ANTITRUST LAW

Unit 7: Unreasonableness

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Introduction

PROVING UNREASONABLENESS

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is declared to be illegal."[1] Today, *every* violation of Section 1 requires a showing of four distinct elements: (1) a plurality of actors with the legal capacity to conspire with one another, (2) an agreement among these actors, and (3) a restraint of trade or commerce as the object of the agreement that (4) is unreasonable within the meaning of the antitrust laws.[2] Unit 6 addressed the elements of plurality and agreement; this unit examines restraint and unreasonableness.

Restraint of trade

U.S. antitrust law has paid almost no attention to the general definition of a restraint of trade and instead has focused on what constitutes an actionable restraint. That said, a good working definition is that a restraint of trade is a restriction on the freedom or liberty of a person (or firm) to operate in the marketplace. This definition, which we first examined in Unit 2, is suggested by Lord Coke's definition of monopoly in his commentary on the Statute of Monopolies.[3]

Section 1 speaks in terms of restraints "of trade or commerce." Courts have interpreted this language to limit Section 1 to *commercial restraints*.[4] This is a substantive element of a prima facie case for a Section 1 violation. It should be distinguished from an effect on interstate or foreign commerce, which is required for subject matter jurisdiction. As a general rule, courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances.[5] Congress intended the antitrust laws to apply broader to commercial conduct, so that they could prohibit anticompetitive business practices wherever they occur.[6] On the other hand, the legislative history of the Sherman Act reveals that it was not intended to reach noncommercial activities that

1. 15 U.S.C. § 1.

2. Standard Oil Co. v. United States, 221 U.S. 1 (1911); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (plurality and agreement); American Needle, Inc. v. National Football League, 560 U.S. 183 (2010) (plurality and agreement).

3. *See* 3 COKE, INSTITUTES 85b (defining a monopoly to be an institution "for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindred in their lawfull trade").

4. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959).

5. United States v. Brown Univ., 5 F.3d 658, 666 (3d Cir. 1993).

6. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 (1975); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

are intended to promote social causes.[7] Nonprofit organization can engage in commercial restraints, and to the extent they do they are subject to Section 1 scrutiny.[8] The typical examples of noncommercial restraint are rules of sports leagues governing the eligibility and the rules of the game.[9] But the commercial operations of sports leagues can be commercially restrained and are subject to scrutiny under the Sherman Act.[10]

Unreasonableness

Section 1 was read originally in a literal construction to prohibit all restraints of trade that result from concerted action.[11] In 1911, however, the Supreme Court in *Standard Oil Co. v. United States*[12] held that only *unreasonable* restraints are actionable.[13] The *Standard Oil* notion of unreasonableness is related to but not identical with the way courts considered unreasonableness when assessing contracts or combinations under the common law. Rather, under *Standard Oil* a restraint is unreasonable if it brings about or promotes the "evils of monopoly" that result from

7. National Org. for Women v. Scheidler, 968 F.2d 612, 617-21 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994); Missouri v. National Org. for Women, 620 F.2d 1301, 1304-09 (8th Cir. 1980).

8. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982); National Soc'y of Prof'l Eng'rs v. United States, 422 U.S. 1031 (1975); United States v. Brown Univ., 5 F.3d 658, 667-68 (3d Cir.1993).

9. *See, e.g.*, Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998) (finding NCAA eligibility rules not related to the NCAA's commercial or business activities and hence not commercial restraints where they primarily seek to ensure fair competition in intercollegiate athletics), *vacated on other grounds*, NCAA v. Smith, 525 U.S. 459 (1999); *accord* Bowers v. NCAA, 475 F.3d 524, 535 & n.11 (3d Cir. 2007); *see* Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 581-84 (E.D. Pa. 2004) (rejecting challenge to NCAA's rules restricting recruiting of basketball players at NCAA-certified summer basketball camps as a noncommercial restraint).

10. *See, e.g.*, [AUTHORITY]; *see also* United States v. Brown Univ., 5 F.3d 658, 667 (3d Cir. 1993) (noting that "we 'can conceive of few aspects of higher education that are more commercial than the price charged to students'" and finding that financial assistance to students is part of the process of setting tuition and can be commercially restrained) (internal citation omitted).

11. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); *see* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342 (1982); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687-88 (1978); United States v. Topco Assocs., 405 U.S. 596, 606 (1972); Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

12. 221 U.S. 1 (1911).

13. *Id*. at 59-62 (1911); *accord Leegin*, 551 U.S. at 885; Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); California Dental Ass'n v. FTC, 526 U.S. 756, 769-81 (1999); NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988); Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985); NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984); *Prof'l Eng'rs*, 435 U.S. at 687-91; Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

the diminution of competition. As the Supreme Court explained in *Northern Pacific Railway Co. v. United States*:[14]

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.[15]

In this context, Chief Justice White in *Standard Oil* was able to affirm the results in *Trans-Missouri*[16] and *Joint Traffic*[17] that horizontal price fixing was an unreasonable restraint within the meaning of the Sherman Act even when the restraint furnished the public with adequate facilities at just and reasonable rates while at the same time preventing destructive competition. The *Trans-Missouri* and *Joint Traffic* combinations constrained the ability of competitors to set their own prices individually and so restrained the competition that the Sherman Act sought to protect, with the result that prices were higher than they otherwise would have been. Since the challenged restraints furthered the evils of monopoly—here, higher prices—by restraining competition, the combinations were unreasonable within the meaning of the Sherman Act regardless of whether they were unreasonable under common law principles at the time.

Although higher prices, reduced output, and quality deterioration have been considered some of the evils of monopoly since *Darcy v. Allen*[18] in 1602, other "evils" have emerged from time to time since 1890 to inform the Sherman Act's application. As a result, the goals of the Sherman Act have variously included the protection of small businesses from more efficient larger firms, preservation of local control over business, and prevention of significant industrial concentration. As the prevailing conception of the goals of the antitrust laws changed, so did the notion of what constituted an unreasonable restraint. As we will same in Unit 9, for example, the same merger may be actionable under the antitrust laws when it threatens the

14. 356 U.S. 1 (1958).

15. *Id*. at 4.

16. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

17. United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898)

18. 11 Co. 846, 77 Eng. Rep. 1260 (K.B. 1602). The case also was reported by Noy and Moore. *See* Noy 173, 74 Eng. Rep. 1131 (K.B. 1602); Moore 671, 72 Eng. Rep. 830 (K.B. 1602). For more on the case, see Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261 (1996), and D. Seaborne Davies, *Further Light on the Case of Monopolies*, 191 L.Q. REV. 394 (July 1932).

existence of small competitors, reduces local control over local businesses, and increases industrial concentration when those are effects are contrary to the operative goals of the antitrust laws, yet be permissible if not encouraged when the goal is to increase economic efficiency and consumer welfare.

In modern terms, an unreasonable restraint is one that is anticompetitive, that is, when it is likely to create or enhance the exercise of market power by the defendants to the detriment of consumers, especially by raising market prices, reducing market output, or reducing the rate of technological innovation or product improvement in the market.[19]

Courts have developed four general standards to determine what constitutes an unreasonable restraint of trade within the meaning of Section 1: (1) the per se rule, (2) the rule of reason analysis, (3) the "quick look," and (4) the *BMI* "flip." In brief:

- The *per se rule* is a conclusive presumption based on the inherent nature" of the challenged restraint that the restraint is unreasonable within the meaning of the Sherman Act. The absence of an anticompetitive effect is not a defense to per se illegal restraint. The pre se rule applies only to a limited category of restraints. In recent years, the Supreme Court has narrowed the categories of per se unlawful restraints.

- The *rule of reason* is the default standard for testing the reasonableness of a restraint and requires an affirmative showing on the merits that the challenged restraint is unreasonable. There are no presumptions and the burden of proof is on the plaintiff.

19. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940) (noting that the Sherman Act prevents "restraints to free competition in business and commercial transactions which tend[ ] to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services"); NCAA v. Board of Regents, 468 U.S. 85, 107 (1984) ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal [to protect consumer welfare] of antitrust law."); United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) ("The plaintiff may satisfy this burden [of showing unreasonableness] by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services.").. *See generally* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (antitrust laws traditionally concerned with "consumer welfare and price competition"); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 360 (1990); NCAA v. Board of Regents, 468 U.S. 85, 107 (1984); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); United States v. Rockford Memorial Corp., 898 F.2d 1278, 1282-83 (7th Cir. 1990) ("The current understanding of § 7 is that it forbids mergers that are likely 'to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or father above the competitive level.'") (quoting Hospital Corp. of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986)); Schachar v. American Acad. of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989) ("Antitrust law is about consumers' welfare and the efficient organization of production. It condemns reductions in output that drive up prices as consumers bid for the remaining supply.").

- The *quick look* is a rebuttable presumption based on the nature of the challenged restraint that the restraint is unreasonable. Courts rarely apply it, but that may be changing. Courts typically apply the quick look when the challenged restraint appears inherently anticompetitive with no apparent justification. Once the court determines that the challenged restraint is subject to quick look scrutiny, the burden of going forward with evidence—and probably the burden of persuasion—shift to the defendant to show that the restraint is not anticompetitive.

The Supreme Court has emphasized that these categories are not rigid and that the analysis of reasonableness are more fluid and adaptable to the circumstances as the need arises.[20] That said, the jurisprudence of proof of unreasonableness is an absolute mess. Granted, the domain of application and the methodology of the per se rule is well defined and the rule is almost always applied without controversy. While the domain of the rule of reason is essentially well understood—almost everything that falls outside the per se rule—the courts are completely lost in how to apply it except at the extremes. By contrast, the quick look is relatively well understood as a rebuttable presumption of unreasonableness, but no one knows with any confidence when it applies. The BMI flip is analytically available, but as far as I know has been applied in one situation.

Finally, it is important to remember that, in contrast to the common law of conspiracy, the essence of any Section 1 violation is the illegal agreement itself, independently of any overt acts that may be performed in furtherance of it. For this reason, the analysis of reasonableness focuses on the potential harm to competition that might result from the challenged agreement in addition to any actual consequences.

The per se rule

The *per se rule* is a conclusive presumption of unreasonableness flowing from the nature and likely effects of the challenged conduct.[21] *Standard Oil* created the rule as a means of proving the unreasonableness of some restraints when affirming the results in *Trans-Missouri* and *Joint Traffic*.

> [C]onsidering the contracts and agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but

20. California Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) (but noting that "[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'Rule of Reason' tend to make them appear").

21. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 344 (1982).

> decided that the nature and character of the contracts, creating, as they did, *a conclusive presumption which brought them within the statute*, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.[22]

But apart from horizontal price-fixing arrangements such as those found in *Trans-Missouri* and *Joint Traffic*, when is the per se rule to be applied? The Supreme Court has held that a restraint that "facially appears to be one that would always or almost always tend to restrict competition and decrease output," rather than one designed to "increase economic efficiency and render markets more, rather than less, competitive," may be deemed to be illegal per se and may be condemned without further analysis.[23] *Per se* illegal restraints are "plainly" or "manifestly" anticompetitive,[24] and have a "pernicious effect on competition and lack . . . any redeeming virtue."[25] The Court has cautioned that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations"[26] and then only when this experience "enables the Court to predict with confidence that the rule of reason will condemn it."[27] Conversely, courts will not

22. Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911) (emphasis added).

23. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979) (citing United States v. United States Gypsum Co., 438 U.S. 422, 436 n.14 (1978)); *accord Leegin*, 551 U.S. at 886 ("Resort to per se rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output."); *Dagher*, 547 U.S. at 5; State Oil Co. v. Kahn, 522 U.S. 2, 10 (1997) ("Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se."); *Atlantic Richfield*, 495 U.S. at 342; *Northwest Wholesale Stationers*, 472 U.S. at 289-90; *Maricopa Cty.*, 457 U.S. at 344 ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."); *Continental T.V.*, 433 U.S. at 50; *see NCAA*, 468 U.S. at 103-04 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); *Prof. Eng'rs*, 435 U.S. at 692 (reserving per se liability for only those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality"); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (noting that per se illegal restraints are unlawful "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

24. *Leegin*, 551 U.S. at 886; *Business Elecs.*, 485 U.S. at 723; *Broadcast Music*, 441 U.S. at 8; *Prof'l Eng'rs*, 435 U.S. at 692; *Sylvania*, 433 U.S. at 50.

25. *Northern Pac.*, 356 U.S. at 5; *accord Northwest Wholesale*, 472 U.S. at 289; *State Oil*, 522 U.S. at 10; Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 & n.9 (1980); United States v. Topco Assocs., 405 U.S. 596, 607 (1972); Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 498 (1969); United States v. General Motors Corp., 384 U.S. 127, 146 (1966); White Motor Co. v. United States, 372 U.S. 253, 262 (1963).

26. *Topco Assocs.*, 405 U.S. at 607-08; *accord Leegin*, 551 U.S. at 886; *Broadcast Music*, 441 U.S. at 9; *Sylvania*, 433 U.S. at 47-59 (1977); *White Motor*, 372 U.S. at 263; *see Maricopa County*, 457 U.S. at 349-51 n.19 ("[A] new per se rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged.").

27. *Maricopa County*, 457 U.S. at 344; *accord Leegin*, 551 U.S. at 886-87 ("As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of

apply the per se rule to restraints "where the economic impact of certain practices is not immediately obvious."[28]

The per se rule eliminates the need to analyze the competitive effect of the challenged restraint.[29] When the per se rule applies, the conduct is conclusively presumed to be unreasonable within the meaning of the Section 1 even if the defendants lack market power and hence cannot adversely affect competition in the market by their actions.[30] The plaintiff is not required to plead or prove the relevant market that is likely to be harmed or to prove an actual or threatened anticompetitive effect in order to show a violation.[31] The per se rule is essentially a rule of efficiency: the idea is that the probability that per se illegal conduct is anticompetitive is so high that the costs associated with performing a full competitive analysis outweighs the expected social benefits from identifying and avoiding the few overinclusiveness errors that might otherwise occur.[32]

restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.") (citations omitted); State Oil Co. v. Kahn, 522 U.S. 2, 10 (1997); *see* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986) (expressing reluctance "to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious").

28. *Leegin*, 551 U.S. at 887.

29. *Leegin*, 551 U.S. at 886 (noting that "[t]he per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work").

30. Realcomp II, Ltd. v. FTC, 635 F.3d 815, 825 (6th Cir. 2011); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362 (5th Cir. 1980).

31. *In re* Mercedes-Benz Antitrust Litig., 157 F. Supp. 2d 355, 359 (D.N.J. 2001).

32. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982) ("As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable."); *accord* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990); *Northwest Wholesale*, 472 U.S. at 289; *see Sylvania*, 433 U.S. at 50 n.16 ("*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials . . . ."); *Northern Pac.*, 356 U.S. at 5 ("This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."); California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1146 n.3 (9th Cir. 2011) ("The ultimate inquiry in both analyses [per se rule and quick look] is establishing a sufficiently high likelihood of anticompetitive effect to justify foreclosing, in the name of certainty and efficiency goals, the possibility that a more in depth review would reveal that a restraint was on balance benign or even beneficial.").

The Court has narrowly confined the application of the per se rule to only certain well-defined categories of conduct, which today include:

- Horizontal price fixing (including bid rigging)[33]
- Horizontal market allocation of territories or customers[34]
- Certain tying arrangements[35]
- Certain group boycotts.[36]

The first two categories are known as "hard core" antitrust violations, are unqualifiedly per se unlawful, and usually prosecuted criminally. Tying arrangements and group boycotts are qualified per se violations in that the per se rule applies only when certain prerequisite conditions are satisfied; if the prerequisite conditions are not satisfied, the restraint is subject to rule of reason scrutiny.

The list of restraints falling into the per se unlawful category used to be longer. Minimum resale price maintenance was held to be per se unlawful in 1911, but was returned to the rule of reason in 2007.[37] Maximum resale price maintenance was held to be per se unlawful in 1968, but returned to the rule of reason in 1997.[38] Nonprice vertical restraints were originally held to be subject to the rule of reason in 1963, made per se unlawful in 1967, and returned to the rule of reason in 1977.[39]

The courts in general, and the Supreme Court in particular, have resisted many invitations to create new categories of per se illegal categories of conduct or to apply the per se rule on an ad hoc basis.[40] The last per se unlawful category created by the courts was nonprice vertical restraints in 1967, and that lasted for only ten years before the category was returned to rule of reason treatment.

33. *Leegin*, 551 U.S. at 886; Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); *Maricopa County*, 457 U.S. at 343-48; Catalano, Inc. v. Target Sales, Inc., 446 US 643 (1980); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

34. *Leegin*, 551 U.S. at 886; Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990) (per curiam).

35. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984); United States Steel Corp. v. Fortner Enters., 429 U.S. 610, 619-21 (1977); Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969); Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958); Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947).

36. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210 (1959); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941). *See generally* NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

37. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *abrogated*, Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

38. Albrecht v. Herald Co., 390 U.S. 145 (1968), *abrogated*, State Oil Co. v. Kahn, 522 U.S. 2 (1997).

39. White Motor Co. v. United States, 372 U.S. 253 (1963) (rule of reason), *abrogated*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (instituting per se rule), *abrogated*, Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977) (returning to rule of reason).

40. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); State Oil Co. v. Kahn, 522 U.S. 2, 10 (1997).

The rule of reason

The *rule of reason* is the default standard that generally applies to categories of conduct that do not fall within a per se illegal category.[41] The seminal statement of the rule of reason was given by Justice Brandeis in *Chicago Board of Trade v. United States*:[42]

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The 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 may suppress or even destroy competition. To determine that question, 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 a good intention will save an otherwise objectionable regulation, or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.[43]

The Brandeis formulation, however, has been heavily criticized for providing a list of factors to consider but no indication of how to weigh these factors. As discussed below in a note, the criticism is misplaced.[44]

Under the rule of reason, the unreasonableness of the challenged restraint must be shown by affirmative proof.[45] Modern antitrust law holds a restraint is unreasonable if it is on balance anticompetitive, that is, if it creates or facilitates the exercise of market power to the detriment of the customer.[46]

41. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1."); *Dagher*, 547 U.S. at 5 (observing that "this Court presumptively applies rule of reason analysis"); State Oil Co. v. Kahn, 522 U.S. 2, 10 (1997); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986).

42. 246 U.S. 231 (1918).

43. *Id*. at 238.

44. *See infra* p. __.

45. *See, e.g.*, USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 513 (7th Cir. 1982) (requiring some "actual or probable anticompetitive effect in a relevant market" to prove rule of reason violation).

46. *Leegin*, 551 U.S. at 886 ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."); *see Dagher*, 547 U.S. at 5 (noting that under rule of reason analysis "antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful"); Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278, 290 (4th Cir. 2012).

Many courts have expressed this idea by words to the effect that "the restraint's harm to competition outweighs its procompetitive effect."[47] The problem with this formulation is that it suggests an analysis that identifies, measures, and weighs the anticompetitive effects and procompetitive effects of the restraint, a task that few courts have attempted and none have accomplished with analytical success. The better view is to go straight to the ultimate question: does the restraint in the circumstances harm customers through the exercise of market power? In other words, direct the analysis in the first instance to the net effect on customers and not try to disentangle the anticompetitive and procompetitive effects.

Whatever the proper approach, the plaintiff bears the burden of proof of showing the unreasonableness of the restraint. The plaintiff may discharge its burden by either direct or circumstantial evidence of anticompetitive effect.

Direct proof of an anticompetitive restraint requires a showing that the restraint increased market prices, decreased market output, or reduced the rate of product improvement or technological innovation in the market to the harm to customers when compared to what would have happened in the "but for" world, that is, the world that would have existed absent the restraint. In many cases, the analysis is straightforward: the restraint raised prices to customers with no arguable customer benefit, hence unambiguously harming customers. The analysis is much less clear when, for example as in some nonprice vertical restraints, prices are increased but sellers use their increased free cash flow to provide valuable point of sale services to customers. Courts have not successfully come to grips with how to ascertain whether customers on balance are helped or harm, although perhaps the best test is whether the restraint increases or decreases the output of the underlying good or service.

Courts also allow a plaintiff to make a prima facie rule of reason case through a more structured three-step approach.[48] First, the plaintiff must show, by either direct or circumstantial evidence, that the defendant has imposed or participated in some restraint of trade and has market power (that is, the ability to adversely affect market price or market output) in a properly defined relevant market affected by the restraint.[49] If the plaintiff makes this showing, the burden shifts to the defendant to come forward with evidence that the challenged conduct has at least some significant procompetitive virtues.[50] If the defendant meets its burden, the plaintiff can rebut by showing that the restraint was not "reasonably necessary to achieve the stated objective" or that "those objectives can be achieved in a substantially less restrictive

47. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001).

48. *See, e.g.*, *In re* K-Dur Antitrust Litig., 686 F.3d 197, 209 (3d Cir. 2012); United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993).

49. NCAA v. Board of Regents, 468 U.S. 85, 110 (1984); Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012); *Brown Univ.*, 5 F.3d at 668; (3d Cir. 1993). Some courts also require a showing of significant anticompetitive effects in the relevant market as part of the plaintiff's prima facie case. *See, e.g.*, *K-Dur*, 686 F.3d at 209; *Tanaka*, 252 F.3d at 1063. But this simply makes the prima facie case one of direct evidence.

50. *See K-Dur*, 686 F.3d at 209; *Brown Univ.*, 5 F.3d at 669.

manner."[51] If there is a less restrictive means of obtaining the procompetitive benefits of the restraint, the restraint is unreasonable. Otherwise, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.[52] The plaintiff should bear the burden of persuasion in this weighing, but the courts have not been clear on this point.[53] In practice, courts rarely reach the third stage of this approach, perhaps because they have not developed a clear way to handle it. Instead, they either find that the plaintiff failed at the first stage to establish a proper relevant market or the defendant's market power in that market, or that the defendant failed at the second stage to demonstrate any procompetitive benefits of the restraint.

Some circuits explicitly require a threshold showing that the defendant possesses market power.[54] This requirement makes sense, since without market power the defendant would have no ability to adversely affect the level of competition in the marketplace. Market power is usually inferred from circumstantial evidence of the defendant's market share and of barriers to entry and other attributes of the relevant market in which the market power is alleged to exist. This, in turn, requires the relevant market to be defined. But when anticompetitive effects are proved through direct evidence, market power necessarily exists and there is no need to define markets or assess market share and market conditions.[55] Conversely, in many cases it may be easier to prove through a market analysis that the defendant does not market power, and so cannot have adversely affected competition in the market, than it is to assess the competitive effects of the alleged restraint directly.

There was once question as to the extent that the nature of an enterprise and any social welfare goals it aims to advance can be considered in assessing the reasonableness of a commercial restraint under the rule of reason. In *Goldfarb v.*

51. *See, e.g.*, *K-Dur*, 686 F.3d at 209; *Agnew*, 683 F.3d at 335-36; *In re* Tamoxifen Citrate Antitrust Litig., 429 F.3d 370, 385 (2d Cir. 2005); Care Heating & Cooling, Inc. v. American Standard, Inc., 427 F.3d 1008, 1012 (6th Cir. 2005); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1064-65 (11th Cir. 2005); Geneva Pharms. Tech. Corp. v. Barr Labs., 386 F.3d 485, 506-07 (2d Cir. 2004); Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003); *Brown Univ.*, 5 F.3d at 669; Bhan v. NME Hosps., Inc., 929 F2d 1404, 1413 (9th Cir. 1991).

52. *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998).

53. It appears that some courts may require the defendant in the second step to prove that the procompetitive benefits of the restraint outweigh its anticompetitive costs. If the defendant satisfies this burden, then the plaintiff may prove a Section 1 violation even if the restraint is, on balance, procompetitive if there was a less competitively restrictive means of achieving the same procompetitive objective.

54. *See, e.g.*, Behrend v. Comcast Corp., 655 F.3d 182, 192 (3d Cir. 2011), rev'd on other grounds, 133 S. Ct. 1426 (2013). The Supreme Court and some circuits have not clearly imposed a market power prerequisite. *Cf.* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885-86 (2007); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1332 (Fed. Cir. 2008) ("Although the precise role that market power plays in the rule of reason analysis is unclear, it may be a highly relevant factor.").

55. Behrend v. Comcast Corp., 655 F.3d 182, 192 (3d Cir. 2011); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 n.3 (3d Cir. 2007).

Virginia State Bar,[56] the Supreme Court held that a minimum fee schedule issued by the Fairfax Country Bar Association and enforced by the Virginia State Bar was subject to scrutiny under the Sherman Act. Although the Court did not reach the ultimate merits, it observed that the professional society nature of the FCBA was a factor that could be considered in analyzing the reasonableness of the restraint:

> 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 properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.[57]

Yet seven years later, in *Arizona v. Maricopa County Medical Society*,[58] the court unceremoniously held that a *maximum* fee schedule set by the Maricopa Foundation for Medical Care (FMC) to be charged by physician members for health services provided to policyholders of certain Foundation-approved third-party insurance plans constituted per se illegal horizontal price fixing. In making this decision, the Court assumed, as FMC argued, that the maximum fee schedules imposed a meaningful limit on physicians' charges, that the advance agreement by the doctors to accept the maxima enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite, and that as a result the schedule served as an effective cost-containment mechanism that saved patients and insurers millions of dollars.[59] Today, the inquiry is simply "whether the challenged agreement is one that promotes competition or one that suppresses competition."[60] Social or other policy considerations have no role in a rule of reason analysis except to the extent they have some bearing on the restraint's effect on competition.

56. 421 U.S. 773 (1975).

57. *Id*. at 788 n.17; *see* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) ("Although MIT's status as a nonprofit educational organization and its advancement of congressionally-recognized and important social welfare goals does not remove its conduct from the realm of trade or commerce, these factors will influence whether this conduct violates the Sherman Act.").

58. 457 U.S. 332 (1982).

59. Procedurally, the district court had denied the state's motion for summary judgment on the issue of liability but certified the question of whether the maximum fee schedules were per se unlawful for an interlocutory appeal under 28 U.S.C. § 1292(b). The Ninth Circuit Court of Appeals accepted the appeal and in a two-to-one decision affirmed the denial of summary judgment.

60. National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

The “quick look”

A third standard, called the *truncated* or *abbreviated rule of reason* or, more commonly, the *quick look*, has emerged.[61] The quick look analysis is sometimes more descriptively called the “inherently suspect” analysis,[62] since it raises a rebuttable presumption of unreasonableness for restraints that appear likely to be anticompetitive but do not trigger the conclusive presumption of unreasonableness of the per se rule because of a lack of judicial experience with them.[63] In effect, the quick look shifts the evidentiary burdens of a traditional rule of reason analysis. The Supreme Court recognized this mode of analysis in *California Dental Ass’n v. FTC*,[64] although the parameters are still evolving.

When the quick look applies, the plaintiff does not need to establish the boundaries of the relevant market or to prove that the defendants collectively possessed market power.[65] The idea is that where there is what appears to be a direct restraint on price and output, a detailed market analysis is unnecessary to establish a prima facie case of an unreasonable restraint of trade.[66] In those circumstances, only a quick look is necessary because the arrangement is “so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.”[67] Put another way, the quick look approach can be used when the per se rule does not apply but “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets” in the absence of some

61. *See, e.g.*, California Dental Ass’n v. FTC, 526 U.S. 756 (1999); FTC v. Indiana Fed’n of Dentists, 476 U.S. 447 (1986); *NCAA*, 468 U.S. at 109-10; *see also* Texaco Inc. v. Dagher, 547U.S. 1, 7 n.3 (2006) (recognizing “quick look” as a mode of analysis).

62. *See* North Texas Specialty Physicians v. FTC, 528 F.3d 346, 354 (5th Cir. 2008); Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

63. *See NCAA*, 468 U.S. at 109; Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 387 (8th Cir. 2007).

64. 526 U.S. 756 (1999).

65. *California Dental*, 526 U.S. at 779 (finding that “a challenge to a ‘naked restraint on price and output’ need not be supported by ‘a detailed market analysis’ in order to ‘requir[e] some competitive justification’”) (quoting *NCAA*, 468 U.S. at 110); Polygram Holding Inc. v. FTC, 416F.3d 29, 36 (D.C. Cir. 2005); Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998); *but cf.* Agnew v. National Collegiate Athletic Ass’n, 683 F.3d 328, 345 (7th Cir. 2012) (requiring some allegations of “the rough contours of the relevant commercial market in which anticompetitive effects may be felt” where the area is “not obviously commercial, and thus where the Sherman Act’s application is not clearly apparent”).

66. *California Dental*, 526 U.S. at 769-70; *see Polygram*, 416 F.3d at 36 (finding an agreement subject to the quick look “[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition”).

67. Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006) (declining to apply the quick look where the challenged arrangement was not plainly anticompetitive); *see* NCAA v. Board of Regents, 468U.S. 85, 109 (1984).

procompetitive justification.[68] The Supreme Court has cautioned that the quick look should not be easily invoked:

> [B]efore a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.[69]

Upon a sufficient showing by the plaintiff, the burden shifts to the defendant to come forward with evidence of some legitimate procompetitive justification to put the presumption in issue.[70] If the defendant fails to adduce sufficient evidence to put the presumption in issue, the plaintiff prevails on the merits without any additional showing.[71] If the defendant adduces sufficient evidence of a procompetitive justification, the court must proceed to weigh the overall reasonableness of the restraint using a full rule of reason analysis.[72]

68. *California Dental*, 526 U.S. at 770.

