

STEALING HOME: WHY BASEBALL'S ANTITRUST EXEMPTION SHOULD BE ELIMINATED IN THE AGE OF MODERN INTERNET STREAMING AND PIRACY

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I. INTRODUCTION: AMERICA'S PASTIME

Baseball is America's pastime, but it may not be America's future. As baseball's primary audience begins to age, the sport's viewership and fan base have steadily diminished.¹ While experts speculate a number of reasons that contribute to declining viewership, including the cost of attending an actual game and the drawn-out length of the games (on average, over three hours),² a primary reason for the decline in ratings may be Major League Baseball's inability to attract younger viewers. However, the younger generation may be tuning out not because they want to, but because Major League Baseball ("MLB" or "the League") is forcing them to. Due to MLB "blackout restrictions,"³ young, cord-cutting fans may struggle to follow their favorite teams, ultimately resulting in lost viewers and harming MLB's business.⁴

Historically, MLB contracted with local cable television networks, providing them with the rights to exclusively air their

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1. Brad Tuttle, *9 Reasons It's Hard to Be a Baseball Fan Today*, TIME (Apr. 6, 2015), <https://time.com/3772690/enums/>.

2. *Id.*

3. "Blackout Restrictions" refers to geographic and territorial broadcasting restrictions, which grant an exclusive license to local cable TV networks and prevent online or paid TV subscribers from viewing specific games. See Alexandra DeSanctis, *Major League Baseball's Ridiculous Blackout Policy*, NAT'L REV. (Apr. 13, 2018, 6:30 AM), <https://www.nationalreview.com/2018/04/major-league-baseball-blackout-rules-alienate-fans/>.

4. MLB restrictions prevent viewers in specified areas from watching games if their region is "blacked out." *Blackout Restrictions*, MLB.TV, <https://www.mlb.com/live-stream-games/subscribe> [<https://web.archive.org/web/20180504172635/https://www.mlb.com/live-stream-games/subscribe>] (last visited Oct. 25, 2019). This also affects viewers who wish to view their home team online while physically located in any region their home team is or will be playing. See *id.*

home team's games in specified territories.⁵ While contracting to restrain trade and business is, by definition, a violation of the Sherman Antitrust Act,⁶ MLB has been granted what has come to be known as the "baseball exemption." In 1922, the Supreme Court determined that professional baseball is not interstate commerce, and the League has thus been exempted from traditional antitrust considerations.⁷

MLB's coveted exemption, however, may be the cause of the loss of viewership plaguing its business. Because the exemption allows for local networks to exclusively air the games of certain baseball teams, MLB has enforced "blackout restrictions" of game viewings in specified territories.⁸ This means that for fans to watch home games in predefined territories, they must do so via cable television networks. For Millennial cord-cutters,⁹ blackout restrictions prevent the legal viewing of home team, in-market games, and even prevent fans from watching games that by most standards would not be considered local.¹⁰ This forces Millennial fans to either purchase expensive cable television packages, forgo watching games, or turn to illegal means, such as illegal internet streaming, to be able to watch blackout-restricted games. Recently, a class of baseball fans attempted to challenge the legality of the blackout restrictions and baseball's exemption generally, which ultimately ended in a settlement before the court could rule on whether television broadcasting and blackout restrictions are subject to antitrust law.¹¹

This Article contends that in order to avoid a continuing decline in viewership and to prevent illegal viewing of MLB games, the baseball exemption should be eliminated altogether, or at the very least, MLB broadcasting activities should not be considered part of the exemption. Part II of this Article gives an overview of the "baseball exemption" to the Sherman Antitrust Act and an overview

5. *Id.* (noting territories are determined based on teams' home locations).

6. *See* 15 U.S.C. §§ 1–2 (2012).

7. *See* *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

8. *See* *Blackout Restrictions*, *supra* note 4.

