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PROFESSIONAL SPORTS FRANCHISE MOVEMENTS AND THE SHERMAN ACT: WHEN AND WHERE TEAMS SHOULD BE ABLE TO MOVE

Jeffrey Glick*

I. INTRODUCTION

Professional sports play a major role in American life. On any weekend one need only turn on a television set to be inundated with baseball, football, basketball, hockey and soccer games, tennis matches, golf tournaments and any one of a growing number of other sporting events.¹ One hundred and twenty-two teams² and five major United States team sports compete for fan recognition, media attention, ticket sales, players, coaches, and other personnel. Millions of dollars are won or lost on ninth inning home runs and last second field goals and a championship team can send an entire city into a frenzy. This “sports mania” shows no regard for race, sex, age, social status or any other conceivable categorization.³ Beyond

¹. 1982 by Jeffrey Glick

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1. For example, the San Francisco Chronicle on October 17, 1981 listed the following televised sports events for the weekend of October 17-18: four professional football games, two league championship baseball games, a college football game, four college and professional football highlight programs, boxing, auto racing, soccer, wrestling, horse racing and even roller derby. In addition, cable television subscribers have access to a 24-hour-a-day all sports station. San Francisco Chronicle, Oct. 17, 1981, (Sporting Green) at 41, col. 5.

2. At present there are: 26 major league baseball teams, 12 in the National League (NL) and 14 in the American League (AL) (each league has one franchise in Canada); 28 teams in the National Football League (NFL); 12 teams in the United States Football League (USFL); 23 teams in the National Basketball Association (NBA); 21 teams in the National Hockey League (NHL) (14 of which are located in the United States); and 12 teams in the North American Soccer League (NASL) (9 of which are located in the United States).

3. No less of an authority than Justice Blackmun devoted a significant portion of his opinion in Flood v. Kuhn, 407 U.S. 258 (1972), to lionize baseball’s greats of yesteryear. See id. at 260-64.
family entertainment, friendly wagers, and civic pride lies a very serious business.

One of the major decisions facing professional sports leagues and their team owners is team location. There are two ways for a team to be placed in its home territory: First, a league may grant an owner a franchise for a particular city. Second, an existing team may relocate. League expansion is the most popular method for locating a team.4

The attempt by the Raiders football team to play its home games in the Los Angeles Coliseum, and the resulting litigation has sparked interest in the franchise transfer issue throughout the sports world.6 The major claim made by the plaintiff Raiders in this litigation is that section 4.3 of the National Football League (NFL) Constitution,6 which governs the relocation of franchises, violates section 1 of the Sherman Act.7 Because other professional sports leagues have rules similar to the NFL’s,8 a judicial resolution of this case will have far reaching effects. Even if this particular case is resolved,9

4. Several mergers between competitor leagues have occurred since 1970; the AFL merged into the NFL in 1970, the ABA merged into the NBA in 1976 and the WHA merged into the NHL in 1979. From the standpoint of team additions, however, these are really equivalent to the addition of several expansion teams simultaneously.

5. See Los Angeles Memorial Coliseum Comm’n v. National Football League, 484 F. Supp. 1274 (C.D. Cal.) rev’d, 634 F.2d 1197 (9th Cir. 1980); Los Angeles Memorial Coliseum Comm’n v. National Football League, 486 F. Supp. 154 (C.D. Cal. 1979). During the summer of 1981, the case was tried to a jury in the United States District Court for the Central District of California, No. 78-3523-HP. This action ended in a mistrial in August 1981.

After a second trial in the district court, a six person jury, on May 7, 1982, decided that § 4.3 of the NFL Constitution violated the Sherman Act. The final disposition of this matter may not occur for some time because although the damages phase of the trial has just been completed, it is almost certain that the NFL and the Oakland Coliseum will appeal the verdict. The City of Oakland also attempted to prevent the move under the theory of eminent domain; a trial on this began in May 1983.

6. Section 4.3 provides in pertinent part: “No member shall have the right to transfer its franchise or playing site to a different city ... without prior approval by the affirmative vote of three-fourths of existing member clubs of the league.”

7. 15 U.S.C. § 1 (1976). This section provides in pertinent part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”

8. See, e.g., NATIONAL [BASEBALL] LEAGUE CONSTITUTION AND RULES art. 3.4 (requiring approval of three-fourths of the member clubs); AMERICAN [BASEBALL] LEAGUE CONSTITUTION art. 3.2 (three-fourths); NATIONAL BASKETBALL ASSOCIATION CONSTITUTION § 7 (three-fourths); NATIONAL HOCKEY LEAGUE CONSTITUTION § 4.2 (prohibiting transfers); NORTH AMERICAN SOCCER LEAGUE CONSTITUTION § 3.6 (three-fourths).

9. It is quite possible that the NFL will grant the Los Angeles Coliseum an
the issue is still certain to become important in the near future.\textsuperscript{10}

As the "Sun Belt" cities continue to grow, they will undoubtedly seek to attract major league teams and the leagues will seek to accommodate them.\textsuperscript{11} If one assumes that when a city reaches a certain size it has a sufficient population base to support a major league team,\textsuperscript{12} and that a league cannot function with an infinite number of teams,\textsuperscript{13} then once the team limit is reached, owners of the less profitable teams (which may be in areas of declining population) will actively seek to move their teams to these growing "Sun Belt" cities.\textsuperscript{14} When such moves are attempted, the various league rules will take effect. Thus, an analysis of the legality of these leagues rules, and alternative methods of controlling team movement is appropriate.

This article demonstrates that professional league franchise transfer rules are horizontal restraints on competition. However, these rules should be analyzed under a "rule of reason" test. The article shows that existing rules are unreasonable because they are subjective, arbitrary, and inconsistently enforced. Reasonable restraints, taking into account specific characteristics of potential locations will be offered.

expansion franchise as a compromise.

10. For example, the NBA's San Diego Clippers briefly threatened to move to Los Angeles in June of 1982 contrary to the NBA Constitution.

11. Census figures indicate the ten states which recorded the greatest absolute population gains were all southern and western, led by California and Texas (over 3,000,000), Florida (slightly under 3,000,000), and Arizona (slightly less than 1,000,000). U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 9 (102d ed. 1981).

12. In American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), aff'd, 323 F.2d 124 (4th Cir. 1963), the court found a metropolitan area with a population of 700,000 sufficient to support a professional football team. 205 F. Supp. at 76, 323 F.2d at 128. While this figure may not be valid today, this case does illustrate that a threshold figure exists.

13. As league size increases generally the number of teams involved in league playoffs increases. Expanded playoff structures decrease the importance of regular season games. As the importance of regular season games decreases, so will their attendance, with the result that some teams will become unprofitable and forced to move or disband.

14. It is possible that such moves will be attempted before the team limit is reached, if the cities offer the owners a substantially better financial deal than they are currently receiving.
II. THE APPLICATION OF ANTITRUST LAWS TO PROFESSIONAL TEAM SPORTS

"Decisions involving anti-trust claims respecting various aspects of sports are perhaps, more noteworthy for their number than for their logical consistency." Antitrust laws are widely thought applicable to most professional sports. Not all sports, however, fall under the umbrella of the Sherman Act. Major league baseball, largely due to a reluctance to overrule precedent, remains exempt from the antitrust laws. This anomaly dates back to the first sports antitrust case, Federal Baseball Club v. National League, where Justice Holmes wrote that "[t]he business is giving exhibitions of baseball, which are purely [intra] state affairs." Because section 1 of the Sherman Act speaks of commerce among the several states, baseball was exempt. Although the decision has been criticized by the courts, it has twice been affirmed by the Supreme Court. Federal Baseball Club has not, however, been extended to other team sports. Football, basketball, and most recently, hockey, have all been deemed to be cov-

15. Although some leagues have several franchises in Canada, and Canadian antitrust law may have an effect on these teams' attempts to move, this article will concern itself solely with American law.


18. 259 U.S. 200 (1922).

19. Id. at 208.

20. Judge Friendly commented: "We freely acknowledge our belief that Federal Baseball was not one of Mr. Justice Holmes' happiest days, that the rationale of Toolson is extremely dubious and that . . . the distinction between baseball and other professional sports is 'unrealistic', 'inconsistent', and 'illogical'." Salerno v. American League, 429 F.2d 1003, 1005 (2nd Cir.), cert. denied, sub nom. Salerno v. Kuhn, 400 U.S. 1001 (1970) (citing Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)).

21. Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). In Toolson, the Court gave four reasons for upholding Federal Baseball Club: (1) congressional awareness of the situation coupled with congressional inaction, (2) the fact that baseball developed under the assumption that it was exempt from antitrust laws, (3) a reluctance to overrule Federal Baseball Club, and (4) a decision that any change should be made through legislation. 346 U.S. at 357. Flood simply held that "the remedy, if any is indicated, is for congressional, and not judicial action." 407 U.S. at 285.


er by the antitrust laws, as businesses involved in interstate commerce.\textsuperscript{25}

Aside from baseball's blanket exemption, professional sports are statutorily exempt from the antitrust laws in the negotiation of radio and television contracts and in certain league mergers.\textsuperscript{26}

Although professional sports leagues are subject to the antitrust laws, it has been argued that these laws should not apply to the leagues' franchise location determinations.\textsuperscript{27} This argument classifies professional sports leagues as single entities, analogous to single firms exploiting national markets by deciding where to locate their branch offices in order to maximize profits.\textsuperscript{28} The better reasoned view, however, is that sports leagues are joint ventures, at least for this purpose, and thus covered by the antitrust laws.\textsuperscript{29}

The joint venture theory gains support from several sources. First, the league is not a single entity because each team is separately owned and operated with complete control over prices charged, marketing, strategy and personnel. Furthermore, the teams do not share profits and losses. Second, the general structure of a sports league is akin to that of a joint venture. A professional sports league is a voluntary organization which provides an institutional structure within which team contests can be arranged.\textsuperscript{30} Third, many courts have recognized the joint venture aspects of sports leagues,\textsuperscript{31}

\begin{footnotes}
\item[26] 15 U.S.C. § 1291 (1976). Additionally, blanket legislative exemptions for the NFL have been proposed.
\item[27] J. Weis\textsuperscript{2}tart \& C. Lowell, Law of Sports 698 (1977) [hereinafter cited as Weis\textsuperscript{2}tart \& Lowell].
\item[28] Id. at 699. Weis\textsuperscript{2}tart and Lowell rely heavily on the district court's opinion in San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974), to support this contention. They claim that league franchising activity should not be analyzed by using traditional section 1 concepts, because league franchises are not competitors "in the economic sense." At the very least, one must concede that two teams in the same league which play home games in the same city are in direct economic competition for fan attendance. Additionally, as will be explained later, each team actually competes economically in several markets at the same time, and from an antitrust viewpoint, this multi-market competition is relevant to a determination of the validity of the questioned league restraints.
\item[29] See Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (joint ventures subject to antitrust laws).
\item[31] See, e.g., North Am. Soccer League v. National Football League, 670 F.2d
\end{footnotes}
based on the teams' joint production of sporting contests which cannot be produced independently. Fourth, teams compete for players and coaches. Fifth, and perhaps most important, franchise location is determined not by the league administration, but rather by vote of the individual teams. Teams may vote in their own self interest rather than for the league's benefit.

A significant comparison for the individual votes argument is supplied by United States v. Sealy, Inc. In Sealy manufacturers were licensed to produce and sell Sealy products. The Court found that the licensees exercised power in granting, assigning and reassigning licenses. The Court concluded from these facts that "the obvious and inescapable facts are that Sealy was a joint venture of, by, and for its stockholder-licensees." This situation closely parallels the sports league situation because leagues, in effect, license teams to produce the league product, the teams exercise power over the reassignment of territories, and the league exists for the benefit of its teams. Clearly, this case weakens the single entity argument.

Because there is no specific antitrust exemption for franchise location and because the antitrust laws have been held to apply to professional sports, and there are no reasons not to apply the antitrust laws in this area, it is logical to conclude that franchise movement restrictions must comply with section 1 of the Sherman Act. The question thus becomes: What types of restrictions will comply with section 1 of the Sherman Act? Neither case law nor commentators offer a clear consensus. Additionally, the cases and commentaries

33. The National Football League's provision on team location is a representative provision relying on the aggregation of individual members' decisions to determine the ability of a league member to switch locations. See supra note 6.
34. 388 U.S. 350 (1967).
35. Id. at 353.
36. See, e.g., San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974) (concluding § 1 of the Sherman Act is not violated); Comment, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws, 81 Harv. L. Rev. 418, 429-30 (1967) (concluding devices which restrict an owner's ability to shift his franchise to a new territory should be held illegal, and loss of fan loyalty due to movements is the only argument for allowing restraints in other
provide only a cursory analysis of the issue.  

III. A Categorization of the Restraint

Franchise movement restrictions fall under the general category of territorial restrictions. These are broken down into two basic types—vertical and horizontal.

Vertical territorial restrictions are imposed between firms performing functions at successive stages in product production and distribution. A common example of this type of restraint is the typical franchise agreement. The franchisor, generally a manufacturer or distributor, will grant the franchisee, generally a retailer, the right to sell the franchisor’s products in a specific area. Often this involves an exclusive right to sell.

By contrast, horizontal territorial restraints are agreements between direct economic competitors, at the same level of the market structure, to allocate territories; for example, when competitors in the same market, such as hamburger chains, decide that one will sell only in the northern half of a state, while the other will sell only in the southern half. Because the Supreme Court treats these two restrictive practices differently, it is important to formulate an accurate characterization of any territorial restriction. The Supreme Court has held vertical territorial restraints to be governed by a rule of reason analysis, rather than by a per se analysis. This is not meant to imply that vertical restraints will never be determined to be per se unreasonable, but that the general presumption is that they are not.

In order to characterize the sports franchise restrictions as vertical, it must be determined that these restraints are

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situations); Leavell & Millar, Trade Regulation and Professional Sports, 26 Mercer L. Rev. 603, 613-14 (1975) (concluding the restrictions are territorial divisions of markets, and thus per se illegal); Weistart & Lowell, supra note 27, at 695-701 (concluding under San Francisco Seals, § 1 of the Sherman Act should not apply to these restraints as they should be “viewed as essentially internal marketing decisions”).  

37. San Francisco Seals, Ltd. and Weistart & Lowell, supra note 27, at 695-701, provide the most lengthy analyses, and both conclude that the antitrust laws do not apply based on the premise that a sports league is a single entity. This argument has been previously discussed and refuted.  

league imposed.\(^4\) Support for the position that these franchise restrictions are league imposed comes from two main sources. First, the territorial restrictions in question appear in the leagues’ constitutions and bylaws. Second, the leagues grant the franchises, and assign each a specific home territory.\(^4\) Thus, franchise location looks very much like a league-imposed vertical restriction. An analysis of Supreme Court territorial restriction decisions, however, leads one to dismiss this conclusion.

The two major cases holding vertical territorial restrictions subject to a rule of reason analysis are *White Motor Co. v. United States*,\(^4\) and *Continental T.V., Inc. v. GTE Sylvania, Inc.*\(^5\) In *White Motor* the White Motor Company manufactured trucks and sold them to distributors, dealers and users. White Motor’s franchise agreements with its dealers and distributors contained territorial clauses which granted exclusive rights to sell White trucks within an assigned territory.\(^6\) Likewise, in *Continental T.V.*, Sylvania, the manufacturer, included a provision in its contracts with its franchised retailers which prevented the retailers from selling Sylvania’s products at a location other than the one at which the retailer was franchised.\(^7\)

While these situations may appear similar to the sports franchising cases they are in fact quite different, and as a result provide no guidance for sports franchising. The major difference between the sports cases and *White Motor Co.* and *Continental T.V.* becomes quite clear upon a careful reading of a representative league rule, section 4.3 of the NFL Constitution,\(^8\) which requires “the affirmative vote of three-fourths

\(^4\) In this sense, the teams act as distributors of the league product by selling it to the public in a way that is somewhat similar to an automobile dealer selling the manufacturer’s products. One court has noted in dictum that an agreement between a league and its owners should be treated the same as a vertical agreement. North Am. Soccer League v. National Football League, 670 F.2d 1249, 1258 n.5 (2nd Cir.), cert. denied, 103 S. Ct. 499 (1982).


\(^7\) 433 U.S. 36 (1977).
\(^8\) 372 U.S. at 255.
\(^9\) 433 U.S. at 46.
\(^10\) See supra note 6.
of existing member clubs.” Here, the restraint is imposed by the other teams in the league. The situation parallels United States v. Sealy, Inc.⁴⁹ where horizontal competitors imposed restraints on one another. In Sealy, the Court found that Sealy licensed manufacturers to produce and sell products under the Sealy name by means of an exclusive territorial allocation system. These licensees owned almost all of Sealy’s stock and composed Sealy’s Board of Directors and executive committee. The licensees exercised control over Sealy in the granting, assignment, reassignment, and termination of exclusive territorial licenses.⁵⁰ The Court further found that, “[t]he arrangements for exclusive territories are necessarily chargeable to the licensees of appellee whose interests such arrangements were supposed to promote.”⁵¹ From these facts, the Court concluded that the restraints were horizontal.⁵²

The parallels between Sealy and the sports situations are clear. The teams involved are similar to the franchisees in Sealy because they are licensed by the leagues to produce the leagues’ products under an exclusive territorial scheme. Since the teams vote pursuant to league rules to approve or disapprove team moves, they sit in the same position as did the Sealy franchisees with respect to license reassignment. Additionally, as was the case with Sealy’s licensees, by controlling team location, each individual team promotes its own interests by creating a profitable league and keeping direct competition out of its team’s area.