69. *California Dental*, 526 U.S. at 775 n.12.

70. [AUTHORITY]; *see also* Brentwood Acad.v. Tennessee Secondary Schools Athletic Ass'n, Civ. A. No. 5:04-425-JMH, 2008 WL 2811307, at *5 (M.D. Tenn. Jul 18, 2008) (rejecting application of the quick look where plaintiff failed to show that the defendant high school association's regulation of intersholastic atheletics had an adverse effect on economic competition by, for example, increasing the costs of association membership, reducing gate receipts, or increasing the costs of a high school education).

71. Chicago Prof'l Sports Limited P'ship v. National Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992).

72. Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328, 336 (7th Cir. 2012); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993).

The Seminal Cases

CHICAGO BOARD OF TRADE v. UNITED STATES, 246 U.S. 231 (1918)

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236. Its 1600 members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators. Grains there dealt in are graded according to kind and quality, and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (a) spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (b) future sales; that is, agreements for delivery later in the current or in some future month. (c) sales "to arrive"—that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day, sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9:30 A.M. to 1:15 P.M., except on Saturdays, when the session closes at 12 M. Special sessions, termed the "call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions, transactions are between members only, but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the Board.[1]

Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago, which includes, besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after, but most purchases are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers, offers to buy at the prices named, any number of carloads, subject to acceptance before 9:30 A.M. on the next business day.

In 1906, the Board adopted what is known as the "call" rule. By it, members were prohibited from purchasing or offering to purchase, during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the call. The call was over, with rare exceptions, by 2 o'clock. The change effected was this: before

1. There is an exception as to future sales not here material.

the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the call until the opening of the next session.

In 1913, the United States filed in the District Court for the Northern District of Illinois, this suit against the Board and its executive officers and directors, to enjoin the enforcement of the call rule, alleging it to be in violation of the Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209. The defendants admitted the adoption and enforcement of the call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the government, the allegations concerning the purpose of establishing the regulation were stricken from the record. The case was then heard upon evidence; and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain interstate and foreign trade and commerce "by adopting, acting upon and enforcing" the "call" rule; and enjoined them from acting upon the same or from adopting or acting upon any similar rule.

No opinion was delivered by the District Judge. The government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago, or of retarding or accelerating shipment, or if raising or depressing prices, or of discriminating against any part of the public, or that it resulted in hardship to anyone. The case was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The 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 may suppress or even destroy competition. To determine that question, 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 a good intention will save an otherwise objectionable regulation, or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

First. The nature of the rule: the restriction was upon the period of price-making. It required members to desist from further price-making after the close of the call until 9:30 A.M. the next business day; but there was no restriction upon the sending out of bids after close of the call. Thus, it required members who desired to buy grain "to arrive" to make up their minds before the close of the call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the call, and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second. The scope of the rule: it is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales; members were left free to purchase grain already in Chicago from anyone at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive," at any price, from members anywhere and from nonmembers anywhere except on the premises of the Board. It applied only to grain shipped to Chicago; members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." Thus, Missouri, Kansas, Nebraska, and parts of Illinois are also tributary to St. Louis; Nebraska and Iowa, to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third. The effects of the rule: as it applies to only a small part of the grain shipped to Chicago, and to that only during a part of the business day, and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But, within the narrow limits of its operation, the rule helped to improve market conditions thus:

(a) It created a public market for grain "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.

(b) It brought into the regular market hours of the Board sessions, more of the trading in grain "to arrive."

(c) It brought buyers and sellers into more direct relations because, on the call, they gathered together for a free and open interchange of bids and offers.

(d) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(e) It increased the number of country dealers engaging in this branch of the business, supplied them more regularly with bids from Chicago, and also increased the number of bids received by them from competing markets.

(f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way, the rule made it possible for them to pay more to farmers without raising the price to consumers.

(g) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."

(h) It enabled those grain merchants of Chicago who sell to millers and exporters to trade on a smaller margin and, by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(i) Incidentally, it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfill their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in Anderson v. United States, 171 U.S. 604. Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed, with directions to dismiss the bill.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

NOTES

1. The Department of Justice filed its petition against the CBOT, its officers and directors on February 11, 1913, in the Northern District of Illinois. The petition alleged a conspiracy to fix the prices of corn, oats, wheat, and rye arriving at Chicago when the CBOT was not in session. The district court declared the combination illegal and permanently enjoined its operation.[1] The Supreme Court reversed on March 4, 1918, and a decree on the mandate of the Supreme Court was entered on April 18, 1918.[2]

1. United States v. Chicago Bd. of Trade, Eq. 8 (N.D. Ill. Dec. 28, 1915), *reprinted in* DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890-JANUARY 1, 1918, at 413 (Roger Shale ed., 1918), *rev'd*, 246 U.S. 231 (1918).

2. For more on the case and the surrounding facts, see, for example, Jonathan Lurie, The Chicago Board of Trade, 1859- 1905: The Dynamics of Self-Regulation (1979); Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Board of Trade Case and the*

2. *CBOT* is the seminal case on the rule of reason. The following passage, which according to Westlaw has been quoted in in over 150 opinions (including seven Supreme Court opinions), often is said to define the rule of reason in antitrust cases:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The 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 may suppress or even destroy competition. To determine that question, 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 a good intention will save an otherwise objectionable regulation, or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.[3]

3. But Brandeis is often equally criticized for defining the rule of reason in terms of a laundry list of factors to be considered but with no indication of how to consider them. But this is much too harsh. Brandeis not only gave a list of factors to be considered, he also carefully applied them in a way very familiar to modern antitrust practitioners.


Chicago Board of Trade

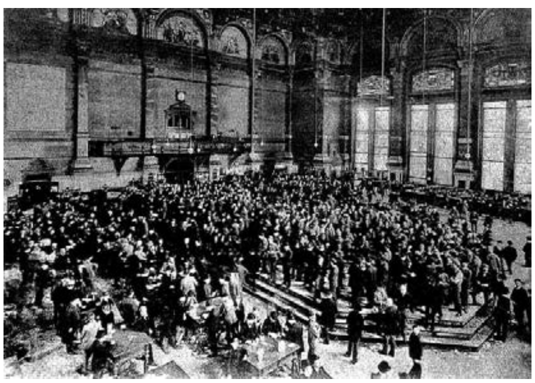
The "call" was a special trading session held after the regular session to purchase gain to arrive," that is, grain that was already in transit to Chicago or would be shipped there within a short specified period of time. The competitive restraint embodied in the Call Rule prohibited CBOT members from purchasing or offering to purchase "grain to arrive" contracts between the close of the call (around 2:00 pm) and the reopening of trading the next day (9:30 A.M.) at any price other than the closing bid at the call. The government argued for, and the district court apparently accepted, a *per se* approach: the CBOT admittedly fixed prices at which parties could trade during a portion of the day and nothing else needed to be proved. As a result of its position, the government presented no evidence that rule was designed or had the effect of

Meaning of the Rule of Reason in Restraint of Trade Analysis, 15 Res.in L. & Econ. 1 (1992); Richard O. Zerbe, *The Chicago Board of Trade Case, 1918*, 5 Res.in L. & Econ. 17 (1983).

3. *Chicago Bd.*, 246 U.S. at 238.

altering the amount of grain shipped to Chicago, raising or lowering prices, or resulting in any hardship. The defendants sought to justify the rule by presenting evidence that the rule's purpose was not to prevent competition or raise prices, but rather to promote the convenience of its members and "to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen [the public elevator operators] in Chicago."[4] The district court rejected this evidence as irrelevant to the application of the per se rule. But for Brandeis, writing for a unanimous Court, the Call Rule was not a naked restraint on prices, and a more nuanced analysis was required to determine whether it was an illegal restraint on competition under the Sherman Act.

In reversing the district court and sustaining the Call Rule, Brandeis found that the rule had no significant anticompetitive effect (as we would call it today): it applied to only a small part of the grain shipped to Chicago, fixed prices only during a limited part of the business day, did not apply to grain shipped to other markets, had no appreciable effect on general market prices, and did not materially affect the total volume of grain shipped to Chicago. At the same time, Brandeis found that the rule had some procompetitive effects. Most importantly, it encouraged buyers to attend the call, thus creating a more robust public auction market (with presumably prices closer to the competitive equilibrium) , while at the same time it protected sellers (county dealers and farmers) from adverse informational asymmetries when they dealt in after-hours dealing with the few warehousemen that dominated the after-hours market. Moreover, although not explicitly noted by Brandeis, grain sellers that did not like the closing bid at the prior call session could simply wait until the opening of the next trading session to make a sale.



The "Pit" at the Chicago Board of Trade (1899)

Notably, Brandeis did not invoke the convenience of the members as a factor in his analysis. On its face, the Brandeis analysis appealed only to what he concluded was the increased efficiency in the market. Of course, since Brandeis reversed the district court and remanded with instructions to dismiss the bill, we do not know if his conclusion would have been supported if the record was reopened and the case decided on a more complete evidentiary record.

4. A somewhat more modern variant of the CBOT was a rule adopted by the Detroit Automobile Dealers Association and other trade associations and dealerships in the Detroit area to keep their automobile showrooms closed all day on Saturdays

4. *Id*. at 237.

and on three weekday evenings. Finding that a restriction in hours is a reduction in output and hence "inherently suspect," The Commission applied a form of "quick look" analysis; found no lowered overhead costs or other offsetting efficiencies, and so held the restraint to be an unfair method of competition in violation of Section 5 of the FTC Act.[5] In its analysis, the Commission also found that showrooms hours were an important dimension of competition among dealerships that benefits consumers and that the restriction in showroom hours reduced consumer welfare. On appeal, the Sixth Circuit rejected the Commission's finding that a reduction in showroom hours is a reduction in output, but affirmed the Commission's conclusion that the agreement violated Section 5 under the rule of reason since it restricted a form of competition without any offsetting justification.

Note the key differences in the factual findings between *CBOT* and *Detroit Auto Dealers*. In *CBOT*, the Court found that the restraint have no adverse effect on competitive conditions and promoted the efficiency of the market to the benefit of sellers. By contrast, in *Detroit Auto Dealers*, the Commission found that the restraint adversely affected competition and had no offsetting procompetitive justifications.

5. *In re* Detroit Auto Dealers Ass'n, 111 F.T.C. 417, 498 (1989), *aff'd in part and remanded*, 955 F.2d 457 (6th Cir. 1992), *mod*., 119 F.T.C. 891 (1995). The "quick look" form of analysis is addressed below.

NATIONAL SOC'Y OF PROF'L ENG'RS v. UNITED STATES, 435 U.S. 679 (1978)

MR. JUSTICE STEVENS delivered the opinion of the Court.

This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.* (1976 ed.), because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association.[1] The Court of Appeals affirmed.[2] We granted certiorari to decide whether the District Court should have considered the factual basis for the proffered justification before rejecting it. 434 U.S. 815. Because we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation, we affirm.

I

Engineering is an important and learned profession. There are over 750,000 graduate engineers in the United States, of whom about 325,000 are registered as professional engineers. Registration requirements vary from State to State, but usually require the applicant to be a graduate engineer with at least four years of practical experience and to pass a written examination. About half of those who are registered engage in consulting engineering on a fee basis. They perform services in connection with the study, design, and construction of all types of improvements to real property—bridges, office buildings, airports, and factories are examples. Engineering fees, amounting to well over $2 billion each year, constitute about 5% of total construction costs. In any given facility, approximately 50% to 80% of the cost of construction is the direct result of work performed by an engineer concerning the systems and equipment to be incorporated in the structure.

The National Society of Professional Engineers (Society) was organized in 1935 to deal with the nontechnical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members. Its present membership of 69,000 resides throughout the United States and in some

1. 389 F. Supp. 1193 (DC 1974).

2. 181 U.S.App.D.C. 41, 555 F.2d 978 (1977). When the District Court's original judgment was entered, petitioner as entitled to appeal directly to this Court. We vacated the District Court's judgment for reconsideration in the light of our then recent decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773. 422 U.S. 1031. After reconsideration, the District Court reentered its original judgment, 404 F. Supp. 457 (DC 1975), and petitioner then appealed to the Court of Appeals.

foreign countries. Approximately 12,000 members are consulting engineers who offer their services to governmental, industrial, and private clients. Some Society members are principals or chief executive officers of some of the largest engineering firms in the country.

The charges of a consulting engineer may be computed in different ways. He may charge the client a percentage of the cost of the project, may set his fee at his actual cost plus overhead plus a reasonable profit, may charge fixed rates per hour for different types of work, may perform an assignment for a specific sum, or he may combine one or more of these approaches. Suggested fee schedules for particular types of services in certain areas have been promulgated from time to time by various local societies. This case does not, however, involve any claim that the National Society has tried to fix specific fees, or even a specific method of calculating fees. It involves a charge that the members of the Society have unlawfully agreed to refuse to negotiate or even to discuss the question of fees until after a prospective client has selected the engineer for a particular project. Evidence of this agreement is found in § 11(c) of the Society's Code of Ethics, adopted in July 1964.[3]

The District Court found that the Society's Board of Ethical Review has uniformly interpreted the "ethical rules against competitive bidding for engineering services as prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services."[4] If the client requires that such information be provided,

3. That section, which remained in effect at the time of trial, provided:

> "Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. . . . "
>
> "c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professions." App. 9951.

4. 389 F. Supp. at 1206. In addition to § 11(c) of the Society's Code of Ethics, see n. 3, *supra*, the Society's Board of Directors has adopted various "Professional Policy" statements. Policy statement 10-F was issued to "make it clear beyond all doubt" that the Society opposed competitive bidding for all engineering projects. 389 F. Supp., at 1206. This policy statement was replaced in 1972 by Policy 10-G which permits price quotations for certain types of engineering work—in particular, research and development projects.

then § 11(c) imposes an obligation upon the engineering firm to withdraw from consideration for that job. The Society's Code of Ethics thus "prohibits engineers from both soliciting and submitting such price information," 389 F. Supp. 1193, 1206 (DC 1974),[5] and seeks to preserve the profession's "traditional" method of selecting professional engineers. Under the traditional method, the client initially selects an engineer on the basis of background and reputation, not price.[6]

In 1972, the Government filed its complaint against the Society alleging that members had agreed to abide by canons of ethics prohibiting the submission of competitive bids for engineering services and that, in consequence, price competition among the members had been suppressed and customers had been deprived of the benefits of free and open competition. The complaint prayed for an injunction terminating the unlawful agreement.

In its answer, the Society admitted the essential facts alleged by the Government and pleaded a series of affirmative defenses, only one of which remains in issue. In that defense, the Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional engineers was contrary to the public interest. It was averred that it would be cheaper and easier for an engineer "to design and specify inefficient and unnecessarily expensive structures and methods of construction."[7] Accordingly, competitive pressure to offer engineering services at the

5. Although the Society argues that it has never "enforced" its ban on competitive bidding, Reply Brief for Petitioner 15-18, the District Court specifically found that the record "support[s] a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients." 389 F. Supp. at 1200. This finding has not been challenged as clearly erroneous.

6. Having been selected, the engineer may then, in accordance with the Society's canons of ethics, negotiate a satisfactory fee arrangement with the client. If the negotiations are unsuccessful, then the client may withdraw his selection and approach a new engineer. *Id*. at 1215.

7. The entire defense pleaded in the answer reads as follows:

> "18. (a) The principles and standards contained in the NSPE Code of Ethics, particularly those contained in that part of the NSPE Code of Ethics set out above, are reasonable, necessary to the public health, safety and welfare insofar as they are affected by the work of professional engineers, and serve the public interest."
>
> "(b) Experience has demonstrated that competitive bidding for professional engineering services is inconsistent with securing for the recipients of such services the most economical projects or structures. Testing, calculating and designing the most economical and efficient structures and methods of construction is complex, difficult and expensive. It is cheaper and easier to design and specify inefficient and unnecessarily expensive structures and methods of construction. Consequently, if professional engineers are required by competitive pressures to submit bids in order to obtain, employment of their services, the inevitable tendency will be to offer professional engineering services at the lowest possible price. Although this may result in some lowering of the cost of professional engineering services, it will inevitably result in increasing the overall cost and decreasing the efficiency of those structures and projects which require professional engineering design and specification work."

lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. For these reasons, the Society claimed that its Code of Ethics was not an "unreasonable restraint of interstate trade or commerce."

The parties compiled a voluminous discovery and trial record. The District Court made detailed findings about the engineering profession, the Society, its members' participation in interstate commerce, the history of the ban on competitive bidding, and certain incidents in which the ban appears to have been violated or enforced. The District Court did not, however, make any finding on the question whether, or to what extent, competition had led to inferior engineering work which, in turn, had adversely affected the public health, safety, or welfare. That inquiry was considered unnecessary, because the court was convinced that the ethical prohibition against competitive bidding was, "on its face, a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act." 389 F. Supp. at 1200.

Although it modified the injunction entered by the District Court,[8] the Court of Appeals affirmed its conclusion that the agreement was unlawful on its face, and therefore "illegal without regard to claimed or possible benefits." 181 U.S. App.D.C. 41, 47, 555 F.2d 978, 984.

II

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, the Court held that a bar association's rule prescribing minimum fees for legal services violated § 1 of the Sherman Act. In that opinion, the Court noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context. The Court said:

> "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.

> "(c) Experience has also demonstrated that competitive bidding in most instances and situations results in an award of the work to be performed to the lowest bidder, regardless of other factors such as ability, experience, expertise, skill, capability, learning and the like, and that such awards in the case of professional engineers endanger the public health, welfare and safety."

> "(d) For the aforesaid reasons, the provisions of the NSPE Code of Ethics set out above are not, in any event, in unreasonable restraint of interstate trade or commerce." App. 21-22.

8. The Court of Appeals struck down the portion of the District Court's decree that ordered the Society to state that it did not consider competitive bidding to be unethical. 181 U.S. App. D.C. at 47, 555 F.2d at 984. The court reasoned that this provision was "more intrusive than necessary to achieve fulfillment of the governmental interest." *Ibid*. The Government has not petitioned for review of that decision.

> The public service aspect, and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." 421 U.S. 788-789, n.17.

Relying heavily on this footnote, and on some of the major cases applying a Rule of Reason—principally *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); *Standard Oil Co. v. United States*, 221 U.S. 1; *Chicago Board of Trade v. United States*, 246 U.S. 231; and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36—petitioner argues that its attempt to preserve the profession's traditional method of setting fees for engineering services is a reasonable method of forestalling the public harm which might be produced by unrestrained competitive bidding. To evaluate this argument it is necessary to identify the contours of the Rule of Reason and to discuss its application to the kind of justification asserted by petitioner.

A. The Rule of Reason.

One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that "every" contract that restrains trade is unlawful.[9] But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract;[10] read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition.[11] The Rule of Reason, with its origins in common law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition,

9. Section 1 of the Sherman Act, as set forth in 15 U.S.C. § 1 (1976 ed.), provides:

> "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. . . ."

10. "But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Board of Trade v. United States*, 246 U.S. 231, 246 U.S. 238.

See also *United States v. Topco Associates*, 405 U.S. 596, 405 U.S. 606:

> "Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it."

11. See 21 Cong. Rec. 2456 (1890) (comments of Sen. Sherman); see generally H. Thorelli, Federal Antitrust Policy 228-229 (1955).

and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

This principle is apparent in even the earliest of cases applying the Rule of Reason, *Mitchel v. Reynolds*, *supra*. *Mitchel* involved the enforceability of a promise by the seller of a bakery that he would not compete with the purchaser of his business. The covenant was for a limited time, and applied only to the area in which the bakery had operated. It was therefore upheld as reasonable, even though it deprived the public of the benefit of potential competition. The long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition.[12]

The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-283 (CA6 1898), aff'd, 175 U.S. 175 U.S. 211. That case, and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.[13]

The early cases also foreclose the argument that, because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290; *United States v. Joint Traffic Assn.*, 171 U.S. 505, 171 U.S. 573-577. That kind of argument is properly addressed to Congress, and may justify an exemption from the statute for specific industries,[14] but it is not permitted by the Rule of Reason. As the Court observed in *Standard Oil Co. v. United States*, 221 U.S., at 65, "restraints of trade within the purview of the statute . . . [can]not be

12. "4thly, The fourth reason is in favour of these contracts, and is that there may happen instances wherein they may be useful and beneficial, as . . . in case of an old man who, finding himself under such circumstances, either of body or mind, as that he is likely to be a loser by continuing his trade, in this case, it will be better for him to part with it for a consideration, that, by selling his custom, he may procure to himself a livelihood which he might probably have lost by trading longer." 1 P. Wms., at 191, 24 Eng. Rep. at 350.

13. 85 F. at 293. See also United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 166 U.S. 340-342.

14. Congress has exempted certain industries from the full reach of the Sherman Act. See, *e.g.*, 7 U.S.C. §§ 291-292 (1976 ed.) (Capper-Volstead Act, agricultural cooperatives); 15 U.S.C. §§ 1011-1013 (1976 ed.) (McCarran-Ferguson Act, insurance); 49 U.S.C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U.S.C. § 1801 (1976 ed.) (newspaper joint operating agreements).

taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made."

The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.[15] Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.[16]

In this respect, the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in *Continental T.V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. "The 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 may suppress or even destroy competition." 246 U.S. at 246 U.S. 238, quoted in 433 U.S. at 433 U.S. 49 n.15.[17]

15. "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." 221 U.S., at 58.

16. Throughout the Court's opinion, the emphasis is on economic conceptions. For instance, the Court's description of the common law treatment of engrossing and forestalling statutes noted that contracts which had been illegal on their face were later recognized as reasonable because they tended to promote competition. *Id*. at 221 U.S. 55. As was pointed out in the Report of the Attorney General's National Committee To Study the Antitrust Laws 11 (1955):

> "While Standard Oil gave the courts discretion in interpreting the word 'every' in Section 1, such discretion is confined to consideration of whether, in each case, the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions, or a monopolization, or an attempt to monopolize. This standard permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect; it makes obsolete once prevalent arguments, such as whether monopoly arrangements would be socially preferable to competition in a particular industry because, for example, of high fixed costs or the risks of 'cutthroat' competition or other similar unusual conditions."

17. In *Continental T.V.*, Inc., the Court explained the Rule of Reason standard as follows:

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.[18]

B. The Ban on Competitive Bidding.

Price is the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 310 U.S. 226 n.59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp.*, 393 U.S. 333, 393 U.S. 337. In this case, we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price-fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services." 404 F. Supp. 457, 460. On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.

The Society's affirmative defense confirms, rather' than refutes, the anticompetitive purpose and effect of its agreement. The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work, with consequent risk to public safety and health.[19] The logic of this

> "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."

The Court then analyzed the "market impact" of vertical restraints, noting their complexity because of the potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. *Id*. at 433 U.S. 50-51. "Competitive impact" and "economic analysis" were emphasized throughout the opinion.

18. See generally Attorney General's Report, *supra*, n. 16, at 10-11; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775 (1965); L. Sullivan, Law of Antitrust 165-197 (1977).

19. The Society also points out that competition, in the form of bargaining between the engineer and customer, is allowed under its canon of ethics once an engineer has been initially selected. See n. 6, *supra*. It then contends that its prohibition of competitive bidding regulates only

argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose. The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this Court has never accepted such an argument.

It may be, as petitioner argues, that competition tends to force prices down, and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. Similarly, competitive bidding for engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the project.[20] Based on these considerations, a purchaser might conclude that his interest in quality—which may embrace the safety of the end product outweighs the advantages of achieving cost savings by pitting one competitor against another. Or an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers' needs. These decisions might be reasonable; indeed, petitioner has provided ample documentation for that thesis. But these are not reasons that satisfy the Rule; nor are such individual decisions subject to antitrust attack.

The Sherman Act does not require competitive bidding;[21] it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding

the timing of competition, thus making this case analogous to *Chicago Board of Trade*, where the Court upheld an exchange rule which forbade exchange members from making purchases after the close of the day's session at any price other than the closing bid price. Indeed, petitioner has reprinted the Government's brief in that case to demonstrate that the Solicitor General regarded the exchange's rule as a form of price-fixing. Reply Brief for Petitioner A1-A28. We find this reliance on *Chicago Board of Trade* misplaced for two reasons. First, petitioner's claim mistakenly treats negotiation between a single seller and a single buyer as the equivalent of competition between two or more potential sellers. Second, even if we were to accept the Society's equation of bargaining with price competition, our concern with *Chicago Board of Trade* is in its formulation of the proper test to be used in judging the legality of an agreement; that formulation unquestionably stresses impact on competition. Whatever one's view of the application of the Rule of Reason in that case, see Sullivan, *supra*, 435 U.S. 18, at 175-182, the Court considered the exchange's regulation of price information as having a positive effect on competition. 246 U.S. at 246 U.S. 240-241. The District Court's findings preclude a similar conclusion concerning the effect of the Society's "regulation."

20. We, of course, express no view on the truth of this assertion, although it might be noted that the Society has allowed competitive bidding for some types of engineering projects in this country, see n. 4, *supra*, and, at one time, allowed competitive bidding for all engineering work in foreign countries "as required by the laws, regulations or practices of the foreign country." App. 6487. This rule, called the "When-in-Rome" clause, was abolished in 1968. *Id.* at 6344.

21. Indeed, Congress has decided not to require competitive bidding for Government purchases of engineering services. The Brooks Act, 40 U.S.C. §§ 541-544 (1970 ed., Supp. V), requires the Government to use a method af selecting engineers similar to the Society's "traditional method." See n. 6, *supra*. The Society relies heavily on the Brooks Act as evidence that its ban on

prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

The Sherman Act reflects a legislative judgment that, ultimately, competition will produce not only lower prices but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 340 U.S. 248. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy, the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

By the same token, the cautionary footnote in *Goldfarb*, 421 U.S. at 421 U.S. 788-789, n.17, quoted *supra*, cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.[22] But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional exception is a proper subject of an ethical canon. But, once again, the equation of competition with

competitive bidding is reasonable. The argument is without merit. The Brooks Act does not even purport to exempt engineering services from the antitrust laws, and the reasonableness of an individual purchaser's decision not to seek lower prices through competition does not authorize the vendors to conspire to impose that same decision on all other purchasers.

22. Courts have, for instance, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller's main purpose of protecting the public from harm or itself from product liability. See, *e.g.*, *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (CA3 1970) (en banc); cf. *Continental T.V.*, 433 U.S. at 433 U.S. 55 n. 23.

deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. Such a view of the Rule would create the "sea of doubt" on which Judge Taft refused to embark in *Addyston*, 85 F. at 284, and which this Court has firmly avoided ever since.

III

The judgment entered by the District Court, as modified by the Court of Appeals,[23] prohibits the Society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical.[24] Petitioner argues that this judgment abridges its First Amendment rights.[25] We find no merit in this contention.

Having found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. See, *e.g.*, *International Salt Co. v. United States*, 332 U.S. 392, 332 U.S. 400-401; *United States v. Glaxo Group, Ltd.*, 410 U.S. 62, 410 U.S. 64. While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price-fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding.[26] The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade. . . ." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 336 U.S. 502. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct. We agree with the Court of Appeals that the injunction, as modified, meets this standard. While it goes beyond a simple proscription against the precise conduct previously pursued, that is entirely appropriate.

23. See n.8, supra.

24. See App. 9974-9980.

25. Petitioner contends the judgment is both an unconstitutional prior restraint on speech and an unconstitutional prohibition against free association.

26. Thus, in *Goldfarb*, although the bar association believed that its fee schedule accurately reflected ethical price levels, it was nonetheless enjoined "from adopting, publishing, or distributing any future schedules of minimum or suggested fees." *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491, 495-496 (ED Va. 1973). See also *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485.

> “The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open, and that only the worn one be closed.” *International Salt Co.*, *supra* at 332 U.S. 400.

The Society apparently fears that the District Court’s injunction, if broadly read, will block legitimate paths of expression on all ethical matters relating to bidding.[27] But the answer to these fears is, as the Court held in *International Salt*, that the burden is upon the proved transgressor “to bring any proper claims for relief to the court’s attention.” *Ibid*. In this case, the Court of Appeals specifically stated that, “[i]f the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree.” 181 U.S. App. D.C. at 46, 555 F.2d at 983. This is, we believe, a proper approach, adequately protecting the Society’s interests. We therefore reject petitioner’s attack on the District Court’s order.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of the case.