9. *See* Toni Fitzgerald, *Portrait of a Cord Cutter: Who's Doing It and Why*, *FORBES* (June 29, 2019, 7:22 PM), <https://www.forbes.com/sites/tonifitzgerald/2019/06/29/portrait-of-a-cord-cutter-whos-doing-it-and-why/> (noting that cord-cutting is often associated with the "Millennial" and "Gen Z" generations, contributing to the idea that a required cable subscription will weed out younger viewers).

10. *See* *Blackout Restrictions*, *supra* note 4. A fan located in Winston-Salem, North Carolina, using a paid MLB.tv subscription is restricted from viewing all games played by the Atlanta Braves, Baltimore Orioles, Cincinnati Reds, and Washington Nationals. *See id.* (enter zip code 27109 in the "Check your local restrictions" tool); *see also* *infra* note 41 (explaining that none of these teams would be considered local in any meaningful sense, and restrictions of out-of-state teams do not further MLB's policy of encouraging fans to attend games live).

11. William F. Saldutti IV, Comment, *Blocking Home: Major League Baseball Settles Blackout Restriction Case; However, a Collision with Antitrust Laws Is Still Inevitable*, 24 *JEFFREY S. MOORAD SPORTS L.J.* 49, 63–68 (2017).

of the exemption's origins. Part III looks at the recent settlement in *Garber* and the threats to baseball's exemption regarding broadcasting and blackout restrictions,¹² as well as the likely future interpretation of the baseball exemption. Part IV argues that even if the exemption is still valid, Major League Baseball should reconsider its blackout restrictions and internet streaming system in an age of cord-cutters or risk a sharp decline in business and possible increase in internet piracy.

II. CALLING BALLS AND STRIKES: THE BASEBALL EXEMPTION AND THE SHERMAN ANTITRUST ACT

The baseball exemption is a unique exclusion from the Sherman Antitrust Act that protects baseball activities from being subject to antitrust laws.¹³ While the exemption was granted by the Supreme Court in 1922, the validity of the exemption becomes increasingly questionable with each new court decision addressing the issue.

A. *Loading the Bases: The Development of the Baseball Exemption*

With the goal of preventing restraints on trade, promoting competition to keep prices low, and protecting consumers, the Sherman Antitrust Act (the "Act") was enacted by Congress in 1890.¹⁴ The first two sections of the Act outline the ways in which entities are prohibited from creating restraints on trade.¹⁵ Section One of the Act prevents contracting to create a trust or conspiracy that would restrain trade between the states.¹⁶ Section Two of the Act prohibits the creation or formation of monopolies that would restrain trade amongst the states.¹⁷ Thus, all forms of contracting in restraint of trade, or creation of monopolies, would be a violation of the Act.

In 1922, the Supreme Court determined that "baseball activities" were exempt from antitrust restraints and were therefore not subject to antitrust laws via its ruling in *Federal Baseball*.¹⁸ There, the Baltimore Terrapins, a baseball club then competing in a league (the Federal League) independent of the still-extant National League and

12. While the court in *Flood v. Kuhn* recognized that "[p]rofessional baseball is a business and it is engaged in interstate commerce," an in-depth discussion of whether certain business divisions of professional baseball are considered interstate commerce is beyond the scope of this Article. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

13. Saldutti, *supra* note 11, at 56–58.

14. Jacob M. Ware, Note, *Intentional Pass: Analyzing Baseball's Antitrust Exemption as Applied to Broadcasting Agreements in Laumann v. National Hockey League*, 49 GA. L. REV. 895, 903 (2015).

15. 15 U.S.C. §§ 1–2 (2012).

16. *Id.* § 1.

17. *Id.* § 2.

18. *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

American League,¹⁹ alleged that the two leagues were colluding in an anticompetitive manner by inducing all of the other Federal League teams to leave that league, thereby effectively destroying the Federal League.²⁰ But the Supreme Court created what would become known as the baseball exemption by holding that baseball was not even interstate commerce at all; if baseball was not interstate commerce, the business of baseball could not violate federal antitrust laws.²¹ According to the Court, the business of baseball was “giving exhibitions,” which constituted “purely state affairs,” and any accompanying interstate travel to play such exhibitions was merely incidental to the state exhibitions.²² Because antitrust laws could only be constitutionally applied to interstate commerce, the business of baseball was safe from antitrust regulation.

