

# REGIONAL SPORTS NETWORKS, COMPETITION, AND THE CONSUMER

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## I. INTRODUCTION

In an economy increasingly characterized by complex business relationships, Regional Sports Networks (RSNs) are no novelty. There are now about 40 such entities in the U.S., the oldest of which is the Madison Square Garden Sports Network (MSG). Launched in 1969, MSG offers programming for the New York Knicks (NBA), New York Rangers and Buffalo Sabres (NHL), New York Liberty (WNBA), and New York Red Bulls (MLS).<sup>1</sup> Arguably, the centerpieces of the RSN industry in the U.S. are the two large, rival families of RSNs controlled by Comcast SportsNet (CSN) and Fox Sports Net (FSN).<sup>2</sup> CSN operates eight RSNs while FSN controls almost 18 networks that offer sports programming for a variety of individual U.S. cities and regions.

The prominent role of media in sports likely accounts for the ownership interests of multi-channel video programming distributors (MVPDs) in many RSNs. MVPDs include cable and Direct Broadcast Satellite (DBS) providers. RSNs are hugely

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<sup>1</sup> Little League Communications Division, *New England Sports Network, Madison Square Garden Network to Televisе LLB New England, Mid-Atlantic Region Tournament Games*, Little League Online, April 14, 2008, [http://www.littleleague.org/media/newsarchive/2008stories/New\\_England\\_Sports\\_Network\\_Madison\\_Square\\_Garden\\_Network\\_to\\_Televisе\\_LLB\\_New\\_England\\_Mid-Atlantic\\_Region\\_Tournament\\_Games\\_-\\_April\\_14.htm](http://www.littleleague.org/media/newsarchive/2008stories/New_England_Sports_Network_Madison_Square_Garden_Network_to_Televisе_LLB_New_England_Mid-Atlantic_Region_Tournament_Games_-_April_14.htm).

<sup>2</sup> See, e.g., Ronald Grover et al., *Rumble in Regional Sports*, BUS. WEEK, November 22, 2004, available at [http://www.businessweek.com/magazine/content/04\\_47/b3909143\\_mz016.htm](http://www.businessweek.com/magazine/content/04_47/b3909143_mz016.htm).

profitable, with margins estimated at 30 to 40 percent and average fees of \$2 per subscriber, second only to the Entertainment and Sports Programming Network's (ESPN) fees of \$2.50 per subscriber.<sup>3</sup> In the recent acquisition of Adelphia cable assets by Time Warner and Comcast, Federal Trade Commission Commissioners Leibowitz and Jones Harbor noted that "RSN programming. . . is a unique product, of tremendous value to a certain segment of consumers, and thus access to it is crucial to cable and satellite providers' ability to remain competitive."<sup>4</sup>

Comcast and Fox have aggressively pursued the formation of RSNs around the country, often vying with each other for control of key markets. For example, Fox has recently ceded RSN markets in Chicago, the Bay Area, New England, and New York to CSN and entered other markets in Southern California, Arizona, Houston, Indiana, and Kansas. Both CSN and FSN have purchased a number of formerly independent RSNs. Strategic competition also appears to play a large role in the RSN industry. For example, News Corporation, parent of FSN West, purchased the Los Angeles Dodgers (MLB) in 1998 with the alleged purpose of discouraging Disney (which then owned ESPN and the Anaheim Angels (MLB)) from launching its own RSN—ESPN West.<sup>5</sup>

Competition between RSNs in bidding for team media rights and in negotiating with MVPDs for distribution is often quite fierce. A number of independent RSNs have been outbid by the larger incumbents, CSN and FSN, in their attempts to purchase the media rights to specific teams. The Grizzlies Regional Sports Network, for example, was formed to carry the programming for the Memphis Grizzlies (NBA) but folded before its first scheduled game because the team re-signed with FSN South.<sup>6</sup> And the Victory Sports channel, owned by the Minnesota Twins (MLB), collapsed in 2004 after less than six months on the

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<sup>3</sup> Grover, *supra* note 2; see also Frank Ahrens, *Area Baseball Network Must Form Quickly*, WASH. POST, Sept. 30, 2004, at A14.

<sup>4</sup> Time Warner/Comcast/Adelphia, Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part), January 31, 2006, File No. 051-0151, available at [http://www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz\\_harbour.pdf](http://www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz_harbour.pdf).

<sup>5</sup> See John Dempsey, *Disney, Fox in NHL Faceoff*, VARIETY, Aug. 6, 1998, available at <http://www.variety.com/article/VR1117479211.html?categoryid=18&cs=1>.

<sup>6</sup> Grover, *supra* note 2.

air because the Twins failed to negotiate deals with local area cable or DBS distributors.<sup>7</sup> Twins programming returned to the local FSN network.

Vertical relationships involving sports-related multi-video programming (MVP) link up the media rights holders (i.e., the teams) with the RSN, which purchases the rights to transmit the events. The RSN then coordinates with and jointly markets the programming to MVPDs who offer it in turn to subscribers in the form of sports channels and other premium sports packages. These relationships can range from ownership through merger or acquisition, to contractual agreements with exclusive terms and conditions, to simple buyer-seller relationships.