27. For instance, the Society argues that the injunction can be read as prohibiting it from opposing repeal of statutes such as the Brooks Act, see n 21, supra, and that such a prohibition would violate the principles of the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc*., 365 U.S. 127; *Mine Workers v. Pennington*, 381 U.S. 657. By its terms, the injunction contains no such prohibition, and indeed the Government contends that “[n]othing in the judgment prevents NSPE and its members from attempting to influence governmental action. . . .” Brief for United States 60.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join 435 U.S. because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante* at 435 U.S. 696, and n. 22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 421 U.S. 788-789, n.17 (1975), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly, this case does not require us to decide whether the "Rule of Reason," as applied to the professions, ever could take account of benefits other than increased competition. For even accepting petitioner's assertion that product quality is one such benefit, and that maintenance of the quality of engineering services requires that an engineer not bid before he has made full acquaintance with the scope of a client's desired project, Brief for Petitioner 49-50, 54, petitioner Society's rule is still grossly overbroad. As petitioner concedes, Tr. of Oral Arg. 47 48, § 11(c) forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must purport to engage a single engineer, and so long as that engagement continues, no other member of the Society is permitted to discuss the project with the client in order to provide comparative price information. Though § 11(c) does not fix prices directly, and though the customer retains the option of rejecting a particular engineer's offer and beginning negotiations all over again with another engineer, the forced process of sequential search inevitably increases the cost of gathering price information, and hence will dampen price competition, without any calibrated role to play in preventing uninformed bids. Then, too, the Society's rule is overbroad in the aspect noted by Judge Leventhal, when it prevents any dissemination of competitive price information in regard to real property improvements prior to the engagement of a single engineer, regardless of "the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information." 181 U.S. App. D.C. 41, 45, 55 F.2d 978, 982 (1977).

My skepticism about going further in this case by shaping the Rule of Reason to such a narrow last as does the majority,* arises from the fact that there may be ethical rules which have a more than de minimis anticompetitive effect, and yet are important in a profession's proper ordering. A medical association's prescription of

* This Court has not always applied the Rule of Reason with such rigor even to commercial businesses. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); L. Sullivan, Law of Antitrust 175-182 (1977); R. Bork, The Antitrust Paradox 41-47, 56 (1978). I intimate no view as to the correctness of those decisions.

standards of minimum competence for licensing or certification may lessen the number of entrants. A bar association's regulation of the permissible forms of price advertising for nonroutine legal services or limitation of in-person solicitation, see Bates v. State Bar of Arizona, 433 U.S. 350 (1977), may also have the effect of reducing price competition. In acknowledging that "professional services may differ significantly from other business services," and that the "nature of the competition in such services may vary," *ante* at 435 U.S. 696, but then holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I am not at all certain that the Court leaves enough elbow room for realistic application of the Sherman Act to professional services.

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I concur in the Court's judgment to the extent it sustains the finding of a violation of the Sherman Act, but dissent from that portion of the judgment prohibiting petitioner from stating in its published standards of ethics the view that competitive bidding is unethical. The First Amendment guarantees the right to express such a position, and that right cannot be impaired under the cloak of remedial judicial action.

NOTES

1. For an interesting application of Rule 11(c) in a case study published by the National Society of Professional Engineers in 1969, see NSPE Board of Ethical Review, Case No. 69-7: Competitive Bidding–Submission of Project Cost (1969).

2. *Professional Engineers* has a somewhat lengthy history.[1] The Justice Department filed the original civil complaint on December 5, 1972. The case was decided on the merits for the government by the district court on December 19, 1974. The court held that professional engineering was "trade or commerce" and so covered by the Sherman Act, that the ethical rules prohibiting competitive bidding constituted per se illegal horizontal price fixing in violation of Section 1, and that the state action doctrine did not apply to immunize the conduct. It appears that a direct appeal from this judgment was taken to the Supreme Court under the Expediting Act.[2]

3. The Supreme Court vacated the judgment and remanded to the district court for further consideration in light of *Goldfarb v. Virginia State Bar*.[3] In *Goldfarb*, Lewis and Ruth Goldfarb unsuccessfully tried to find a lawyer to perform title examinations for less than the fee prescribed by three county bar associations in their minimum fee schedules, which were based on a percentage of the purchase price. The *Goldfarb* plaintiffs then brought a class action for damages and injunctive relief against the county bar associations for setting the minimum fee schedules, and the Virginia State Bar whose disciplinary procedures could be used to enforce them, alleging that the minimum fee schedules and the enforcement mechanism constituted horizontal price fixing in violation of Section 1 of the Sherman Act.

Two of the country bar associations agreed before trial to a consent judgment pursuant to which they were directed to cancel their existing fee schedules and were enjoined from publishing fee schedules in the future. As to the remaining two defendants, the district court bifurcated liability and damages. On liability, the court found that the Virginia State Bar, an administrative agency of the state, was engaged in state action and hence exempt from liability under the Sherman Act. Apart from state action immunity, the district court also

1. United States v. National Soc'y of Prof'l Eng'rs, 389 F. Supp. 1193 (D.D.C. 1974), *vacated and remanded*, 422 U.S. 1031 (1975), *on remand*, 404 F. Supp. 457 (D.D.C. 1975), *aff'd in part, mod. in part*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

2. Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (1903). The direct appeal provision of the Expediting Act was eliminated by the Antitrust Procedures and Penalties Act § 5, Pub. L. No. 93-528, § 5, 88 Stat. 1706 (1974) (then current version at 15 U.S.C. § 29). Although enacted into law on December 21, 1974, a direct appeal could still be taken to the Supreme Court if the notice of appeal was filed within fifteen days of enactment. *Id*. at § at 7. The NPSE appears to have filed a timely notice.

3. 421 U.S. 773 (1975).

found that the state bar had too minor a role to violate the Sherman Act: although the state bar had suggested that local associations that they might wish to adopt a minimum fee schedule, had circulated reports on the schedules that local bar associations had adopted, and had issued two ethical opinions stating that lawyers who habitually charge less than the applicable minimum fee might be disciplined, the State Bar did not promulgate the minimum fee schedule, did not endorse or approve it, never undertook to discipline any attorney for violating it, and never contemplated any such disciplinary action. The court, however, found the Fairfax County Bar Association liable for price fixing and enjoined the association from adopting, publishing, or distributing any future schedules of minimum or suggested fees.[4]

The plaintiffs appealed the dismissal of the Virginia State Bar and the FCBA appealed the finding of its liability. The Fourth Circuit affirmed the dismissal of the Virginia State Bar on state action grounds, but reversed on the liability of the FCBA, holding that a the practice of law is a "learned profession," and that a restriction on the practice of a learned profession was not a restraint on "trade or commerce" and hence not subject to the Sherman Act. Although there was some suggestion in the case law at the time that restraints on learned professions were exempt from Sherman Act coverage, the Fourth Circuit was the first court of appeals squarely to so hold. Separately, the Fourth Circuit held that the investigation and certification of land titles in Fairfax County do not sufficient affect interstate commerce to invoke the Sherman Act.

On certiorari, the Supreme Court, in an opinion by Chief Justice Burger for a unanimous Court, reversed as to both the Virginia State Bar and the FCBA. First, the Court found that the promulgation of the minimum fee schedule by the FCBA, the threat of enforcement by the state bar (especially including it ethical opinions), and the widespread adherence to the minimum fee schedule by attorneys restrained competition. Second, the Court also found that the restraint affected interstate commerce. A significant portion of loans to purchase homes in Fairfax County comes from out of state and are often guaranteed by federal agencies headquartered in the District of Columbia, making the purchase of real estate an interstate transaction. Moreover, title examinations are a necessary part of a real estate purchase. "Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected."[5] Third, the Court rejected the idea that the "learned professions" are outside of the Sherman Act as completely unsupported by the case law or public policy. To the contrary, the Court found that lawyer play an important part in commercial intercourse, and that anticompetitive conduct by lawyers can impose a restraint on competition that should be regulated by the Sherman Act. Finally, the court rejected that application of state action immunity to the Virginia State Bar, since although it

4. Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973), *rev'd*, 497 F.2d 1 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975)

5. 421 U.S. at 785 (footnote omitted).

may be a state agency for some purposes, its activities with respect to the minimum fee schedules was not mandated by state law nor required by the Virginia Supreme Court. "The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act."[6] Having reserved the judgment of the Fourth Circuit, the Supreme Court remanded with instructions to the court of appeals to remand to the district court for further proceedings.

Before any decision on remand, the class action settled. The class, which consisted of approximately 2400 homeowners in Reston, Virginia, was certified prior to the trial on liability. The Virginia State Bar and the FCBA contributed $200,000 and $50,000, respectively, to the settlement fund. After deducting court-approved fees and costs, class counsel was able to distribute $200,000 to the class, or approximately $139 to each claiming class member.[7]

3. Since *Goldfarb* and *Professional Engineers*, the antitrust enforcement agencies have challenged various provisions in the ethical codes of numerous organizations for restricting price competition.[8]

6. Id. at 791-92.

7. *See* Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 443-45 (1996). Additional details were obtained in a telephone conversation with Alan Morrison, class counsel in the *Goldfarb* case.

8. *See, e.g.*, Complaint, *In re* Music Teachers National Ass'n, Inc., No. C-4448 (F.T.C. Apr. 3, 2014) (challenging provisions prohibiting teachers from actively recruiting students from one another) (consent settlement); Complaint, In re California Ass'n of Legal Support Professionals, No. C-4447 (F.T.C. Apr. 3, 2014) (challenging provisions that restrained its members from competing against each other on price, disparaging each other through advertising, and soliciting legal support professionals for employment); Complaint, *In re* Institute of Store Planners, No. C-4080 (F.T.C. May 27, 2003) (challenging provisions prohibiting members from providing their services for free and competing with other members for work on the basis of price) (consent settlement); Complaint, *In re* American Institute for Conservation of Historic and Artistic Works, No. C-4065 (F.T.C. Oct. 30, 2002) (challenging provisions prohibiting professional conservator members from working for free or at reduced fees) (consent settlement); *In re* American Medical Ass'n, 94 F.T.C. 701 (1979) (challenging, among other things, provisions prohibiting underbidding for a contract or agreeing to accept compensation that was "inadequate" in light of the usual fees in the community), *aff'd and mod.*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided vote*, 455 U.S. 676 (1982).

BROADCAST MUSIC, INC. v. CBS, 441 U.S. 1 (1979)

MR JUSTICE WHITE delivered the opinion of the Court.

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates.[1] The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price-fixing per se unlawful under the antitrust laws.

I

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated stations and telecasting approximately 7,500 network programs per year. Many, but not all, of these programs make use of copyrighted music recorded on the soundtrack. CBS also owns television and radio stations in various cities. It is "the giant of the world in the use of music rights,'" the "`No. 1 outlet in the history of entertainment.'"[2]

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit,[3] but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that, as a practical matter, it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. "ASCAP was organized as a clearing-house' for copyright owners and users to solve these problems" associated with the licensing of music. 400 F. Supp. 737, 741 (SDNY 1975). As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

1. The District Court certified the case as a defendant class action. 400 F. Supp. 737, 741 n.2 (SDNY 1975).

2. *Id*. at 771, quoting a CBS witness. CBS is also a leading music publisher, with publishing subsidiaries affiliated with both ASCAP and BMI, and is the world's largest manufacturer and seller of records and tapes. *Ibid*.

3. Act of Jan. 6, 1897, 29 Stat. 481.

BMI, a nonprofit corporation owned by members of the broadcasting industry,[4] was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI. Until this litigation, CBS held blanket licenses from both organizations for its television network on a continuous basis since the late 1940's, and had never attempted to secure any other form of license from either ASCAP[5] or any of its members. *Id*. at 752-754

The complaint filed by CBS charged various violations of the Sherman Act[6] and the copyright laws.[7] CBS argued that ASCAP and BMI are unlawful monopolies, and that the blanket license is illegal price-fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights. The District Court, though denying summary judgment to certain defendants, ruled that the practice did not fall within the per se rule. 337 F. Supp. 394, 398 (SDNY 1972). After an 8-week trial, limited to the issue of liability, the court dismissed the complaint, rejecting again the claim that the blanket license was price-fixing and a *per se* violation of § 1 of the Sherman Act, and holding that, since direct negotiation with individual copyright owners is available and feasible, there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization. 400 F. Supp. at 781-783.

Though agreeing with the District Court's factfinding and not disturbing its legal conclusions on the other antitrust theories of liability,[8] the Court of Appeals held that the blanket license issued to television networks was a form of price-fixing illegal per se under the Sherman Act. 532 F.2d 130, 140 (CA2 1977). This conclusion, without more, settled the issue of liability under the Sherman Act, established

4. CBS was a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959. 400 F. Supp. at 742.

5. Unless the context indicates otherwise, references to ASCAP alone in this opinion usually apply to BMI as well. See n.20, *infra*.

6. 15 U.S.C. §§ 1 and 2.

7. CBS seeks injunctive relief for the antitrust violations and a declaration of copyright misuse. 400 F. Supp. at 741.

8. The Court of Appeals affirmed the District Court's rejection of CBS's monopolization and tying contentions, but did not rule on the District Court's conclusion that the blanket license was not an unreasonable restraint of trade. See 562 F.2d 130, 132, 135, 141 n.29 (CA2 1977).

copyright misuse,[9] and required reversal of the District Court's judgment, as well as a remand to consider the appropriate remedy.[10]

ASCAP and BMI petitioned for certiorari, presenting the questions of the applicability of the *per se* rule and of whether this constitutes misuse of copyrights. CBS did not cross-petition to challenge the failure to sustain its other antitrust claims. We granted certiorari because of the importance of the issues to the antitrust and copyright laws. 439 U.S. 817 (1978). Because we disagree with the Court of Appeals' conclusions with respect to the *per se* illegality of the blanket license, we reverse its judgment and remand the cause for further appropriate proceedings.

II

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers v. United States*, 435 U.S. 679, 435 U.S. 692 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 433 U.S. 50 (1977), and so often "lack . . . any redeeming virtue," *Northern Pac. R. Co. v. United States*, 356 U.S. 1, (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This per se rule is a valid and useful tool of antitrust policy and enforcement.[11] And agreements among competitors to fix

9. At CBS's suggestion, the Court of Appeals held that the challenged conduct constituted misuse of copyrights solely on the basis of its finding of unlawful price fixing. *Id*. at 141 n.29.

10. The Court of Appeals went on to suggest some guidelines as to remedy, indicating that, despite its conclusion on liability, the blanket license was not totally forbidden. The Court of Appeals said:

> "Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing—in this case, the blanket license. We think, however, that if, on remand, a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all circumstances. The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright, as well as an indemnification against suits by others."
>
> "Our objection to the blanket license is that it reduces price competition among the members, and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing." *Id*. at 140 (footnotes omitted).

11. "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large

prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.[12] But easy labels do not always supply ready answers.

A

To the Court of Appeals and CBS, the blanket license involves “price-fixing” in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells.[13] But this is not a question simply of determining whether two or more potential competitors have literally “fixed” a “price.” As generally used in the antitrust field, “price-fixing” is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals’ literal approach does not alone establish that this particular practice is one of those types or that it is “plainly anticompetitive” and very likely without “redeeming virtue.” Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services, they are literally “price-fixing,” but they are not *per se* in violation of the Sherman Act. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), aff’d, 175 U.S. 11 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label “*per se* price-fixing.” That will often, but not always, be a simple matter.[14]

Consequently, as we recognized in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 405 U.S. 607-608 (1972), “[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations. . . .”

whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.” *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 356 U.S. 5 (1958). See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 433 U.S. 50 n.16 (1977); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 405 U.S. 609 n.10 (1972).

12. See cases discussed in n.14, *infra*.

13. CBS also complains that it pays a flat fee regardless of the amount of use it makes of ASCAP compositions, and even though many of its programs contain little or no music. We are unable to see how that alone could make out an antitrust violation or misuse of copyrights:

> “Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. . . . Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them.”

Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 339 U.S. 834 (1950). See also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

14. Cf., *e.g.*, *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956) (manufacturer/wholesaler agreed with independent wholesalers on prices to be charged on products it manufactured); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (firms controlling a substantial part of an industry agreed to purchase “surplus” gasoline with the intent and necessary effect of increasing the price); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (manufacturers and distributors of 82% of certain vitreous pottery fixtures agreed to sell at uniform prices).

See *White Motor Co. v. United States*, 372 U.S. 253, 372 U.S. 263 (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that, "[i]n dealing with performing rights in the music industry, we confront conditions both in copyright law and in antitrust law which are sui generis." 562 F.2d at 132. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a per se restraint of trade.

B

This litigation and other cases involving ASCAP and its licensing practices have arisen out of the efforts of the creators of copyrighted musical compositions to collect for the public performance of their works, as they are entitled to do under the Copyright Act. As already indicated, ASCAP and BMI originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, "[n]either ASCAP nor BMI is a stranger to antitrust litigation." 400 F. Supp. at 743.

The Department of Justice first investigated allegations of anticompetitive conduct by ASCAP over 50 years ago.[15] A criminal complaint was filed in 1934, but the Government was granted a mid-trial continuance and never returned to the courtroom. In separate complaints in 1941, the United States charged that the blanket license, which was then the only license offered by ASCAP and BMI, was an illegal restraint of trade, and that arbitrary prices were being charged as the result of an illegal copyright pool.[16] The Government sought to enjoin ASCAP's exclusive licensing powers and to require a different form of licensing by that organization. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations.[17] Following complains relating to the television industry, successful private litigation against ASCAP by movie theaters,[18] and a Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950.[19]

Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the

15. Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo.L.J. 407, 424 n.91 (1941).

16. *E.g.*, complaint in *United States v. ASCAP*, Civ. No. 13-95 (SDNY 1941), pp. 3-4.

17. *United States v. ASCAP*, 1940-1943 Trade Cases ¶ 56,104 (SDNY 1941).

18. See *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (SDNY 1948); *M. Witmark & Sons v. Jenson*, 80 F. Supp. 843 (Minn.1948), appeal dismissed sub nom. *M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (CA8 1949).

19 *United States v. ASCAP*, 1950-1951 Trade Cases ¶ 62,595 (SDNY 1950).

owner have requested it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions, either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.[20]

The 1950 decree, as amended from time to time, continues in effect, and the blanket license continues to be the primary instrument through which ASCAP conducts its business under the decree. The courts have twice construed the decree not to require ASCAP to issue licenses for selected portions of its repertory.[21] It also remains true that the decree guarantees the legal availability of direct licensing of performance rights by ASCAP members; and the District Court found, and in this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so. Since 1946, CBS and other television networks have taken blanket licenses from ASCAP and BMI. It was not until this suit arose that the CBS network demanded any other kind of license.[22]

Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 366 U.S. 690 (1961), which involved this same decree. But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of

20. BMI is in a similar situation. The original decree against BMI is reported as *United States v. BMI*, 1940-1943 Trade Cases ¶ 56,096 (ED Wis.1941). A new consent judgment was entered in 1966 following a monopolization complaint filed in 1964. United States v. BMI, 1966 Trade Cases ¶ 71,941 (SDNY). The ASCAP and BMI decrees do vary in some respects. The BMI decree does not specify that BMI may only obtain nonexclusive rights from its affiliates, or that the District Court may set the fee if the parties are unable to agree. Nonetheless, the parties stipulated, and the courts below accepted, that "CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members." 400 F. Supp. at 745.

21. United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 208 F. Supp. 896 (SDNY 1962), aff'd, 331 F.2d 117 (CA2), cert. denied, 377 U.S. 997 (1964); *United States v. ASCAP (Application of National Broadcasting Co.)*, 1971 Trade Cases ¶ 73,491 (SDNY 1970). See also *United States v. ASCAP (Motion of Metromedia, Inc.)*, 341 F.2d 1003 (CA2 1965).

22. National Broadcasting Co. did, in 1971, request an annual blanket license for 2,217 specific ASCAP compositions most frequently used on its variety shows. It intended to acquire the remaining rights to background and theme music through direct transactions by it and its program packagers. See *United States v. ASCAP (Application of National Broadcasting Co.), supra*.

asserted anticompetitive practices.[23] In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues, and that the search for those values is not almost sure to be in vain.[24] Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice. See *id*. at 366 U.S. 694-695. That fact alone might not remove a naked price-fixing scheme from the ambit of the per se rule, but, as discussed *infra*, Part III, here we are uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition among the individual composers.

After the consent decrees, the legality of the blanket license was challenged in suits brought by certain ASCAP members against individual radio stations for copyright infringement. The stations raised as a defense that the blanket license was a form of price-fixing illegal under the Sherman Act. The parties stipulated that it would be nearly impossible for each radio station to negotiate with each copyright holder separate licenses for the performance of his works on radio. Against this background, and relying heavily on the 1950 consent judgment, the Court of Appeals for the Ninth Circuit rejected claims that ASCAP was a combination in restraint of trade and that the blanket license constituted illegal price-fixing. *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (1967), cert. denied, 389 U.S. 1045 (1968).

The Department of Justice, with the principal responsibility for enforcing the Sherman Act and administering the consent decrees relevant to this case, agreed with the result reached by the Ninth Circuit. In a submission amicus curiae opposing one station's petition for certiorari in this Court, the Department stated that there must be "some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them." Memorandum for United States as *Amicus Curiae* on Pet. for Cert. in *K-91, Inc. v. Gershwin Publishing Corp.*, O.T. 1967, No. 147, pp. 10-11. And the Department elaborated on what it thought that fact meant for the proper application of the antitrust laws in this area:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press v. United States*, 326 U.S. 1; *United States v. St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc. v. United States*, 288 U.S. 344; *Chicago Board of Trade v. United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating

23. 1950-1951 Trade Cases ¶ 62,595, p. 63,756.

24. Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 433 U.S. 50 n.16. Moreover, unthinking application of the per se rule might upset the balancing of economic power and of procompetitive and anticompetitive effects presumably worked out in the decree.

> individual licenses for each composition, and the ephemeral nature of each performance—all combine to create unique market conditions for performance rights to recorded music."

Id. at 10 (footnote omitted). The Department concluded that, in the circumstances of that case, the blanket licenses issued by ASCAP to individual radio stations were neither a per se violation of the Sherman Act nor an unreasonable restraint of trade.

As evidenced by its amicus brief in the present case, the Department remains of that view. Furthermore, the United States disagrees with the Court of Appeals in this case, and urges that the blanket licenses, which the consent decree authorizes ASCAP to issue to television networks, are not per se violations of the Sherman Act. It takes no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry.

Finally, we note that Congress itself, in the new Copyright Act., has chosen to employ the blanket license and similar practices. Congress created a compulsory blanket license for secondary transmissions by cable television systems, and provided that, "[n]otwithstanding any provisions of the antitrust laws, . . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designatee a common agent to receive payment on their behalf." 17 U.S.C. App. § 111(d)(5)(A). And the newly created compulsory license for the use of copyrighted compositions in jukeboxes is also a blanket license, which is payable to the performing rights societies such as ASCAP unless an individual copyright holder can prove his entitlement to a share. § 116(c)(4). Moreover, in requiring noncommercial broadcasters to pay for their use of copyrighted music Congress again provided that, "[n]otwithstanding any provision of the antitrust laws" copyright owners "may designate common agents to negotiate, agree to pay, or receive payments." § 118(1). Though these provisions are not directly controlling, they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances.

There have been District Court cases holding various ASCAP practices, including its licensing practices, to be violative of the Sherman Act,[25] but even so, there is no nearly universal view that either the blanket or the per-program licenses issued by ASCAP at prices negotiated by it are a form of price-fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason.

25. See cases cited in n.18, *supra*. Those cases involved licenses sold to individual movie theaters to "perform" compositions already on the motion pictures' soundtracts. ASCAP had barred its members from assigning performing rights to movie producers at the same time recording rights were licensed, and the theaters were effectively unable to engage in direct transactions for performing rights with individual copyright owners.

III

Of course, we are no more bound than is CBS by the views of the Department of Justice, the results in the prior lower court cases, or the opinions of various experts about the merits of the blanket license. But, while we must independently examine this practice, all those factors should caution us against too easily finding blanket licensing subject to per se invalidation.

A

As a preliminary matter, we are mindful that the Court of Appeals' holding would appear to be quite difficult to contain. If, as the court held, there is a *per se* antitrust violation whenever ASCAP issues a blanket license to a television network for a single fee, why would it not also be automatically illegal for ASCAP to negotiate and issue blanket licenses to individual radio or television stations or to other users who perform copyrighted music for profit?[26] Likewise, if the present network licenses issued through ASCAP on behalf of its members are per se violations, why would it not be equally illegal for the members to authorize ASAP to issue licenses establishing various categories of uses that a network might have for copyrighted music, and setting a standard fee for each described use?

Although the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the per se rule does not accommodate itself to such flexibility, and that the observations of the Court of Appeals with respect to remedy tend to impeach the per se basis for the holding of liability.[27]

CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use.

26. Certain individual television and radio stations, appearing here as amici curiae, argue that the per se rule should extend to ASCAP's blanket licenses with them as well. The television stations have filed an antitrust suit to that effect. *Buffalo Broadcasting Co. v. ASCAP*, 78 Civ. 5670 (SDNY, filed Nov. 27, 1978).

27. See n.10, *supra*. The Court of Appeals would apparently not outlaw the blanket license across the board, but would permit it in various circumstances where it is deemed necessary or sufficiently desirable. It did not even enjoin blanket licensing with the television networks, the relief it realized would normally follow a finding of per se illegality of the license in that context. Instead, as requested by CBS, it remanded to the District Court to require ASCAP to offer, in addition to blanket licensing, some competitive form of per-use licensing. But per-use licensing by ASCAP, as recognized in the consent decrees, might be even more susceptible to the per se rule than blanket licensing.

The rationale for this unusual relief in a per se case was that "[t]he blanket license is not simply a naked restraint' ineluctably doomed to extinction." 562 F.2d at 140. To the contrary, the Court of Appeals found that the blanket license might well "serve a market need" for some. *Ibid*. This, it seems to us, is not the per se approach, which does not yield so readily to circumstances, but in effect is a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint.

400 F. Supp. at 747 n. 7.[28] But if this, in itself or in conjunction with blanket licensing, constitutes illegal price-fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works.[29] Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are quite sure, however, that the per se rule does not require any such holding.

B

In the first place, the line of commerce allegedly being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws. Those who would use copyrighted music in public performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement and, if the conduct is willful and for the purpose of financial gain, to criminal penalties.[30] Furthermore, nothing in the Copyright Act of 1976 indicates in the slightest that Congress intended to weaken the rights of copyright owners to control the public performance of musical compositions. Quite the contrary is true.[31] Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a per se violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all, or would exist only as a pale reminder of what Congress envisioned.[32]

28. Surely, if ASCAP abandoned the issuance of all licenses and confined its activities to policing the market and suing infringers, it could hardly be said that member copyright owners would be in violation of the antitrust laws by not having a common agent issue per-use licenses. Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent. Cf. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. at 395 U.S. 139-140.

29. In its complaint, CBS alleged that it would be "wholly impracticable" for it to obtain individual licenses directly from the composers and publishing houses, but it now says that it would be willing to do exactly that if ASCAP were enjoined from granting blanket licenses to CBS or its competitors in the network television business.

30. 17 U.S.C. App. § 506.

31. See Koenigsberg, The 1976 Copyright Act: Advances for the Creator, 26 Cleve.St.L.Rev. 515, 524, 528 (1977).

32. Cf. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

Because a musical composition can be "consumed" by many different people at the same time and without the creator's knowledge, the "owner" has no real way to demand reimbursement for the use of his property except through the copyright laws and an effective way to enforce those legal rights. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 422 U.S. 162 (1975). It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use.

C

More generally, in characterizing this conduct under the per se rule,[33] our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 U.S. 436 n.13 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id*. at 438 U.S. 441 n. 16; see *National Society of Professional Engineers v. United States*, 435 U.S. at 435 U.S. 688; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 433 U.S. 50 n. 16; *Northern Pac. R. Co. v. United States*, 356 U.S. at 356 U.S. 4.

The blanket license, as we see it, is not a "naked restrain[t] of trade with no purpose except stifling of competition," *White Motor Co. v. United States*, 372 U.S. 253, 372 U.S. 263 (1963), but rather accompanies the integration of sales, monitoring and enforcement against unauthorized copyright use. See L. Sullivan, Handbook of the Law of Antitrust 59 p. 154 (1977). As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, 562 F.2d at 140 n.26, and it was in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public performance rights organized itself largely around the single-fee blanket license, which gave unlimited access to the repertory and reliable protection against infringement. When ASCAP's major and user-created competitor, BMI, came on the scene, it also turned to the blanket license.

33. The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers v. United States*, 435 U.S. 679, 435 U.S. 690-692 (1978), or else we should apply the rule of reason from the start. That is why the per se rule is not employed until after considerable experience with the type of challenged restraint.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public.[34] But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands,[35] of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for.[36] ASAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

D

This substantial lowering of costs, which is, of course, potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: it allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations,[37] and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package,[38] and even small performing rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses.[39] Thus, to the extent the blanket license is a different product, ASCAP is

34. And, of course, changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.

35. The District Court found that CBS would require between 4,000 and 8,000 individual license transactions per year. 400 F. Supp. at 762.

36. To operate its system for distributing the license revenues to its members, ASCAP relies primarily on the networks' records of which compositions are used.