Later decisions, both from the Supreme Court and lower courts, have expressed skepticism as to the exemption’s validity and have debated which activities are essential to the business of baseball and which are tangential (and thus subject to antitrust regulations). The Supreme Court in *Toolson v. New York Yankees*²³ refused to revisit the issue of whether baseball amounted to interstate commerce. Instead, the Court held that any decision to overturn *Federal Baseball* and invalidate the exemption should be left to Congress, and Congress had never expressed an intention to consider baseball interstate commerce.²⁴ Further, in a final Supreme Court decision addressing the baseball exemption, the Court admitted that baseball is, in fact, interstate commerce,²⁵ but it again refused to invalidate baseball’s exemption.²⁶ The reasoning mirrored that of *Toolson*, suggesting that Congress had not intended to invalidate the baseball exemption because they had not taken any action to do so.²⁷ While the Court stated that the emergence of radio and television broadcasting did not require the court to overrule the baseball exemption, the exemption has never been held to actually *apply* to television broadcasting.²⁸ To the contrary, a decision from the Southern District of Texas held that the exemption was inapplicable to radio broadcasting, reasoning that broadcasting was “not central

19. These leagues, together, are the predecessors of the MLB organization. See Nathaniel Grow, *Defining the “Business of Baseball”: A Proposed Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 566–67 (2010).

20. *Fed. Baseball Club, Inc.*, 259 U.S. at 207.

21. *Id.* at 208–09.

22. *Id.*

23. 346 U.S. 356 (1953).

24. *Id.* at 357.

25. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (“Professional baseball is a business and it is engaged in interstate commerce.”).

26. *Id.* at 284.

27. *Id.* at 283.

28. Gary Roberts, *On the Scope and Effect of Baseball’s Antitrust Exclusion*, 4 SETON HALL J. SPORT L. 321, 327–28 (1994).

enough to baseball” to be included in the exemption and ultimately that anticompetitive radio broadcasting violated antitrust law.²⁹

While Congress has not directly addressed the validity of baseball’s exemption, the Sports Broadcasting Act of 1961³⁰ may provide insight into Congress’s intent with respect to broadcasting restrictions. The Sports Broadcasting Act provides for antitrust exemptions to telecasting of competitions in specified professional sports, including baseball.³¹ However, Congress excluded from this statute certain agreements related to territorial broadcasting restrictions, which suggests that Congress may have intended to subject these restrictions to antitrust law.³²

The exemption is also unique to baseball, as no other professional sport enjoys a similar privilege. Indeed, subsequent courts have acknowledged the holding of *Federal Baseball* should be limited to its facts and have held that the exemption was not meant to apply to other sports.³³ It is unclear what specifically separates the exhibition of baseball games from other sporting events, but no other professional sport enjoys a blanket immunity in the same way baseball has.³⁴ In fact, the exemption has been explicitly rejected for boxing,³⁵ football,³⁶ hockey,³⁷ and golf.³⁸

B. Seventh Inning Stretch: How MLB Blackout Restrictions Affect Viewership

In order to reach a larger audience and to transition into the modern internet age, MLB began to allow fans to stream games on MLB.tv in 2003.³⁹ However, MLB’s antitrust exemption allows the League to contract with both local and national television networks

29. *Henderson Broad. Corp. v. Houston Sports Ass’n*, 541 F. Supp. 263, 265 (S.D. Tex. 1982).

30. 15 U.S.C. § 1291 (2012).

31. *Id.*

32. *See* 15 U.S.C. § 1292 (2012); *Laumann v. Nat’l Hockey League*, 56 F. Supp. 3d 280, 295 (S.D.N.Y. 2014). The court in *Garber*, discussed in greater detail in Part III of this paper, relied on this exemption in determining that broadcasting was not included in the baseball exemption.