It can be argued that teams in the same league do not compete economically, and that the leagues impose the restrictions since they are nothing more than the sum of their teams. These arguments, however, are not convincing. This “non-competitor” argument fails because teams in the same league, located in the same metropolitan area, are competing in the same local market.⁵³ The “sum of the teams” argument fails because there is no unified league decision made in this circumstance. Each team has one vote in the process, and it is free to vote as it wishes; it has no obligation whatsoever to be

49. 388 U.S. 350 (1967).
50. Id. at 351-53.
51. Id. at 353-54.
52. Id. at 352.
53. See infra note 62 and accompanying text (analysis of relevant product and geographic markets).
guided by collective league interests other than its own. The
decision is the result of the individual actions of league mem-
bers, not the result of a unified league body. Thus, the re-
straint is the result of the action of economic competitors and
as such resembles the situation in Sealy more closely than the
situation in either White Motor or Continental T.V. It follows
then, that because Sealy is an example of a horizontal re-
straint, so too are the sports cases. 54

Once franchise location restraints are classified as hori-
zontal territorial restraints, the next inquiry which must be
made is whether the applicable rule to apply in analyzing
them is the “per se” rule, or the “rule of reason.”

In United States v. Topco Associates, Inc., 55 the Su-
preme Court held that horizontal territorial restraints consti-
tute a per se violation of section 1 of the Sherman Act. 56 The
Topco defendants were a group of independent supermarkets
which had formed a cooperative corporation (Topco) to pro-
duce a house label for group members. Each member store
held a license granted by the members to sell the Topco brand
in a specific territory. 57 The agreements decreased competi-
tion in the Topco brand and increased each member’s ability
to compete with large grocery chains. The Court found these
agreements to be illegal per se. Such restraints were described
by the Court in White Motor as “naked restraints of trade
with no purpose except stifling of competition.” 58

If sports franchise transfers are horizontal territorial re-
straints, does it follow that they are per se illegal? Regardless
of the strength of the analogy to Topco, close scrutiny of the

54. In a discussion of franchise movement restrictions, the subject of group boy-
cotts often arises. Conventional group boycotts occur when traders at one level act to
minimize competition from non-group members at that level. These are generally ac-
complished by concerted action whose purpose is to deprive the non-group members
of a trade relationship necessary to their continued competition. L. Sullivan, supra
note 38, at 230. Such actions have been held to be per se illegal. Klor’s, Inc. v. Broad-
Federal Trade Comm’n, 312 U.S. 457 (1941). Although some exercises of the sports
restraints may restrain head to head competition, all the parties involved are group
members and therefore this situation does not meet the definition of a group boycott.
The group boycott rationale might, however, be applicable when discussing a re-
straint on the entry of a new team into the league.

55. 405 U.S. 506 (1972). See also infra notes 84-88 and accompanying text.
56. Id. at 608.
57. Id. at 598-600.
58. 372 U.S. at 263.
particular circumstances surrounding sports leagues leads to uncertainty regarding the appropriateness of a rigorous, absolute, per se prohibition against all restrictions on team movement. The usual reasons for applying the per se doctrine may not be present here. Although it is tempting to follow the bright line rule for per se illegality laid down in Topco, one must not be quite so willing to trade off sound reasoning and fairness for simplicity. The classic definition of the per se rule was set forth in Northern Pacific Railway Co. v. United States, where Justice Black articulated the rule: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."  

From this decision, the Court progressed to its "naked restraints" view in White Motor, and to its decision in Topco. Therefore, the typical scenario for the application of the per se approach is one where an imposed restraint is so plainly anti-competitive, and so lacking in any redeeming features that its illegality should be conclusively presumed. These definitions and presumptions are vital, for when viewed in light of another recent Supreme Court decision, Broadcast Music Inc. v. Columbia Broadcasting System, Inc., they point out the hazards of literally following a general mechanical rule.

Broadcast Music considered the validity of blanket licensing agreements. BMI and ASCAP, two music clearinghouses, sold blanket licenses which included all compositions in which they held non-exclusive licenses. The costs of the licenses sold were fixed by the seller, and did not depend on the amount or type of music the purchaser used. The Court of Appeals for the Second Circuit found that the arrangement was a form of price fixing and thus per se illegal.  

The Supreme Court reversed. Justice White determined that the court of appeals decision hinged on a finding of "price fixing" in the literal sense because the composers and

60. Id. at 5.
63. 444 U.S. at 7.
publishing houses joined together to form an organization which set prices for blanket licenses. The Court went on to state that "price fixing" is a simple way of categorizing certain behaviors which have been found to be per se illegal and the literal approach of the court of appeals did not, in and of itself, establish that the particular practice engaged in was plainly anticompetitive. The Court then found that these restraints were not naked restraints of trade, but rather were developed to meet market demand. After listing several positive aspects of the licenses, such as user preference, practical necessity and decreased costs, the Court concluded that the blanket license was an acceptable way for some customers to obtain music performance rights, and was therefore not per se illegal. Additionally, the Court held that, "It is only after considerable experience with certain business relationships that courts classify them as per se violations ...." Thus, the Court appears to have decided that, (1) narrow literal readings of business practices are not encouraged in a per se analysis, (2) regardless of the existence of a specific per se business practice category, a restraint which appears to fall within the category must still meet the per se tests of Northern Pacific and White Motor, and (3) regardless of a tentative per se conclusion, a per se violation should not be found if the court has not given the issue considerable thought in the past.

64. Id. at 8.
65. Id. at 9.
66. Id. at 20.
67. Id. at 24. The Court was also impressed by the fact that the blanket licenses offered by BMI and ASCAP were different products than the individual licenses offered by individual composers. Thus, the organizations were really just fixing the price for their own product; a product which they each sold alone.
68. Id. at 9 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972)).
69. This analysis may suggest that the Court is moving away from the strict result reached in Topco. By requiring strict compliance with the proposition that a restraint is a per se violation only if it is plainly anticompetitive and that the Court must have previously considered the issue, Broadcast Music appears to clear the way for a case by case determination of per se violations rather than the traditional determination based solely on the mechanical categorization of the restraint in question. This somewhat stricter standard for per se violations is consistent with the Court's decision in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). There, although acknowledging the existence of the per se rule, the Court refused to view a restraint, which substantially prevented price competition by banning competitive bidding, as a form of price fixing, and undertook a rule of reason
Under the rationale followed in *Broadcast Music* it appears that restrictions on sports franchise movements, although horizontal restraints, need not always be illegal. Several factors point towards this conclusion. Sports leagues are functionally different from the stores in *Topco* and, therefore, the per se rule should not be literally and arbitrarily applied. *Topco* involved cooperation among grocery stores which would have been economic competitors in the Topco line absent their restraining agreement. Although the sports restraints may prevent teams in the same league from competing, the level of integration needed between teams in the same professional league is far greater than the level necessary between grocery stores. While it is quite common for individual stores to make their own decisions and still prosper, a professional sports team cannot act without regard for the others in the league and still survive.

League members are not economic competitors in the same sense as are individual companies.70 "No NFL team, in short, is interested in driving another team out of business, whether in the counting house or the football field, for if the league fails, no one team can survive."71 This is certainly not the case in the typical horizontal relationship, for in the classic case, one firm (a monopoly) has been shown to prosper. Additionally, for a professional game to occur, there must be cooperation between the participants in choosing the time and place to play. Likewise, for a league to exist, there must be a certain amount of cooperation between the league members. While it is theoretically possible for organized professional sports teams to independently arrange to play each other outside a league format, and thus compete in economic respects for fans and players, independent professional teams are rare in this country.72 Thus, because there exists a need for cooperation among teams, calling any form of cooperation

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between teams illegal without scrutinizing the agreement in some detail is not prudent.\textsuperscript{73}

Moreover, assuming arguendo that teams could survive outside a league structure, there is still support for rejecting an overbroad per se test. One of the major issues discussed in Broadcast Music was that a blanket license was different from an individual license; therefore, the agreement created a new product and in effect gave consumers more freedom in choosing how to obtain their music.\textsuperscript{74} Similarly, a league structure creates a unique product, league competition with its attendant playoff structure, standings, etc. Individual teams can exist and play exhibitions, but these games will be quite different than league contests. Therefore, leagues do not foreclose the operation of independent teams, they create more choices for consumers.