Partial ownership structures are common for RSNs. For example, Comcast has a 20 percent ownership interest in SportsNet Chicago (which replaced the defunct FSN Chicago), along with Cubs (MLB) owner the Tribune Company (20 percent share) and the White Sox (MLB) and Bulls (NBA) owner, Jerry Reisdorf (40 percent share). The CSN Bay Area is jointly owned by Comcast (45 percent), Fox (30 percent), and the San Francisco Giants (25 percent). Other RSNs are joint ventures that do not include MVPD ownership. The New England Sports Network (NESN), for example, is a joint venture between the Boston Bruins (NHL) and Red Sox (MLB). Also consider the controversial Mid-Atlantic Sports Network (MASN), which is co-owned by MLB rivals the Baltimore Orioles and Washington Nationals.<sup>8</sup>

RSNs raise threshold competition policy issues because of the unique structure of the markets involved. Rivalry at one or more levels in the chain of vertical integration involving sports teams, RSNs, and MVPDs is often limited, if not nonexistent. Under these circumstances, changes in control that create or strengthen vertically-integrated content/distribution platforms warrant a rigorous level of scrutiny by antitrust and regulatory

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<sup>7</sup> See Mike Reynolds & R. Thomas Umstead, *Twins Rights Victory for Fox*, MULTICHANNEL NEWS, May 17, 2004, available at <http://www.allbusiness.com/government/government-bodies-offices-regional-local/6259986-1.html>.

<sup>8</sup> See, e.g., *Baseball, TV and the Antitrust Exemption*, WASH. TIMES, August 22, 2005, at A12. ("In an era when the potential on-the-field fortunes of baseball teams rise or collapse with the size of the television contracts they can negotiate off the field, the Nationals have suffered a major financial setback whose relative and absolute dimensions will almost certainly worsen over time unless the outrageous, back-stabbing deal is reversed.").

agencies.

This article sets forth the various scenarios for vertical arrangements involving RSNs that potentially raise competitive and consumer problems. Central to the analysis are the unique issues surrounding the demand for sports programming and market definition surrounding those markets. This article also notes that while there are no antitrust exemptions involving relationships between professional league sports and MVPDs, other sports-related immunities might be argued to apply to RSNs.

Fact situations in RSN markets can vary substantially, so there are no simple answers to the foregoing questions. But it is possible to frame the major questions they raise for competition policy. The article proceeds in Section II with some brief background material on markets for sports MVP. Section III then discusses potential horizontal and vertical competitive issues that may arise in such markets. Section IV considers important questions that are specific to markets for sports MVP that can bear on antitrust analysis. Set forth in section V is a discussion of the applicability of certain sports-related immunities to RSNs and MVPDs. The article concludes with a discussion of the implications that competitive issues surrounding sports MVP markets have on antitrust and regulatory policy.

#### MARKETS FOR SPORTS MVP

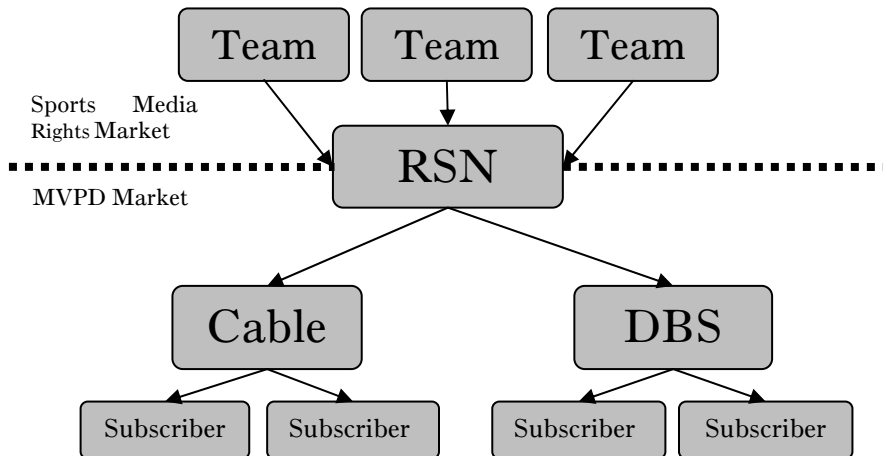
There are a number of possible scenarios involving markets for local sports programming. Two scenarios, however, are most likely to be encountered. One scenario is a single, unintegrated RSN in the upstream media rights market and competing cable and/or satellite providers in the downstream MVPD market (*Figure 1*). A second scenario (*Figure 2*) involves multiple, unintegrated upstream RSNs and competing downstream MVPDs. *Figures 1* and *2* indicate the relationship between the RSN and MVPDs in the downstream market and the individual teams and the RSN in the upstream market. In either case, an unintegrated RSN markets programming to both the local cable and DBS providers, although it could have an exclusive arrangement to market programming to only one MVPD.<sup>9</sup> Also note that the figures assume that consumers choose

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<sup>9</sup> Federal Communications Commission (FCC) program access rules prohibit exclusivity between integrated cable providers and RSNs. Integrated

one mode of MVP distribution, but nothing precludes sports enthusiasts from subscribing to both cable and DBS services, if they are available.

FIGURE 1:  
SINGLE RSN AND RIVAL MVPDS



As for the relationships in the upstream market, *Figure 1* indicates that an RSN purchases the media rights for one or more local professional teams. This relationship best describes, for example, CSN Chicago, which handles programming for the White Sox, Cubs, Bears (NFL), Bulls (NBA), Blackhawks (NHL), and Fire (MLS). The FSN West and FSN Prime Ticket serve the Southern California market, collectively covering a vast array of teams, including: the Clippers (NBA), Lakers (NBA), Angels (MLB), Dodgers (MLB), Ducks (NHL), Sparks (WNBA), Kings (NHL), Chivas (MLS), and Galaxy (MLS).