37. See Timberg, The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950, 19 Law & Contemp.Prob. 294, 297 (1954) ("The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author"). Significantly, ASCAP deals only with nondramatic performance rights. Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. The same is true of various other rights, such as sheet music, recording, and synchronization, which are licensed on an individual basis.

38. Cf. *United States v. Grinnell Corp.*, 384 U.S. 563, 384 U.S. 572-573 (1966); *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 374 U.S. 356-357 (1963).

39. Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind.L.J. 168, 170 (1950). See also Garner, *United States v. ASCAP*. The Licensing Provisions of the Amended Final

not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.[40] ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively.[41]

E

Finally, we have some doubt—enough to counsel against application of the per se rule—about the extent to which this practice threatens the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 310 U.S. 226 n. 59 (1940), that is, competitive pricing as the free market's means of allocating resources. Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act, or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Here, the blanket license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price-fixing in such other markets.[42] Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored. The District Court found that there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice.

Judgment of 1950, 23 Bull. Copyright Soc. 119, 149 (1975) ("no performing rights are licensed on other than a blanket basis in any nation in the world").

40. Moreover, because of the nature of the product—a composition can be simultaneously "consumed" by many users—composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even within the blanket license in terms of productivity and consumer satisfaction.

41. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 310 U.S. 217 (distinguishing *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918), on the ground that, among the effects of the challenged rule, there "was the creation of a public market"); *United States v. Trenton Potteries Co.*, 273 U.S. at 273 U.S. 401 (distinguishing *Chicago Bd. of Trade* on the ground that it did not involve "a price agreement among competitors in an open market").

42. "CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them." 400 F. Supp. at 748.

With this background in mind, which plainly enough indicates that, over the years and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.

IV

As we have noted, n.27, *supra*, the enigmatic remarks of the Court of Appeals with respect to remedy appear to have departed from the court's strict, *per se* approach, and to have invited a more careful analysis. But this left the general import of its judgment that the licensing practices of ASCAP and BMI under the consent decree are *per se* violations of the Sherman Act. We reverse that judgment, and the copyright misuse judgment dependent upon it, see n.9, *supra*, and remand for further proceedings to consider any unresolved issues that CBS may have properly brought to the Court of Appeals.[43] Of course, this will include an assessment under the rule of reason of the blanket license as employed in the television industry, if that issue was preserved by CBS in the Court of Appeals.[44]

The judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

43. It is argued that the judgment of the Court of Appeals should nevertheless be affirmed on the ground that the blanket license is a tying arrangement in violation of § 1 of the Sherman Act or on the ground that ASCAP and BMI have monopolized the relevant market contrary to § 2. The District Court and the Court of Appeals rejected both submissions, and we do not disturb the latter's judgment in these respects, particularly since CBS did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain its tying and monopolization claims.

44. The Court of Appeals did not address the rule of reason issue, and BMI insists that CBS did not preserve the question in that court. In any event, if the issue is open in the Court of Appeals, we prefer that that court first address the matter. Because of the United States' interest in the enforcement of the consent decree, we assume it will continue to play a role in this litigation on remand.

MR. JUSTICE STEVENS, dissenting.

The Court holds that ASCAP's blanket license is not a species of price-fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the case to the Court of Appeals, leaving open the question whether the blanket license, as employed by ASCAP and BMI, is unlawful under a rule of reason inquiry. I think that question is properly before us now, and should be answered affirmatively.

There is ample precedent for affirmance of the judgment of the Court of Appeals on a ground that differs from its rationale, provided of course that we do not modify its judgment.[1] In this litigation, the judgment of the Court of Appeals was not that blanket licenses may never be offered by ASCAP and BMI. Rather, its judgment directed the District Court to fashion relief requiring them to offer additional forms of license as well.[2] Even though that judgment may not be consistent with its stated conclusion that the blanket license is "illegal per se" as a kind of price-fixing, it is entirely consistent with a conclusion that petitioners' exclusive all-or-nothing blanket license policy violates the rule of reason.[3]

The Court of Appeals may well so decide on remand. In my judgment, however, a remand is not necessary.[4] The record before this Court is a full one, reflecting extensive discovery and eight weeks of trial. The District Court's findings of fact are thorough and well supported. They clearly reveal that the challenged policy does have a significant adverse impact on competition. I would therefore affirm the judgment of the Court of Appeals.

I

In December, 1969, the president of the CBS television network wrote to ASCAP and BMI requesting that each "promptly . . . grant a new performance rights license which will provide, effective January 1, 1970, for payments measured by the actual

1. See *United States v. New York Telephone Co.*, 434 U.S. 159, 434 U.S. 166 n.8; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 433 U.S. 419; *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 426 U.S. 480-481; *United States v. American Railway Express Co.*, 265 U.S. 425, 265 U.S. 435.

2. 562 F.2d 130, 140-141 (CA2 1977).

3. See *ante* at 441 U.S. 17 n.27 (describing relief ordered by Court of Appeals as "unusual" for a per se case, and suggesting that that court's decision appears more consistent with a rule of reason approach).

4. That the rule of reason issues have been raised and preserved throughout seems to me clear. See 562 F.2d at 134. ("CBS contends that the blanket licensing method is not only an illegal tie-in or block-booking which, in practical terms, is coercive in effect, but is also an illegal price-fixing device, a per se violation . . . "); *id*. at 141 n. 29 ("As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and bypass' of the ASCAP blanket license. The District Court, as noted, rejected this contention, and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record"); Brief for Respondents 41.

use of your music."[5] ASCAP and BMI each responded by stating that it considered CBS's request to be an application for a license in accordance with the provisions of its consent decree, and would treat it as such,[6] even though neither decree provides for licensing on a per-composition or per-use basis.[7] Rather than pursuing further discussion, CBS instituted this suit.

Whether or not the CBS letter is considered a proper demand for per-use licensing is relevant, if at all, only on the question of relief. For the fact is, and it cannot seriously be questioned, that ASCAP and BMI have steadfastly adhered to the policy of only offering overall blanket or per-program licenses,[8] notwithstanding requests for more limited authorizations. Thus, ASCAP rejected a 1971 request by NBC for licenses for 2,217 specific compositions,[9] as well as an earlier request by a group of television stations for more limited authority than the blanket licenses which they were then purchasing[10]. Neither ASCAP nor BMI has ever offered to license anything less than its entire portfolio, even on an experimental basis. Moreover, if the response to the CBS letter were not sufficient to characterize their consistent policy, the defense of this lawsuit surely is. It is the refusal to license anything less than the entire repertoire—rather than the decision to offer blanket licenses themselves—that raises the serious antitrust questions in this case.

II

Under our prior cases, there would be no question about the illegality of the blanket-only licensing policy if ASAP and BMI were the exclusive sources of all licenses. A copyright, like a patent, is a statutory grant of monopoly privileges. The rules which prohibit a patentee from enlarging his statutory monopoly by conditioning a license on the purchase of unpatented goods,[11] or by refusing to grant

5. 400 F. Supp. 737, 753 (SDNY 1975).

6. ASCAP responded in a letter from its general counsel stating that it would consider the request at its next board of directors meeting, and that it regarded it as an application for a license consistent with the decree. The letter from BMI's president stated: "The BMI Consent Decree provides for several alternative licenses, and we are ready to explore any of these with you." *Id*. at 753-754.

7. See *ante* at 441 U.S. 12, and n.21.

8. The 1941 decree requires ASCAP to offer per-program licenses as an alternative to the blanket license. *United States v. ASCAP*, 1940-1943 Trade Cases ¶ 56,104, p. 404 (SDNY). Analytically, however, there is little difference between the two. A per-program license also covers the entire ASCAP repertoire; it is therefore simply a miniblanket license. As is true of a long-term blanket license, the fees set are in no way dependent on the quantity or quality of the music used. See *infra* at 441 U.S. 30-33.

9. See *United States v. ASCAP (Application of National Broadcasting Co.)*, 1971 Trade Cases ¶ 73,491 (SDNY 1970).

10. See *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.*), 208 F. Supp. 896 (SDNY 1962), aff'd, 331 F.2d 117 (CA2 1964), cert. denied, 377 U.S. 997.

11. *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436; *International Business Machines Corp. v. United States*, 298 U.S. 131; *United Shoe Machinery Corp. v. United States*, 258 U.S. 451.

a license under one patent unless the licensee also takes a license under another, are equally applicable to copyrights.[12]

It is clear, however, that the mere fact that the holder of several patents has granted a single package license covering them all does not establish any illegality. This point was settled by *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 339 U.S. 834, and reconfirmed in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 395 U.S. 137-138. The Court is therefore unquestionably correct in its conclusion that ASCAP's issuance of blanket licenses covering its entire inventory is not, standing alone, automatically unlawful. But both of those cases identify an important limitation on this rule. In the former, the Court was careful to point out that the record did not present the question whether the package license would have been unlawful if Hazeltine had refused to license on any other basis. 339 U.S. at 339 U.S. 831. And in the latter case, the Court held that the package license was illegal because of such a refusal. 395 U.S. at 385 U.S. 140-141.

Since ASCAP offers only blanket licenses, its licensing practices fall on the illegal side of the line drawn by the two *Hazeltine* cases. But there is a significant distinction: unlike Hazeltine, ASCAP does not have exclusive control of the copyrights in its portfolio, and it is perfectly possible—at least as a legal matter—for a user of music to negotiate directly with composers and publishers for whatever rights he may desire. The availability of a practical alternative alters the competitive effect of a block-booking or blanket licensing policy. ASCAP is therefore quite correct in its insistence that its blanket license cannot be categorically condemned on the authority of the block-booking and package licensing cases. While these cases are instructive, they do not directly answer the question whether the ASCAP practice is unlawful.

The answer to that question depends on an evaluation of the effect of the practice on competition in the relevant market. And, of course, it is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market.[13] We

12. Indeed, the leading cases condemning the practice of "block-booking" involved copyrighted motion pictures, rather than patents. See *United States v. Paramount Pictures*, 334 U.S. 131; *United States v. Loew's Inc.*, 371 U.S. 38.

13. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 365 U.S. 334 (upholding requirements contract on the ground that "[t]here is here neither a seller with a dominant position in the market as in *Standard Fashion* [*Co.* v. *Marane-Houston Co.,* 258 U.S. 346]; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil* [*Co.* v. *United States*, 337 U.S. 293]; nor a plainly restrictive tying arrangement as in *International Salt* [*Co.* v. *United States*, 332 U.S. 392]"); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 345 U.S. 610-612 (upholding challenged advertising practice because, while the volume of commerce affected was not "insignificant or insubstantial,'" seller was found not to occupy a "dominant position" in the relevant market). While our cases make clear that a violation of the Sherman Act requires both that the volume of commerce affected be substantial and that the seller enjoy a dominant position, see *id*. at 345 U.S. 608-609, proof of actual compulsion has not been required, but cf. *Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 251 (CA2 1959), cert. denied, 361 U.S.

therefore must consider what the record tells us about the competitive character of this market.

III

The market for music at issue here is wholly dominated by ASCAP-issued blanket licenses.[14] Virtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI. And again, virtually without exception, the only means that has been used to secure authority to perform such compositions is the blanket license.

The blanket all-or-nothing license is patently discriminatory[15]. The user purchases full access to ASCAP's entire repertoire, even though his needs could be satisfied by a far more limited selection. The price he pays for this access is unrelated either to the quantity or the quality of the music he actually uses, or, indeed, to what he would probably use in a competitive system. Rather, in this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues,[16] a measure that reflects the customer's ability to pay[17] but is totally unrelated to factors—such as the cost, quality, or quantity of the product—that normally affect price in a competitive market. The ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what is "reasonable" for the access they are getting,[18] may well be far

885; *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (CA7 1951), cert. denied, 342 U.S. 909. The critical question is one of the likely practical effect of the arrangement: whether the "court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric Co. v. Nashville Coal Co.*, *supra*, at 365 U.S. 327.

14. As in the majority opinion, my references to ASCAP generally encompass BMI as well.

15. See Cirace, *CBS v. ASCAP*: An Economic Analysis of A Political Problem, 47 Ford. L. Rev. 277, 286 (1978) ("the all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms").

16. For many years prior to the commencement of this action, the BMI blanket license fee amounted to 1.09% of net receipts from sponsors after certain specified deductions. 400 F. Supp. at 743. The fee for access to ASCAP's larger repertoire was set at 2.5% of net receipts; in recent years, however, CBS has paid a flat negotiated fee, rather than a percentage, to ASCAP. 23 Jt.App. in CA2 No. 75-7600, pp. E1051-E1052, E1135.

17. See Cirace, supra at 288:

> "This history indicates that, from its inception, ASCAP exhibited a tendency to discriminate in price. A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay. The effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license."

18. Under the ASCAP consent decree, on receipt of an application, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on the fee within 60 days of the application, the applicant may apply to the United States District Court for the Southern District of New York for the determination of a

higher than what they would choose to spend for music in a competitive system. It is a classic example of economic discrimination .

The record plainly establishes that there is no price competition between separate musical compositions.[19] Under a blanket license, it is no more expensive for a network to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music[20] the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is, in any event, unlikely, but the blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized, rather than a competitive, market.[21]

The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited—and thus less restrictive—licenses by ASCAP is not feasible. The District Court's findings disclose no reason why music performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP. In fact, ASCAP now compensates composers and publishers on precisely those bases.[22] If distributions of royalties can be calculated on a per-use and per-composition basis, it is difficult to see why royalties could not also be collected in the

"reasonable fee." *United States v. ASCAP*, 1950-1951 Trade Cases ¶ 62,595, p. 63,754 (SDNY 1950). The BMI decree contains no similar provision for judicial determination of a reasonable fee.

19. ASCAP's economic expert, Robert Nathan, was unequivocal on this point:

> "Q. Is there price competition under this system between separate musical compositions?"
>
> "A. No sir."

Tr. 3983.

20. See 562 F.2d at 136 n.15. In determining royalties, ASCAP distinguishes between feature, theme, and background uses of music. The 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to the performance of the compositions." The 1960 decree provided for the additional option of receiving royalties under a deferred plan which provides additional compensation based on length of membership and the recognized status of the individual's works. See *United States v. ASCAP*, 1960 Trade Cases ¶ 69,612, pp. 76,469-76,470 (SDNY 1960).

21. See generally 2 P. Areeda D. Turner, Antitrust Law 280 281, 342-345 (1978); Cirace, *supra*, n.15, at 286-292.

22. See n.20, *supra*.

same way. Moreover, the record also shows that, where ASCAP's blanket license scheme does not govern, competitive markets do. A competitive market for "synch" rights exists,[23] and after the use of blanket licenses in the motion picture industry was discontinued,[24] such a market promptly developed in that industry.[25] In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all.

IV

Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably. ASCAP argues, however, that at least as to CBS, there has been no restraint at all, since the network is free to deal directly with copyright holders.

The District Court found that CBS had failed to establish that it was compelled to take a blanket license from ASCAP. While CBS introduced evidence suggesting that a significant number of composers and publishers, satisfied as they are with the ASCAP system, would be "disinclined" to deal directly with the network, the court found such evidence unpersuasive in light of CBS's substantial market power in the music industry and the importance to copyright holders of network television exposure.[26] Moreover, it is arguable that CBS could go further and, along with the other television networks, use its economic resources to exploit destructive competition among purveyors of music by driving the price of performance rights down to a far lower level. But none of this demonstrates that ASCAP's practices are lawful, or that ASCAP cannot be held liable for injunctive relief at CBS's request.

The fact that CBS has substantial market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. Indeed, even if the victim of a conspiracy is himself a wrongdoer, he has not forfeited the protection of the law.[27] Moreover, a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a

23. The "synch" right is the right to record a copyrighted song in synchronization with the film or videotape, and is obtained separately from the right to perform the music. It is the latter which is controlled by ASCAP and BMI. See *CBS, Inc. v. ASCAP*, 400 F. Supp. at 743.

24. See Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (SDNY 1948).

25. See 400 F. Supp. at 759-763; 5 Jt. App. in CA2 No. 75-7600, pp. 775-777 (testimony of Albert Berman, managing director of the Harry Fox Agency, Inc.). Television synch rights and movie performance and synch rights arc handled by the Fox Agency, which serves as the broker for thousands of music publishers.

26. See 400 F. Supp. at 767-771.

27. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 392 U.S. 138-140; *Simpson v. Union Oil Co.*, 377 U.S. 13, 377 U.S. 16-17; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 340 U.S. 214.

defense to a violation of the Sherman Act.[28] Even though characterizing CBS as an oligopolist may be relevant to the question of remedy, and even though free competition might adversely affect the income of a good many composers and publishers, these considerations do not affect the legality of ASCAP's conduct.

More basically, ASCAP's underlying argument that CBS must be viewed as having acted with complete freedom in choosing the blanket license is not supported by the District Court's findings. The District Court did not find that CBS could cancel its blanket license "tomorrow" and continue to use music in its programming and compete with the other networks. Nor did the District Court find that such a course was without any risk or expense. Rather, the District Court's finding was that, within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts.[29] In other words, although the barriers to direct dealing by CBS as an alternative to paying for a blanket license are real and significant, they are not insurmountable.

Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality of its conduct. Neither CBS nor any other user has been willing to assume the costs and risks associated with an attempt to purchase music on a competitive basis. The fact that an attempt by CBS to break down the ASCAP monopoly might well succeed does not preclude the conclusion that smaller and less powerful buyers are totally foreclosed from a competitive market.[30] Despite its size, CBS itself may not obtain music on a competitive basis without incurring unprecedented costs and risks. The fear of unpredictable consequences, coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibits any CBS management decision to embark on a competitive crusade. Even if ASCAP offered CBS a special bargain to forestall any such crusade, that special arrangement would not cure the marketwide restraint.

Whatever management decision CBS should or might have made, it is perfectly clear that the question whether competition in the market has been unduly restrained is not one that any single company's management is authorized to answer. It is often the case that an arrangement among competitors will not serve to eliminate competition forever, but only to delay its appearance or to increase the costs of new entry. That may well be the state of this market. Even without judicial intervention,

28. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 435 U.S. 689-690.

29. See 400 F. Supp. at 762-765.

30. For an individual user, the transaction costs involved in direct dealing with individual copyright holders may well be prohibitively high, at least in the absence of any broker or agency routinely handling such requests. Moreover, the District Court found that writers and publishers support and prefer the ASCAP system to direct dealing. *Id*. at 767. While their apprehension at direct dealing with CBS could be overcome, the District Court found, by CBS's market power and the importance of television exposure, a similar conclusion is far less likely with respect to other users.

the ASCAP monopoly might eventually be broken by CBS, if the benefits of doing so outweigh the significant costs and risks involved in commencing direct dealing.[31] But that hardly means that the blanket licensing policy at issue here is lawful. An arrangement that produces marketwide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy. History suggests, however, that these restraints have an enduring character.

Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. The record in this case plainly discloses that the limits have been exceeded, and that ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders.

Indeed, ASCAP itself argues that its blanket license constitutes a product that is significantly different from the sum of its component parts. I agree with that premise, but I conclude that the aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

31. The risks involved in such a venture appear to be substantial. One significant risk, which may be traced directly to ASCAP and its members, relates to music "in the can"—music which has been performed on shows and movies already in the network's inventory, but for which the network must still secure performing rights. The networks accumulate substantial inventories of shows "in the can." And, as the Government has pointed out as *amicus curiae*:

> "If they [the networks and television stations] were to discontinue the blanket license, they then would be required to obtain performance rights for these already produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' It would produce, in other words, a case of bilateral monopoly. Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music 'in the can' to allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable."

Brief for United States as *Amicus Curiae* 24-25.

This analysis is in no sense inconsistent with the findings of the District Court. The District Court did reject CBS's coercion argument as to music "in the can." But as the Government again points out, the District Court's findings were addressed essentially to a tie-in claim; "the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS' dropping the blanket license sufficiently high that ASCAP and BMI could take this 'termination penalty' into account in setting fees for the blanket license." *Id*. at 25 n. 23.

NCAA v. BOARD OF REGENTS,
468 U.S. 85 (1984)

JUSTICE STEVENS delivered the opinion of the Court.

The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated § 1 of the Sherman Act,[1] and granted injunctive relief. 546 F. Supp. 1276 (WD Okla. 1982). The Court of Appeals agreed that the statute had been violated, but modified the remedy in some respects. 707 F.2d 1147 (CA10 1983). We granted certiorari, 464 U.S. 913 (1983), and now affirm.

I

The NCAA

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. In some sports, such as baseball, swimming, basketball, wrestling, and track, it has sponsored and conducted national tournaments. It has not done so in the sport of football, however. With the exception of football, the NCAA has not undertaken any regulation of the televising of athletic events.[2]]

The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I includes 276 colleges with major athletic programs; in this group, only 187 play intercollegiate football. Divisions II and III include approximately 500 colleges with less extensive athletic programs. Division I has been subdivided into Divisions I-A and I-AA for football.

Some years ago, five major conferences, together with major football-playing independent institutions, organized the College Football Association (CFA). The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure. The Universities of Oklahoma and Georgia, respondents in this Court, are members of the CFA.

1. Section 1 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. . . ." 26 Stat. 209, as amended, 15 U.S.C. § 1.

2. Presumably, however, it sells the television rights to events that the NCAA itself conducts.

History of the NCAA Television Plan

In 1938, the University of Pennsylvania televised one of its home games.[3] From 1940 through the 1950 season, all of Pennsylvania's home games were televised. App. 303. That was the beginning of the relationship between television and college football.

On January 11, 1951, a three-person "Television Committee," appointed during the preceding year, delivered a report to the NCAA's annual convention in Dallas. Based on preliminary surveys, the committee had concluded that "television does have an adverse effect on college football attendance, and, unless brought under some control, threatens to seriously harm the nation's overall athletic and physical system." *Id.* at 265. The report emphasized that "the television problem is truly a national one, and requires collective action by the colleges." *Id.* at 270. As a result, the NCAA decided to retain the National Opinion Research Center (NORC) to study the impact of television on live attendance, and to declare a moratorium on the televising of football games. A television committee was appointed to implement the decision and to develop an NCAA television plan for 1951. *Id.* at 277-278.

The committee's 1951 plan provided that only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season. A team could appear on television only twice during a season. The plan also provided that the NORC would conduct a systematic study of the effects of the program on attendance. *Id.* at 279. The plan received the virtually unanimous support of the NCAA membership; only the University of Pennsylvania challenged it. Pennsylvania announced that it would televise all its home games. The council of the NCAA thereafter declared Pennsylvania a member in bad standing, and the four institutions scheduled to play at Pennsylvania in 1951 refused to do so. Pennsylvania then reconsidered its decision and abided by the NCAA plan. *Id.* at 280-281.

During each of the succeeding five seasons, studies were made which tended to indicate that television had an adverse effect on attendance at college football games. During those years, the NCAA continued to exercise complete control over the number of games that could be televised. *Id.* at 325-359.

From 1952 through 1977, the NCAA television committee followed essentially the same procedure for developing its television plans. It would first circulate a questionnaire to the membership and then use the responses as a basis for formulating a plan for the ensuing season. The plan was then submitted to a vote by means of a mail referendum. Once approved, the plan formed the basis for NCAA's negotiations with the networks. Throughout this period, the plans retained the essential purposes of the original plan. See 546 F. Supp. at 1283.[4] Until 1977, the

3. According to the NCAA football television committee's 1981 briefing book: "As far as is known, there were [then] six television sets in Philadelphia; and all were tuned to the game." App. 244.

4. The television committee's 1981 briefing book elaborates:

contracts were all for either 1- or 2-year terms. In 1977, the NCAA adopted "principles of negotiation" for the future, and discontinued the practice of submitting each plan for membership approval. Then the NCAA also entered into its first 4-year contract granting exclusive rights to the American Broadcasting Cos. (ABC) for the 1978-1981 seasons. ABC had held the exclusive rights to network telecasts of NCAA football games since 1965. *Id.* at 1283-1284.

The Current Plan

The plan adopted in 1981 for the 1982-1985 seasons is at issue in this case.[5] This plan, like each of its predecessors, recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance.[6] It provides that "all forms of television of the football games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." App. 35. The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks." *Id.* at 36. In addition to the principal award of rights to the carrying networks, the plan also describes rights for a "supplementary series" that had been awarded for the 1982 and 1983 seasons,[7] as well as a procedure for permitting specific "exception telecasts."[8]

"In 1952, the NCAA Television Committee initiated a plan for controlling the televising of college football games. The plans have remained remarkably similar as to their essential features over the past 30 years. They have had the following primary objectives and purposes:"

"1. To reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance;"

"2. To spread television among as many NCAA member colleges as possible; and"

"3. To provide football television to the public to the extent compatible with the other two objectives." *Ibid.*

5. Because respondents sought and obtained only injunctive relief against future violations of § 1 in the District Court, we do not consider previous NCAA television plans, except to the extent that they shed light on the purpose and effect of the current plan.

6. "The purposes of this Plan shall be to reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." *Id*. at 35 (parenthetical omitted).

7. The supplementary series is described in a separate article of the plan. It is to consist of no more than 36 exposures in each of the first two years, and no more than 40 exposures in the third and fourth years of the plan. Those exposures are to be scheduled on Saturday evenings or at other times that do not conflict with the principal football series that is scheduled for Saturday afternoons. Id. at 86-92.

8. An "exception" telecast is permitted in the home team's market of games that are sold out, and in the visiting team's market of games played more than 400 miles from the visiting team's campus, but in both cases only if the broadcast would not be shown in an area where another college football game is to be played. *Id.* at 62-72. Also, Division II and Division III institutions are

In separate agreements with each of the carrying networks, ABC and the Columbia Broadcasting System (CBS), the NCAA granted each the right to telecast the 14 live "exposures" described in the plan, in accordance with the "ground rules" set forth therein.[9] Each of the networks agreed to pay a specified "minimum aggregate compensation to the participating NCAA member institutions" during the 4-year period in an amount that totaled $131,750,000. In essence, the agreement authorized each network to negotiate directly with member schools for the right to televise their games. The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years, and that the District Court found would be followed under the current agreement, involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being the most valuable, regional telecasts being less valuable, and Division II or Division III games commanding a still lower price.[10] The aggregate of all these payments presumably equals the total minimum aggregate compensation set forth in the basic agreement. Except for differences in payment between national and regional telecasts, and with respect to Division II and Division III games, the amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the "ground rules" provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved. See 546 F. Supp. at 1289-1293.[11]

allowed complete freedom to televise their games, except that the games may not appear on a network of more than five stations without the permission of the NCAA. *Id.* at 73-74.

9. In addition to its contracts with the carrying networks, the NCAA has contracted with Turner Broadcasting System, Inc. (TBS), for the exclusive right to cablecast NCAA football games. The minimum aggregate fee for the initial 2-year period of the TBS contract is $17,696,000. 546 F. Supp. at 1291-1292.

10. The football television committee's briefing book for 1981 recites that a fee of $600,000 was paid for each of the 12 national games telecast by ABC during the regular fall season and $426,779 was paid for each of the 46 regional telecasts in 1980. App. 250. The report further recites: "Division I members received $27,842,185 from 1980 football television revenue, 89.8 percent of the total. Division II's share was $625,195 (2.0 percent), while Division III received $385,195 (1.3 percent) and the NCAA $2,147,425 (6.9 percent)." *Id.* at 251.

11. The District Court explained how the agreement eliminates competition for broadcasting rights:

> "First, the networks have no intention to engage in bidding. Second, once the network holding first choice for any given date has made its choice and agreed to a rights fee for that game with the two teams involved, the other network is then in a monopsony position. The schools cannot threaten to sell the broadcast rights to any other network. They cannot sell to NBC without committing a violation of NCAA rules. They cannot sell to the network which had first choice over that particular date, because again they would be in violation of NCAA rules, and the network would be in violation of its agreement with NCAA. Thus, NCAA creates a single eligible buyer for the product of

The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2-year periods that the plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2-year period. Under the appearance limitations, no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. See *Id.* at 1293. The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus, although the current plan is more elaborate than any of its predecessors, it retains the essential features of each of them. It limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any sale of television rights except in accordance with the basic plan.

Background of this Controversy

Beginning in 1979, CFA members began to advocate that colleges with major football programs should have a greater voice in the formulation of football television policy than they had in the NCAA. CFA therefore investigated the possibility of negotiating a television agreement of its own, developed an independent plan, and obtained a contract offer from the National Broadcasting Co. (NBC). This contract, which it signed in August, 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members. See *Id.* at 1286.

In response, the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. The NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well. On September 8, 1981, respondents commenced this action in the United States District Court for the Western District of Oklahoma and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Notwithstanding the entry of the injunction, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the threatened sanctions, and therefore the agreement was never consummated. See *id.* at 1286-1287.

Decision of the District Court

After a full trial, the District Court held that the controls exercised by the NCAA over the televising of college football games violated the Sherman Act. The District Court defined the relevant market as "live college football television" because it found that alternative programming has a significantly different and lesser audience

all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the new plan." 546 F. Supp. at 1292-1293.

appeal. *Id.* at 1297-1300.[12] The District Court then concluded that the NCAA controls over college football are those of a "classic cartel" with an

> "almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products." *Id.* at 1300-1301.