Furthermore, the restraints do not deserve per se dismissal because they fail to meet the standards of Northern Pacific and White Motor; they neither suffer from a "lack of any redeeming virtue" nor are they "naked restraints." These location restrictions have several redeeming virtues for the league, the teams and the public.\textsuperscript{75} An example of their value is the positive effect on fan acceptance and loyalty toward the league and specific teams. If teams were allowed to move indiscriminately and often, they would not have time to cultivate fan loyalty. Additionally, the league itself would lose credibility and be perceived as a fly by night operation. Although courts hesitate to accept just any argument for abandoning a per se analysis,\textsuperscript{76} the fan loyalty and support argument is fundamental to a league's existence, and its promotion is sufficient to meet the redeeming virtue requirement.

Finally, the Broadcast Music decision focuses on a court's experience with the particular issue. The question of franchise restrictions has been litigated only once. In San Francisco

\textsuperscript{73} "In an industry which necessarily requires some interdependence and cooperation, the per se rule should not be applied indiscriminately." Hatley v. American Quarter Horse Assoc., 552 F.2d 646, 652-63 (5th Cir. 1977).

\textsuperscript{74} 441 U.S. 1, 21-22 (1979).

\textsuperscript{75} See infra notes 103-24 and accompanying text.

\textsuperscript{76} National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978).
Seals, Ltd. v. National Hockey League, the district court found that the enforcement of the franchise location restraint section of the NHL constitution did not restrain trade. The Court in San Francisco Seals, however, viewed the league as a single economic unit. This, as has been argued previously, is an erroneous conclusion and thus the opinion should not be given great weight. The courts have not considered the issue at length, and therefore under the rationale of Broadcast Music a per se rule should not be applied.

The application of a rule of reason is supported by other decisions involving restrictive, cooperative practices of sports leagues. Courts have held that league drafts of amateur players are to be analyzed under a rule of reason, as are rules requiring compensation for free agents, and rules governing the broadcast of league games. In fact, there is no example of a court applying a per se rule to any sports league restrictive practices. All of these factors considered together re-
quire one conclusion: The rule of reason should be applied to franchise location restrictions.

IV. THE RULE OF REASON

Antitrust laws are applicable in the context of sports franchising, and the correct test to apply in determining the legality of territorial restraints on these franchises is the rule of reason. The underlying goal of section 1 of the Sherman Act is to maintain competition between all firms in the marketplace.\(^84\) Section 1, however, prohibits "[e]very contract, combination . . . or conspiracy. . . ." By their very nature, all contracts restrain actions. Read literally and construed narrowly, any commercial contract would violate section 1 as all businesses could be considered potential competitors of each other.\(^85\) Hence, the Supreme Court has concluded that Congress never intended to prohibit contracts which might pose a minor, insignificant restraint on trade.\(^86\) In giving effect to this intent, the Court has adopted a "rule of reason" analysis for determining whether contracts or combinations violate the Sherman Act.

This rule was first posited in *Standard Oil Co. of New Jersey v. United States*,\(^87\) which held that conduct was violative of section 1 only if it imposed an "undue" restraint on competition.\(^88\) In *Chicago Board of Trade v. United States*,\(^89\) Mr. Justice Brandeis stated: "[T]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as

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\(^87\) 221 U.S. 1 (1911). Although *Standard Oil* is traditionally credited with giving birth to the "rule of reason," the rule was actually applied several times, in one form or another, many years before the decision. In United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), Judge Taft, in discussing price restraints imposed by pipe manufacturers, traced the precedent for his reasonableness analysis to Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

\(^88\) 221 U.S. at 58-60.

\(^89\) 246 U.S. 231 (1918).
may suppress or even destroy competition." These reasonable versus unreasonable, or suppresses versus regulates comparisons, form the foundation of antitrust analysis.

The rule of reason test requires that the restraint be ancillary to a legitimate purpose. Such a restraint must be justified by legitimate competitive needs, reasonably necessary to the attainment of legitimate competitive goals, and drawn to specifically achieve these goals. Above all, a court must view the total picture within its context.

A discussion of the rule of reason would not be complete without considering how the courts have construed the requirements of competitive impacts and legitimate purposes. Perhaps the case most indicative of the state of the art is National Society of Professional Engineers v. United States. Here, the Court accepted the basic rule of reason standard as reiterated in Continental T.V., Inc. v. GTE Sylvania, Inc., but when considering the factors to be weighed the Court stated that the purpose of the rule of reason is "to form a judgment about the competitive significance of the restraint. . . ." By limiting the rule's purpose to a consideration of competitive impacts, Professional Engineers has effectively made the test an economic one.

90. Id. at 238. Perhaps the classic pronouncement of the factors to be considered when applying this rule appears in this case as well:

The court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts. This is not because good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret fact and to predict consequences.

Id.

This passage explains quite well the view to which the Supreme Court has consistently adhered: When analyzing a restraint, courts must look at more than just the restrictiveness of the practice. Indeed, they must consider the purposes and effects of the restraint.

91. See United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).
92. See United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1374-75 (5th Cir. 1980).
95. 435 U.S. at 692.
96. See, e.g., United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir.
In summary, there are several steps involved in a rule of reason analysis. The court must identify the restrictive practice, determine the purpose behind the practice, identify effects, and then weigh the benefits and harms to competition in the market to determine if the practice substantially impedes competition. It is from this point that the analysis of the sports franchise restraints proceeds.

V. AN EXAMPLE OF THE APPLICATION OF THE RULE OF REASON TO A HORIZONTAL TERRITORIAL RESTRICTION

Before embarking on a lengthy rule of reason analysis of territorial restrictions on sports franchises, close study of a somewhat similar situation would be beneficial.97 The district court in United States v. Topco Associates, Inc.,98 was faced with a situation analogous to that presented by the sports restraints. Topco was a cooperative buying corporation organized and owned by a group of independent grocery stores. Each member store conducted business independently under its own name, none conducted business under the Topco name, and there was no pooling of earnings, profits, or management skill among the stores. Topco produced and distributed products under its own label. Topco members operated in many geographic markets and competed with other stores. Each member had a Topco license which specified the territories in which they could sell Topco brands, and were not permitted to sell Topco brands outside these areas. There were several types of licenses, some of which permitted more than one store to sell in the same area. All licenses were granted by a Board of Directors composed of principal executive officers of member stores. It was rare for two or more stores to sell Topco products in the same area, since the stores would lose their distinctiveness if they did. As a matter of practice, the Board did not modify licenses to allow stores to move into another's territory without first consulting the existing store in that territory. Members could sell Topco brands at whatever prices they desired. Topco membership was not static, larger members often developed their own house labels

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97. Such an analysis is difficult to find owing to the Supreme Court's pronouncement that such restraints are per se illegal.
and left, while new smaller stores joined the group. The licensing agreements decreased competition in the Topco label, but increased the members' interbrand competitive abilities.\textsuperscript{99} The court followed the rule of reason, and concluded that Topco's practices were procompetitive, not inherently unreasonable, ancillary to a legitimate purpose, and in the public interest.\textsuperscript{100}

The parallels between the \textit{Topco} organizational structure and a sports league are striking. As was the case with Topco, sports leagues are basically cooperative ventures organized and operated by a group of teams who conduct business operations independently under their own names. Teams do not share profits and management, but operate under league granted territorial licenses and compete in the entertainment market by distributing the league product. The league members vote on license ownership changes, and rarely allow two teams to exist in one area. League members are also free to set their product price. These territorial agreements tend to decrease league product competition but increase interbrand, or interleague, competition.

The district court in \textit{Topco} found several factors persuasive on the matter of reasonableness. Among these were the small size of most members' market shares, and the changing membership. The underlying argument was that the Topco labels were essential for these smaller stores to compete with large chains which had their own labels.\textsuperscript{101} The court concluded that the anticompetitive effects of the agreements were far outweighed by the increased ability of Topco members to compete with other stores.

There are several major differences between Topco and sports leagues. First, while Topco members were virtually indistinguishable if they operated in the same market, the same cannot be said for sports teams. Every team develops a unique style of play, uses unique players, and produces a unique

\textsuperscript{99} \textit{Id.} at 1032-38.

\textsuperscript{100} \textit{Id.} at 1038. This decision was reversed by the Supreme Court in \textit{United States v. Topco Assocs., Inc.}, 405 U.S. 596 (1972), when the Court found the horizontal territorial restraints were per se illegal. This is not relevant to the analysis, since it has already argued that the per se approach is not applicable to sports franchises. Thus, the district court's analysis is helpful because it is a rare example of a rule of reason approach to a horizontal territorial restraint.