*Figure 2* shows the scenario involving multiple RSNs that market programming for different combinations of teams or sports in the same geographic area.<sup>10</sup> For example, the Rocky Mountain region hosts both the Altitude Sports and Entertainment Network (ASE), which carries programming for the Nuggets (NBA), Avalanche (NHL), Rapids (MLS), and

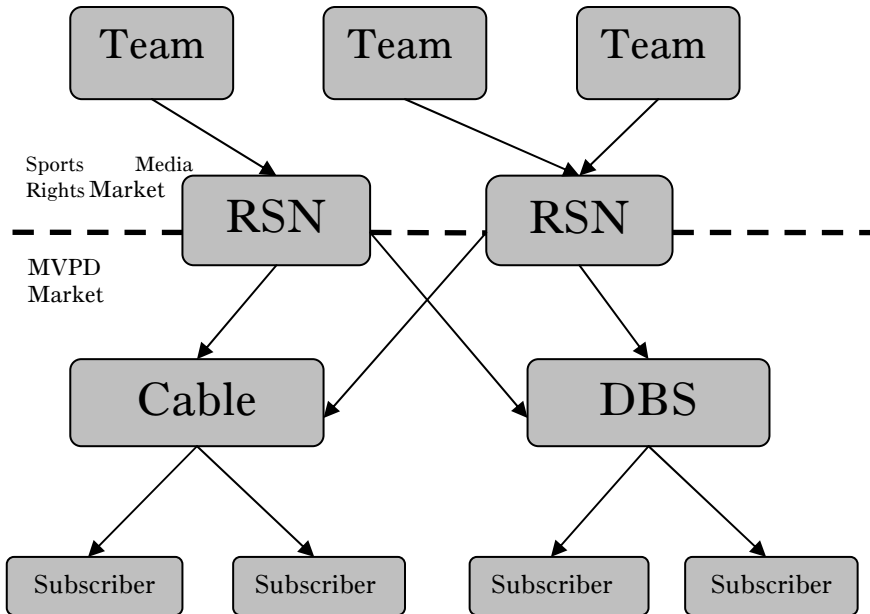
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entities are required to charge other MVPDs reasonable and non-discriminatory fees for programming. These rules were extended for five years in September 2007. See, e.g., John Eggerton, *NCTA Pans Program-Access Rules in FCC Filing*, BROADCASTING & CABLE, Jan. 4, 2008, <http://www.broadcastingcable.com/article/CA6517249.html>.

<sup>10</sup> Some RSNs also cover local collegiate and minor league teams.

Mammoth (NLL). Rival CSN Rocky Mountain carries the Broncos (NFL), Rockies (MLB), and Mammoth.

FIGURE 2:  
RIVAL RSNs AND MVPDs



The scenario shown in *Figure 2* prompts a number of questions. One is the extent to which consumers have access to both cable and DBS modes of MVPD, since different RSN programming can be carried on rival MVPD providers. The ability of consumers to switch MVPD providers in response to programming prices, content, and quality is an important feature in markets with multiple RSNs. DBS continues to be slightly less available in certain markets that are served by cable. In 2002 the Federal Communications Commission estimated that 88 percent of cable subscribers also had access to DBS, up by 12 percent from 2001.<sup>11</sup> Cable penetration rates, however, have declined over time—falling to a 17 year low of about 61 percent in

<sup>11</sup> This issue has arisen in controversial mergers of cable or DBS providers. See, e.g., Richard J. Gilbert and James Tarliff, *Sky Wars: The Attempted Merger of EchoStar and DirecTV*, in *THE ANTITRUST REVOLUTION 120* (J. E. Kwoka & L. J. White, eds. 5th ed. 2008) (citing F.C.C., REPORT ON CABLE INDUSTRY PRICES, FCC 03-136, released July 3, 2003, available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-136A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-03-136A1.pdf)).

February 2007.<sup>12</sup> Most of this share was given up to DBS. Between 2004 and 2005, for example, DBS subscribership increased by almost 13 percent.<sup>13</sup> In 2005, DBS accounted for about 28 percent of all U.S. MVP subscriptions.<sup>14</sup>

Another question is the extent of competition in the upstream market for sports media rights, which arguably influences the number of RSNs that potentially operate in any given region. *Table 1* lists U.S. RSNs that carry programming for professional sports and the regions they cover as of the writing of this article. There are a total of 15 RSNs nationwide, serving 28 regional markets. Seven markets contain two or more RSNs, including: New York City (three), Kansas City (two), the Mid-Atlantic region (two), Ohio (three), New England (two), the Rocky Mountain region (two), and the Northwest (two). The remaining 21 markets contain only one RSN.<sup>15</sup>

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<sup>12</sup> Steve Donohue, *Cable Penetration Hits 17-Year Low*, Multichannel News, Mar. 19, 2007, <http://www.multichannel.com/article/CA6425963.html>.

