MAKE A DEAL

I don't know how much time and effort I wasted before discovering that deals aren't usually blown by principals; they're blown by lawyers and accountants trying to prove how valuable they are.<sup>171</sup>

Considering the current court battles, the hard lines drawn on both sides, and general animosity between the parties, an amicable settlement seems unlikely. This section will briefly look at the strengths and weakness of possible solutions to the issue.

#### A. *The Stalemate*

If neither side is willing to budge, what happens? Considering the speed with which disputes move through the court system, a judicial resolution is not likely to come any time soon. The FCC is restructuring with the new administration, and in the meantime—however much outgoing Chairman Martin might want to push the NFL Network case through the FCC administrative court system—the FCC should be pretty busy switching television over to the new digital format.<sup>172</sup> And the Senate has told Chairman Martin to concentrate on just that, no more warring with the cable companies.<sup>173</sup>

Fans on either side are angry. If the parties refuse to budge and continue to litigate, appeal, and try to force the other side to concede, we could be looking at several years in court. In the meantime fans are likely to become increasingly frustrated with both sides. Some fans might switch to a cable provider that provides the NFL Network for free. Some fans might avoid the NFL Network out of disgust. If the baseball strike of 1994–95 taught us anything, it is that professional sports can lose a lot of their fan base when they put financial matters over the fans.<sup>174</sup> A stalemate has consequences for both sides. By the time the parties finally settle and are ready to put the programming out there, those La-Z-Boys may be cold and empty.

#### B. *Making It Basic, Making It Free*

One option the NFL might consider for getting the distribution it wants without charging a premium would be to make the channel more advertising supported. Because football games have such high viewership, additional advertising revenue should be easy to obtain and could help defray production and distribution costs. Comcast and other companies could also seek advertising dollars to keep costs down—a promise of an advertisement during high viewership times could command a substantial investment from companies looking to reach the football fan demographic.

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<sup>170</sup> See Nathan Koppel, *Lawyers Gear up Grand New Fees*, WSJ.COM, Aug. 22, 2007, [http://online.wsj.com/article/SB118775188828405048.html?mod=hpp\\_us\\_whats\\_news](http://online.wsj.com/article/SB118775188828405048.html?mod=hpp_us_whats_news) (noting that hourly rates in excess of \$1000 are no longer seen as taboo by attorneys).

<sup>171</sup> ROBERT L. TOWNSEND & WARREN G. BENNIS, *UP THE ORGANIZATION* 152 (commemorative ed. 2007).

<sup>172</sup> Hearn, *supra* note 115.

<sup>173</sup> *Id.*

<sup>174</sup> Mike Lopresti, *Baseball Strike Timeline*, CINCINNATI ENQUIRER, Aug. 12, 2004, <http://reds.enquirer.com/2004/08/12/STRIKEBOX12-LOPRESTI.html>.



Despite extensive research, it remains unclear why the Network has to charge such a high price per subscriber. It also remains unclear why the NFL Network is unable to offer its programming at a reduced rate with its already-existing advertiser support.<sup>175</sup>

In the past, advertising support has enabled independent television channels to “work with much lower capitalization” than is needed when programming and development costs are absorbed by the entity itself.<sup>176</sup>

Sadly, with all the time and effort both parties have invested in their respective positions, relying on advertising support to finance the Network would probably be more of a “win” for the cable companies than the NFL Network would be willing to settle for and vice versa. Still, in combination with a minor surcharge, advertising dollars could help to ease the burden on both sides and get the parties to a settlement sooner rather than later.

### *C. And the Winner is . . .*

The best solution is to institute an à la carte option for cable subscribers who actually want the NFL Network’s programming. Millions of people in the United States watch football on television.<sup>177</sup> This means that there is a ready market for the NFL Network. This ready market can be best accessed by an à la carte cable scheme for the NFL Network. If the NFL Network is going to charge on a per-subscriber basis, shouldn’t Comcast offer the channel on an optional per-subscriber basis? For a specialty channel like the NFL Network, it is unfair to make cable subscribers who have no interest in football to subscribe to a network whose mantra is “All Things Football.”<sup>178</sup> Neither is it fair to make a football fan pay for extra sports programming when all he or she wants to watch is football. Neither side is going to gain any ground by resisting the inevitable. At some point, each side is going to have to give a little to get a little.