The District Court found that competition in the relevant market had been restrained in three ways: (1) NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its own members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. *Id.* at 1293-1295.

In the District Court, the NCAA offered two principal justifications for its television policies: that they protected the gate attendance of its members and that they tended to preserve a competitive balance among the football programs of the various schools. The District Court rejected the first justification because the evidence did not support the claim that college football television adversely affected gate attendance. *Id.* at 1295-1296. With respect to the "competitive balance" argument, the District Court found that the evidence failed to show that the NCAA regulations on matters such as recruitment and the standards for preserving amateurism were not sufficient to maintain an appropriate balance. *Id.* at 1296.

Decision of the Court of Appeals

The Court of Appeals held that the NCAA television plan constituted illegal per se price-fixing, 707 F.2d at 1152.[13] It rejected each of the three arguments advanced by NCAA to establish the procompetitive character of its plan.[14] First, the court rejected the argument that the television plan promoted live attendance, noting that, since the plan involved a concomitant reduction in viewership, the plan did not result

12. The District Court held that the NCAA had monopolized the relevant market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. See 546 F. Supp. at 1319-1323. The Court of Appeals found it unnecessary to reach this issue, as do we.

13. The Court of Appeals rejected the District Court's boycott holding, since all broadcasters were free to negotiate for a contract as carrying networks and the threat of sanctions against members for violating NCAA rules could not be considered a boycott if the rules were otherwise valid. 707 F.2d at 1160-1161.

14. In the Court of Appeals as well as the District Court, petitioner argued that respondents had suffered no injury of the type the antitrust laws were designed to prevent, relying on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Both courts rejected its position, 707 F.2d at 1150-1152; 546 F. Supp. at 1303-1304. Petitioner does not seek review on that question in this Court. Brief for Petitioner 5, n. 1.

in a net increase in output, and hence was not procompetitive. *Id.* at 1153-1154. Second, the Court of Appeals rejected as illegitimate the NCAA's purpose of promoting athletically balanced competition. It held that such a consideration amounted to an argument that "competition will destroy the market"—a position inconsistent with the policy of the Sherman Act. Moreover, assuming *arguendo* that the justification was legitimate, the court agreed with the District Court's finding "that any contribution the plan made to athletic balance could be achieved by less restrictive means." *Id.* at 1154. Third, the Court of Appeals refused to view the NCAA plan as competitively justified by the need to compete effectively with other types of television programming, since it entirely eliminated competition between producers of football, and hence was illegal per se. *Id.* at 1155-1156.

Finally, the Court of Appeals concluded that, even if the television plan were not per se illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined. *Id.* at 1157-1160.[15] The case was remanded to the District Court for an appropriate modification in its injunctive decree. *Id.* at 1162.[16]

II

There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.[17]

It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and

15. The Court of Appeals rejected petitioner's position that it should set aside many of the District Court's findings as clearly erroneous. In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 458 U.S. 623 (1982). In any event, petitioner does not now ask us to set aside any of the findings of the District Court, but rather argues only that both the District Court and the Court of Appeals erred as a matter of law. Brief for Petitioner 6, n. 2, 18-19.

16. Judge Barrett dissented on the ground that the NCAA television plan's primary purpose was not anticompetitive. "Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of the key purposes is to insure that the student athlete is fully integrated into academic endeavors." 707 F.2d at 1163. He regarded the television restraints as fully justified "in that they are necessary to maintain intercollegiate football as amateur competition." *Id.* at 1165. He added: "The restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism, so that intercollegiate athletics supplement, rather than inhibits, academic achievement." *Id.* at 1167.

17. See, e.g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 457 U.S. 342-343 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 435 U.S. 687-688 (1978); *Chicago Board of Trade v. United States*, 246 U.S. 231, 246 U.S. 238 (1918).

athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another.[18] A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.[19] Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price-fixing, perhaps the paradigm of an unreasonable restraint of trade.[20]

Horizontal price-fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach, because the probability that these practices are anticompetitive is so high; a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 441 U.S. 19-20 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement,[21] on the fact that the NCAA is organized as a nonprofit

18. See *Arizona v. Maricopa County Medical Society,* 457 U.S. at 457 U.S. 356-357; *National Society of Professional Engineers v. United States,* 435 U.S. at 435 U.S. 694-696; *United States v. Topco Associates, Inc.*, 405 U.S. 596, 405 U.S. 608-611 (1972). See also *United States v. Sealy, Inc*., 388 U.S. 350, 388 U.S. 352-354 (1967) (marketing association controlled by competing distributors is a horizontal combination). See generally Blecher & Daniels, Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act, 4 Whittier L.Rev. 217 (1982).

19. See, e.g., *United States v. Topco Associates, Inc*., 405 U.S. at 405 U.S. 608-609; *United States v. Sealy, Inc.*, supra; *United States v. American Linseed Oil Co*., 262 U.S. 371, 262 U.S. 388-390 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 257 U.S. 410-412 (1921).

20. See, e.g., *Arizona v. Maricopa County Medical Society*, 457 U.S. at 457 U.S. 344-348; *Catalano, Inc. v. Target Sales, Inc*., 446 U.S. 643, 446 U.S. 646-647 (1980) (per curiam); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 340 U.S. 213 (1951); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 310 U.S. 212-214 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 273 U.S. 396-398 (1927).

21. While judicial inexperience with a particular arrangement counsels against extending the reach of per se rules, see *Broadcast Music*, 441 U.S. at 441 U.S. 9-10; *United States v. Topco Associates, Inc.*, 405 U.S. at 405 U.S. 607-608; *White Motor Co. v. United States*, 372 U.S. 253, 372 U.S. 263 (1963), the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the per se rule without inquiry into the special

entity,[22] or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics.[23] Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

As Judge Bork has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices

characteristics of a particular industry. See *Arizona v. Maricopa County Medical Society*, 457 U.S. at 457 U.S. 349-351; *National Society of Professional Engineers v. United States*, 435 U.S. at 435 U.S. 689-690.

22. There is no doubt that the sweeping language of § 1 applies to nonprofit entities, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 421 U.S. 786-787 (1975), and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct, *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 456 U.S. 576 (1982). Moreover, the economic significance of the NCAA's nonprofit character is questionable, at best. Since the District Court found that the NCAA and its member institutions are in fact organized to maximize revenues, see 546 F. Supp. at 1288-1289, it is unclear why petitioner is less likely to restrict output in order to raise revenues above those that could be realized in a competitive market than would be a for-profit entity. Petitioner does not rely on its nonprofit character as a basis for reversal. Tr. of Oral Arg. 24.

23. While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice. See *United States v. Griffith*, 334 U.S. 100, 334 U.S. 105-106 (1948); *Associated Press v. United States*, 326 U.S. 1, 326 U.S. 16, n. 15 (1945); *Chicago Board of Trade v. United States*, 246 U.S. at 246 U.S. 238; *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 226 U.S. 49 (1912); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 166 U.S. 342 (1897).

available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.[24]

Broadcast Music squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output, and thus be procompetitive. See 441 U.S. at 441 U.S. 18-23. Similarly, as we indicated in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 433 U.S. 51-57 (1977), a restraint in a limited aspect of a market may actually enhance market-wide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 435 U.S. 692 (1978). A conclusion that a restraint of trade is unreasonable may be

> "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions." *Id.* at 435 U.S. 690 (footnotes omitted).

24. See *Justice v. NCAA*, 577 F. Supp. 356, 379-383 (Ariz.1983); *Jones v. NCAA*, 392 F. Supp. 295, 304 (Mass.1975); *College Athletic Placement Service, Inc. v. NCAA*, 1975-1 Trade Cases 1160, 117 (NJ), aff'd mem., 506 F.2d 1050 (CA3 1974). See also *Brenner v. World Boxing Council*, 675 F.2d 445, 454-455 (CA2 1982); *Neeld v. National Hockey League*, 594 F.2d 1297, 1299, n.4 (CA9 1979); *Smith v. Pro Football, Inc.*, 193 U.S.App.D.C.19, 26-27, 593 F.2d 1173, 1180-1181 (1978); *Hatley v. American Quarter Horse Assn.*, 552 F.2d 646, 652-654 (CA5 1977); *Mackey v. National Football League*, 543 F.2d 606, 619 (CA8 1976), cert. dism'd, 434 U.S. 801 (1977); *Bridge Corp. of America v. The American Contract Bridge League, Inc.*, 428 F.2 1365, 1370 (CA9 1970), cert. denied, 401 U.S. 940 (1971); *Gunter Harz Sports, Inc. v. United States Tennis Assn.*, 511 F. Supp. 1103, 1116 (Neb.), aff'd, 665 F.2d 222 (CA8 1981); *Cooney v. American Horse Shows Assn., Inc.*, 495 F. Supp. 424, 430 (SDNY 1980); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 468 F. Supp. 154, 165-166 (CD Cal.1979), preliminary injunction entered, 484 F. Supp. 1274 (1980), rev'd on other grounds, 634 F.2d 1197 (CA9 1980); *Kupec v. Atlantic Coast Conference*, 399 F. Supp. 1377, 1380 (MDNC 1975); Closius, Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry, 24 Boston College L.Rev. 341, 344-345 (1983); Kurlantzick, Thoughts on Professional Sports and the Antitrust Law: Los Angeles Memorial Coliseum v. National Football League, 15 Conn.L.Rev. 183, 189-194 (1983); Note, Antitrust and Nonprofit Entities, 94 Harv.L.Rev. 802, 817-818 (1981). See generally *Hennessey v. NCAA*, 564 F.2d 1136, 1151-1154 (CA5 1977); *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494-495 (DC 1983); *Warner Amex Cable Communications, Inc. v. American Broadcasting Cos.*, 499 F. Supp. 537, 545-546 (SD Ohio 1980); *Board of Regents v. NCAA*, 561 P.2d 499, 506-507 (Okla.1977); Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L.J. 655, 665-666, 673-675 (1978).

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.[25] But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.[26] Under the Sherman Act, the criterion to be used in judging the validity of a restraint on trade is its impact on competition.[27]

III

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects.[28] The findings of the District Court indicate that this potential has been realized. The District Court found that, if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the

25. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 466 U.S. 15-16, n.25 (1984); *Arizona v. Maricopa County Medical Society*, 457 U.S. at 457 U.S. 350-351; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 433 U.S. 50, n. 16 (1977).

26. Indeed, there is often no bright line separating per se from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "per se" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. at 466 U.S. 11-12.

27. "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end, it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the Several States.'" *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 356 U.S. 4-5 (1958).

28. In this connection, it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. See 15 U.S.C. §§ 1291-1295. The legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in *United States v. National Football League*, 116 F. Supp. 319 (ED Pa.1953), which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games within 75 miles of the home city of another team on a day when that team was not playing at home and was televising its game by use of a station within 75 miles of its home city, violated § 1 of the Sherman Act. See S. Rep. No. 1087, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 1178, 87th Cong., 1st Sess., 2-3 (1961); 107 Cong. Rec. 20059-20060 (1961) (remarks of Rep. Celler); *id*. at 20061-20062 (remarks of Rep. McCulloch); Telecasting of Professional Sports Contests: Hearings on H.R. 8757 before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 1-2 (1961) (statement of Chairman Celler); *id*. at 3 (statement of Rep. McCulloch); *id*. at 10-28 (statement of Pete Rozelle); *id*. at 69-70 (letter from Assistant Attorney General Loevinger).

networks pay for television rights.[29] Moreover, the court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.[30] And, of course, since, as a practical matter, all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.[31]

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete.[32] Price is higher and output lower than

29. "It is clear from the evidence that, were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level. The circumstances which would allow so-called exception telecasts arise infrequently for many schools, and the evidence is clear that local broadcasts of college football would occur far more frequently were it not for the NCAA controls. This is not a surprising result. Indeed, this horizontal agreement to limit the availability of games to potential broadcasters is the very essence of NCAA's agreements with the networks. The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on the other networks or on various local stations. Therefore, the Court concludes that the membership of NCAA has agreed to limit production to a level far below that which would occur in a free market situation." 546 F. Supp. at 1294.

30. "Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. NCAA has created the mechanism which produces a uniform price for each national telecast, and a uniform price for each regional telecast. Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference."

"In a competitive market, each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary for the games, with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates for commercial time because of the larger audience. The telecaster would then be willing to pay larger rights fees due to the increased prices paid by the advertisers. Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market." *Id.* at 1318.

31. Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for restraining institutions which require its approval. See *Silver v. New York Stock Exchange*, 373 U.S. 341, 373 U.S. 347-349, and n. 5 (1963); *Associated Press v. United States*, 326 U.S. at 326 U.S. 17-18.

32. See *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 312 U.S. 465 (1941); *Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. at 226 U.S. 47-49; *Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

they would otherwise be, and both are unresponsive to consumer preference.[33] This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 442 U.S. 343 (1979). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.[34] Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit. See *Standard Oil Co. v. United States*, 221 U.S. 1, 221 U.S. 52-60 (1911).[35]

33. "In this case, the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures." *Arizona v. Maricopa County Medical Society*, 457 U.S. at 457 U.S. 348. The District Court provided a vivid example of this system in practice:

> "A clear example of the failure of the rights fees paid to respond to market forces occurred in the fall of 1981. On one weekend of that year, Oklahoma was scheduled to play a football game with the University of Southern California. Both Oklahoma and USC have long had outstanding football programs, and indeed, both teams were ranked among the top five teams in the country by the wire service polls. ABC chose to televise the game along with several others on a regional basis. A game between two schools which are not well-known for their football programs, Citadel and Appalachian State, was carried on four of ABC's local affiliated stations. The USC-Oklahoma contest was carried on over 200 stations. Yet, incredibly, all four of these teams received exactly the same amount of money for the right to televise their games." 546 F. Supp. at 1291.

34. As the District Court observed:

> "Perhaps the most pernicious aspect is that, under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised." *Id.* at 1319.

35. Even in the context of professional football, where Congress was willing to pass a limited antitrust exemption, see n.28, supra, it was concerned about ensuring that telecasts not be subject to output limitations:

"Mr. GARY. On yesterday, I had the opportunity of watching three different games. There were three different games on three different channels . . . ."

"Would this bill prevent them from broadcasting three different games at one time, and permit the league to enter into a contract so that only one game would be permitted?"

"Mr. CELLER. The bill does not prevent what the gentleman saw yesterday. As a matter of fact, the antitrust exemption provided by the bill shall not apply to any package contract which prohibits the person to whom league television rights are sold or transferred from televising any game within any area except the home area of a member club on the day when that club is playing a home game."

"* * * *"

"Mr. GARY. I am an avid sports fan. I follow football, baseball, basketball, and track, and I am very much interested in all sports. But I am also interested in the people of the United States being able to see on television the games that are played. I am interested in the television audience. I want

At the same time, the television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete.[36] Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.[37]

Petitioner argues, however, that its television plan can have no significant anticompetitive effect, since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market.[38] We must reject this argument for two reasons, one legal, one factual.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers*, 435 U.S. at 435 U.S. 692.[39] Petitioner does not quarrel with the District

to know that they are not going to be prohibited from seeing games that might otherwise be telecast."

"Mr. CELLER. I can assure the gentleman from Virginia that he need have no fears on that score." 107 Cong. Rec. 20060 (1961).

36. The impact on competitors is thus analogous to the effect of block booking in the motion picture industry that we concluded violated the Sherman Act:

> "In the first place, they eliminate the possibility of bidding for films theater by theater. In that way, they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 334 U.S. 154 (1948).

37. 546 F. Supp. at 1294. One of respondents' economists illustrated the point:

"[I]t's my opinion that, if a free market operated in the market for intercollegiate television of football, that there would be substantially more regional and even more local games being televised than there are currently. I can take a specific example from my home state of Indiana."

"I am at Ball State University, which until recently was a division one-A institution, although now is a division one-AA institution in terms of intercollegiate football. When Ball State plays Indiana State, that is a hotly contested game in an intrastate sense. That is a prime example of the type of game that probably would be televised. For example, when Ball State is playing Indiana State at Terre Haute, Indiana, that [would be] a popular game to be televised in the Muncie area, and, vice versa, in Terre Haute when the game happens to be in Muncie." App. 506-507. See also id. at 607-608.

38. Market power is the ability to raise prices above those that would be charged in a competitive market. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. at 466 U.S. 27, n.46; *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 429 U.S. 620 (1977); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 351 U.S. 391 (1956).

39. "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable'

Court's finding that price and output are not responsive to demand. Thus, the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference.[40] We have never required proof of market power in such a case.[41] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.[42]

As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable for televised NCAA football games.[43] Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers, and that competitors

under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981) (parenthetical omitted).

40. Moreover, because, under the plan, member institutions may not compete in terms of price and output, it is manifest that significant forms of competition are eliminated. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. at 446 U.S. 648-649 (per curiam); *Professional Engineers*, 435 U.S. at 435 U.S. 692-695; *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 282 U.S. 43-44 (1930).

41. See *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 351 U.S. 309-310 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 310 U.S. 221. See also *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 359 U.S. 213 (1959).

42. The Solicitor General correctly observes:

> "There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." Brief for United States as Amicus Curiae 19-20 (footnote and citation omitted).

43. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 384 U.S. 571 (1966); *United States v. E. 1. du Pont de Nemours & Co.*, 351 U.S. at 351 U.S. 394-395; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 345 U.S. 612, n. 31 (1953).

are unable to offer programming that can attract a similar audience.[44] These findings amply support its conclusion that the NCAA possesses market power.[45] Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics[46] is vivid evidence of the uniqueness of this product.[47] Moreover, the District Court's market analysis is firmly supported by our decision in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959), that championship boxing events are uniquely attractive to fans,[48] and hence constitute a market separate from that for nonchampionship events. See *id.* at 358 U.S. 249-252.[49] Thus, respondents have demonstrated that there is a separate market for telecasts of college football which "rest[s] on generic qualities differentiating" viewers. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 345 U.S. 613 (1953). It inexorably follows that, if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 351 U.S. 394 (1956).[50]

Thus, the NCAA television plan, on its face, constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these

44. See 546 F. Supp. at 1297-1300. See also Hochberg & Horowitz, Broadcasting and CATV: The Beauty and the Bane of Major College Football, 38 Law & Contemp.Prob. 112, 118-120 (1973).

45. See, e.g., *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. at 466 U.S. 27, n.46; *id*. at 466 U.S. 37-38, n.7 (O'Connor, J., concurring in judgment); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 394 U.S. 504-506, and n.2 (1969).

46. See 546 F. Supp. at 1298-1300.

47. As the District Court observed, *id*. at 1297, the most analogous programming in terms of the demographic characteristics of its audience is professional football, and as a condition of its limited exemption from the antitrust laws the professional football leagues are prohibited from telecasting games at times that conflict with intercollegiate football. See 15 U.S.C. § 1293.

48. We approved of the District Court's reliance on the greater revenue-producing potential and higher television ratings of championship events, as opposed to other events to support its market definition. See 358 U.S. at 358 U.S. 250-251.

49. For the same reasons, it is also apparent that the unique appeal of NCAA football telecasts for viewers means that, "from the standpoint of the consumer—whose interests the statute was especially intended to serve," *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. at 466 U.S. 15, there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute. Thus we agree with the District Court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers.

50. See, e.g., *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. at 466 U.S. 24-25; *Northern Pacific R. Co. v. United States*, 356 U.S. at 356 U.S. 7-8; *Times-Picayune*, 345 U.S. at 345 U.S. 611-613. Petitioner seems to concede as much. See Brief for Petitioner 36-37; Tr. of Oral Arg. 6.

hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. See Professional Engineers, 435 U.S. at 435 U.S. 692-696. We turn now to the NCAA's proffered justifications.

IV

Relying on *Broadcast Music*, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights, and hence is procompetitive. While joint ventures have no immunity from the antitrust laws,[51] as Broadcast Music indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 457 U.S. 365 (1982) (Powell, J., dissenting) (footnote omitted). The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike Broadcast Music's blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary, it concluded that NCAA football could be marketed just as effectively without the television plan.[52] There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." *Broadcast Music*, 441 U.S. at 441 U.S. 23.[53] In Broadcast Music, the availability of a

51. See *Citizen Publishing Co. v. United States*, 394 U.S. 131, 394 U.S. 134-136 (1969); *United States v. Sealy, Inc.*, 388 U.S. at 388 U.S. 353; *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 341 U.S. 59-598 (1951); *Associated Press v. United States*, 326 U.S. at 326 U.S. 15-16.

52. See 546 F. Supp. at 1306-1308.

53. Compare *id*. at 1307-1308 ("The colleges are clearly able to negotiate agreements with whatever broadcasters they choose. We are not dealing with tens of thousands of relatively brief musical works, but with three-hour football games played eleven times each year"), with *Broadcast Music*, 441 U.S. at 441 U.S. 22-23 (footnotes omitted) ("[T]o the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many

package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint. Here, production has been limited not enhanced.[54] No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors.[55] This is borne out by the District Court's finding that the NCAA's television plan reduces the volume of television rights sold.

V

Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which are shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.[56]

Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if unlimited television were permitted,[57] the District

sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively").

54. Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures. See Brodley, Joint Ventures and Antitrust Policy, 95 Harv.L.Rev. 1523, 1550-1552, 1555-1560 (1982). See also Note, United Charities and the Sherman Act, 91 Yale L.J. 1593 (1982).

55. If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete. See *Continental T. V., Inc.*, 433 U.S. at 433 U.S. 54-57. Our conclusion concerning the availability of substitutes in 468 U.S. *supra*, forecloses such a justification in this case, however.

56. The NCAA's plan is not even arguably related to a desire to protect live attendance by ensuring that a game is not televised in the area where it is to be played. No cooperative action is necessary for that kind of "blackout." The home team can always refuse to sell the right to telecast its game to stations in the immediate area. The NCAA does not now and never has justified its television plan by an interest in assisting schools in "blacking out" their home games in the areas in which they are played.

57. During this period, the NCAA also expressed its concern to Congress in urging it to limit the antitrust exemption professional football obtained for telecasting its games to contests not held on Friday or Saturday when such telecasts might interfere with attendance at intercollegiate games. See H.R. Rep. No. 1178, 87th Cong., 1st Sess., 3-4 (1961); 107 Cong. Rec. 20060-20061 (1961) (remarks of Rep. Celler); *id*. at 20662; Hearings, *supra*, n.28, at 66-68 (statement of William R. Reed). The provision enacted as a result is now found in 15 U.S.C. § 1293.

Court found that there was no evidence to support that theory in today's market.[58] Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events.[59]

There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market.[60] The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers*, 435 U.S. at 435 U.S. 696.

VI

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important, and that it justifies the regulations challenged in this case. We agree with the first part of the argument, but not the second.

Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.[61] It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams,

58. See 546 F. Supp. at 1295-1296, 1315.

59. "[T]he greatest flaw in the NCAA's argument is that it is manifest that the new plan for football television does not limit televised football in order to protect gate attendance. The evidence shows that, under the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season. Because the 'ground rules' eliminate head-to-head programming, a full nine hours of college football will have to be shown on television during a nine-to-twelve hour period on almost every Saturday of the football season in most of the major television markets in the country. It can hardly be said that such a plan is devised in order to protect gate attendance." *Id.* at 1296.

60. Ironically, to the extent that the NCAA's position has merit, it rests on the assumption that football telecasts are a unique product. If, as the NCAA argues, see supra at 468 U.S. 111-112, all television programming is essentially fungible, it would not be possible to protect attendance without banning all television during the hours at which intercollegiate football games are held.

61. See Part II, *supra*.

and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league.[62] The plan is nationwide in scope, and there is no single league or tournament in which all college football teams compete. There is no evidence of any intent to equalize the strength of teams in Division I-A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools.[63] The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising.[64] The plan simply

62. It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The District Court found that, in fact, the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a "power elite" in intercollegiate football. See 546 F. Supp. at 1310-1311. Moreover, the District Court's finding that there would be more local and regional telecasts without the NCAA controls means that Northwestern could well have generated more television income in a free market than was obtained under the NCAA regime.

63. Indeed, the District Court found that the basic reason the television plan has endured is that the NCAA is in effect controlled by schools that are not restrained by the plan:

> "The plaintiffs and other CFA members attempted to persuade the majority of NCAA members that NCAA had gone far beyond its legitimate role in football television. Not surprisingly, none of the CFA proposals was adopted. Instead the membership uniformly adopted the proposals of the NCAA administration which 'legitimized' NCAA's exercises of power. The result was not surprising in light of the makeup of the voting membership. Of approximately 800 voting members of the NCAA, 500 or so are in Divisions II and III, and are not subjected to NCAA television controls. Of the 275 Division I members, only 187 play football, and only 135 were members of Division I-A at the time of the January Convention. Division I-A was made up of the most prominent football-playing schools, and those schools account for most of the football games shown on network television. Therefore, of some 850 voting members, less than 150 suffer any direct restriction on their right to sell football games to television." *Id.* at 1317.

64. Moreover, the District Court found that those schools which would realize increased revenues in a free market would not funnel those revenues into their football programs. See *id.* at 1310.

imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. At the same time, as the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are “clearly sufficient” to preserve competitive balance to the extent it is within the NCAA’s power to do so.[65] much more than speculation supported the District Court’s findings on this score. No other NCAA sport employs a similar plan, and in particular the court found that, in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan.[66]

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court’s unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product.[67] The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not, in fact, serve any such legitimate purpose.[68]

VII

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court’s conclusion that, by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted, rather than enhanced, the place of intercollegiate athletics in the Nation’s life. Accordingly, the judgment of the Court of Appeals is

Affirmed.

65. See *id*. at 1296, 1309-1310.

66. See id. at 1284-1285, 1299.

67. See *Continental T. V., Inc.*, 433 U.S. at 433 U.S. 54-57. See also n55, *supra*.

68. This is true not only for television viewers, but also for athletes. The District Court’s finding that the television exposure of all schools would increase in the absence of the NCAA’s television plan means that smaller institutions appealing to essentially local or regional markets would get more exposure if the plan is enjoined, enhancing their ability to compete for student athletes.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-1ess commercial activities. See Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L.J. 655, 656-657 (1978). Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits. Accordingly, I dissent.

I

"While it would be fanciful to suggest that colleges are not concerned about the profitability of their ventures, it is clear that other, noncommercial goals play a central role in their sports programs." J. Weistart & C. Lowell, The Law of Sports § 5.12 (1979). The NCAA's member institutions have designed their competitive athletic programs "to be a vital part of the educational system." Constitution and Interpretations of the NCAA, Art. II, § 2(a) (1982-1983), reprinted in App. 216. Deviations from this goal, produced by a persistent and perhaps inevitable desire to "win at all costs," have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike. See G. Hanford, Report to the American Council on Education, An Inquiry into the Need for and Feasibility of a National Study of Intercollegiate Athletics 74-76 (1974) (Hanford); Marco, The Place of Intercollegiate Athletics in Higher Education: The Responsibility of the Faculty, 31 J.Higher Educ. 422, 426 (1968). The fundamental policy underlying the NCAA's regulatory program, therefore, is to minimize such deviations "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports." Constitution and Interpretations of the NCAA, Art. II, § 2(a), reprinted in App. 216. See 546 F. Supp. 1276, 1309 (WD Okla.1982).

The NCAA, in short, "exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education, as distinguished from realizing maximum return on it as an entertainment commodity." *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494 (DC 1983), aff'd, 236 U.S. App.D.C. 311, 735 F.2d 577 (1984). In pursuing this goal, the organization and its members seek to provide a public good—a viable system of amateur athletics—that most likely could not be provided in a perfectly competitive market. See *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (CA5 1977). "Without regulation, the desire of member institutions to remain athletically competitive would lead them to engage in activities that deny amateurism to the public. No single institution could confidently enforce its own standards, since it could not trust its competitors to do the same." Note, Antitrust and Nonprofit Entities, 94 Harv.L.Rev. 802, 817-818 (1981). The history of intercollegiate athletics prior to the advent of the NCAA provides ample support for this conclusion. By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.

In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members, many of which "are similar to those which are summarily condemned when undertaken in a more traditional business setting." Weistart & Lowell, *supra*, § 5.12.b. Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student athletes, see, e.g., *Justice v. NCAA*, 577 F. Supp. 356 (Ariz.1983), and the number of coaches a school may hire for its football and basketball programs, see, e.g., *Hennessey v. NCAA*, *supra*; it also has prohibited athletes who formerly have been compensated for playing from participating in intercollegiate competition, see, e.g., *Jones v. NCAA*, 392 F. Supp. 295 (Mass.1975), restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games played, and many other aspects of intercollegiate athletics. See 707 F.2d 1147, 1153 (CA10 1983); 546 F. Supp. at 1309. One clear effect of most, if not all, of these regulations is to prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profitmaking objectives would overshadow educational objectives." *Kupec v. Atlantic Coast Conference*, 399 F. Supp. 1377, 1380 (MDNC 1975). Significantly, neither the Court of Appeals nor this Court questions the validity of these regulations under the Rule of Reason. See *ante* at 468 U.S. 100-102, 117; 707 F.2d at 1153.