<sup>13</sup> F.C.C., ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING, 12TH ANNUAL REPORT, released March 3, 2006, at 37, *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-11A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-11A1.pdf) [hereinafter 12TH ANNUAL REPORT]. Note that a more recent report has not yet been released by the FCC. *See, e.g.*, Barbara Esbin & Adam Thierer, *Where is the FCC's Annual Video Competition Report?*, Progress & Freedom Foundation, Apr. 11, 2008, *available at* <http://www.pff.org/issues-pubs/ps/2008/ps4.11whereisFCCvidcompreport.html>.

<sup>14</sup> 12TH ANNUAL REPORT, *supra* note 13.

<sup>15</sup> *Table 1* does not report RSNs that carry collegiate sports or arena football programming. For the purposes of distinguishing regions by distinct geographic area, Northern and Southern California are divided into two regions. RSNs serving the Portland and Seattle areas (Northwest) are combined, as are those offering programming for teams based in Ohio.

TABLE I: REGIONAL SPORTS NETWORKS (RSNs) IN THE U.S.

| <i>Geographic Region</i>         | F<br>S<br>N | C<br>S<br>N | M<br>S<br>G | N<br>E<br>S<br>N | Y<br>E<br>S<br>N | A<br>S<br>E<br>N | 4<br>S<br>D | M<br>A<br>S<br>N | M<br>S | C<br>O<br>X | S<br>T<br>O | C<br>4<br>7 | C<br>o<br>S<br>N | T<br>W<br>S<br>26 | S<br>N<br>Y |
|----------------------------------|-------------|-------------|-------------|------------------|------------------|------------------|-------------|------------------|--------|-------------|-------------|-------------|------------------|-------------------|-------------|
| Arizona                          | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Chicago                          |             | •           |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Detroit                          | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Florida                          | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Houston                          | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Indiana                          | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Kansas City                      | •           |             |             |                  |                  |                  |             |                  | •      |             |             |             |                  |                   |             |
| Mid Atlantic                     |             | •           |             |                  |                  |                  |             | •                |        |             |             |             |                  |                   |             |
| Midwest                          | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| New England                      |             | •           |             | •                |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| New Orleans                      |             |             |             |                  |                  |                  |             |                  |        | •           |             |             |                  |                   |             |
| New York                         |             |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   | •           |
| New York City                    |             |             | •           |                  | •                |                  |             |                  |        |             |             |             |                  |                   | •           |
| North                            | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Northern California <sup>†</sup> |             | •           |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Northwest                        | •           | •           |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Ohio                             | •           |             |             |                  |                  |                  |             |                  |        |             | •           |             | •                |                   |             |
| Philadelphia                     |             | •           |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Pittsburgh                       | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Prime Ticket                     | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Rocky Mtn.                       | •           |             |             |                  |                  | •                |             |                  |        |             |             |             |                  |                   |             |
| San Diego                        |             |             |             |                  |                  |                  | •           |                  |        |             |             |             |                  |                   |             |
| South                            | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Southern California <sup>‡</sup> | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Southeast                        |             | •           |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Southwest                        | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |
| Tampa                            |             |             |             |                  |                  |                  |             |                  |        |             |             | •           |                  |                   |             |
| Wisconsin                        | •           |             |             |                  |                  |                  |             |                  |        |             |             |             |                  |                   |             |

Key to Abbreviations:  
**FSN**=Fox Sports Net; **CSN**=Comcast Sports Net; **MSG**=Madison Square Garden Network; **NESN**=New England Sports Network; **YESN**=Yankees Entertainment and Sports Network; **ASEN**=Altitude Sports and Entertainment; **4SD**=Channel 4 San Diego; **MASN**=Mid-Atlantic Sports Network; **MS**=Metro Sports; **COX**=Cox Sports; **STO**=SportsTime Ohio; **C47**=Catch 47; **CoSN**=Columbus Sports Network; **TWS26**=Time Warner Sports 26; **SNY**=SportsNet New York.  
<sup>†</sup> Includes CSN West and CSN Bay Area Networks  
<sup>‡</sup> Includes FSN West and FSN Prime Ticket  
Note: ESPN is not included in the table since it is a national sports network

Potential “overlaps” in RSN programming are greater in large cities that can support more than one same-sport team or that contain a large enough number of professional sports teams to support multiple RSNs. For example, New York City hosts both the Yankees Entertainment and Sports Network (YESN) that covers the Yankees (MLB) and SportsNet New York (SNY), which carries the rival Mets. The Mid-Atlantic region also hosts multiple RSNs. The Mid-Atlantic Sports Network (MASN) carries programming for rival MLB teams the Orioles and Nationals as well as the Ravens (NFL). The CSN Mid-Atlantic carries the Redskins (NFL), Wizards (NBA), Capital (NHL), D.C. United (MLS), Bayhawks (NLL), and Mystics (WNBA).

Because the demand for sports programming is driven in large part by fan loyalty, however, it is not clear to what extent RSN packages actually compete, despite the apparent choices in programming that are evident in many of the markets served by multiple RSNs.

#### COMPETITIVE ISSUES INVOLVING RSNs AND MVPDS

Mergers or contractual agreements involving RSNs and MVPDs can fundamentally alter the incentives and abilities of market participants, potentially affecting prices, output, choice, and innovation in both programming and distribution. While the focus here is primarily on vertical arrangements, it is helpful to review the horizontal issues that can arise in RSN and MVPD markets.<sup>16</sup> For example, does the aggregation, coordination, and joint marketing function performed by a single RSN eliminate competition in the upstream media rights market? If it does, then the RSN could restrict programming output and raise prices to MVPDs. The answer to this query, of course, largely depends on whether individual team programming competes for the viewership of local fans or, in the alternative, whether the RSN performs a valuable economic integration function for a series of individual team “monopolies,” each with no good substitutes.