33. *See Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957) (“[W]e now specifically limit the rule there established to the facts there involved, i.e., the business of organized professional baseball.”).

34. *See* Carl W. Hittinger & Adam D. Brown, *Antitrust Law Looms over Sports Contracts Analysis*, PITT. POST-GAZETTE (Feb. 14, 2011, 12:00 AM), <https://www.post-gazette.com/business/legal/2011/02/14/Antitrust-law-looms-over-sports-contracts-analysis/stories/201102140219>.

35. *United States v. Int’l Boxing Club*, 348 U.S. 236, 242 (1955).

36. *Radovich*, 352 U.S. at 447–48.

37. *Laumann*, 56 F. Supp. 3d at 297.

38. *Flood v. Kuhn*, 407 U.S. 258, 282–83 (1972) (citing *Deesen v. Prof’l Golfers’ Ass’n of Am.*, 358 F.2d 165 (9th Cir. 1966)).

39. Ben Popper, *The Changeup: How Baseball’s Tech Team Built the Future of Television*, VERGE, <https://www.theverge.com/2015/8/4/9090897/mlb-bam-live-streaming-internet-tv-nhl-hbo-now-espn> (last visited Oct. 25, 2019). MLB’s first venture with streaming packages began in 2002. *See id.*

to ensure that such networks have exclusive rights to broadcast certain games.⁴⁰ The blackout restrictions predate the days of cable to a time when MLB contracted with local broadcasters to create exclusive contracts within teams' "home territories," with the alleged purpose of encouraging local fans to attend the games in person rather than listen to or watch the games at home.⁴¹

MLB's use of two different types of blackout restrictions limits and burdens users of the MLB.tv streaming services. First, national blackout restrictions apply to games for which MLB has granted an exclusive broadcast license to a national network.⁴² Thus, if national networks such as ESPN or Fox obtain a license to air a game, that particular game will be unavailable on MLB.tv.⁴³ Second, live games are unavailable for a viewer located in a team's home territory.⁴⁴ Such viewers are restricted from watching both home and away games that feature their regional home team.⁴⁵ Further, while an out-of-state fan (often referred to as an out-of-market viewer) would typically have the opportunity to watch her home team because she is not physically located in the restricted region, she would be unable to watch the game if her team is playing an away game against a team that is regionally restricted.

III. THREE STRIKES YOU'RE OUT: *GARBER'S* THREAT TO BASEBALL'S ANTITRUST EXEMPTION

A. *The Garber Settlement and the Effects on Blackout Restrictions*

While MLB has enjoyed its carve out from antitrust law for nearly a century, MLB television broadcasts have recently come under fire as violating antitrust law. In 2014, the Southern District of New York refused to dismiss a class action lawsuit regarding MLB blackout restrictions.⁴⁶ The plaintiffs consisted of a class of fans who alleged, in part, that MLB's blackout restrictions were anticompetitive, violated antitrust law, and constituted a conspiracy

40. Saldutti, *supra* note 11, at 63–64.

41. *Id.* at 64. The blackout restrictions are no longer effective for this purpose. *See id.* Blackout restrictions often apply to both the region a viewer is physically located and surrounding areas. As noted above, a viewer in Winston-Salem, North Carolina, is restricted from viewing games of the Cincinnati Reds, Washington Nationals, Atlanta Braves, and Baltimore Orioles. *See supra* note 10. "It is not feasible" for fans to travel to view games in each of these areas at the frequency with which they may stream games over the internet. *See Saldutti, supra* note 11, at 64.

42. Nathan M. Hennigan, *Blackout or Blackmail? How Garber v. MLB Will Shed Light on Major League Baseball's Broadcasting Cartel*, 8 BROOK. J. CORP. FIN. & COM. L. 158, 174 (2013).

43. *Id.*

44. *Id.* at 175.