\textsuperscript{101} 319 F. Supp. at 1040.
product. Teams in the same territory will thus be distinguishable. Second, while Topco members often left the group after developing an ability to compete on their own, the same is not true for sports teams. League teams cannot operate successfully outside the league structure. The same territorial restriction is therefore more restrictive when applied to sports franchises than when applied to similar cooperative ventures in the business world. Third, while Topco members did not pool revenues, league teams share profits from television rights and ticket sales resulting in greater interteam dependence and decreased economic competition. Finally, Topco members possessed relatively small shares in the grocery market. Professional sports teams own significant shares of the entertainment market. The sports rules, therefore, restrain a greater portion of trade in a larger market.

While Topco provides some guidance as to the factors that should be weighed and their relative importance in a rule of reason determination, it is not controlling. Since the particulars of any given business will differ from those of another, the rule of reason is applied on a case-by-case basis. The procompetitive and anticompetitive effects of the territorial restraints must be weighed and balanced within the framework of factors specific to professional sports leagues.

VI. RULE OF REASON ANALYSIS

A. The Relevant Markets

The first question which must be answered in any rule of reason analysis is: In which markets is trade being restrained? These market determinations are extremely important, because if the restraining party does not possess "market power," it will not be capable of exerting pressure which is sufficiently detrimental to cause an "undue" restraint on competition. Hence, market power is necessary to inflict the sort of harm that the Sherman Act is designed to prevent. The issue is not whether the party possesses monopoly power, but whether it possesses a substantial degree of market power. To determine if this power is present, both the product and geographic markets involved must be considered.

102. WEISTART & LOWELL, supra note 27, at 700 n.140.
103. L. SULLIVAN, supra note 38, at 192.
There are two possible geographic markets relevant to sports franchise location restraints: A nationwide market and a metropolitan market. In Hecht v. Pro-Football, Inc.,\textsuperscript{104} the court considered these markets in a case which was somewhat similar to a team relocation, and concluded that the relevant market was the target city.\textsuperscript{106} Hecht had attempted to acquire an American Football League franchise for Washington, D.C. One of the conditions placed on the acquisition was the negotiation of a contract which would enable the team to play in a suitable stadium. Hecht wanted the team to play in RFK Stadium. Due to a restrictive covenant in the lease between the NFL's Washington Redskins and the Stadium, Hecht was unable to secure a lease for the Stadium, and thus unable to submit a successful application.\textsuperscript{106}

The court concluded that "the relevant geographical market is the D.C. metropolitan area: it is here that 'the seller operates;' it is here alone that the Redskins' customers . . . can 'practically turn' for the supply of professional football."\textsuperscript{107} The court found "the 'national competition' was but a preliminary . . . step to a distinctly local end."\textsuperscript{108} This conclusion deserves some respect when considering markets for franchise transfers. The location of a new franchise is similar to the relocation of an existing one, insofar as in each case the team is attempting to enter one city and will only be capable of soliciting customers in that area; the relocating franchise competes in the target city.

There is one major difference between franchise transfers, and Hecht. In Hecht, the restrained party would have been a direct competitor of the restraining party in the relevant market. In franchise transfers this is not so; although the restrained franchise is prevented from competing in the target city, the need to limit the market is not as compelling.\textsuperscript{108}  

\textsuperscript{105} Id. at 989.
\textsuperscript{106} Id. at 985-86.
\textsuperscript{107} Id. at 989.
\textsuperscript{108} Id.
\textsuperscript{109} A good way to view this distinction is to look at it as the difference between a restraint imposed by one competitor on another where no integration exists between the two parties, and a restraint imposed by a group of competitors integrated with the restrained party. In the first case (Hecht) the restraint is only felt in the target city. The denial of access to the stadium is an injury to specific competition between the two parties in that area. In the case of a proposed move, the restraint
There is support for the proposition that these restraints are national in scope, but it is not entirely persuasive. Under this view, the teams are still considered to be the sellers of the product, but the cities, rather than the fans, are the customers. Individual cities are therefore competing for the teams. Under this reasoning, the restraints prevent cities from competing with each other for teams that are willing to relocate. The market is national because it is composed of a nation of cities.

Although this argument deserves some merit, it has one serious flaw. While it is true that several cities may initially compete for teams, by the time a move is submitted for approval the market has been narrowed to one city, and the vote is concerned with that city alone. Therefore, each vote directly restrains trade in just one city and that city is the relevant market.\(^{110}\)

Despite these arguments against the premise of a national market, the nationwide effects of restraints must be considered. Due to the joint nature of sports leagues, any team movement will affect the teams in other cities. The market is, in essence national, however, the market upon which the restraint’s effects are strongest is the target city. Therefore, both areas must be considered.\(^{111}\)

When considering the relevant sports league product market courts are presented with a myriad of possibilities; the particular professional sport (e.g., pro basketball), the sport both professional and amateur (e.g., all basketball games), professional sports in general, sports in general, and the entertainment industry. Difficulty in sporting throughout these categories arises because, depending on the context of the problem considered, any one or all of these markets may be relevant.\(^{112}\)

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111. But cf. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (holding that the relevant geographic market is the "area of competitive overlap, [where] the effect on competition will be direct and immediate," and finding that this market was local for banks due to state banking regulations).

112. In Brown Shoe Co. v. United States, 370 U.S. 294 (1962), the Court stated:
The key element in an analysis of product markets is whether the primary impact of the restraint is on a well-defined submarket which can be clearly identified. If this is the case, then the submarket will be the relevant market, if not, then the broader market must be considered. Within this framework, the court in *San Francisco Seals, Ltd. v. National Hockey League*,\(^{113}\) the only case which has specifically considered territorial restrictions on sports franchises, concluded that the relevant product market was "the production of professional hockey games before live audiences. . . ."\(^{114}\) Several other courts have reached similar conclusions when analyzing various other aspects of professional sports.\(^{115}\)

The argument against the conclusion reached in *San Francisco Seals* is buttressed by the fact teams in various leagues compete with each other for fans, and that live sporting events compete with televised events, in the entertainment market. This theory found support in *North American Soccer League v. National Football League*.\(^{116}\) The court found that the NASL and the NFL compete for fan support, game attendance, and broadcast revenues on the local level, and for broadcast and advertising revenues on the regional and national level.\(^{117}\) These findings really cannot be disputed, although they appear to contradict the conclusion of *San Francisco Seals*.

This dual national and local market is supported by language in *Continental T.V., Inc. v. GTE Sylvania, Inc.*\(^{118}\) where the Court considered both intrabrand and interbrand

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*Id.* at 325.


114. *Id.* at 969.


117. *Id.* at 1252.

competition in applying a rule of reason test to a territorial sales restriction imposed by a manufacturer on its distributors.\textsuperscript{119}

Territorial restrictions, as they now occur in professional sports, clearly present a case where interbrand and intrabrand competition are affected at the same time. The direct impact of the restraint is on the performance of the particular sport. By preventing the performance of one sport in a city, however, the rule restrains competition in the broader entertainment market as well. Direct economic competition in the particular sport will be restrained only when a team proposes to move to a city which already has another team from that league.\textsuperscript{120} The restraint on interleague competition will be present whenever any other professional team resides in the target city. The entertainment market restraint will always exist. Hence, both the narrow and broad product markets should be considered in a rule of reason analysis.

The sports franchise transfers involve restraints on economic competition in a particular sport and the entertainment market as a whole. The primary effects may be felt in one city, but the secondary effects may be felt in others. In dealing with sports franchises, however, is it logical to offset interbrand competition in City A with intrabrand competition in City B? The answer is probably "yes," although no court has addressed this issue within the sports leagues context.

In \textit{Smith v. Pro-Football},\textsuperscript{121} the District of Columbia Circuit ruled on the validity of the NFL player draft. A major justification for the draft was that it made teams more com-

\textsuperscript{119} \textit{Id.} at 54. Accord \textit{Arizona v. Maricopa County Medical Center}, 643 F.2d 553 (9th Cir. 1980), \textit{rev'd on other grounds}, 102 S. Ct. 2466 (1982). The Supreme Court reversed the Ninth Circuit in \textit{Maricopa County} because it found that the challenged medical fee restrictions were a form of price fixing and thus illegal per se. It did not discuss the inter/intrabrand dichotomy. Although the Court has displayed a reluctance in the past to balance competitive effects in different sectors of the economy, (\textit{e.g.}, \textit{United States v. Topco Associates, Inc.}, 405 U.S. 596, 609-10 (1972); \textit{Brown Shoe Co. v. United States}, 370 U.S. 294, 325-28 (1962)), it would still appear, given the Court's consideration of inter and intrabrand competition in determining that the rule of reason should be applied to nonsale franchising transactions in \textit{Continental T.V., Inc.}, that the Ninth Circuit's reasoning on this point in \textit{Maricopa County} is valid.

\textsuperscript{120} When only one team from a league exists in an area, it has no competition in that sport and acts as a monopoly. Its only competition comes from outside the sport.