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<sup>16</sup> The competitive effects of consolidation or agreements on competition and consumers are evaluated under the “no-harm” (to competition) standard employed by the antitrust agencies under Section 7 of the Clayton Act (15 U.S.C. § 18); Section 5 of the Federal Trade Commission Act (as amended, 15 U.S.C. § 45); and the broader public interest standard applied by the FCC in exercising its statutory authority under the Communications Act (47 U.S.C. § 310(d)).

Mergers of either MVPDs or RSNs also have horizontal effects. In Figure 2, for example, the merger of two independent RSNs could produce a more powerful entity with a greater ability to make demands on downstream MVPDs. This includes placement on an MVPD's standard tier and/or a per customer charge that would be passed on to subscribers. The rumored combination of the YESN and NESN in 2004 potentially raised this issue.<sup>17</sup> A merger of unintegrated local cable providers that creates significant market share, on the other hand, might enhance buyer market power. The likely competitive effects of these scenarios depend on a variety of factors, including the structure of upstream and downstream markets, the degree of vertical integration, consumer preferences, and any relevant efficiencies. The preponderance of vertical integration involving RSNs (e.g., joint-ownership by teams and MVPDs), however, bears strongly on competitive judgments involving horizontal integration such as the merger of two cable companies.

Vertical integration or contractual arrangements that mimic a merger between RSNs and MVPDs pose the classic double-edged sword for competition and consumers—the balancing of efficiencies against potentially restricted output, higher prices, reduced choice, and less innovation resulting from the exercise of market power. There are three potential categories of economies that might result from such integration. One is lower transactions costs for the merged firm due, for example, to: (1) eliminating price negotiations for certain services and (2) avoiding the haggling between stakeholders about how to divide the proceeds of sports media productions. A second source of savings is investment in equipment that can be used in joint production of sports and non-sports programming. Finally, integration can eliminate double margins (i.e., successive markups) associated with imperfectly competitive up and downstream markets.

At the same time, consolidation that creates a vertically-integrated content/distribution platform or exclusive agreements involving an unintegrated RSN and MVPD can have potentially anticompetitive effects.<sup>18</sup> For example, consider a merger

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<sup>17</sup> See, e.g., *Yanks, Red Sox in TV Merger?*, CNN Money, Aug. 3, 2004, [http://money.cnn.com/2004/08/03/news/midcaps/yes\\_nesn/index.htm](http://money.cnn.com/2004/08/03/news/midcaps/yes_nesn/index.htm).

<sup>18</sup> The United Kingdom Monopolies and Mergers Commission blocked the take-over of the Manchester United football (soccer) club by Rupert Murdoch's BSkyB—the monopoly supplier of premium sports programming.

between the RSN and cable provider in Figure 1. Such a combination potentially creates the ability and incentive for the firm to adversely affect market outcomes by foreclosing the rival DBS supplier from access to RSN programming (i.e., input foreclosure) or to engage in conduct that would otherwise raise its rival's costs by charging more for programming or lowering the quality of such programming in a way that could inhibit the MVPD's ability to compete.<sup>19</sup> A merger or exclusive agreement between an RSN and DBS supplier in Figure 2 poses the additional possibility that the merged entity could deny or frustrate the rival RSN access to placing programming on its MVP system (i.e., customer foreclosure).

The foregoing types of input and customer foreclosure or raising rivals' costs strategies are typically considered in vertical arrangements involving upstream input and downstream output suppliers.<sup>20</sup> The integrated firm's ability to foreclose or raise rivals' costs stems from the control of RSN programming. Incentive turns on whether frustrating or denying access is a profitable strategy. For example, the integrated or contractually-related firm must offset the lost programming revenue from rival MVPDs with a revenue gain from its own sales of sports programming at supra-competitive prices. This cost/benefit analysis depends on the structure (i.e., market shares and concentration) in upstream and downstream markets.

Consider now a merger of the two cable providers (one with an existing interest in an RSN) in Figure 3. Such a combination might increase the firm's incentive to adversely affect market outcomes. With a greater share of the downstream MVPD market, the merged company might find it profitable to deny or frustrate the rival DBS supplier's access to the programming of its integrated RSN affiliate or otherwise raise its

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*See, e.g.,* Martin Cave and Robert W. Crandall, *Sports Rights and the Broadcast Industry*, 111 THE ECON. J. 469 (2001) at F4-F26.