The economic implications are lessened by the à la carte scheme. While cable providers have long resisted an à la carte programming structure, perhaps the time has come where it would not be so burdensome. Cable subscribers who were already willing to pay for an entire sports programming package are unlikely to change to a single sports channel or a few channels. If the cable companies offer programming on an à la carte basis, discounting packages when several channels are purchased together, viewership and revenue are likely to increase, not decrease. The people who want all the sports will still buy the package, and the people who just want one or two sports will be more willing to pay for those one or two channels. Having the option to choose can increase customers’ sense of value, even when the “value” is largely illusory. It is the prospect of paying for something one does not want that likely discourages many would-be customers from purchasing “package” deals. Rather than having a detrimental effect on revenue and subscription rates, à la carte is likely to have a positive effect. Both the NFL and Comcast will be able to cover the cost of the programming without placing a burden on disinterested customers. Advertising revenue can help to alleviate some of the production and distribution costs as well. At this point the battle has become pointless—if there ever was a point in the first place. The parties have to work together if they want to stop wasting resources.

The question then becomes how to implement an à la carte scheme. An old argument against à la carte is that the arrangement imposes more costs on consumers and cable providers because it requires a

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<sup>175</sup> See NFL.com, *supra* note 12 (noting that the NFL Network is ad-supported).

<sup>176</sup> See NORMA ODOM PECORA, *THE BUSINESS OF CHILDREN’S ENTERTAINMENT* 44 (2002) (describing techniques independent channels with low capital have been able to use successfully).

<sup>177</sup> Street & Smith, *supra* note 5.

<sup>178</sup> Eichelberger, *supra* note 10.

switch to digital format.<sup>179</sup> With digital format being the preferred—and soon to be mandatory—medium for even over-the-air broadcasts, this concern is no longer present.<sup>180</sup>

Perhaps the FCC should rule that Comcast has discriminated against the Network. Perhaps the New York courts should in turn rule in favor of Comcast, finding that Comcast has a contractual right to tier the Network. But someone also needs to remember the fans. Most fans are not going to care whether Comcast violated an FCC regulation or whether the NFL contracted away distribution on basic cable. Most fans just want to see their favorite teams play.

The issues that have arisen from the disputes between the NFL and the cable companies could likely have been resolved without getting courts and regulators involved. For example, the NFL and the cable companies could have spent a little more time drafting their contracts and ensured that everyone was clear on exactly what was expected. Such a statement might seem sophomoric, but oftentimes the simplest solutions are the most effective. In the end, the free market should determine whether or not the NFL Network is viable, not regulators or judges. Neither the Network nor the cable companies deserve to be subsidized by the government. Consumers should be free to choose whether they want the NFL Network or not.

#### IV. CONCLUSION

The battle between the NFL and the cable companies has been playing in various theaters for several years now. Neither side is entirely correct, although both sides claim innocence. The dispute seems much like a fight between overgrown and precocious children who have not yet realized that their audience is slowly but surely dwindling. Though the NFL paints Comcast as greedy and anti-football-fan, the NFL's own greed may be getting in the way of its judgment, and some fans are starting to see the NFL's actions as entirely self-serving. Unless both sides work toward an equitable solution, they may both end up alienating the people who justify their very existence—the fans.

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<sup>179</sup> See AM. LEGIS. EXCH. COUNCIL, *supra* note 165, at 3 (arguing that because at the time of the report only thirty percent of cable subscribers have digital cable, the à la carte scheme will result in increased equipment and delivery costs for cable companies and consumers).

<sup>180</sup> See, e.g., Jackson Breland, *Most Local TV Stations Delay Digital*, JACKSON FREE PRESS (Miss.), Feb. 17, 2009, [http://www.jacksonfreepress.com/index.php/site/comments/most\\_local\\_tv\\_stations\\_delay\\_digital\\_021709](http://www.jacksonfreepress.com/index.php/site/comments/most_local_tv_stations_delay_digital_021709) (explaining Congress has extended the deadline for television stations to broadcast in digital format from midnight, Feb. 17, 2009, to June 12, 2009).