45. *Id.*

46. *Laumann v. Nat'l Hockey League*, 56 F. Supp. 3d 280, 307 (S.D.N.Y. 2014).

to charge high prices for viewing games.⁴⁷ In rejecting MLB's motion for summary judgment, the court expressly stated that territorial broadcast restrictions are not meant to be included in the baseball exemption and that such restrictions are subject to antitrust law.⁴⁸

The decision in *Garber* hinged on the fact that *Federal Baseball* has been limited to its facts,⁴⁹ which discussed only those parts of baseball which were not considered interstate commerce—the actual exhibition of baseball games.⁵⁰ Acknowledging that television broadcasting is “by nature” an interstate industry, the court threatened that, should the case go to trial, the baseball exemption may be limited or even overturned.⁵¹

Perhaps because MLB feared a close scrutiny of its antitrust exemption, the League settled with the class of fans before the case could go to trial.⁵² With the judge in *Garber* clearly willing to consider broadcasting beyond the scope of the baseball exemption, it seems likely that MLB's broadcasting policies would, in fact, be held to violate antitrust laws.⁵³ As a result of the settlement agreements, MLB agreed to lower prices for MLB.tv subscriptions and to provide an option for fans to purchase less expensive, single-team options that allow viewers to purchase access to games only for a selected team, rather than for the entire league.⁵⁴ The settlement, however, does not address the validity of MLB blackout restrictions. Because the issue of the baseball exemption was never actually reached in *Garber*, MLB retained its ability to enforce territorial blackout restrictions. Thus, regardless of the newly available services resulting from the settlement, local fans must still purchase regional cable packages in order to watch geographically restricted programming.⁵⁵

B. *The Future of the Baseball Exemption*

Because the settlement prevented the issue from reaching court, the question remains: is the baseball exemption a valid exemption

47. *Id.* at 285; see *Garber v. Office of the Comm'r of Baseball*, 120 F. Supp. 3d 334, 336 (S.D.N.Y. 2014); Saldutti, *supra* note 11, at 65–67. Because the claims in *Garber* and *Laumann* were similar, the court consolidated the decision. *Laumann*, 56 F. Supp. 3d at 280.

48. *Laumann*, 56 F. Supp. 3d at 295.

49. *Radovich v. Nat'l Football League*, 352 U.S. 445, 451 (1957).

50. *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

51. *Laumann*, 56 F. Supp. 3d at 295.

52. Saldutti, *supra* note 11, at 68.

53. *Laumann*, 56 F. Supp. 3d at 295.

54. *Major League Baseball Settles Lawsuit over Television Blackouts*, SPORTS ILLUSTRATED (Jan. 19, 2016), <https://www.si.com/mlb/2016/01/19/garber-case-settlement-tv-packages>.

55. Sharon B. Hodge, *After Settlement, MLB Remains Vulnerable to Antitrust Challenges*, LEGAL NEWSLINE (May 2, 2016), <https://legalnewsline.com/stories/510720144-after-settlement-mlb-remains-vulnerable-to-antitrust-challenges>.

from antitrust law? This will likely depend on a reviewing court's interpretation of the purpose of the exemption.

If a court were to revisit the baseball exemption in the context of its original purpose, then the exemption is likely no longer relevant. The court in *Federal Baseball* made its decision based on the idea that baseball was not interstate commerce and therefore not subject to antitrust regulation.⁵⁶ Some scholars, including Supreme Court Justice Samuel Alito, have suggested that this decision was not an outlier when it was issued, considering the 1922 Court's narrow, "limited" view of the commerce clause power.⁵⁷ However, that rationale does not endure today. Even if baseball was strictly a state affair in 1922, the business of baseball has grown through endeavors such as merchandise licensing and sales, a system of trading players between teams, major league teams contracting with minor league teams to create a "farm system," and national broadcasting of games and events.⁵⁸ Courts after *Federal Baseball* have acknowledged that the business of baseball can certainly be defined as interstate commerce.⁵⁹

But even after its acknowledgement that baseball is interstate commerce, the Supreme Court has not invalidated the baseball exemption. Subsequent decisions found that Congress's intent was clear from its decision not to respond to *Federal Baseball* and decided that any changes to the exemption should come directly from Congress.⁶⁰ However, this reasoning may have simply been a way for the Court to avoid invalidating the long-established exemption and its reluctance to create "retroactivity problems."⁶¹ It is not clear if a modern court would feel similarly reluctant to take responsibility for undoing an exemption that has been relied upon for nearly a century.