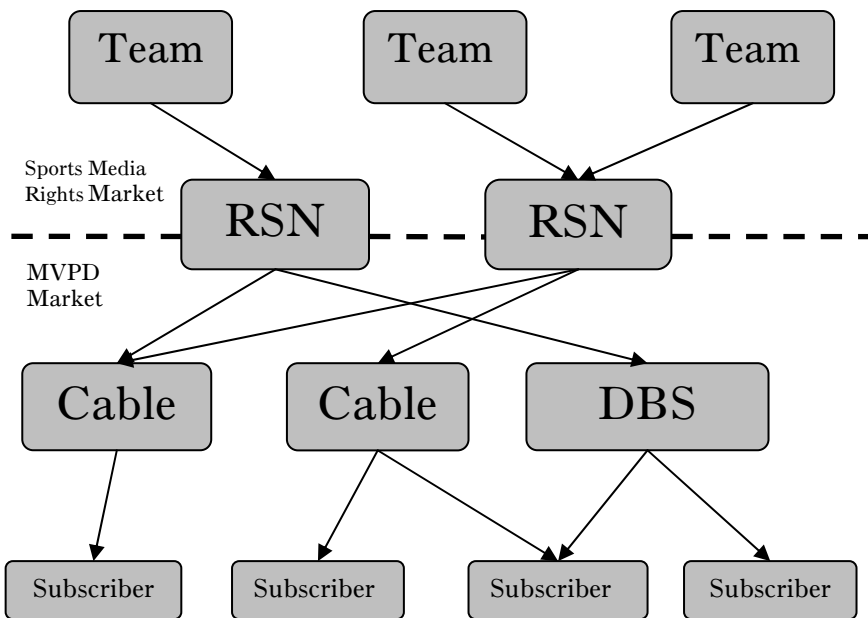
<sup>19</sup> Note that FCC rules that require integrated cable providers to offer programming on reasonable and non-discriminatory terms can be gamed by setting a high price charged to competing MVPDs. But the same price—charged by the cable provider to “itself”—is effectively a transfer price and arguably does not affect the ability of the firm to compete.

<sup>20</sup> *See, e.g.,* Michael H. Riordan and Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1994) and David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 FED. COMM. L.J. 511 (1994) at 517-20.

costs, thus impairing the firm's ability to compete in the downstream market. Alternatively, the larger post-merger MVPD might have more incentive to foreclose the competing RSN from access to the merged company's MVPD as a customer.

Likewise, the merger of the two competing RSNs in Figure 3 (one with an existing interest in a MVPD) could increase the ability of the merged entity to adversely affect market outcomes. With a control over all RSN programming in the market, foreclosure of the rival MVPD is more viable.

FIGURE 3:  
RIVALS RSNs AND MULTIPLE, RIVAL MVPDs



The exclusionary conduct embodied in foreclosure is problematic because it narrows the field of options for rivals in their respective markets. Depending on the type of foreclosure, such diminished competition can increase the prices at which RSN programming is sold to MVPDs and/or those charged to subscribers of MVP services.

Consumers' ability to switch to competing MVPDs to avoid subscription price increases or degradation in programming quality is a key factor in determining whether mergers or exclusive agreements involving RSNs and MVPDs

can harm consumers. These issues have arisen in a number of cases, including the Federal Communication Commission's decision in Fox's proposed acquisition of DirecTV<sup>21</sup> and the Federal Trade Commission's investigation into Comcast and Time Warner Cable's proposed acquisition of the cable assets of Adelphia.<sup>22</sup>

#### IMPORTANT FACTORS IN EVALUATING COMPETITIVE ISSUES

Competition analysis under both antitrust and regulatory standards typically looks at a number of factors: market definition and structure (i.e., market shares and concentration), competitive effects, the role of entry, and merger-related efficiencies. Two of these factors are likely to stand out in assessing competitive outcomes in sports-related MVP—market definition in upstream media rights and downstream MVPD markets and the role of consumer-related efficiencies.

#### MARKET DEFINITION

Market definition is the first and often most important step in antitrust analysis. A “relevant” market for antitrust purposes is the smallest group of products (in a geographic area) that consumers could switch to in order to avoid a price increase by a “hypothetical” monopolist. Market definition therefore asks what products consumers view as good substitutes. If consumers can switch to other available products, then it would be harder for any single seller or group of sellers to profitably increase prices.<sup>23</sup> Applied in the RSN context, the question of market

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<sup>21</sup> See F.C.C., General Motors Corp. and Hughes Electronics Corp., Transferors, and News Corp. Ltd., Transferee, Memorandum Opinion and Order, FCC 03-330, released January 14, 2004, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-330A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-330A1.pdf).

<sup>22</sup> See, e.g., posting of Shepard Mullin to Antitrust Law Blog, FCC Antitrust Highlights, <http://www.antitrustlawblog.com/highlights-153-fcc-antitrust-highlights.html> (Aug. 7, 2005); David Lieberman, *FCC Asked to Put Limits on Deal for Adelphia*, USA TODAY, July 24, 2005, available at [http://www.usatoday.com/money/media/2005-07-24-adelphia-usat\\_x.htm](http://www.usatoday.com/money/media/2005-07-24-adelphia-usat_x.htm); F.T.C., FTC's Competition Bureau Closes Investigation into Comcast, Time Warner Cable and Adelphia Communications Transactions, January 31, 2006, <http://www.ftc.gov/opa/2006/01/fyio609.htm>.

<sup>23</sup> See U.S. D.O.J. and F.T.C., Horizontal Merger Guidelines, 57 FR 41,552 (1992), revised, 4 Trade Reg. Rep. (CCH) ¶13,104 (April 8, 1997), Section 1, available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

definition centers on how MVPDs are likely to view programming for different local teams marketed by an RSN.

For example, is programming for the local baseball team a good substitute for local hockey? Is programming for one local baseball team a viable substitute for a rival local baseball team, as in the case of the Yankees and Mets in New York or the Dodgers and Angels in Southern California? If not, then the media rights for each team are effectively individual monopolies and joint marketing would not eliminate competition.<sup>24</sup> Alternatively, if programming for individual teams offered by an RSN does compete for the viewership of local fans, joint marketing through an RSN eliminates such competition and could result in restricted or lower quality programming and higher prices to MVPDs.