\textsuperscript{121} 593 F.2d 1173 (D.C. Cir. 1978).
petitive on the playing field. The court concluded that the draft had an anticompetitive effect on the players' services market and a procompetitive effect on the playing field. However, "the NFL teams are not economic competitors on the playing field. . . . Because the draft's anticompetitive and procompetitive effects are not comparable, it is impossible to net them out. . . ."122 In this case, the court dealt with athletic competition on the field, and economic competition for players—a clear case of comparing apples and oranges as far as antitrust law is concerned. However, the territorial restraint case is not as clear cut, since the analysis must consider two kinds of economic competition in different markets. Since the Sherman Act is concerned with promoting economic competition,123 it would be logical to infer from Smith and Continental T.V. that both of these competitive areas should be considered.124

Once the markets have been defined, it is not difficult to show market power. In the market for the particular sport, power is abundantly clear: With the exception of football, there is only one league in the United States in each major sport. Additionally, since there are few leagues, in cases where the market which must be considered is interleague or entertainment, the small number of competitors assures each league an impact on the market. Product market power will exist in any city because many cities do not have teams from every league.

B. Goals and Benefits of the Restraints

In order to achieve a finding of legality under the rule of reason, a restraint must serve a legitimate competitive purpose without unreasonably restraining trade. In most situations, this determination involves a balancing of the competitive interests of the party or parties promoting the restraint and those of the restrained party. Sports franchise transfers involve a balancing of the league's interest in keeping teams

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122. Id. at 1186.
124. These factors are not just any argument(s) in favor of a challenged restraint, Smith, 593 F.2d at 1186 (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978)), but are confined to a consideration of impact on competitive conditions, National Soc'y of Professional Eng'rs, 435 U.S. at 690.
in their present locations, against the teams' interest in freedom of movement. An analysis of these competing interests must begin with a look at the legitimate purposes served by the restraint. These purposes can be grouped into four broad categories based on the unique cooperative scheduling of sports leagues, the promotion of league legitimacy, community support and public service, and league profitability. Underlying all these concerns is the joint nature of the league enterprise, and the need for cooperation among league members.

1. Cooperative Scheduling

The unique aspects of professional team sports leagues as businesses are well documented. The need for cooperation between league members is vital to the league's, as well as the individual's survival. One area where cooperation is necessary is the joint production of the league product. Territorial restraints promote general agreement on where teams play their games, and this promotes competition by enabling these games to be played. The teams must have definite home sites chosen so that the distance traveled between games is manageable. Unrestrained team movement may make travel impractical. For example, if the Cleveland Indians decided to move to Tokyo, they could create serious hardships for the other league members both in terms of travel schedules and costs. Because every team has an interest in where its games are played, team location should be a joint decision.

Thus, by balancing the interests of all teams in site selection, a legitimate restraint can promote on-field competition in locations acceptable to both participants, create a marketable product and thereby promote economic competition.

127. This argument is based on the premise that league efficiency will make the product more competitive. By scheduling games in such a manner as to maximize profits while minimizing costs, the league places its teams in a better competitive position.
129. This does not mean that the presently enforced restraints are reasonable, but that there is justification for properly drawn restraints. The real question to be answered, is what type of restraints are properly drawn.
2. The Importance of League Legitimacy

One of the foremost concerns of a fledgling sports league is to achieve legitimacy as an ongoing concern.\(^{130}\) Even after a league has achieved major league status and public recognition, restraints which promote league legitimacy and stability may help avoid destructive economic competition. Conversely, it can be viewed as the elimination of valuable economic competition.

League survival depends on a stable core of teams which remain in the same cities for a number of years. However, the early histories of most sports leagues, even those that are eventually successful, are punctuated by frequent team failures and movements.\(^{131}\) A balance must therefore be struck between allowing failing or struggling teams to move easily, and the league's need for a stable core of markets for its product. This is where a territorial restraint is justified, for it can protect the interests of all parties by insuring stability and keeping teams in acceptable markets.

Once a league has been established, its interest in team stability, as courts have recognized, is still great.\(^{132}\) The economic success of each team depends on the economic strength and stability of the other teams. Damage to one team can harm the competitiveness of the others. One team cannot survive on its own; it is important to prevent teams from driving each other out of business. League rules which prevent such ruinous competition serve a valuable function by promoting the image of an established institution. League survival keeps a product on the market and thus increases the potential for competition.

Although league teams are directly affected by territorial restraints, other sports teams are also affected. Franchises

\(^{130}\) League legitimacy is based on several factors, among which are league identity, a sense of quality in the league product, and a sense of league permanence.


should not be permitted to choose locations without consideration of the competition from teams already established in the area. By preventing teams from failing because of intersport competition, the league preserves its image of stability, and is therefore able to compete more effectively in the entire entertainment market. The greater nationwide league acceptance which is an incident of this stability increases the competitiveness of every league team. Likewise, every team which moves and fails decreases overall competition. It is, therefore, procompetitive to try to keep teams from failing.\footnote{133} 

A final legitimacy and stability argument involves the protection of intraleague rivalries. Such rivalries, which are generally local in nature, generate fan interest in the league, make the product more desirable and thus more competitive, and create a tradition which helps ensure the league's continued well being. Since rivalries tend to lose strength as they lose their local flavor,\footnote{134} the league has a stake in keeping teams where they are to protect these rivalries. Territorial restrictions can help perform this function.

In summary, territorial restraints control intraleague economic competition so that teams remain strong, control interleague economic competition, compete as strongly as possible with other sports franchises, and protect local intraleague rivalries, all of which have the effect of making the league product stronger and more competitive.

3. \textit{Community Support and Public Service}

The antitrust laws have made allowances for businesses whose operations contain strong overtones of public service. In analyzing the reasonableness of a territorial restraint, it is necessary to consider the public service aspect of team sports. Without community support, specifically that of fans and local government, professional teams cannot survive. To the extent that territorial restrictions promote such support, they serve a legitimate league purpose.

The Eighth Circuit explained the importance of public

\footnote{133}{One might infer from this argument that league judgment is better than individual team judgment. While this may be true, the important factor to consider is that the league is more likely to account for all factors, rather than narrow issues affecting single teams.}

\footnote{134}{A perfect example is the cooling off of the rivalry between the Dodgers and the Giants since the two teams moved from New York to California.}
support in *Reynolds v. National Football League:* \(^{135}\) "Professional sports are set up for the enjoyment of the paying customers and not solely for the benefit of the owners or the benefit of the players. Without public support any professional sport would soon become unprofitable to the owners and the participants." \(^{136}\)

The Supreme Court has also examined the public interest aspect of antitrust analysis. In *Goldfarb v. Virginia State Bar,* \(^{137}\) the Court examined the significance of differences among businesses and public interest in the businesses in antitrust analysis, stating:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently. \(^{138}\)

The key to the analysis in *Goldfarb* is not the fact that the case involved a profession, but that professions, like sports leagues, are vastly different from other businesses in competitive practices and purpose, and as such should not be placed into the standard "pigeon holes" of the rule of reason. \(^{139}\) Action in the public interest is a legitimate factor in a rule of reason analysis; later cases determined its relative importance.

In *Boddicker v. Arizona State Dental Association* \(^{140}\) the court followed *Goldfarb,* concluding that a restraint imposed by a professional group "must serve the purpose for which the profession exists . . . to serve the public." \(^{141}\) "Those which only suppress competition between practitioners will fail to

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135. 584 F.2d 280 (8th Cir. 1978).
136. *Id.* at 287.
138. *Id.* at 787 n.17.
140. 549 F.2d 626 (9th Cir.), *cert. denied,* 434 U.S. 825 (1977).
141. *Id.* at 632.
survive the challenge." Territorial restrictions, then, must truly increase competition by improving public service.

It is not difficult to understand how sports franchise territorial restrictions promote public service; by requiring a vote of all members, the rules provide safeguards against random, arbitrary, or selfishly motivated team movements. Without the input of other more objective league owners, any owner could move his team on a sheer whim. Such movements could be detrimental to the team’s city, which may have invested money in building a stadium, and to the fans who have become emotionally attached to their team. Additionally, the league may be harmed; cities would be less likely to invest in the league if its teams moved too often. Without such investment, the league would be unable to place teams in certain markets, thus preventing valuable economic competition, and community service. The territorial restrictions are therefore procompetitive and do provide a real public service.

Another public benefit of the rules is their protection of the league’s good will toward its fans. Frequent team movement may display insensitivity to fan loyalty. Fans who feel their team is unsympathetic towards them will stop attending games. Teams compete in the entertainment market and cannot afford the luxury of turning away customers. Fan defection harms all teams both economically and in terms of prestige. By restraining frequent movement, these rules protect fan loyalty and goodwill, ensuring continued economic support, and competitive viability in the marketplace.