After *Garber*, it seems clear that animus exists toward the current exercise of the baseball exemption. And while some have argued that the antitrust exemption enhances consumer welfare by creating a "competitive balance," the exemption is actually harming fans by allowing MLB to overcharge them for the ability to watch games and by preventing them from watching some games entirely—an essential experience of a baseball fan.⁶² However, the future of the

56. *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

57. Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 34 J. SUP. CT. HIST. 183, 193 (2009).

58. *Id.*; see Grow, *supra* note 19, at 610–11.

59. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("Professional baseball is a business and it is engaged in interstate commerce.").

60. *Id.* at 273–76; *Toolson v. New York Yankees, Inc.* 346 U.S. 356, 356–57 (1953).

61. *Flood*, 407 U.S. at 283.

62. The Second Circuit reasoned that the collection and even distribution of profits from the sale of all MLB licensed merchandise created a procompetitive balance by distributing profits from the sales to smaller-market teams. See Allan H. ("Bud") Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effects on America's Pastime and Other Professional Sports Leagues*, 50 ARIZ. ST. L.J. 1171,

baseball exemption may depend on the willingness of the next reviewing court to overturn a century of history rather than rely on the outdated intent of the original rule.

IV. REVIEWING THE PLAY: THE SHIFT TO “CORD-CUTTING” AND INTERNET STREAMING MAY HARM MAJOR LEAGUE BASEBALL

The chain of events in *Garber* that lead to a settlement suggests that MLB broadcasting is interstate commerce and contracting to create territorial broadcast restrictions is a restraint of trade in violation of federal antitrust law. But the settlement also suggests that future judicial evaluation of the baseball exemption may be difficult to achieve. Because courts appear to agree that *Federal Baseball* should be construed narrowly and that professional baseball likely constitutes interstate commerce, MLB should consider nonenforcement of the antitrust exemption in relation to blackout restrictions in an effort to protect its business from a surge of illegal internet streaming.

In the age of “instant” and endless choices, Millennial cable television subscribers are sharply declining in numbers.⁶³ Millennials are leaving behind paid cable television subscriptions at an increasing rate in favor of streaming subscriptions that offer benefits such as lower per-month costs and premium on-demand content.⁶⁴ The trend towards “cord-cutting” appears to be accelerating—households with cable television declined from ninety percent of households in 2010 to seventy-seven percent in 2018 with no indication of a reversal.⁶⁵

While Major League Baseball may have previously enjoyed legitimate advantages via the antitrust exemption, that exact exemption may be harming its business. The shift to cord-cutting resulted in a decline in cable television subscribers, and with it a decline in viewership of cable television networks. In fact, fans’ inabilities to watch baseball games via streaming services and the high cost of cable subscriptions is contributing to the overall decline in Americans’ interests in watching baseball.⁶⁶ It would be beneficial

1189 (2018). This arguably promotes fans’ expectations that each team has the ability to win a championship, thereby promoting “fan welfare.”

63. Brad Adgate, *Cord Cutting Is Not Stopping Anytime Soon*, FORBES (Dec. 7, 2017, 11:41 AM), <https://www.forbes.com/sites/bradadgate/2017/12/07/cord-cutting-is-not-stopping-any-time-soon>.

64. *See id.*; Robert Briel, *Tivo Research Shows Reasons for Cord-Cutting*, BROADBAND TV NEWS (June 15, 2017, 8:56 AM), <https://www.broadbandtvnews.com/2017/06/15/tivo-research-shows-reasons-for-cord-cutting/>.