Notwithstanding the contrary conclusion of the District Court, 546 F. Supp. at 1316, and the majority, *ante* at 468 U.S. 117, I do not believe that the restraint under consideration in this case the NCAA's television plan—differs fundamentally for antitrust purposes from the other seemingly anticompetitive aspects of the organization's broader program of self-regulation. The television plan, like many of the NCAA's actions, furthers several complementary ends. Specifically, the plan is designed

> "to reduce, insofar as possible, the adverse effects of live television . . . upon football game attendance and, in turn, upon the athletic and related educational

> programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." App. 35.

See also *id.* at 244, 323, 640, 651, 672. More generally, in my view, the television plan reflects the NCAA's fundamental policy of preserving amateurism and integrating athletics and education. Nor does the District Court's finding that the plan is intended to maximize television revenues, 546 F. Supp. at 1288-1289, 1315-1316, warrant any implication that the NCAA and its member institutions pursue this goal without regard to the organization's stated policies.

Before addressing the infirmities in the Court's opinion, I should state my understanding of what the Court holds. To do so, it is necessary first to restate the essentials of the NCAA's television plan and to refer to the course of this case in the lower courts. Under the plan at issue, 4-year contracts were entered into with the American Broadcasting Cos. (ABC), Columbia Broadcasting System (CBS), and Turner Broadcasting System (Turner) after competitive bidding. Every fall, ABC and CBS were to present 14 exposures of college football and Turner would show 19 evening games. The overall price for each network was stated in the contracts. The networks select the games to be telecast and pay directly to the colleges involved what has developed to be a uniform fee for each game telecast. Unless within one of the exceptions, only the designated number of games may be broadcast, and no NCAA member may arrange for televising its games other than pursuant to the plan. Under this scheme, of course, NCAA members must compete against one another for television appearances, although this competition is limited somewhat by the fact that no college may appear on television more than six times in any 2-year period. In 1983, 242 games were televised, 89 network games and 153 under the exceptions provided in the television plan. In 1983, 173 schools appeared on television, 89 on network games and an additional 84 teams under the exceptions. Report of the 1983 NCAA Football Television Committee to the 78th Annual Convention of the NCAA 61-65 (1984).[1]

The District Court held that the plan constituted price-fixing and output limitation illegal per se under § 1 of the Sherman Act; it also held that the scheme was an illegal group boycott, was monopolization forbidden by § 2, and was, in any event, an unreasonable restraint of trade. It then entered an injunction that, for all practical purposes, excluded the NCAA from interfering with or regulating its members' arrangements for televising their football games. The Court of Appeals, while disagreeing with the boycott and monopolization holdings, otherwise upheld the

1. Television plans with similar features have been in place since 1951. The 1951-1953 plans were submitted to the Antitrust Division of the Department of Justice for review. The Department took the matter "under study," App. 284-285, and, until this litigation, has apparently never taken the position that the NCAA's television plans were unlawful.

District Court's judgment that the television plan violated the Sherman Act, focusing almost entirely on the price-fixing and output-limiting aspects of the television plan. The Court of Appeals, however, differed with the District Court with respect to the injunction. After noting that the injunction vested exclusive control of television rights in the individual schools, the court stated that, "[w]hile we hold that the NCAA cannot lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case." 707 F.2d at 1162. The court expressly stated, for example, that the NCAA could prevent its members from telecasting games on Friday night in competition with high school games, ibid., emphasized that the disparity in revenue between schools could be reduced by "[a] properly drawn system of pass-over payments to ensure adequate athletic funding for schools that do not earn substantial television revenues," *id.* at 1159, and indicated that it was not outlawing "membership-wide contract[s] with opt-out and pass-over payment provisions, or blackout rules." *Id.* at 1162. It nevertheless left the District Court's injunction in full force and remanded the case for further proceedings in light of its opinion. Anticipating that the Court would grant certiorari, I stayed the judgment of the Court of Appeals. 463 U.S. 1311 (1983).

In affirming the Court of Appeals, the Court first holds that the television plan has sufficient redeeming virtues to escape condemnation as a per se violation of the Sherman Act, this because of the inherent characteristics of competitive athletics and the justifiable role of the NCAA in regulating college athletics. It nevertheless affirms the Court of Appeals' judgment that the NCAA plan is an unreasonable restraint of trade because of what it deems to be the plan's price-fixing and output-1imiting aspects. As I shall explain, in reaching this result, the Court traps itself in commercial antitrust rhetoric and ideology, and ignores the context in which the restraints have been imposed. But it is essential at this point to emphasize that neither the Court of Appeals nor this Court purports to hold that the NCAA may not (1) require its members who televise their games to pool and share the compensation received among themselves, with other schools, and with the NCAA; (2) limit the number of times any member may arrange to have its games shown on television; or (3) enforce reasonable blackout rules to avoid head-to-head competition for television audiences. As I shall demonstrate, the Court wisely and correctly does not condemn such regulations. What the Court does affirm is the Court of Appeals' judgment that the NCAA may not limit the number of games that are broadcast on television, and that it may not contract for an overall price that has the effect of setting the price for individual game broadcast rights.[2] I disagree with the Court in these respects.

2. This litigation was triggered by the NCAA's response to an attempt by the College Football Association (CFA), an organization of the more dominant football-playing schools and conferences, to develop an independent television plan. To the extent that its plan contains features similar to those condemned as anticompetitive by the Court, the CFA may well have antitrust problems of its own. To the extent that they desire continued membership in the NCAA, moreover, participation in a television plan developed by the CFA will not exempt football powers like

II

"In a competitive market," the District Court observed, "each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free to sell that right to any entity it chose," and "for whatever price it could get." 546 F. Supp. at 1318. Under the NCAA's television plan, member institutions' competitive freedom is restrained because, for the most part, television rights are bought and sold, not on a per-game basis, but as a package deal. With limited exceptions not particularly relevant to antitrust scrutiny of the plan, broadcasters wishing to televise college football must be willing and able to purchase a package of television rights without knowing in advance the particular games to which those rights apply. The real negotiations over price and terms take place between the broadcasters and the NCAA, rather than between the broadcasters and individual schools. Knowing that some games will be worth more to them than others, the networks undoubtedly exercise whatever bargaining power they possess to ensure that the minimum aggregate compensation they agree to provide for the package bears some relation to the average value to them of the games they anticipate televising. Because some schools' games contribute disproportionately to the total value of the package, see *id.* at 1293, the manner in which the minimum aggregate compensation is distributed among schools whose games are televised has given rise to a situation under which less prominent schools receive more in rights fees than they would receive in a competitive market, and football powers like respondents receive less. *Id.* at 1315.

As I have said, the Court does not hold, nor did the Court of Appeals hold, that this redistributive effect, alone, would be sufficient to subject the television plan to condemnation under § 1 of the Sherman Act. Nor should it, for an agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges, and of minimizing the tendency to professionalism in the dominant schools. Sharing with the NCAA itself is also a price legitimately exacted in exchange for the numerous benefits of membership in the NCAA, including its many-faceted efforts to maintain a system of competitive, amateur athletics. For the same reasons, limiting the number of television appearances by any college is an essential attribute of a balanced amateur athletic system. Even with shared television revenues, unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others, and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements.

The Court relies instead primarily on the District Court's findings that (1) the television plan restricts output; and (2) the plan creates a noncompetitive price structure that is unresponsive to viewer demand. Ante at 468 U.S. 104-106. See, e.g., 546 F. Supp. at 1318-1319. These findings notwithstanding, I am unconvinced that the television plan has a substantial anticompetitive effect.

respondents from the many kinds of NCAA controls over television appearances that the Court does not purport to invalidate.

First, it is not clear to me that the District Court employed the proper measure of output. I am not prepared to say that the District Court's finding that "many more college football games would be televised" in the absence of the NCAA controls, *id.* at 1294, is clearly erroneous. To the extent that output is measured solely in terms of the number of televised games, I need not deny that it is reduced by the NCAA's television plan. But this measure of output is not the proper one. The District Court found that eliminating the plan would reduce the number of games on network television and increase the number of games shown locally and regionally. *Id.* at 1307. It made no finding concerning the effect of the plan on total viewership, which is the more appropriate measure of output or, at least, of the claimed anticompetitive effects of the NCAA plan. This is the NCAA's position, and it seems likely to me that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football. The NCAA would surely be an irrational "profit maximizer" if this were not the case. In the absence of a contrary finding by the District Court, I cannot conclude that respondents carried their burden of showing that the television plan has an adverse effect on output, and is therefore anticompetitive.

Second, and even more important, I am unconvinced that respondents have proved that any reduction in the number of televised college football games brought about by the NCAA's television plan has resulted in an anticompetitive increase in the price of television rights. The District Court found, of course, that for wheat or widgets. Reductions in output by monopolists in most product markets enable producers to exact a higher price for the same product. By restricting the number of games that can be televised, however, the NCAA creates a new product—exclusive television rights—that are more valuable to networks than the products that its individual members could market independently.

The television plan makes a certain number of games available for purchase by television networks and limits the incidence of head-to-head competition between football telecasts for the available viewers. Because competition is limited, the purchasing network can count on a larger share of the audience, which translates into greater advertising revenues and, accordingly, into larger payments per game to the televised teams. There is thus a relationship between the size of the rights payments and the value of the product being purchased by the networks; a network purchasing a series of games under the plan is willing to pay more than would one purchasing the same games in the absence of the plan, since the plan enables the network to deliver a larger share of the available audience to advertisers, and thus to increase its own revenues. In short, by focusing only on the price paid by the networks for television rights, rather than on the nature and quality of the product delivered by the NCAA and its member institutions, the District Court, and this Court as well, may well have deemed anticompetitive a rise in price that more properly should be attributed to an increase in output, measured in terms of viewership.

Third, the District Court's emphasis on the prices paid for particular games seems misdirected and erroneous as a matter of law. The distribution of the minimum aggregate fees among participants in the television plan is, of course, not wholly based on a competitive price structure that is responsive to viewer demand, and is only partially related to the value those schools contribute to the total package the networks agree to buy. But as I have already indicated, see "the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee." *Id.* at 1294. Undoubtedly, this is true. But the market for television rights to college football competitions should not be equated to the markets *supra* at 468 U.S. 128, this "redistribution" of total television revenues is a wholly justifiable, even necessary, aspect of maintaining a system of truly competitive college teams. As long as the NCAA cannot artificially fix the price of the entire package and demand supercompetitive prices, this aspect of the plan should be of little concern: and I find little, if anything, in the record to support the notion that the NCAA has power to extract from the television networks more than the broadcasting rights are worth in the marketplace.

III

Even if I were convinced that the District Court did not err in failing to look to total viewership, as opposed to the number of televised games, when measuring output and anticompetitive effect, and in failing fully to consider whether the NCAA possesses power to fix the package price, as opposed to the distribution of that package price among participating teams, I would nevertheless hold that the television plan passes muster under the Rule of Reason. The NCAA argues strenuously that the plan and the network contracts "are part of a joint venture among many of the nation's universities to create a product—high-quality college football—and offer that product in a way attractive to both fans in the stadiums and viewers on [television]. The cooperation in producing the product makes it more competitive against other [television] (and live) attractions." Brief for Petitioner 15. The Court recognizes that, "[i]f the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." Ante at 468 U.S. 115, n. 55. See *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 433 U.S. 54-57 (1977). It rejects the NCAA's proffered procompetitive justification, however, on the ground that college football is a unique product for which there are no available substitutes, and "there is no need for collective action in order to enable the product to compete against its nonexistent competitors." Ante at 468 U.S. 115 (footnote omitted). This proposition is singularly unpersuasive.

It is one thing to say that "NCAA football is a unique product," 546 F. Supp. at 1299, that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers, and that competitors are unable to offer programming that can attract a similar audience." Ante at 468 U.S. 111 (footnote omitted). See 707 F.2d at 1158-1159; 546 F. Supp. at 1298-1300. It is quite another, in my view, to say that maintenance or enhancement of the quality of NCAA football telecasts is unnecessary to enable those telecasts to compete effectively against other forms of entertainment. The NCAA has no monopoly power when competing against other types of entertainment. Should the quality of the NCAA's product "deteriorate to any perceptible degree, or should the cost of 'using' its product rise, some fans undoubtedly would turn to another form of entertainment. . . . Because of the broad possibilities for alternative forms of entertainment," the NCAA "properly belongs in the broader entertainment' market, rather than in . . . [a] narrower marke[t]" like sports or football. Grauer, Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model, 82 Mich.L.Rev. 1, 34, n. 156 (1983). See *National Football League v. North American Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from the denial of certiorari); R. Atwell, B. Grimes, & D. Lopiano, The Money Game 32-33 (1980); Hanford, at 67; J. Michener, Sports in America 208-209 (1976); Note, 87 Yale L.J. at 661, and n. 31.

The NCAA has suggested a number of plausible ways in which its television plan might enhance the ability of college football telecasts to compete against other forms of entertainment. Brief for Petitioner 22-25. Although the District Court did conclude that the plan is "not necessary for effective marketing of the product," 546 F Supp., at 1307, its finding was directed only at the question whether college football telecasts would continue in the absence of the plan. It made no explicit findings concerning the effect of the plan on viewership, and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing the market penetration of NCAA football. See also 707 F.2d at 1154-1156, 1160. The District Court's finding that network coverage of NCAA football would likely decrease if the plan were struck down, 546 F. Supp. at 1307, in fact, strongly suggests the validity of the NCAA's position. On the record now before the Court, therefore, I am not prepared to conclude that the restraints imposed by the NCAA's television plan are "such as may suppress or even destroy competition," rather than "such as merely regulat[e], and perhaps thereby promot[e], competition." *Chicago Board of Trade v. United States*, 246 U.S. 231, 246 U.S. 238 (1918).

IV

Finally, I return to the point with which I began—the essentially noneconomic nature of the NCAA's program of self-regulation. Like Judge Barrett, who dissented in the Court of Appeals, I believe that the lower courts "erred by subjugating the NCAA's educational goals (and, incidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of [an] 'every school for itself' approach to television contract bargaining." 707 F.2d at 1168. Although the NCAA does not enjoy blanket immunity from the antitrust laws, cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), it is important to remember that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 359 U.S. 213, n.7 (1959).

The fact that a restraint operates on nonprofit educational institutions as distinguished from business entities is as "relevant in determining whether that particular restraint violates the Sherman Act" as is the fact that a restraint affects a profession, rather than a business. *Goldfarb v. Virginia State Bar*, *supra*, at 788, n.17. Cf. *Community Communications Co. v. Boulder*, 455 U.S. 40, 455 U.S. 56, n.20 (1982). The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members, and these noneconomic goals "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia State Bar*, *supra*, at 421 U.S. 788, n.17. The Court of Appeals, like the District Court, flatly refused to consider what it termed "noneconomic" justifications advanced by the NCAA in support of the television plan. It was of the view that our decision in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), precludes reliance on noneconomic factors in assessing the reasonableness of the television plan. 707 F.2d at 1154; see Tr. of Oral Arg. 24-25. This view was mistaken, and I note that the Court does not in so many words repeat this error.

Professional Engineers did make clear that antitrust analysis usually turns on "competitive conditions" and "economic conceptions." 435 U.S. at 435 U.S. 690, and n.16. Ordinarily, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 435 U.S. 691. The purpose of antitrust analysis, the Court emphasized, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Id.* at 435 U.S. 692. Broadly read, these statements suggest that noneconomic values like the promotion of amateurism and fundamental educational objectives could not save the television plan from condemnation under the Sherman Act. But these statements were made in response to "public interest" justifications proffered in defense of a ban on competitive bidding imposed by practitioners engaged in standard, profit-motivated commercial activities. The primarily noneconomic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen, Gulland, Byrne, & Steinbach, Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges, 52 Ford. L. Rev. 717, 728 (1984), and neither Professional Engineers nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate noneconomic values they promote.

When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. Ante at 468 U.S. 119. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, "[t]he restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism, so that intercollegiate athletics supplement, rather than inhibit, educational achievement." 707 F.2d at 1167 (Barrett, J., dissenting). The collateral consequences of the spreading of regional and national appearances among a number of schools are many: the television plan, like the ban on compensating student athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice, see Note, 87 Yale L.J. at 676, n. 106; it helps ensure the economic viability of athletic programs at a wide variety of schools with weaker football teams; and it "promot[es] competitive football among many and varied amateur teams nationwide." Gulland, Byrne, & Steinbach, *supra*, at 722 (footnote omitted). These important contributions, I believe, are sufficient to offset any minimal anticompetitive effects of the television plan.

For all of these reasons, I would reverse the judgment of the Court of Appeals. At the very least, the Court of Appeals should be directed to vacate the injunction of the District Court pending the further proceedings that will be necessary to amend the outstanding injunction to accommodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games.

FTC v. INDIANA FED'N OF DENTISTS, 476 U.S. 447 (1986)

JUSTICE WHITE delivered the opinion of the Court.

This case concerns commercial relations among certain Indiana dentists, their patients, and the patients' dental health care insurers. The question presented is whether the Federal Trade Commission correctly concluded that a conspiracy among dentists to refuse to submit x-rays to dental insurers for use in benefits determinations constituted an "unfair method of competition" in violation of § 6 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45 (1982 ed. and Supp. II).

I

Since the 1970's, dental health insurers, responding to the demands of their policyholders, have attempted to contain the cost of dental treatment by, among other devices, limiting payment of benefits to the cost of the "least expensive yet adequate treatment" suitable to the needs of individual patients. Implementation of such cost-containment measures, known as "alternative benefits" plans, requires evaluation by the insurer of the diagnosis and recommendation of the treating dentist, either in advance of or following the provision of care. In order to carry out such evaluation, insurers frequently request dentists to submit, along with insurance claim forms requesting payment of benefits, any dental x-rays that have been used by the dentist in examining the patient, as well as other information concerning their diagnoses and treatment recommendations. Typically, claim forms and accompanying x-rays are reviewed by lay claims examiners, who either approve payment of claims or, if the materials submitted raise a question whether the recommended course of treatment is in fact necessary, refer claims to dental consultants, who are licensed dentists, for further review. On the basis of the materials available, supplemented where appropriate by further diagnostic aids, the dental consultant may recommend that the insurer approve a claim, deny it, or pay only for a less expensive course of treatment.

Such review of diagnostic and treatment decisions has been viewed by some dentists as a threat to their professional independence and economic wellbeing. In the early 1970's, the Indiana Dental Association, a professional organization comprising some 85% of practicing dentists in the State of Indiana, initiated an aggressive effort to hinder insurers' efforts to implement alternative benefits plans by enlisting member dentists to pledge not to submit x-rays in conjunction with claim forms.[1]

1. A presentation made in 1974 by Dr. David McClure, an Association official and later one of the founders of respondent Indiana Federation of Dentists, is revealing as to the motives underlying the dentists' resistance to the provision of x-rays for use by insurers in making alternative benefits determinations:

The Association's efforts met considerable success: large numbers of dentists signed the pledge, and insurers operating in Indiana found it difficult to obtain compliance with their requests for x-rays, and accordingly had to choose either to employ more expensive means of making alternative benefits determinations (for example, visiting the office of the treating dentist or conducting an independent oral examination) or to abandon such efforts altogether.

By the mid-1970's, fears of possible antitrust liability had dampened the Association's enthusiasm for opposing the submission of x-rays to insurers. In 1979, the Association and a number of its constituent societies consented to a Federal Trade Commission order requiring them to cease and desist from further efforts to prevent member dentists from submitting x-rays. *In re Indiana Dental Assn.*, 93 F.T.C. 392. Not all Indiana dentists were content to leave the matter of submitting x-rays to the individual dentist. In 1976, a group of such dentists formed the Indiana Federation of Dentists, respondent in this case, in order to continue to pursue the Association's policy of resisting insurers' requests for x-rays. The Federation, which styled itself a "union" in the belief that this label would stave off antitrust liability,[2] immediately promulgated a "work rule" forbidding its members to submit x-rays to dental insurers in conjunction with claim forms. Although the Federation's membership was small, numbering less than 100, its members were highly concentrated in and around three Indiana communities: Anderson, Lafayette, and Fort Wayne. The Federation succeeded in enlisting nearly 100% of the dental specialists in the Anderson area, and approximately 67% of the dentists in and around Lafayette. In the areas of its strength, the Federation was successful in continuing to enforce the Association's prior policy of refusal to submit x-rays to dental insurers.

> "The problems associated with third-party programs are many, but I believe the 'Indiana Plan' [i.e., the policy of refusing to submit x-rays] to be sound, and, if we work together, we can win this battle. We are fighting an economic war where the very survival of our profession is at stake."
>
> "How long can some of the leaders of dentistry in other states be so complacent and willing to fall into the trap that is being set for us. If only they would take the time to see from whence come the arrows that are heading in our direction. The Delta Dental Plans have bedded down with the unions, and have been a party to setting up the greatest controls that any profession has ever known in a free society. . . ."
>
> "The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar."
>
> "Already we are locked into a fee freeze that could completely control the quality of dental care, if left on long enough."

FTC Complaint Counsel's Trial Exhibit CX 372A, F, App. 104

2. Respondent no longer makes any pretense of arguing that it is immune from antitrust liability as a labor organization.

In 1978, the Federal Trade Commission issued a complaint against the Federation, alleging in substance that its efforts to prevent its members from complying with insurers' requests for x-rays constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. Following lengthy proceedings, including a full evidentiary hearing before an Administrative Law Judge, the Commission ruled that the Federation's policy constituted a violation of § 5, and issued an order requiring the Federation to cease and desist from further efforts to organize dentists to refuse to submit x-rays to insurers. *In re Indiana Federation of Dentists*, 101 F.T.C. 57 (1983). The Commission based its ruling on the conclusion that the Federation's policy of requiring its members to withhold x-rays amounted to a conspiracy in restraint of trade that was unreasonable, and hence unlawful under the standards for judging such restraints developed in this Court's precedents interpreting § 1 of the Sherman Act. *E.g., Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). The Commission found that the Federation had conspired both with the Indiana Dental Association and with its own members to withhold cooperation with dental insurers' requests for x-rays; that, absent such a restraint, competition among dentists for patients would have tended to lead dentists to compete with respect to their policies in dealing with patients' insurers; and that, in those areas where the Federation's membership was strong, the Federation's policy had had the actual effect of eliminating such competition among dentists and preventing insurers from obtaining access to x-rays in the desired manner. These findings of anticompetitive effect, the Commission concluded, were sufficient to establish that the restraint was unreasonable, even absent proof that the Federation's policy had resulted in higher costs to the insurers and patients than would have occurred had the x-rays been provided. Further, the Commission rejected the Federation's argument that its policy of withholding x-rays was reasonable because the provision of x-rays might lead the insurers to make inaccurate determinations of the proper level of care, and thus injure the health of the insured patients: the Commission found no evidence that use of x-rays by insurance companies in evaluating claims would result in inadequate dental care. Finally, the Commission rejected the Federation's contention that its actions were exempt from antitrust scrutiny because the withholding of x-rays was consistent with the law and policy of the State of Indiana against the use of x-rays in benefit determination by insurance companies. The Commission concluded that no such policy existed, and that, in any event, the existence of such a policy would not have justified the dentists' private and unsupervised conspiracy in restraint of trade.

The Federation sought judicial review of the Commission's order in the United States Court of Appeals for the Seventh Circuit, which vacated the order on the ground that it was not supported by substantial evidence. 745 F.2d 1124 (1984). Accepting the Federation's characterization of its rule against submission of x-rays as merely an ethical and moral policy designed to enhance the welfare of dental patients, the majority concluded that the Commission's findings that the policy was anticompetitive were erroneous. According to the majority, the evidence did not support the finding that, in the absence of restraint, dentists would compete for patients by offering cooperation with the requests of the patients' insurers, nor, even accepting that finding, was there evidence that the Federation's efforts had prevented such competition. Further, the court held that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market. Finally, the majority faulted the Commission for not finding that the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers. The third member of the Court of Appeals panel concurred in the judgment solely on the ground that there was insufficient proof that cooperation with insurers was an element of dental services as to which dentists would tend to compete.

We granted certiorari, 474 U.S. 900 (1985), in order to consider the Commission's claim that, in vacating the Commission's order, the Court of Appeals misconstrued applicable principles of antitrust law and "misapprehended or grossly misapplied' the substantial evidence test," *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 452 U.S. 523 (1981) (citation omitted). We now reverse.

II

The issue is whether the Commission erred in holding that the Federation's policy of refusal to submit x-rays to dental insurers for use in benefits determinations constituted an "unfair method of competition," unlawful under § 5 of the Federal Trade Commission Act. The question involves review of both factual and legal determinations. As to the former, our review is governed by 15 U.S.C. § 45(c), which provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The statute forbids a court to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 291 U.S. 73 (1934). Rather, as under the essentially identical "substantial evidence" standard for review of agency factfinding, the court must accept the Commission's findings of fact if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 340 U.S. 477 (1951); see also *Beneficial Corp. v. FTC*, 542 F.2d 611, 616 (CA3 1976), cert. denied, 430 U.S. 983 (1977).

The legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are, by contrast, for the courts to resolve, although, even in considering such issues, the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as "unfair." See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 381 U.S. 367-368 (1966); *FTC v. Cement Institute*, 333 U.S. 683, 333 U.S. 720 (1948). The standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, see FTC v. Cement

Institute, *supra*, at 333 U.S. 689-695, but also practices that the Commission determines are against public policy for other reasons, see *FTC v. Sperry & Hutchinson Co.*, 405 U.S. at 405 U.S. 244. Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair. See *id*. at 405 U.S. 245-250; cf. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). In the case now before us, the sole basis of the FTC's finding of an unfair method of competition was the Commission's conclusion that the Federation's collective decision to withhold x-rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1. Accordingly, the legal question before us is whether the Commission's factual findings, if supported by evidence, make out a violation of Sherman Act § 1.

III

The relevant factual findings are that the members of the Federation conspired among themselves to withhold x-rays requested by dental insurers for use in evaluating claims for benefits, and that this conspiracy had the effect of suppressing competition among dentists with respect to cooperation with the requests of the insurance companies. As to the first of these findings, there can be no serious dispute: abundant evidence in the record reveals that one of the primary reasons—if not the primary reason—for the Federation's existence was the promulgation and enforcement of the so-called "work rule" against submission of x-rays in conjunction with insurance claim forms.

As for the second crucial finding—that competition was actually suppressed—the Seventh Circuit held it to be unsupported by the evidence, on two theories. First, the court stated that the evidence did not establish that cooperation with requests for information by patients' insurance companies was an aspect of the provision of dental services with respect to which dentists would, in the absence of some restraint, compete. Second, the court found that, even assuming that dentists would otherwise compete with respect to policies of cooperating or not cooperating with insurance companies, the Federation's policy did not impair that competition, for the member dentists continued to allow insurance companies to use other means of evaluating their diagnoses when reviewing claims for benefits: specifically, "the IFD member dentists allowed insurers to visit the dental office to review and examine the patient's x-rays, along with all of the other diagnostic and clinical aids used in formulating a proper course of dental treatment." 745 F.2d at 1143.

Neither of these criticisms of the Commission's findings is well-founded. The Commission's finding that, "[i]n the absence of . . . concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to . . . comply with the requests of patients' third-party insurers," 101 F.T.C. at 173, finds support not only in common sense and economic theory, upon both of which the FTC may reasonably rely, but also in record documents, including newsletters circulated among Indiana dentists, revealing that Indiana dentists themselves perceived that unrestrained competition tended to lead their colleagues to comply with insurers' requests for x-rays. See App. to Pet. for Cert. 289a, 306a-308a. Moreover, there was evidence that, outside of Indiana, in States where dentists had not collectively refused to submit x-rays, insurance companies found little difficulty in obtaining compliance by dentists with their requests. 101 F.T.C. at 172. A "reasonable mind" could conclude on the basis of this evidence that competition for patients, who have obvious incentives for seeking dentists who will cooperate with their insurers, would tend to lead dentists in Indiana (and elsewhere) to cooperate with requests for information by their patients' insurers.

The Commission's finding that such competition was actually diminished where the Federation held sway also finds adequate support in the record. The Commission found that, in the areas where Federation membership among dentists was most significant (that is, in the vicinity of Anderson and Lafayette), insurance companies were unable to obtain compliance with their requests for submission of x-rays in conjunction with claim forms, and were forced to resort to other, more costly, means of reviewing diagnoses for the purpose of benefit determination. Neither the opinion of the Court of Appeals nor the brief of respondent identifies any evidence suggesting that the Commission's finding that the Federation's policy had an actual impact on the ability of insurers to obtain the x-rays they requested was incorrect. The lower court's conclusion that this evidence is to be discounted because Federation members continued to cooperate with insurers by allowing them to use more costly—indeed, prohibitively costly—methods of reviewing treatment decisions is unpersuasive. The fact remains that the dentists' customers (that is, the patients and their insurers) sought a particular service: cooperation with the insurers' pretreatment review through the forwarding of x-rays in conjunction with claim forms. The Federation's collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. To this extent, at least, competition among dentists with respect to cooperation with the requests of insurers was restrained.