4. Profitability Considerations

The final justifications for territorial restraints are related to league profitability. Although the arguments enumerated in

142. Id.
144. The thrust of this argument is that by promulgating rules which help it serve the public interest, leagues act in a procompetitive manner. This assertion is consistent with the Supreme Court’s decision in National Soc’y of Professional Eng’rs v. United States, 435 U.S. 679 (1978): First, because a league that is insensitive to the communities it operates in will be unable to gain support and compete, and second, because the Court recognized that professional services may differ from other businesses and therefore competition for these services may vary. Norms which promote this competition will fall within the rule of reason. Id. at 696.
145. The Raiders suffered a decrease in season ticket holders, and overall attendance in Oakland after their proposed move was announced.
the previous three sections have economic undertones, they are not solely concerned with profitability.

Although courts have held that profit maximization alone does not establish a rule of reason justification, and certain cases have eliminated the factoring of profit maximization into the reasonableness determination, profitability should continue to be included. While territorial restraints can exert an anticompetitive effect on the markets for the particular professional sport and for entertainment in the target city, they may be procompetitive in the city the team wishes to leave. Likewise, a poor territorial choice which causes a team to fail can harm the league's competitiveness in other cities as well, decreasing competition in these markets. In this regard, courts have offset intrabrand and interbrand competition against each other. The league's competition with other leagues is important in an interbrand market, it is therefore reasonable to consider this as well as an individual team's competition in the particular sport. Thus, league health, i.e., profitability, is a valid competitive concern, so this sort of economic consideration is not without merit in a rule of reason analysis.

One economic justification given for territorial restraints is their ability to help avoid destructive intraleague economic competition. Professional teams do not want to compete too well economically with other league members driving them out of business and causing the league to fail. Present restraints enable league members to prevent a team from moving into the territory of another member and possibly causing

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147. See Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 167 (C.D. Cal. 1979). The court claimed that this result followed from Professional Engineers, because profit maximization is not by itself a rule of reason justification.


149. Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953). This is the extreme case, however, this article has argued that frequent team movements can be destructive as well, and that possibility is much greater as intraleague competition increases.
Investors will be willing to invest in league franchises if they can be certain that their investment will be protected. Territorial restraints insure that an investor's team will not be adversely infiltrated by direct competition. These restrictions increase a league's ability to obtain capital and management necessary for franchise operation and thus are procompetitive in the entertainment market because they aid in the formation and survival of businesses that might not otherwise exist.

The teams as a joint venture and as joint producers have the right to jointly market their product. It is therefore reasonable for each team to have a voice in deciding where its product is sold. By choosing sites wisely the teams can make their product more competitive. In this manner the restraints can enhance competition.

Every team has a stake in preventing the destruction of proven profitable markets. When a sport is competitive in the entertainment market in one city, it can be severely anticompetitive to allow the franchise to move to an untested market. Likewise, the rules can be valuable in preventing moves to distant markets which may improve the moving team's ability to compete but decrease the other team's competitiveness due to increased travel costs. This is a prime example of one team benefiting at the expense of all the others, and one market benefiting at the expense of many others. Under the rule of reason, these effects must be considered.

Perhaps the most important economic effect of territorial restraints is on television and radio contracts. Teams compete very strongly for media coverage. It is important to each team's survival and competitiveness to protect its league's mass media exposure. Franchise relocations can adversely affect media exposure in two major ways. First, networks will be less willing to pay top dollar for a product which appears to be unstable or transient, especially if transfers from major media markets are involved. Second, if teams are allowed to transfer to poor media markets, the number of viewers will probably decrease in other markets as well. By controlling
team movements to help keep teams in better media areas, the rules are procompetitive.

C. Anticompetitive Aspects of Territorial Restraints

To reach a finding of reasonableness, the procompetitive justifications must outweigh the anticompetitive harms.\textsuperscript{153} When one considers the possible harms of these restraints, one cannot help but wonder whether these rules are reasonable when applied to the prospective transferor franchise owner. While it is true that all owners enter their respective leagues with full knowledge of "the rules of the game," there is still an inherent uneasiness with a rule which allows others to decide one's fate. This uneasiness leads to the issue of why an owner cannot just move his team to wherever he wants.

In \textit{United States v. Addyston Pipe & Steel Co.},\textsuperscript{154} the court, during its evaluation of a price fixing claim, traced the early foundations of the rule of reason. In its consideration of covenants not to compete, the opinion states: "It was of importance . . . that after a man had built up a business . . . he should be able to sell his business . . . to the best advantage. . . ."\textsuperscript{155} Although at least one court has rejected this conclusion with respect to a sports franchise,\textsuperscript{156} there is no clear reason why an owner cannot sell, or move, his independently owned team "to the best advantage." Owners naturally will go where they feel their team will be most competitive. In this view, the restraints are anticompetitive because they may force a viable business to remain in a nonviable location. The counter argument to this is that since leagues operate as joint ventures, the rights and competitive abilities of the other owners, as well as those of the transferring owner, must be protected. The fact remains, however, that these rules restrain competition by preventing an owner from operating "to the best advantage."

A natural extension of the previous argument is that many owners will not even be in a position where their proposed move will be denied, for they will be discouraged by the

\textsuperscript{153} L. \textsc{Sullivan}, \textit{supra} note 38, at 196.
\textsuperscript{154} 85 F. 271 (6th Cir. 1898), \textit{aff'd.}, 175 U.S. 211 (1899).
\textsuperscript{155} \textit{Id.} at 280.
rules from even proposing a relocation. Many owners will prefer a safe course which will not bring them into conflict with other league members who would have the power to approve the future sale or relocation of their team. For these reasons, the rules restrain competition both within and outside the particular sport.

One of the arguments in favor of the restraints is the need to protect team owners’ investments. This can also be turned around to become an argument against the restraints. Because an owner will generally attempt to act to protect his business, it is rational to assume that any proposed move will constitute an attempt by the owner to increase profits by making his team more competitive in the marketplace. By not allowing an owner the unrestricted right to move his team, these rules take away one of the owner’s competitive weapons, thereby decreasing his ability to compete and thus to protect his investment.

Although there is always a decrease in competition in the abandoned market, this is presumably not undesirable; an owner should only leave a market in which he feels he cannot compete effectively. To the extent that a noncompetitive entity departs the market is not appreciably harmed. On the other hand, if the owner is correct in his analysis of the target market, his entry will be competitive and will strengthen competition in the new market. This profitability increase in the new market should offset the decrease in the old market. League rules which can prevent a move of this nature cause anticompetitive effects in the entertainment market, and in some cases the particular sport’s market.

One of the more compelling arguments against territorial restraints is that by their operation, a small minority of owners can control the amount of intrabrand competition in any given market. This is procompetitive; however, it is also anticompetitive. Whenever a team owner desires to move his team into an existing team’s territory, and is denied the opportunity, he has been restrained from engaging in intrabrand competition. This is clearly anticompetitive. The harm of


158. In circumstances where a team proposes to move from a two-team area into an area with an existing team so as to create a two-team area, there is some
this situation is even clearer if the target area is capable of supporting multiple teams in that sport. If this is the case, the existing team need not be protected as it can successfully compete in the market even with the additional team’s presence. Territorial restrictions can be used to prevent team transfers which would not harm the established team’s community standing. They therefore clearly restrain competition in that sport in the target city.

Finally, the voting requirements restrain competition because a small number of owners can block a move. This argument is compelling for several reasons. The rules can prevent an unpopular owner from making a procompetitive move if his adversaries exercise their vetoes. This arbitrary exercise of power is definitely not procompetitive. Additionally, one of the underlying assumptions of the voting requirements is that other owners will exercise their powers for the league’s benefit. This will not always be the case; some teams will vote for their own benefit, or to spite others. When the rules are employed in this fashion, they are not being used in the interests of competition. Recent sports history demonstrates that renegade owners are more often rebuffed than are other owners in their attempts to move teams. This historical treatment cannot be explained by merely stating that disliked owners usually choose poor territories, while accepted owners choose good ones. Additionally, some leagues have a history of expanding to enter new markets, while almost never allowing offset of the anticompetitive effect since competition remains higher in the city the team desires to leave.

159. There are only three Standard Metropolitan Statistical Areas with two teams in major league baseball (New York, Chicago and San Francisco-Oakland), two in the NFL (New York-Los Angeles), none in the USFL, two in the NBA (New York-New Jersey), none in the NHL, and none in the NASL. U.S. DEPARTMENT OF COMMERCE, STATE AND METROPOLITAN AREA DATA BOOK 1982 [hereinafter cited as DATA BOOK].