Decisions in a number of antitrust cases, including *USFL v. NFL*, indicated that the most important sports constitute separate markets.<sup>25</sup> Under such circumstances, an RSN such as CSN Chicago that coordinates the rights for multiple different-sports teams may not raise competitive concerns. However, RSNs like MASN and FSN West that jointly market the rights of the rival Orioles and Nationals and the Dodgers and Angels, respectively, may be problematic.

In downstream markets, the relevant antitrust question is how MVP subscribers view RSN products offered through different MVPDs. For example, do consumers consider different RSN channels and packages sold by local cable and satellite providers to be effective substitutes? This may be the case in the larger metropolitan areas that host the multiple RSNs shown in Table 1. And in what instances do sports channels compete with other forms of non-sports premium programming? In downstream markets, the FTC has made both of the foregoing determinations—i.e., that premium sports channels comprise a

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<sup>24</sup> Most RSNs provide coverage of local or sports teams within or near a major metropolitan with strong fan loyalty and support. A local MVPD would be unlikely to consider sports-related MVP offered by non-local RSNs a good substitute.

<sup>25</sup> See, e.g., *USFL v. NFL*, 842 F.2d 1335 (1988). For a more detailed discussion, see Franklin M. Fisher, Christopher Maxwell, and Evan Sue Schouten, *Sports League Issues: The Relocation of the Los Angeles Rams to St. Louis*, in *THE ANTITRUST REVOLUTION* AT 277 (J. E. Kwoka and L. J. White, eds., 4th ed. 2004).

market and that premium pay television programming comprises the relevant market.<sup>26</sup>

Based on the foregoing, consolidation of RSNs in a “premium sports channel” market could pose competitive problems while under a broader market definition (e.g., all premium pay programming), it would not. Market definition is, and will likely continue to be a controversial part of competitive analysis involving sports-related MVP, particularly with ongoing changes in how sports programming is marketed, with larger numbers of channels offered in basic packages and sports and non-sports programming bundled together as part of premium services.

### CONSUMER ISSUES

Because of the intense popularity of and role of fan loyalty in driving demand for sports programming, the competitive analysis of sports-related MVP is likely to consider other factors that could bear on enforcement decisions involving integration or contractual relationships. First, MVP subscribers may place a higher value on convenience and quality than they do on price. This characteristic of consumer demand creates tensions for the desirability of certain market structures that would be achieved through mergers or agreements involving RSNs and MVPDs. For example, fans might willingly pay a supracompetitive price to avoid the service interruptions that could occur because of disruptive bargaining. Such problems could arise between rival RSNs over the media rights to individual or groups of teams or between multiple RSNs and MVPDs in a geographic market.<sup>27</sup> Under the foregoing circumstances, arrangements or outcomes that place local sports programming with a single RSN could provide benefits to consumers.

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<sup>26</sup> European competition authorities have made similar findings. See, e.g., Office of Fair Trading, The Director General’s Review of BSkyB’s Position in the Wholesale Pay TV Market, (1996), *available at* [http://www.offt.gov.uk/shared\\_offt/reports/media/oft179.pdf](http://www.offt.gov.uk/shared_offt/reports/media/oft179.pdf).

<sup>27</sup> Due to asymmetries (i.e., imbalances) in information between buyers and sellers, establishing prices for programming is costly and bargaining can be a disruptive process. One example of this is the negotiations between YESN and Cablevision in NYC. See, e.g., *Echostar’s Dish Network is Lone Holdout in Cablevision, YES Network Deal*, LONG ISLAND BUS. NEWS, March 28, 2003, *available at* <http://www.allbusiness.com/north-america/united-states-new-york/1147329-1.html>.

Second, placing RSN's sports programming with an MVPD in an exclusive arrangement could arguably allow the firms to differentiate themselves from a competing sports content/distribution (i.e., RSN/MVPD) platform in the market. This type of "systems" competition could allow rival RSN/MVPD platforms to compete more effectively.<sup>28</sup> Both of these potential pro-consumer scenarios involving vertical relationships between RSNs and MVPDs should, however, be considered in light of the fact-patterns in specific cases. For example, horizontal integration between MVPDs (as in the case of *Comcast/Time Warner/Adelphia*), if superimposed on exclusive arrangements between unintegrated RSNs and MVPDs may renew or intensify the bargaining over the share of profits that are divided between the various stakeholders. This increases the likelihood of service disruptions that inconveniences fans and viewing audiences.

Multiple offerings between rival RSNs, each with exclusive agreements with cable and DBS providers, could also force consumers to invest in different or additional equipment and pay for bundled packages that include redundant sports programming.<sup>29</sup>

The weight given to the foregoing considerations in antitrust analysis will depend largely on the magnitude of potential competitive harm raised by various transactions. More competition in popular sports channels and packages offered through RSNs is very much in the interest of MVPDs who—given strong viewership for the team-specific programming that is offered by different RSNs—would find ready customers. Moreover, promoting competition at both the RSN and MVPD levels is likely to ensure that prices are low, and that consumers are afforded choice in sports-related programming.