IV

The question remains whether these findings are legally sufficient to establish a violation of § 1 of the Sherman Act—that is, whether the Federation's collective refusal to cooperate with insurers' requests for x-rays constitutes an "unreasonable" restraint of trade. Under our precedents, a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "per se" unreasonable or because it violates what has come to be known as the "Rule of Reason," under which the "test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States*, 246 U.S. at 246 U.S. 238.

The policy of the Federation with respect to its members' dealings with third-party insurers resembles practices that have been labeled "group boycotts": the policy constitutes a concerted refusal to deal on particular terms with patients covered by group dental insurance. Cf. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930). Although this Court has, in the past, stated that group boycotts are unlawful per se, see *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the per se rule. As we observed last Term in *Northwest Wholesale Stationers, Inc. v. Pacific Stationers & Printing Co.*, 472 U.S. 284 (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se*, see *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). Thus, as did the FTC, we evaluate the restraint at issue in this case under the Rule of Reason, rather than a rule of per se illegality.

Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire—the forwarding of x-rays to insurance companies along with claim forms. "While this is not price-fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Society of Professional Engineers*, *supra*, at 435 U.S. 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, *supra*; *Chicago Board of Trade*, *supra*; cf. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)—such an agreement limiting consumer choice by impeding the "ordinary give-and-take of the marketplace," *National Society of Professional Engineers*, *supra*, at 435 U.S. 692, cannot be sustained under the Rule of Reason. No credible argument has been advanced for the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect.

The Federation advances three principal arguments for the proposition that, notwithstanding its lack of competitive virtue, the Federation's policy of withholding x-rays should not be deemed an unreasonable restraint of trade. First, as did the Court of Appeals, the Federation suggests that, in the absence of specific findings by the Commission concerning the definition of the market in which the Federation allegedly restrained trade and the power of the Federation's members in that market, the conclusion that the Federation unreasonably restrained trade is erroneous as a matter of law, regardless of whether the challenged practices might be impermissibly anticompetitive if engaged in by persons who, together, possessed power in a specifically defined market. This contention, however, runs counter to the Court's holding in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., supra*, that, "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and that such a restriction "requires some competitive justification even in the absence of a detailed market analysis." *Id.* at 468 U.S. 109-110. Moreover, even if the restriction imposed by the Federation is not sufficiently "naked" to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. The Commission found that, in two localities in the State of Indiana (the Anderson and Lafayette areas), Federation dentists constituted heavy majorities of the practicing dentists, and that, as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x-rays. Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986). In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.[3]

Second, the Federation, again following the lead of the Court of Appeals, argues that a holding that its policy of withholding x-rays constituted an unreasonable restraint of trade is precluded by the Commission's failure to make any finding that the policy resulted in the provision of dental services that were more costly than those that the patients and their insurers would have chosen were they able to evaluate x-rays in conjunction with claim forms. This argument, too, is unpersuasive. Although it is true that the goal of the insurers in seeking submission of x-rays for use in their review of benefits claims was to minimize costs by choosing the least

3. Because we find that the Commission's findings can be sustained on this basis, we do not address the Commission's contention that the Federation's activities can be condemned regardless of market power or actual effect merely because they constitute a continuation of the restraints formerly imposed by the Indiana Dental Association, which allegedly had market power throughout the State of Indiana.

expensive adequate course of dental treatment, a showing that this goal was actually achieved through the means chosen is not an essential step in establishing that the dentists' attempt to thwart its achievement by collectively refusing to supply the requested information was an unreasonable restraint of trade. A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). Moreover, even if the desired information were in fact completely useless to the insurers and their patients in making an informed choice regarding the least costly adequate course of treatment—or, to put it another way, if the costs of evaluating the information were far greater than the cost savings resulting from its use—the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information: presumably, if that were the case, the discipline of the market would itself soon result in the insurers' abandoning their requests for x-rays. The Federation is not entitled to preempt the working of the market by deciding for itself that its customers do not need that which they demand.

Third, the Federation complains that the Commission erred in failing to consider, as relevant to its Rule of Reason analysis, noncompetitive "quality of care" justifications for the prohibition on provision of x-rays to insurers in conjunction with claim forms. This claim reflects the Court of Appeals' repeated characterization of the Federation's policy as a "legal, moral, and ethical policy of quality dental care, requiring that insurers examine and review all diagnostic and clinical aids before formulating a proper course of dental treatment." 745 F.2d at 1144. The gist of the claim is that x-rays, standing alone, are not adequate bases for diagnosis of dental problems, or for the formulation of an acceptable course of treatment. Accordingly, if insurance companies are permitted to determine whether they will pay a claim for dental treatment on the basis of x-rays, as opposed to a full examination of all the diagnostic aids available to the examining dentist, there is a danger that they will erroneously decline to pay for treatment that is, in fact, in the interest of the patient, and that the patient will as a result be deprived of fully adequate care.

The Federation's argument is flawed both legally and factually. The premise of the argument is that, far from having no effect on the cost of dental services chosen by patients and their insurers, the provision of x-rays will have too great an impact: it will lead to the reduction of costs through the selection of inadequate treatment. Precisely such a justification for withholding information from customers was rejected as illegitimate in the National Society of Professional Engineers case. The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise, and even dangerous, choices. Such an argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers*, *supra*, at 435 U.S. 695. Moreover, there is no particular reason to believe that the provision of information will be more harmful to consumers in the market for dental services than in other markets. Insurers deciding what level of care to pay for are not themselves the recipients of those services, but it is by no means clear that they lack incentives to consider the welfare of the patient, as well as the minimization of costs. They are themselves in competition for the patronage of the patients—or, in most cases, the unions or businesses that contract on their behalf for group insurance coverage—and must satisfy their potential customers not only that they will provide coverage at a reasonable cost, but also that that coverage will be adequate to meet their customers' dental needs. There is thus no more reason to expect dental insurance companies to sacrifice quality in return for cost savings than to believe this of consumers in, say, the market for engineering services. Accordingly, if noncompetitive quality-of-service justifications are inadmissible to justify the denial of information to consumers in the latter market, there is little reason to credit such justifications here.

In any event, the Commission did not, as the Federation suggests, refuse even to consider the quality-of-care justification for the withholding of x-rays. Rather, the Commission held that the Federation had failed to introduce sufficient evidence to establish such a justification: "IFD has not pointed to any evidence—or even argued—that any consumers have, in fact, been harmed by alternative benefits determinations, or that actual determinations have been medically erroneous." 101 F.T.C. at 177. The evidence before the Administrative Law Judge on this issue appears to have consisted entirely of expert opinion testimony, with the Federation's experts arguing that x-rays generally provide an insufficient basis, standing alone, for dental diagnosis, and the Commission's experts testifying that x-rays may be useful in assessing diagnosis of, and appropriate treatment for, a variety of dental complaints. *Id*. at 128-132. The Commission was amply justified in concluding on the basis of this conflicting evidence that, even if concern for the quality of patient care could, under some circumstances, serve as a justification for a restraint of the sort imposed here, the evidence did not support a finding that the careful use of x-rays as a basis for evaluating insurance claims is, in fact, destructive of proper standards of dental care.[4]

In addition to arguing that its conspiracy did not effect an unreasonable restraint of trade, the Federation appears to renew its argument, pressed before both the Commission and the Court of Appeals, that the conspiracy to withhold x-rays is

4. It is undisputed that lay claims examiners employed by insurance companies have no authority to deny claims on the basis of examination of x-rays; rather, initial screening of x-rays serves only as a means of identifying cases that merit further scrutiny by the licensed dentists serving as consultants to the insurers. Any recommendation that benefits be denied or a less expensive course of treatment be pursued is based on the professional judgment of a licensed dentist that the materials available to him—x rays, claim forms, and whatever further diagnostic aids he chooses to consult—are sufficient to indicate that the treating dentist's recommendation is not necessary to the health of the patient. There is little. basis for concluding that, where such a divergence of professional judgment exists, the treatment recommendation made by the patient's dentist should be assumed to be the one that in fact represents the best interests of the patient.

immunized from antitrust scrutiny by virtue of a supposed policy of the State of Indiana against the evaluation of dental x-rays by lay employees of insurance companies. See Brief for Respondent 25-26, and n. 10. Allegedly, such use of x-rays by insurance companies—even where no claim was actually denied without examination of an x-ray by a licensed dentist—would constitute unauthorized practice of dentistry by the insurance company and its employees. The Commission found that this claim had no basis in any authoritative source of Indiana law, see 101 F.T.C. at 181-183, and the Federation has not identified any adequate reason for rejecting the Commission's conclusion. Even if the Commission were incorrect in its reading of the law, however, the Federation's claim of immunity would fail. That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. See *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 312 U.S. 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 471 U.S. 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation.

V

The factual findings of the Commission regarding the effect of the Federation's policy of withholding x-rays are supported by substantial evidence, and those findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act. Since there has been no suggestion that the cease-and-desist order entered by the Commission to remedy this violation is itself improper for any reason distinct from the claimed impropriety of the finding of a violation, the Commission's order must be sustained. The judgment of the Court of Appeals is accordingly

Reversed.

NOTES

1. In 1988, the FTC in *Massachusetts Bd. of Registration in Optometry*[1] articulated a truncated three-step test to be applied to certain restraints in the wake of *Indiana Federation*, *NCAA*, and *BMI*:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price

1. *In re* Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988).

by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry-there are no likely benefits to offset the threat to competition.[2]

2. *Id*. at 604 (emphasis in original).

CALIFORNIA DENTAL ASS'N v. FTC,
526 U.S. 756 (1999)

JUSTICE SOUTER delivered the opinion of the Court.

There are two issues in this case: whether the jurisdiction of the Federal Trade Commission extends to the California Dental Association (CDA), a nonprofit professional association, and whether a "quick look" sufficed to justify finding that certain advertising restrictions adopted by the CDA violated the antitrust laws. We hold that the Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members, but that where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the Court of Appeals performed.

I

The CDA is a voluntary nonprofit association of local dental societies to which some 19,000 dentists belong, including about three-quarters of those practicing in the State. *In re California Dental Assn.*, 121 F.T.C. 190, 196–197 (1996). The CDA is exempt from federal income tax under 26 U.S.C. § 501(c)(6), covering "[b]usiness leagues, chambers of commerce, real-estate boards, [and] boards of trade," although it has for-profit subsidiaries that give its members advantageous access to various sorts of insurance, including liability coverage, and to financing for their real estate, equipment, cars, and patients' bills. The CDA lobbies and litigates in its members' interests, and conducts marketing and public relations campaigns for their benefit. 128 F. 3d 720, 723 (CA9 1997).

The dentists who belong to the CDA through these associations agree to abide by a Code of Ethics (Code) including the following § 10:

> "Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect." App. 33.

The CDA has issued a number of advisory opinions interpreting this section,[1] and through separate advertising guidelines intended to help members comply with the

1. The advisory opinions, which substantially mirror parts of the California Business and Professions Code, see Cal. Bus. & Prof. Code Ann. §§ 651, 1680 (West 1999), include the following propositions:

> "A statement or claim is false or misleading in any material respect when it:

Code and with state law the CDA has advised its dentists of disclosures they must make under state law when engaging in discount advertising.[2]

Responsibility for enforcing the Code rests in the first instance with the local dental societies, to which applicants for CDA membership must submit copies of their own advertisements and those of their employers or referral services to assure compliance with the Code. The local societies also actively seek information about potential Code violations by applicants or CDA members. Applicants who refuse to withdraw or revise objectionable advertisements may be denied membership; and members who, after a hearing, remain similarly recalcitrant are subject to censure, suspension, or expulsion from the CDA. 128 F. 3d, at 724.

The Commission brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated § 5 of

"a. contains a misrepresentation of fact;

"b. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

"c. is intended or is likely to create false or unjustified expectations of favorable results and/or costs;

"d. relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors;

"e. contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

"Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.

"Any advertisement which refers to the cost of dental services and uses words of comparison or relativity—for example, 'low fees'—must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity."

"Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect." 128 F. 3d 720, 723–724 (CA9 1997) (some internal quotation marks omitted).

2. The disclosures include:

"1. The dollar amount of the nondiscounted fee for the service[.]

"2. Either the dollar amount of the discount fee or the percentage of
the discount for the specific service[.]

"3. The length of time that the discount will be offered[.]

"4. Verifiable fees[.]

"5. [The identity of] [s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." *Id.*, at 724.

the FTC Act, 38 Stat. 717, 15 U.S.C. § 45.[3] The complaint alleged that the CDA had unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. Complaint ¶7. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA, which, the ALJ noted, had itself "stated that a selection of its programs and services has a potential value to members of between $22,739 and $65,127," 121 F.T.C., at 207. He found that, although there had been no proof that the CDA exerted market power, no such proof was required to establish an antitrust violation under *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988), since the CDA had unreasonably prevented members and potential members from using truthful, nondeceptive advertising, all to the detriment of both dentists and consumers of dental services. He accordingly found a violation of § 5 of the FTC Act. 121 F.T.C., at 272–273.

The Commission adopted the factual findings of the ALJ except for his conclusion that the CDA lacked market power, with which the Commission disagreed. The Commission treated the CDA's restrictions on discount advertising as illegal per se. 128 F. 3d, at 725. In the alternative, the Commission held the price advertising (as well as the nonprice) restrictions to be violations of the Sherman and FTC Acts under an abbreviated rule-of-reason analysis. One Commissioner concurred separately, arguing that the Commission should have applied the *Mass. Bd*. standard, not the per se analysis, to the limitations on price advertising. Another Commissioner dissented, finding the evidence insufficient to show either that the restrictions had an anticompetitive effect under the rule of reason, or that the CDA had market power. 128 F. 3d, at 725.

The Court of Appeals for the Ninth Circuit affirmed, sustaining the Commission's assertion of jurisdiction over the CDA and its ultimate conclusion on the merits. *Id*., at 730. The court thought it error for the Commission to have applied per se analysis to the price advertising restrictions, finding analysis under the rule of reason required for all the restrictions. But the Court of Appeals went on to explain that the Commission had properly

> "applied an abbreviated, or 'quick look,' rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. See [*National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 109– 110, and n. 39 (1984)] ('The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.' [*Ibid*. (citing P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981) (parenthetical omitted)).] It allows the

3. The FTC Act's prohibition of unfair competition and deceptive acts or practices, 15 U.S.C. § 45(a)(1), overlaps the scope of § 1 of the Sherman Act, 15 U.S.C. § 1, aimed at prohibiting restraint of trade, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454–455 (1986), and the Commission relied upon Sherman Act law in adjudicating this case, *In re California Dental Assn.*, 121 F.T.C. 190, 292, n.5 (1996).

> condemnation of a 'naked restraint' on price or output without an 'elaborate industry analysis.' *Id.*, at 109." *Id.*, at 727.

The Court of Appeals thought truncated rule-of-reason analysis to be in order for several reasons. As for the restrictions on discount advertising, they "amounted in practice to a fairly 'naked' restraint on price competition itself," *ibid*. The CDA's procompetitive justification, that the restrictions encouraged disclosure and prevented false and misleading advertising, carried little weight because "it is simply infeasible to disclose all of the information that is required," *id*., at 728, and "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *ibid*. As to nonprice advertising restrictions, the court said that

> "[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services. See Areeda & Hovenkamp, Antitrust Law ¶1505 at 693–94 (Supp. 1997). . . . The restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so. . . . Under these circumstances, we think that the restriction is a sufficiently naked restraint on output to justify quick look analysis." *Ibid*.

The Court of Appeals went on to hold that the Commission's findings with respect to the CDA's agreement and intent to restrain trade, as well as on the effect of the restrictions and the existence of market power, were all supported by substantial evidence. *Id*., at 728–730. In dissent, Judge Real took the position that the Commission's jurisdiction did not cover the CDA as a nonprofit professional association engaging in no commercial operations. *Id*., at 730. But even assuming jurisdiction, he argued, full-bore rule-ofreason analysis was called for, since the disclosure requirements were not naked restraints and neither fixed prices nor banned nondeceptive advertising. *Id*., at 730–731.

We granted certiorari to resolve conflicts among the Circuits on the Commission's jurisdiction over a nonprofit professional association[4] and the occasions for abbreviated rule-of-reason analysis.[5] 524 U.S. 980 (1998). We now vacate the judgment of the Court of Appeals and remand.

4. Compare *In re American Medical Assn.*, 94 F.T.C. 701, 983–984, aff 'd, 638 F. 2d 443 (CA2 1980), aff 'd by an equally divided Court, 455 U.S. 676 (1982) (per curiam), and *FTC v. National Comm'n on Egg Nutrition*, 517 F. 2d 485, 487–488 (CA7 1975), with *Community Blood Bank v. FTC*, 405 F. 2d 1011, 1017 (CA8 1969).

5. Cf. *Bogan v. Hodgkins*, 166 F. 3d 509, 514, and n.6 (CA2 1999); *United States v. Brown University*, 5 F. 3d 658, 669 (CA3 1993); *Chicago Professional Sports Limited Partnership v. National Basketball Assn.*, 961 F. 2d 667, 674–676 (CA7 1992); *Law v. National Collegiate Athletic Assn.*, 134 F. 3d 1010, 1020 (CA10 1998); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F. 2d 589, 594–595 (CA1 1993).

II

The FTC Act gives the Commission authority over "persons, partnerships, or corporations," 15 U.S.C. § 45(a)(2), and defines "corporation" to include "any company . . . or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members," § 44. Although the Circuits have not agreed on the precise extent of this definition, see n. 4, supra, the Commission has long held that some circumstances give it jurisdiction over an entity that seeks no profit for itself. While the Commission has claimed to have jurisdiction over a nonprofit entity if a substantial part of its total activities provides pecuniary benefits to its members, see In re American Medical Assn., 94 F.T.C. 701, 983–984 (1980), respondent now advances the slightly different formulation that the Commission has jurisdiction "over anticompetitive practices by nonprofit associations whose activities provid[e] substantial economic benefits to their for-profit members' businesses." Brief for Respondent 20.

Respondent urges deference to this interpretation of the Commission's jurisdiction as reasonable. *Id.*, at 25–26 (citing *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–382 (1988) (Scalia, J., concurring) (*Chevron* deference applies to agency's interpretation of its own statutory jurisdiction)). But we have no occasion to review the call for deference here, the interpretation urged in respondent's brief being clearly the better reading of the statute under ordinary principles of construction.

The FTC Act is at pains to include not only an entity "organized to carry on business for its own profit," 15 U.S.C. § 44, but also one that carries on business for the profit "of its members," *ibid*. While such a supportive organization may be devoted to helping its members in ways beyond immediate enhancement of profit, no one here has claimed that such an entity must devote itself single-mindedly to the profit of others. It could, indeed, hardly be supposed that Congress intended such a restricted notion of covered supporting organizations, with the opportunity this would bring with it for avoiding jurisdiction where the purposes of the FTC Act would obviously call for asserting it.

Just as the FTC Act does not require that a a supporting organization must devote itself entirely to its members' profits, neither does the Act say anything about how much of the entity's activities must go to raising the members' bottom lines. There is accordingly no apparent reason to let the statute's application turn on meeting some threshold percentage of activity for this purpose, or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. To be sure, proximate relation to lucre must appear; the FTC Act does not cover all membership organizations of profit-making corporations without more, and an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach, even though the quality of professional services ultimately affects the profits of those who deliver them.

There is no line drawing exercise in this case, however, where the CDA's contributions to the profits of its individual members are proximate and apparent. Through for-profit subsidiaries, the CDA provides advantageous insurance and preferential financing arrangements for its members, and it engages in lobbying, litigation, marketing, and public relations for the benefit of its members' interests. This congeries of activities confers far more than de minimis or merely presumed economic benefits on CDA members; the economic benefits conferred upon the CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit,"[6] which the FTC Act makes the jurisdictional touchstone. There is no difficulty in concluding that the Commission has jurisdiction over the CDA.

The logic and purpose of the FTC Act comport with this result. The FTC Act directs the Commission to "prevent" the broad set of entities under its jurisdiction "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). Nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts. It may even be possible that a nonprofit entity up to no good would have certain advantages, not only over a

6. This conclusion is consistent with holdings by a number of Courts of Appeals. In *FTC v. National Comm'n on Egg Nutrition*, the Court of Appeals held that a nonprofit association "organized for the profit of the egg industry," 517 F. 2d, at 488, fell within the Commission's jurisdiction. In *American Medical Assn. v. FTC*, 638 F. 2d 443 (CA2 1980), the Court of Appeals held that the "business aspects," *id*., at 448, of the AMA's activities brought it within the Commission's reach. These cases are consistent with our conclusion that an entity organized to carry on activities that will confer greater than de minimis or presumed economic benefits on profit-seeking members certainly falls within the Commission's jurisdiction. In *Community Blood Bank v. FTC*, the Court of Appeals addressed the question whether the Commission had jurisdiction over a blood bank and an association of hospitals. It held that "the question of the jurisdiction over the corporations or other associations involved should be determined on an ad hoc basis," 405 F. 2d, at 1018, and that the Commission's jurisdiction extended to "any legal entity without shares of capital which engages in business for profit within the traditional meaning of that language," *ibid*. (emphasis deleted). The Court of Appeals also said that "[a]ccording to a generally accepted definition 'profit' means gain from business or investment over and above expenditures, or gain made on business or investment where both receipts or payments are taken into account," *id*., at 1017, although in the same breath it noted that the term's "meaning must be derived from the context in which it is used," *id*., at 1016. Our decision here is fully consistent with Community Blood Bank, because the CDA contributes to the profits of at least some of its members, even on a restrictive definition of profit as gain above expenditures. (It should go without saying that the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit.) Nonetheless, we do not, and indeed, on the facts here, could not, decide today whether the Commission has jurisdiction over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players. We therefore do not foreclose the possibility that various paradigms of profit might fall within the ambit of the FTC Act. Nor do we decide whether a purpose of contributing to profit only in a presumed sense, as by enhancing professional educational efforts, would implicate the Commission's jurisdiction.

for-profit member but over a for-profit membership organization as well; it would enjoy the screen of superficial disinterest while devoting itself to serving the interests of its members without concern for doing more than breaking even.

Nor, contrary to petitioner's argument, is the legislative history inconsistent with this interpretation of the Commission's jurisdiction. Although the versions of the FTC Act first passed by the House and the Senate defined "corporation" to refer only to incorporated, joint stock, and sharecapital companies organized to carry on business for profit, see H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 11, 14 (1914), the Conference Committee subsequently revised the definition to its present form, an alteration that indicates an intention to include nonprofit entities.[7] And the legislative history, like the text of the FTC Act, is devoid of any hint at an exemption for professional associations as such.

We therefore conclude that the Commission had jurisdiction to pursue the claim here, and turn to the question whether the Court of Appeals devoted sufficient analysis to sustain the claim that the advertising restrictions promulgated by the CDA violated the FTC Act.

III

The Court of Appeals treated as distinct questions the sufficiency of the analysis of anticompetitive effects and the substantiality of the evidence supporting the Commission's conclusions. Because we decide that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable), we do not reach the question of the substantiality of the evidence supporting the Commission's conclusion.[8]

In *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), we held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." *Id.*, at 110. Elsewhere, we held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of" horizontal agreements among competitors to refuse to discuss prices, *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), or to withhold a particular desired service,

7. A letter from Bureau of Corporations Commissioner Joseph E. Davies to Senator Francis G. Newlands, the bill's sponsor and a member of the Conference Committee, written August 8, 1914, before the Conference Committee revisions, included a memorandum dated August 7, 1914, that expressed concern that the versions of the bill passed by the House and the Senate would not extend jurisdiction to purportedly nonprofit organizations, which might "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to law." Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H. R. 15613) to Create a Federal Trade Commission, 63d Cong., 2d Sess., 3 (1914).

8. We leave to the Court of Appeals the question whether on remand it can effectively assess the Commission's decision for substantial evidence on the record, or whether it must remand to the Commission for a more extensive rule-of-reason analysis on the basis of an enhanced record.

FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986) (quoting *National Soc. of Professional Engineers*, *supra*, at 692). In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. In *National Collegiate Athletic Assn.*, the league's television plan expressly limited output (the number of games that could be televised) and fixed a minimum price. 468 U.S., at 99–100. In *National Soc. of Professional Engineers*, the restraint was "an absolute ban on competitive bidding." 435 U.S., at 692. In *Indiana Federation of Dentists*, the restraint was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." 476 U.S., at 459. As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. See *Law v. National Collegiate Athletic Assn.*, 134 F. 3d 1010, 1020 (CA10 1998) (explaining that quick-look analysis applies "where a practice has obvious anticompetitive effects"); *Chicago Professional Sports Limited Partnership v. National Basketball Assn.*, 961 F.2d 667, 674–676 (CA7 1992) (finding quick-look analysis adequate after assessing and rejecting logic of proffered procompetitive justifications); cf. *United States v. Brown University*, 5 F. 3d 658, 677–678 (CA3 1993) (finding full rule-of-reason analysis required where universities sought to provide financial aid to needy students and noting by way of contrast that the agreements in *National Soc. of Professional Engineers* and *Indiana Federation of Dentists* "embodied a strong economic self-interest of the parties to them").

The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious. Even on Justice Breyer's view that bars on truthful and verifiable price and quality advertising are *prima facie* anticompetitive, see *post*, at 784–785 (opinion concurring in part and dissenting in part), and place the burden of procompetitive justification on those who agree to adopt them, the very issue at the threshold of this case is whether professional price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule. Ultimately our disagreement with Justice Breyer turns on our different responses to this issue. Whereas he accepts, as the Ninth Circuit seems to have done, that the restrictions here were like restrictions on advertisement of price and quality generally, see, *e. g.*, *post*, at 785, 787, 790, it seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition. The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising[9] in a market characterized by striking disparities between the information available to the professional and the patient.[10] Cf. Carr & Mathewson,

9. That false or misleading advertising has an anticompetitive effect, as that term is customarily used, has been long established. Cf. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79–80 (1934) (finding a false advertisement to be unfair competition).

10. "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

The Economics of Law Firms: A Study in the Legal Organization of the Firm, 33 J. Law & Econ. 307, 309 (1990) (explaining that in a market for complex professional services, "inherent asymmetry of knowledge about the product" arises because "professionals supplying the good are knowledgeable [whereas] consumers demanding the good are uninformed"); Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488 (1970) (pointing out quality problems in market characterized by asymmetrical information). In a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising. What is more, the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth filling) or to something else (like a very tough walnut). See Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328, 1330 (1979); 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law § 3–1, p. 86 (1995) (describing the common view that "the lay public is incapable of adequately evaluating the quality of medical services"). Patients' attachments to particular professionals, the rationality of which is difficult to assess, complicate the picture even further. Cf. Evans, Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?, in Occupational Licensure and Regulation 235–236 (S. Rottenberg ed. 1980) (describing long-term relationship between professional and client not as "a series of spot contracts" but rather as "a long-term agreement, often implicit, to deal with each other in a set of future unspecified or incompletely specified circumstances according to certain rules," and adding that "[i]t is not clear how or if these [implicit contracts] can be reconciled with the promotion of effective price competition in individual spot markets for particular services"). The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.

The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the CDA's restrictions on discount advertising began with the unexceptionable statements that "price advertising is fundamental to price competition," 128 F. 3d, at 727, and that "[r]estrictions on the ability to advertise

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 properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788–789, n. 17 (1975).

prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price," *ibid*. (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992)). The court then acknowledged that, according to the CDA, the restrictions nonetheless furthered the "legitimate, indeed procompetitive, goal of preventing false and misleading price advertising." 128 F. 3d, at 728. The Court of Appeals might, at this juncture, have recognized that the restrictions at issue here are very far from a total ban on price or discount advertising, and might have considered the possibility that the particular restrictions on professional advertising could have different effects from those "normally" found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board discount advertising.[11] Instead, the Court of Appeals confined itself to the brief assertion that the "CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required," *ibid*., followed by the observation that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *ibid*.