160. For example, ten out of thirteen votes taken for transfers of major league baseball franchises between 1952 and 1972 ended with approval. Of the three rejections, two were votes against Bill Veeck’s proposed move of the St. Louis Browns to Baltimore. This move was approved two days after the second rejection because Veeck sold the team. The other rejection was Charles Finley’s proposal to move the Kansas City A’s to Louisville. Both Finley and Veeck were “thorns in the side of the baseball establishment.” Quirk, supra note 30, at 50. Additionally, Al Davis, the managing general partner of the Raiders, initially had his request to move to Los Angeles turned down although he later prevailed in the courts. Davis is also considered to be a rabble rouser by fellow owners.
teams to move.¹⁶¹ In all, these two major features of the rules, the ability to vote and arbitrary enforcement and the league history of virtually no team movements may be sufficient to show the anticompetitive nature of these restraints.

D. The Factors in Balance

The next step in the analysis, then, is to balance these procompetitive and anticompetitive effects to determine whether or not these restraints are reasonable. The courts have specifically delineated the requirements for sustaining a restraint: It must be "reasonable,"¹⁶² "justified by legitimate business purposes and no more restrictive than necessary,"¹⁶³ and "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end."¹⁶⁴ Sports league franchise transfer restrictions, then, must be narrowly drawn while still capable of accomplishing their legitimate goals.

Although there are several justifications for allowing some types of territorial restraints, the present ones are too restrictive to be justified under the classic analysis. While the legitimate business justifications for allowing the restraints are valid, they are outweighed by the harm caused by the present rules. The overriding problem with the rules is that they are too subjective and prone to arbitrary application. Member clubs vote individually, and each makes a decision based on its own subjective interpretation of how the proposed move will affect its own profitability. These factors will differ from team to team, and will provide varied determinations, often based on factors which have nothing to do with competitive concerns. Teams have no standards to follow when voting. Consequently, there is no guarantee that the result will be procompetitive. In short, no system that allows arbitrariness, regardless of the number of justifications for the restraints, can be considered in compliance with antitrust laws.¹⁶⁵

¹⁶¹ The last NFL team to move was the Chicago Cardinals who moved to St. Louis in 1960. Through merger and expansion, the league has grown since that time from 12 teams to its present 28.
¹⁶² Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 406 (1911).
¹⁶⁴ United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1375 (5th Cir. 1980).
¹⁶⁵ There is substantial authority for this proposition in cases considering
Another crucial problem with these rules is that league members have no choice in accepting or rejecting them. Because they cannot function outside of it they cannot opt out of the system. If teams had this option available the subjective and arbitrary voting power objections would not be as strong; without this option there is no way to overcome them.

Finally, the restraints must fail because they are not narrowly drawn to accomplish their purposes. The practice of allowing subjective team votes does not deal directly with the specific procompetitive goals to be achieved by the restraints. A better way to attack the problem would be to formulate specific transfer guidelines which could protect the legitimate interests of the non-moving teams, while allowing the moving teams freedom to choose their location and transfer date.

E. A Reasonable Alternative

Trying to formulate a reasonable restraint by merely modifying the unreasonable restraint is tempting. It has been suggested that a simple majority vote replace the currently required supermajority. Changing the percentage of affirmative votes needed for a transfer to 50% or 25% will not solve the basic problem that the present requirements impose. The voting procedure will still be subjective, capable of arbitrary enforcement, and nonprotective of prospective transferors. On the other hand, an agreement that anyone can move anywhere without any restrictions will not protect non-moving owners. Such solutions are far too simplistic. A reasonable set of enforceable standards which objectively consider the team transfer site is needed.

The sports league, team representatives, or even an

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membership criteria. In these group boycott cases, courts generally find that subjective membership criteria do not accomplish a legitimate purpose because they are not drawn narrowly enough. See, e.g., Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656 (1961); United States v. Realty Multi-List, Inc., 629 F.2d 1361 (5th Cir. 1980); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973), L. SULLIVAN, supra note 38, at 249. Although the cases deal with group boycotts, their teachings are worth noting because group boycotts are a form of horizontal restraints. The cases stand for the proposition that subjective requirements which lead to arbitrary decisions are so anticompetitive that they cannot be justified if it is possible to enact reasonable objective standards. Sports restraints fit into this category: subjective, but capable of being accomplished through objective means.

outside agency should conduct a study to determine minimum acceptable standards for a successful site. Since leagues commonly conduct such studies when considering expansion, they should have the experience necessary to perform these studies. Such a study will probably include statistical analysis as well as consideration of the league's prior experience.

The first important concern in such a study is the population of the metropolitan area considered. A certain population base is needed to support a team; however, absolute population is not always the most important factor. In many cases, population growth is equally, if not more, important. A city which can presently support a team may not be able to in the future. A league requirement could then specify that cities with certain populations and/or certain growth rates meet the minimum requirements.

A second factor to consider is the existence of a stadium. League rules could require that a city may acquire a team if it agrees to build a stadium within a short period of time, which meets certain size specifications, provided that there was another place for the team to play in the interim.

A third consideration could be the city's traditional support for the sport. This is a difficult factor to quantify; however, television ratings of the sport in that area, number of residents who have attended or participated in games in the past, and the number of successful college teams in the area could be used as factors to consider.

Limiting the permissible distance of the proposed site from the nearest league member would keep travel costs reasonable. Restricting moves to between seasons would also minimize schedule disruption and thus travel costs.

A fifth factor which could be required is a minimum stay in a city once a team moves there. This requirement could enhance establishment of fan support. Time is necessary for a team to build up the support necessary to be competitive. This will protect the league's goodwill by guaranteeing that

167. Testimony that a city of 700,000 would support a team was accepted in American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), aff'd, 323 F.2d 124 (4th Cir. 1962).
168. Green Bay, Wisconsin, with a metropolitan area population of 175,280 in 1980, Data Book, supra note 159, at 112, has supported its football team strongly. Phoenix, Arizona, with a 1980 metropolitan area population of 1,509,052, id. at 222, will probably never support a hockey team.
the team will be in its location for a specified time. It will protect, and probably make more likely, local government investment in the team. Stability serves the public interest and helps a team forge an identity while helping the league achieve legitimacy as a viable business concern.

Another consideration is the number of other sports teams in the target area. As this number of teams increases, some of the requirements for the factors listed above will increase. A larger population base will be needed to support two teams in the same league. Another stadium may be needed.

If several teams from other leagues are in the target city, the requirements may have to be increased to reflect competition in the entertainment and sports markets.

This list is not exhaustive; other factors must also be considered. The discussion seeks only to present the types of issues which would be of importance. Additions and deletions can and should be made as circumstances change. The same holds true for altering the standards, for example, increasing or decreasing the population requirements as experience demands. The league could require that the standards be reviewed at regular intervals to keep pace with changing circumstances.

Every requirement need not be met in any given case; successful teams and acceptable sites will not always exhibit every positive characteristic. There are several ways that this aspect could be incorporated. For example, certain factors could be required, but a market need only meet a specific percentage of them. In the alternative, the requirements could be weighted on a point system with a minimum number of points required for a site to be selected.

The system would be simple to operate. A team owner could choose a city, check to see if it met the standards, and if it did he could move the team without any interference. If it did not, then he could not move the team. It might still be possible to allow teams to move to cities which did not meet the model's standards by allowing the owner to apply for an exemption from the league rule. Even if this procedure entailed an owner vote it would not be unreasonable since the

169. The Green Bay Packers located in a metropolitan area with a 1980 population of 175,280, DATA BOOK, supra note 159, at 111, consistently outdraws the Baltimore Colts, located in a metropolitan area with a 1980 population of 2,174,023. Id. at 24.
owner would be trying to obtain an exemption from a reasonable procompetitive league rule. Arbitrary denial of an exemption while possibly anticompetitive in a specific case, would not be particularly troublesome since the denial would still enforce a procompetitive restraint.

These suggested standards could be attacked for restraining competition in the unacceptable market sites. This restraint, however, can be justified because it is ancillary to a legitimate purpose. First, the standards are procompetitive because they preserve the procompetitive aspects of the present restraints. Second, they are not anticompetitive because they prevent a team from moving to an area in which it will most likely fail. A team which fails will not exert a significant effect on the market, and since market power is necessary for a restraint to fail under the rule of reason, this restraint is not unreasonable.

VII. Conclusion

Restraints imposed on professional sports franchise transfers are horizontal restraints on competition which should be analyzed under a "rule of reason" test. Such restraints serve many procompetitive purposes. Restraints now in force are unreasonable because they are too subjective and are open to arbitrary and inconsistent enforcement. Reasonable restraints should be developed which would consider characteristics of potential franchise transfer locations. Such standards would achieve the desired procompetitive effects while diminishing the anticompetitive ones.