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<sup>28</sup> See, e.g., *Sports Programming and Cable Distribution: The Comcast/Time Warner/Adelphia Transaction*, December 7, 2006, Prepared statement of Federal Trade Commission, (Presented by Michael Salinder, Director, Bureau of Economics to Committee on the Judiciary, US Senate), available at <http://www.ftc.gov/os/testimony/Po52103SportsProgrammingandCableDistributionTestimonySenate12062006.pdf>.

<sup>29</sup> At the same time, mergers or exclusive agreements could also harm consumers by forcing them to purchase multiple and/or incompatible hardware.

APPLICABILITY OF ANTITRUST EXEMPTIONS RELATING TO  
PROFESSIONAL LEAGUE SPORTS

There are no specific antitrust exemptions involving professional league sports and MVPDs. Nonetheless, another source of controversy in the RSN debate may be whether antitrust immunity afforded league sports in certain contexts should apply to RSNs.<sup>30</sup> For example, professional baseball has the benefit of a court-created exemption which extends to franchise relocations and other conduct that is the “business of baseball.”<sup>31</sup> Arguments that the provisions of the Sports Broadcasting Act (SBA) of 1961 may exempt RSNs may also surface in the debate. The SBA exempts from antitrust scrutiny any league that “sells or transfers all or part of the (broadcast) rights of the league’s member clubs.”<sup>32</sup>

While the applicability of the baseball exemption outside the player market is still unresolved by the courts, it is likely that the exemption would not easily be extended to the joint marketing activities of RSNs. Several attempts to apply the baseball exemption to media have failed.<sup>33</sup> The exemption does not cover arrangements that are designed to protect or increase the profits of a particular team owner or when the controlling entity (the RSN) is not a baseball team engaged in the business of

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<sup>30</sup> See, e.g., Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643 (1988). Ross argues that the single-entity argument is flawed as a matter of economics because club-run leagues do not have a unity of economic purpose and lack a residual claimant to organize the league and distribute the proceeds. See also, e.g., Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. OF ECON. 324 (1982) and Michael A. Flynn & Richard J. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, 111 THE ECON. J. 469 at 27 (2001).

<sup>31</sup> See *Federal Baseball Club vs. National League*, 259 U.S. 200 (1922); see also *Toolson v. New York Yankees, Inc.*, 346 U.S. 917 (1953) and *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>32</sup> 15 U.S.C. § 1291.

<sup>33</sup> See, e.g., *Henderson Broadcasting Corp. v. Houston Sports Association, Inc.*, 659 F. Supp. 109 (S.D. Tex. 1987). Here, a district court held that an exclusive agreement between the Houston Astros and a radio station was not exempt because the competition affected was with a rival broadcaster, not a participant in the baseball industry.

baseball.<sup>34</sup> Arguably, the joint marketing of rights through RSNs is no more the business of baseball than is running a parking lot adjacent to the stadium.

The broadcast exemption is also not easily extended to RSNs. Here again, several attempts to expand coverage of the SBA to MVPD have failed.<sup>35</sup> The SBA deals with collective sales of rights or joint contracting by a league, not to sales of individual rights by local team owners or to the resale of rights by a rights purchaser (e.g., an RSN). Moreover, major federal cases have construed the applicability of the SBA to “sponsored telecasting” to apply narrowly to over-the-air television broadcasting. This means it would not affect negotiations with cable or satellite providers by entities controlling the media rights.

#### IMPLICATIONS FOR ANTITRUST AND REGULATION

The foregoing analysis of competitive issues in sports programming markets highlights two major policy issues. First, MVPD markets have benefited by continued penetration of DBS. But cable mergers that increase incentives to foreclose rival MVPDs from affiliated RSN programming could quickly reverse those gains. Competition will therefore benefit from continued close monitoring and scrutiny of cable consolidation. In problematic cases, divestiture can reduce cable market power. And regulatory policy initiatives and directives that promote the continued penetration of DBS and compel carriage of independent programming should be promoted.

Second, the lack of close substitutes created by fan loyalty to particular local teams can have significant implications for competition in MVPD markets. This unique feature of demand for sports programming will affect whether joint marketing of rights through RSNs creates competitive problems. It also will affect outcomes of vertical relationships between MVPDs and RSNs and mergers or either downstream MVPDS or upstream

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<sup>34</sup> See Stephen F. Ross, *The Baseball Antitrust Exemption Lives, But with Criticism, in the Eleventh Circuit*, American Antitrust Institute, May 28, 2003, <http://www.antitrustinstitute.org/Archives/247.ashx>.

<sup>35</sup> In *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999), the Third Circuit Court of Appeals held that the statute did not protect the NFL's sale of games for satellite programming packages.

RSNs in the presence of vertical arrangements. Exclusive agreements that foreclose competing MVPDs from access to RSN programming could impose significant switching or duplication costs on consumers who are forced to invest in multiple services to get the programming they want.

The foregoing issue highlights the growing dichotomy between cable-based and DBS-based MVPD systems. In this case, maintenance of “systems competition” is heavily dependent on robust upstream media rights and downstream MVPD markets and open and unfettered MVPD access to local sports programming. Exclusive agreements or mergers that limit MVPD access to programming undercut the benefits of growing, head-to-head competition between cable and DBS. Vertical relationships therefore require careful monitoring and (when necessary) remedial conditions such as “open access” to programming or divestiture.<sup>36</sup>

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<sup>36</sup> See, e.g., Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B. U. L. REV. 889 (1999) at 954-55.