65. Dennis Restauero, *The Rapid Decline of Cable TV*, GROUNDED REASON (Jan. 31, 2019), <https://www.groundedreason.com/the-rapid-decline-of-cable-tv/>.

66. *See* Chris Morran, *MLB to Offer In-Market Streaming Starting in 2017 (But You’ll Still Need Cable)*, CONSUMERIST (Jan. 19, 2016, 3:21 PM), <https://consumerist.com/2016/01/19/mlb-to-offer-in-market-streaming-starting-in-2017-but-youll-still-need-cable/>; Tuttle, *supra* note 1.

for MLB to reevaluate its system of contracting with local cable networks in order to attract younger fans, increase business, and detract from the harm that has been caused by cord-cutting.

MLB blackout restrictions also encourage illegal viewing and internet piracy. Because of cord-cutting fans' inability to watch local games, regardless of whether they are willing to pay for MLB.tv packages, many will search for illegal, pirated streams of live games, which diverts both dollars and ratings from MLB.⁶⁷ In 2014, MLB acknowledged that it had lost millions of dollars to piracy.⁶⁸ Unless effective action is taken against piracy, individuals who illegally stream live sporting events will likely continue to avoid paying for legal viewing services in the future, which could result in a large loss of potential revenue for the League.⁶⁹

Targeting and removing illegal streaming sites is often difficult because of the nature of such sites.⁷⁰ While MLB may be dedicated to finding and removing illegal streaming sites, elimination of one site often leads to the creation of others, making it nearly impossible to completely eradicate illegal streams.⁷¹ Further, other fans use Virtual Private Networks ("VPNs") to skirt blackout restrictions. While a fan who uses a VPN still pays for the MLB.tv package, the VPN tricks the MLB.tv service into believing that the fan is in a different geographical location; the service therefore applies the wrong blackout restrictions and allows the fan to watch games that should be restricted.⁷² While MLB punishes violators of streaming policy through fines and suspension of service,⁷³ this only addresses a portion of the problem. Regardless of the League's dedication to

67. Josh Peter, *Digital Pirates Steal Signals, Money from Leagues*, USA TODAY (Oct. 8, 2014, 8:47 AM), <https://www.usatoday.com/story/sports/2014/10/07/television-pirates-pay-per-view-ufc-nfl-nba-nhl-mlb/16871583/>.

68. *Id.*

69. See Ass'n of Internet Security Profls, *Illegal Streaming and Cybersecurity Risks* 15 (Autumn 2014) (unnumbered working paper), <https://cryptome.org/2014/09/illegal-streaming-malware-epoch-times-full-14-0923.pdf> [<https://perma.cc/DFH7-SNQM>].

70. For example, popular websites, including [reddit.com](https://www.reddit.com), provide message boards where users can post streams to individual games. See REDDIT: R/MLBSTREAMS, <https://www.reddit.com/r/MLBStreams/> (last visited Oct. 25, 2019). Multiple new links are provided for each individual game, making it nearly impossible for MLB to eliminate every pirated stream. See ausar999, Comment to *It's Opening Day! Get Ready to Stream!*, REDDIT: R/MLBSTREAMS (Mar. 29, 2019, 6:32:20 PM), <https://www.reddit.com/r/MLBStreams/comments/b6ie4v/its-opening-day-get-ready-to-stream/ejlf1eb/>.

71. Gregory Day, *Competition and Piracy*, 32 BERKELEY TECH. L.J. 775, 819 (2017) ("The leagues have described fighting illicit sites as a game of 'whack-a-mole,' claiming every time one site is eliminated, another arises.")

72. Jacob Bogage, *Fans Still Can't Stream Nats or Orioles Games. They Aren't Happy About It.*, WASH. POST (Apr. 5, 2018, 7:00 AM), <https://www.washingtonpost.com/news/dc-sports-bog/wp/2018/04/05/cord-cutters-still-cant-watch-nats-or-orioles-games-they-arent-happy-about-it/>.

73. Lee Rood, *Baseball Blackouts: Who's Responsible for Viewing Hell?*, DES MOINES REG. (May 5, 2015, 10:02 AM), <https://www.desmoinesregister.com/story/news/2015/05/04/baseball-blackouts-responsible-viewing/26888559/>.

eliminating piracy, total elimination has proven nearly impossible in other industries, and MLB should instead consider how to adapt despite the existence of illegal streaming.

While no other sport or area of the entertainment industry is entitled to similar antitrust exemptions, MLB may look to the movie and music industries as a positive example of how abandoning the antitrust exemption may curb the effects of piracy.⁷⁴ Following a surge of digital piracy in 2005 and endurance of a sharp economic blow, the movie industry ventured into the business of online streaming via services such as Hulu and Netflix.⁷⁵ These endeavors helped to offset the costs of piracy and boosted revenue by offering competitive pricing and superior service.⁷⁶ While piracy has not been eliminated, the movie industry has effectively offset much of the negative effects of piracy, evinced by a continuous increase in gross revenue.⁷⁷

Similarly, the music industry was plagued by the online sharing of pirated music.⁷⁸ In response to the widespread illegal sharing of pirated music that took place in the early twenty-first century,⁷⁹ the music industry responded by adapting to consumer preferences, with Apple allowing for the purchase of individual music tracks and the industry's eventual venture into music streaming services such as Spotify and Apple Music.⁸⁰ As a result, the music industry saw an outcome similar to the movie industry's outcome: the effects of piracy were offset, leading to an increased profit from listeners and a decrease in illegal downloads.⁸¹ MLB should consider emulating the music and movie industries' willingness to adapt in order to balance saving its business and offsetting the effects of illegal internet streaming, or risk facing the consequences that these industries avoided.

V. CONCLUSION

The baseball exemption to antitrust law is nearly a century old and is becoming increasingly outdated as the business of baseball grows to encompass more than simple state affairs. Since the exemption was created in 1922, baseball has grown its business through merchandise licensing deals, trading of players across teams and through minor league systems, and broadcast of games that has

74. Day, *supra* note 71, at 819.

75. *Id.*

76. *Id.* at 817.

77. *Id.*

78. Josh Matthews, Comment, *Sports Broadcasting Blackouts: A Harbinger of Change in a Rapidly Evolving Media Landscape?*, 18 HOUS. BUS. & TAX L.J. 202, 219–21 (2018).

79. *Id.*

80. See Molly Hogan, Note, *The Upstream Effects of the Streaming Revolution: A Look into the Law and Economics of a Spotify-Dominated Music Industry*, 14 COLO. TECH. L.J. 131, 142 (2015).

81. *Id.*

the ability to reach a national audience. Interstate commerce is no longer incidental to the game: it is central to the game.

While the baseball exemption has been heavily criticized over the years, and narrowed by subsequent courts, the exemption is still valid and exercised by Major League Baseball. Through its antitrust exemption, MLB has created anti-competitive contracts that give local cable networks an exclusive license to broadcast regional games, thus creating blackout restrictions that prohibit local fans from viewing games in any manner other than through an expensive cable television subscription.

Regardless of the validity of the baseball exemption, MLB as a business is suffering harm as a result of its blackout restrictions. Baseball has seen a decline in viewership, attributed to a growing disinterest of younger fans and an increasingly aging fan base. The issue, however, appears to be more intricate than simply an aging fan base. Younger audiences are more likely to be “cord-cutters,” viewers who abandon traditional cable subscriptions for internet-based streaming options. Because of the limitations of the blackout restrictions, fans are either not watching games or turning to illegal means to watch the games. Specifically, fans who would have paid to watch a game, had it been available in their area, are instead turning to illegal live streams or VPNs to watch the game.

To curb the effects of piracy and boost its suffering ratings, MLB should reconsider the outdated baseball exemption. While it is unlikely that MLB would be willing to part completely with its exemption, the League should at least consider abandoning its blackout restrictions to adapt to a change in viewership.