But these observations brush over the professional context and describe no anticompetitive effects. Assuming that the record in fact supports the conclusion that the CDA disclosure rules essentially bar advertisement of across-theboard discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here. Whether advertisements that announced discounts for, say, first-time customers, would be less effective at conveying information relevant to competition if they listed the original and discounted prices for checkups, X-rays, and fillings, than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to empirical but not a priori analysis. In a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping. It is also possible in principle that, even if across-the-board discount advertisements were more effective in drawing customers in the short run, the recurrence of some measure of intentional or accidental misstatement due to the breadth of their claims might leak out over time to make potential patients skeptical of any such across-the-board advertising, so undercutting the method's effectiveness. Cf. Akerlof, 84 Q. J. Econ., at 495 (explaining that "dishonest dealings tend to drive honest dealings out of the market"). It might be, too, that acrossthe- board discount advertisements would continue to attract business indefinitely, but might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive. Put another way, the CDA's rule

11. Justice Breyer claims that "the Court of Appeals did consider the relevant differences." Post, at 790. But the language he cites says nothing more than that per se analysis is inappropriate here and that "some caution" was appropriate where restrictions purported to restrict false advertising, see 128 F. 3d, at 726–727. Caution was of course appropriate, but this statement by the Court of Appeals does not constitute a consideration of the possible differences between these and other advertising restrictions.

appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong.[12]

In theory, it is true, the Court of Appeals neither ruled out the plausibility of some procompetitive support for the CDA's requirements nor foreclosed the utility of an evidentiary discussion on the point. The court indirectly acknowledged the plausibility of procompetitive justifications for the CDA's position when it stated that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," 128 F. 3d, at 728. But because petitioner alone would have had the incentive to introduce such evidence, the statement sounds as though the Court of Appeals may have thought it was justified without further analysis to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy; the court's adversion to empirical evidence at the moment of this implicit burden shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects.

The Court of Appeals was comparably tolerant in accepting the sufficiency of abbreviated rule-of-reason analysis as to the nonprice advertising restrictions. The court began with the argument that "[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Ibid*. (citing P. Areeda & H. Hovenkamp, Antitrust Law ¶1505, pp. 693–694 (1997 Supp.)). Although this sentence does indeed appear as cited, it is puzzling, given that the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services. The court came closest to addressing this latter question when it went on to assert that limiting advertisements regarding quality and safety "prevents dentists from fully describing the package of services they offer," 128 F. 3d, at 728, adding that "[t]he restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency

12. Justice Breyer suggests that our analysis is "of limited relevance," post, at 791, because "[t]he basic question is whether this . . . theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case," *ibid*. He thinks that the Commission and the Court of Appeals "adequately answered that question," *ibid*., but the absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden shifting of the kind accepted by Justice Breyer. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

care when they might not otherwise do so," *ibid*. This suggestion about output is also puzzling. If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices,[13] see *General Leaseways, Inc. v. National Truck Leasing Assn.*, 744 F.2d 588, 594–595 (CA7 1984) ("An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects").

Although the Court of Appeals acknowledged the CDA's view that "claims about quality are inherently unverifiable and therefore misleading," 128 F. 3d, at 728, it responded that this concern "does not justify banning all quality claims without regard to whether they are, in fact, false or misleading," *ibid*. As a result, the court said, "the restriction is a sufficiently naked restraint on output to justify quick look analysis." *Ibid*. The court assumed, in these words, that some dental quality claims may escape justifiable censure, because they are both verifiable and true. But its implicit assumption fails to explain why it gave no weight to the countervailing, and at least equally plausible, suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market. It is, indeed, entirely possible to understand the CDA's restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery, cf. *Bates*, 433 U.S., at 366 (claims relating to the quality of legal services "probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false"); *id*., at 383–384 ("[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction"), notwithstanding Justice Breyer's citation (to a Commission discussion

13. Justice Breyer wonders if we "mea[n] this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality." *Post*, at 791. But as the preceding sentence shows, we intend simply to question the logic of the Court of Appeals's suggestion that the restrictions are anticompetitive because they somehow "affect output," 128 F. 3d, at 728, presumably with the intent to raise prices by limiting supply while demand remains constant. We do not mean to deny that an agreement not to advertise service quality might have anticompetitive effects. We merely mean that, absent further analysis of the kind Justice Breyer undertakes, it is not possible to conclude that the net effect of this particular restriction is anticompetitive.

that never faces the issue of the unverifiability of professional quality claims, raised in *Bates*), *post*, at 785.[14]

The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness if, for example, many dentists made very much the same sort of claims. And it is also of course possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

In light of our focus on the adequacy of the Court of Appeals's analysis, Justice Breyer's thorough-going, de novo antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals's review. The obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance. Had the Court of Appeals engaged in a painstaking discussion in a league with Justice Breyer's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly Justice Breyer's treatment of the antitrust issues here is no "quick look." Lingering is more like it, and indeed Justice Breyer, not surprisingly, stops short of endorsing the Court of Appeals's discussion as adequate to the task at hand.

Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed market analysis" in order to "requir[e] some competitive justification," *National Collegiate Athletic Assn*., 468 U.S., at 110, it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating per se from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "per se" condemnation is justified. *Id*., at 104, n. 26. "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same— whether or not the challenged restraint enhances competition." *Id*., at 104. Indeed, the scholar who enriched antitrust law with the metaphor of "the twinkling of an eye" for the most condensed rule-of-reason

14. The Commission said only that " 'mere puffing' deceives no one and has never been subject to regulation." 121 F.T.C., at 318. The question here, of course, is not whether puffery may be subject to governmental regulation, but whether a professional organization may ban it.

analysis himself cautioned against the risk of misleading even in speaking of a "spectrum" of adequate reasonableness analysis for passing upon antitrust claims: "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for. . . . Nevertheless, the quality of proof required should vary with the circumstances." P. Areeda, Antitrust Law ¶1507, p. 402 (1986).[15] At the same time, Professor Areeda also emphasized the necessity, particularly great in the quasi-common law realm of antitrust, that courts explain the logic of their conclusions. "By exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future." *Id*., ¶1500, at 364. As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE KENNEDY, and JUSTICE GINSBURG join, concurring in part and dissenting in part.

I agree with the Court that the Federal Trade Commission (FTC or Commission) has jurisdiction over petitioner, and I join Parts I and II of its opinion. I also agree that in a "rule of reason" antitrust case "the quality of proof required should vary with the circumstances," that "[w]hat is required . . . is an enquiry meet for the case,"

15. Other commentators have expressed similar views. See, e. g., Kolasky, Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements, Antitrust 41, 43 (spring 1998) ("[I]n applying the rule of reason, the courts, as with any balancing test, use a sliding scale to determine how much proof to require"); Piraino, Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act, 47 Vand. L. Rev. 1753, 1771 (1994) ("[C]ourts will have to undertake varying degrees of inquiry depending upon the type of restraint at issue. The legality of certain restraints will be easy to determine because their competitive effects are obvious. Other restrictions will require a more detailed analysis because their competitive impact is more ambiguous"). But see Klein, A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review, Antitrust 41, 42 (spring 1990) (examination of procompetitive justifications "is by no means a full scrutiny of the proffered efficiency justification. It is, rather, a hard look at the justification to determine if it meets the defendant's burden of coming forward with—but not establishing—a valid efficiency justification").

and that the object is a "confident conclusion about the principal tendency of a restriction." *Ante*, at 780 and this page (internal quotation marks omitted). But I do not agree that the Court has properly applied those unobjectionable principles here. In my view, a traditional application of the rule of reason to the facts as found by the Commission requires affirming the Commission—just as the Court of Appeals did below.

I

The Commission's conclusion is lawful if its "factual findings," insofar as they are supported by "substantial evidence," "make out a violation of Sherman Act § 1." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454–455 (1986). To determine whether that is so, I would not simply ask whether the restraints at issue are anticompetitive overall. Rather, like the Court of Appeals (and the Commission), I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?

A

The most important question is the first: What are the specific restraints at issue? See, *e. g.*, *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98–100 (1984) (*NCAA*); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21–23 (1979). Those restraints do not include merely the agreement to which the California Dental Association's (Dental Association or Association) ethical rule literally refers, namely, a promise to refrain from advertising that is " 'false or misleading in any material respect.' " *Ante*, at 760 (quoting California Dental Code of Ethics § 10 (1993), App. 33). Instead, the Commission found a set of restraints arising out of the way the Dental Association implemented this innocent-sounding ethical rule in practice, through advisory opinions, guidelines, enforcement policies, and review of membership applications. *In re California Dental Assn.*, 121 F.T.C. 190 (1996). As implemented, the ethical rule reached beyond its nominal target, to prevent truthful and nondeceptive advertising. In particular, the Commission determined that the rule, in practice:

> (1) "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable," *id*., at 301;
>
> (2) "precluded advertising . . . of across the board discounts," *ibid*.; and
>
> (3) "prohibit[ed] all quality claims," *id*., at 308.

Whether the Dental Association's basic rule as implemented actually restrained the truthful and nondeceptive advertising of low prices, across-the-board discounts, and quality service are questions of fact. The Administrative Law Judge (ALJ) and the Commission may have found those questions difficult ones. But both the ALJ and the Commission ultimately found against the Dental Association in respect to these facts. And the question for us—whether those agency findings are supported by substantial evidence, see *Indiana Federation*, *supra*, at 454–455—is not difficult.

The Court of Appeals referred explicitly to some of the evidence that it found adequate to support the Commission's conclusions. It pointed out, for example, that the Dental Association's "advisory opinions and guidelines indicate that . . . descriptions of prices as 'reasonable' or 'low' do not comply" with the Association's rule; that in "numerous cases" the Association "advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard to their truth"; and that one advisory opinion "expressly states that claims as to the quality of services are inherently likely to be false or misleading," all "without any particular consideration of whether" such statements were "true or false." 128 F. 3d 720, 729 (CA9 1997).

The Commission itself had before it far more evidence. It referred to instances in which the Association, without regard for the truthfulness of the statements at issue, recommended denial of membership to dentists wishing to advertise, for example, "reasonable fees quoted in advance," "major savings," or "making teeth cleaning . . . inexpensive." 121 F.T.C., at 301. It referred to testimony that "across the- board discount advertising in literal compliance with the requirements 'would probably take two pages in the telephone book' and '[n]obody is going to really advertise in that fashion.' " *Id*., at 302. And it pointed to many instances in which the Dental Association suppressed such advertising claims as "we guarantee all dental work for 1 year," "latest in cosmetic dentistry," and "gentle dentistry in a caring environment." *Id*., at 308–310.

I need not review the evidence further, for this Court has said that "substantial evidence" is a matter for the courts of appeals, and that it "will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490–491 (1951). I have said enough to make clear that this is not a case warranting our intervention. Consequently, we must decide only the basic legal question whether the three restraints described above unreasonably restrict competition.

B

Do each of the three restrictions mentioned have "the potential for genuine adverse effects on competition"? *Indiana Federation*, 476 U.S., at 460; 7 P. Areeda, Antitrust Law ¶1503a, pp. 372–377 (1986) (hereinafter Areeda). I should have thought that the anticompetitive tendencies of the three restrictions were obvious. An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices. But why should I have to spell out the obvious? To restrain truthful advertising about lower prices is likely to restrict competition in respect to price—”the central nervous system of the economy.” *United States v. Socony- Vacuum Oil Co.*, 310 U.S. 150, 226, n. 59 (1940); cf., *e. g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (price advertising plays an “indispensable role in the allocation of resources in a free enterprise system”); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The Commission thought this fact sufficient to hold (in the alternative) that the price advertising restrictions were unlawful per se. See 121 F.T.C., at 307; cf. *Socony-Vacuum, supra,* at 222–228 (finding agreement among competitors to buy “spot-market oil” unlawful per se because of its tendency to restrict price competition). For present purposes, I need not decide whether the Commission was right in applying a per se rule. I need only assume a rule of reason applies, and note the serious anticompetitive tendencies of the price advertising restraints.

The restrictions on the advertising of service quality also have serious anticompetitive tendencies. This is not a case of “mere puffing,” as the FTC recognized. See 121 F.T.C., at 317–318; cf. *ante*, at 778. The days of my youth, when the billboards near Emeryville, California, home of AAA baseball’s Oakland Oaks, displayed the name of “Painless” Parker, Dentist, are long gone—along with the Oakland Oaks. But some parents may still want to know that a particular dentist makes a point of “gentle care.” Others may want to know about 1-year dental work guarantees. To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services. That, at any rate, is the theory of the Sherman Act. And it is rather late in the day for anyone to deny the significant anticompetitive tendencies of an agreement that restricts competition in any legitimate respect, see, *e. g.*, *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43 (1930); *United States v. First Nat. Pictures, Inc.*, 282 U.S. 44, 54–55 (1930), let alone one that inhibits customers from learning about the quality of a dentist’s service.

Nor did the Commission rely solely on the unobjectionable proposition that a restriction on the ability of dentists to advertise on quality is likely to limit their incentive to compete on quality. Rather, the Commission pointed to record evidence affirmatively establishing that quality-based competition is important to dental consumers in California. 121 F.T.C., at 309–311. Unsurprisingly, these consumers choose dental services based at least in part on “information about the type and quality of service.” *Id*., at 249. Similarly, as the Commission noted, the ALJ credited testimony to the effect that “advertising the comfort of services will ‘absolutely’ bring in more patients,” and, conversely, that restraining the ability to advertise based on quality would decrease the number of patients that a dentist could attract. *Id*., at 310. Finally, the Commission looked to the testimony of dentists who themselves had suffered adverse effects on their business when forced by petitioner to discontinue advertising quality of care. See *id*., at 310–311.

The FTC found that the price advertising restrictions amounted to a "naked attempt to eliminate price competition." *Id*., at 300. It found that the service quality advertising restrictions "deprive consumers of information they value and of healthy competition for their patronage." *Id*., at 311. It added that the "anticompetitive nature of these restrictions" was "plain." *Ibid*. The Court of Appeals agreed. I do not believe it possible to deny the anticompetitive tendencies I have mentioned.

C

We must also ask whether, despite their anticompetitive tendencies, these restrictions might be justified by other procompetitive tendencies or redeeming virtues. See 7 Areeda, ¶ 1504, at 377–383. This is a closer question—at least in theory. The Dental Association argues that the three relevant restrictions are inextricably tied to a legitimate Association effort to restrict false or misleading advertising. The Association, the argument goes, had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order effectively to stop dentists from making unverifiable claims about price or service quality, which claims would mislead the consumer.

The problem with this or any similar argument is an empirical one. Notwithstanding its theoretical plausibility, the record does not bear out such a claim. The Commission, which is expert in the area of false and misleading advertising, was uncertain whether petitioner had even made the claim. It characterized petitioner's efficiencies argument as rooted in the (unproved) factual assertion that its ethical rule "challenges only advertising that is false or misleading." 121 F.T.C., at 316 (emphasis added). Regardless, the Court of Appeals wrote, in respect to the price restrictions, that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." 128 F. 3d, at 728. With respect to quality advertising, the Commission stressed that the Association "offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts." 121 F.T.C., at 319. Nor did the Court of Appeals think that the Association's unsubstantiated contention that "claims about quality are inherently unverifiable and therefore misleading" could "justify banning all quality claims without regard to whether they are, in fact, false or misleading." 128 F. 3d, at 728.

With one exception, my own review of the record reveals no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful claims. The one exception is the obvious fact that one can stop untruthful advertising if one prohibits all advertising. But since the Association made virtually no effort to sift the false from the true, see 121 F.T.C., at 316–317, that fact does not make out a valid antitrust defense. See *NCAA*, 468 U.S., at 119; 7 Areeda, ¶1505, at 383–384.

In the usual Sherman Act § 1 case, the defendant bears the burden of establishing a procompetitive justification. See *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); 7 Areeda, ¶1507b, at 397; 11 H. Hovenkamp, Antitrust Law ¶1914c, pp. 313–315 (1998); see also *Law v. National Collegiate*

Athletic Assn., 134 F. 3d 1010, 1019 (CA10), cert. denied, 525 U.S. 822 (1998); *United States v. Brown Univ.*, 5 F. 3d 658, 669 (CA3 1993); *Capital Imaging Associates v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537, 543 (CA2), cert. denied, 510 U.S. 947 (1993); *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1492–1495 (CADC 1984). And the Court of Appeals was correct when it concluded that no such justification had been established here.

D

I shall assume that the Commission must prove one additional circumstance, namely, that the Association's restraints would likely have made a real difference in the marketplace. See 7 Areeda, ¶1503, at 376–377. The Commission, disagreeing with the ALJ on this single point, found that the Association did possess enough market power to make a difference. In at least one region of California, the midpeninsula, its members accounted for more than 90% of the marketplace; on average they accounted for 75%. See 121 F.T.C., at 314. In addition, entry by new dentists into the marketplace is fairly difficult. Dental education is expensive (leaving graduates of dental school with $50,000– $100,000 of debt), as is opening a new dentistry office (which costs $75,000–$100,000). *Id*., at 315–316.

And Dental Association members believe membership in the Association is important and valuable and recognized as such by the public. *Id*., at 312–313, 315–316. These facts, in the Court of Appeals' view, were sufficient to show "enough market power to harm competition through [the Association's] standard setting in the area of advertising." 128 F. 3d, at 730. And that conclusion is correct. Restrictions on advertising price discounts in Palo Alto may make a difference because potential patients may not respond readily to discount advertising by the handful (10%) of dentists who are not members of the Association. And that fact, in turn, means that the remaining 90% will prove less likely to engage in price competition. Facts such as these have previously led this Court to find market power— unless the defendant has overcome the showing with strong contrary evidence. See, *e. g.*, *Indiana Federation*, 476 U.S., at 456–457; cf. *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962); *Brown Shoe Co. v. United States*, 370 U.S. 294, 341–344 (1962); accord, *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (CA2 1945). I can find no reason for departing from that precedent here.

II

In the Court's view, the legal analysis conducted by the Court of Appeals was insufficient, and the Court remands the case for a more thorough application of the rule of reason. But in what way did the Court of Appeals fail? I find the Court's answers to this question unsatisfactory—when one divides the overall Sherman Act question into its traditional component parts and adheres to traditional judicial practice for allocating the burdens of persuasion in an antitrust case.

Did the Court of Appeals misconceive the anticompetitive tendencies of the restrictions? After all, the object of the rule of reason is to separate those restraints that "may suppress or even destroy competition" from those that "merely regulat[e] and perhaps thereby promot[e] competition." *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). The majority says that the Association's "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Ante*, at 771. It adds that

> "advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition." *Ante*, at 773.

And it criticizes the Court of Appeals for failing to recognize that "the restrictions at issue here are very far from a total ban on price or discount advertising" and that "the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition . . . ." *Ibid*.

The problem with these statements is that the Court of Appeals did consider the relevant differences. It rejected the legal "treatment" customarily applied "to classic horizontal agreements to limit output or price competition"—*i.e.*, the FTC's (alternative) per se approach. See 128 F. 3d, at 726–727. It did so because the Association's "policies do not, on their face, ban truthful nondeceptive ads"; instead, they "have been enforced in a way that restricts truthful advertising," *id*., at 727. It added that "[t]he value of restricting false advertising . . . counsels some caution in attacking rules that purport to do so but merely sweep too broadly." *Ibid*.

Did the Court of Appeals misunderstand the nature of an anticompetitive effect? The Court says:

> "If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and . . . the producers' supply . . . is normally relevant in determining whether a . . . limitation has the anticompetitive effect of artificially raising prices." *Ante*, at 776–777.

But if the Court means this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality, I believe it is the majority, and not the Court of Appeals, that is mistaken. An agreement not to advertise, say, "gentle care" is anticompetitive because it imposes an artificial barrier against each dentist's independent decision to advertise gentle care. That barrier, in turn, tends to inhibit those dentists who want to supply gentle care from getting together with those customers who want to buy gentle care. See P. Areeda & H. Hovenkamp, Antitrust Law ¶1505*, p. 404 (Supp. 1998). There is adequate reason to believe that tendency present in this case. See *supra*, at 786.

Did the Court of Appeals inadequately consider possible procompetitive justifications? The Court seems to think so, for it says:

> "[T]he [Association's] rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition)

> created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators)." *Ante*, at 775.

That may or may not be an accurate assessment of the Association's motives in adopting its rule, but it is of limited relevance. Cf. *Board of Trade of Chicago*, *supra*, at 238. The basic question is whether this, or some other, theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case. Both court and Commission adequately answered that question.

The Commission found that the defendant did not make the necessary showing that a redeeming virtue existed in practice. See 121 F.T.C., at 319–320. The Court of Appeals, asking whether the rules, as enforced, "augment[ed] competition and increase[d] market efficiency," found the Commission's conclusion supported by substantial evidence. 128 F. 3d, at 728. That is why the court said that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing"— which is to say that the record provides no evidence that the effects, though anticompetitive, are nonetheless redeemed or justified. *Ibid*.

The majority correctly points out that "petitioner alone would have had the incentive to introduce such evidence" of procompetitive justification. *Ante*, at 776. (Indeed, that is one of the reasons defendants normally bear the burden of persuasion about redeeming virtues. See *supra*, at 788.) But despite this incentive, petitioner's brief in this Court offers nothing concrete to counter the Commission's conclusion that the record does not support the claim of justification. Petitioner's failure to produce such evidence itself "explain[s] why [the lower court] gave no weight to the . . . suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market." *Ante*, at 778.

With respect to the restraint on advertising across-the board discounts, the majority summarizes its concerns as follows: "Assuming that the record in fact supports the conclusion that the [Association's] disclosure rules essentially bar advertisement of [such] discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here." *Ante*, at 774. I accept, rather than assume, the premise: The FTC found that the disclosure rules did bar advertisement of across-the-board discounts, and that finding is supported by substantial evidence. See *supra*, at 783–784. And I accept as *literally* true the conclusion that the Court says follows from that premise, namely, that "net anticompetitive effects" do not "*obviously*" follow from that premise. But obviousness is not the point. With respect to any of the three restraints found by the Commission, whether "net anticompetitive effects" follow is a matter of how the Commission, and, here, the Court of Appeals, have answered the questions I laid out at the beginning. See *supra*, at 782. Has the Commission shown that the restriction has anticompetitive tendencies? It has. Has the Association nonetheless shown offsetting virtues? It has not. Has the Commission shown market power sufficient for it to believe that the restrictions will likely make a real world difference? It has.

The upshot, in my view, is that the Court of Appeals, applying ordinary antitrust principles, reached an unexceptional conclusion. It is the same legal conclusion that this Court itself reached in *Indiana Federation*—a much closer case than this one. There the Court found that an agreement by dentists not to submit dental X rays to insurers violated the rule of reason. The anticompetitive tendency of that agreement was to reduce competition among dentists in respect to their willingness to submit X rays to insurers, see 476 U.S., at 456—a matter in respect to which consumers are relatively indifferent, as compared to advertising of price discounts and service quality, the matters at issue here. The redeeming virtue in *Indiana Federation* was the alleged undesirability of having insurers consider a range of matters when deciding whether treatment was justified—a virtue no less plausible, and no less proved, than the virtue offered here. See *id*., at 462–464. The "power" of the dentists to enforce their agreement was no greater than that at issue here (control of 75% to 90% of the relevant markets). See *id*., at 460. It is difficult to see how the two cases can be reconciled.

* * *

I would note that the form of analysis I have followed is not rigid; it admits of some variation according to the circumstances. The important point, however, is that its allocation of the burdens of persuasion reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion, cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 266 (1960), and the latter called forth the criticism that the "Government always wins," *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). I hope that this case does not represent an abandonment of that basic, and important, form of analysis. For these reasons, I respectfully dissent from Part III of the Court's opinion.

FTC v. ACTAVIS, INC., 133 S. CT. 2223 (2013)[1]

JUSTICE BREYER delivered the opinion of the Court.

Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars. Because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called a "reverse payment" settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws. See, *e.g.*, 15 U.S.C. § 1 (Sherman Act prohibition of "restraint[s] of trade or commerce"). Cf. *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (per curiam) (invalidating agreement not to compete).

In this case, the Eleventh Circuit dismissed a Federal Trade Commission (FTC) complaint claiming that a particular reverse payment settlement agreement violated the antitrust laws. In doing so, the Circuit stated that a reverse payment settlement agreement generally is "immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." *FTC v. Watson Pharmaceuticals, Inc.*, 677 F.3d 1298, 1312 (2012). And since the alleged infringer's promise not to enter the patentee's market expired before the patent's term ended, the Circuit found the agreement legal and dismissed the FTC complaint. *Id*., at 1315. In our view, however, reverse payment settlements such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws. We consequently hold that the Eleventh Circuit should have allowed the FTC's lawsuit to proceed.

I

A

Apparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner. See Brief for Petitioner 29; 12 P. Areeda & H. Hovenkamp, Antitrust Law 2046, p. 338 (3d ed. 2012) (hereinafter Areeda); Hovenkamp, Sensible Antitrust Rules for Pharmaceutical Competition, 39 U.S.F.L.Rev. 11, 24 (2004). We consequently describe four key features of the relevant drug-regulatory framework established by the Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, as amended. That Act is commonly known as the Hatch-Waxman Act.

1. Some internal citations omitted without indication.

. . .

[In 1999, Solvay Pharmaceuticals filed a New Drug Application for a brand-name drug called AndroGel. The FDA approved the application in 2000. In 2003, Solvay obtained a relevant patent. Later the same year, Actavis, Inc. (then known as Watson Pharmaceuticals), filed an Abbreviated New Drug Application for a generic drug modeled after AndroGel. Subsequently, Paddock Laboratories separately filed an Abbreviated New Drug Application for its own generic product. Both Actavis and Paddock certified under the Hatch-Waxman Act that Solvay's patent was invalid and their drugs did not infringe it. A fourth manufacturer, Par Pharmaceutical did not file an application of its own but joined forces with Paddock, agreeing to share the patent litigation costs in return for a share of profits if Paddock obtained approval for its generic drug. Solvay initiated patent litigation against Actavis and Paddock.]

Solvay initiated paragraph IV patent litigation against Actavis and Paddock.[2] Thirty months later the FDA approved Actavis' first-to-file generic product, but, in 2006, the patent-litigation parties all settled. Under the terms of the settlement Actavis agreed that it would not bring its generic to market until August 31, 2015, 65 months before Solvay's patent expired (unless someone else marketed a generic sooner). Actavis also agreed to promote AndroGel to urologists. The other generic manufacturers made roughly similar promises. And Solvay agreed to pay millions of dollars to each generic—$12 million in total to Paddock; $60 million in total to Par; and an estimated $19-$30 million annually, for nine years, to Actavis. The companies described these payments as compensation for other services the generics promised to perform, but the FTC contends the other services had little value. According to the FTC the true point of the payments was to compensate the generics for agreeing not to compete against AndroGel until 2015.

2

On January 29, 2009, the FTC filed this lawsuit against all the settling parties, namely, Solvay, Actavis, Paddock, and Par. The FTC's complaint (as since amended) alleged that respondents violated § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by unlawfully agreeing "to share in Solvay's monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with AndroGel for nine years." See generally *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (Section 5 "encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws"). The District Court held that these allegations did not set forth an antitrust law violation. *In re*

[2. Paragraph IV of the Hatch-Waxman Act provides that a certification that any listed patent "is invalid or will not be infringed by the manufacture, use, or sale" of the drug described in the Abbreviated New Drug Application automatically counts as patent infringement and enables the patent holder to immediately commence patent infringement litigation. *See* 35 U.S.C. § 271(e)(2)(A).]

Androgel Antitrust Litigation (No. II), 687 F. Supp. 2d 1371, 1379 (N.D. Ga. 2010). It accordingly dismissed the FTC's complaint. The FTC appealed.

The Court of Appeals for the Eleventh Circuit affirmed the District Court. It wrote that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." 677 F.3d, at 1312. The court recognized that "antitrust laws typically prohibit agreements where one company pays a potential competitor not to enter the market." *Id*., at 1307 (citing *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 344 F.3d 1294, 1304 (CA11 2003)). See also [*Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 50 (1990)] (agreement to divide territorial markets held "unlawful on its face"). But, the court found that "reverse payment settlements of patent litigation presen[t] atypical cases because one of the parties owns a patent." 677 F.3d, at 1307 (internal quotation marks and second alteration omitted). Patent holders have a "lawful right to exclude others from the market," *ibid*. (internal quotation marks omitted); thus a patent "conveys the right to cripple competition." *Id*., at 1310 (internal quotation marks omitted). The court recognized that, if the parties to this sort of case do not settle, a court might declare the patent invalid. *Id*., at 1305. But, in light of the public policy favoring settlement of disputes (among other considerations) it held that the courts could not require the parties to continue to litigate in order to avoid antitrust liability. *Id*., at 1313-1314.

. . .

II

A

Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors. And we are willing to take this fact as evidence that the agreement's "anticompetitive effects fall within the scope of the exclusionary potential of the patent." 677 F.3d, at 1312. But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.

For one thing, to refer, as the Circuit referred, simply to what the holder of a valid patent could do does not by itself answer the antitrust question. The patent here may or may not be valid, and may or may not be infringed. "[A] valid patent excludes all except its owner from the use of the protected process or product." And that exclusion may permit the patent owner to charge a higher-than-competitive price for the patented product. But an invalidated patent carries with it no such right. And even a valid patent confers no right to exclude products or processes that do not actually infringe. The paragraph IV litigation in this case put the patent's validity at issue, as well as its actual preclusive scope. The parties' settlement ended that litigation. The FTC alleges that in substance, the plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, even though the defendants did not have any claim that the plaintiff was liable to them for damages. That form of settlement is unusual. And, for reasons discussed in Part II-B, *infra*, there is reason for concern that settlements taking this form tend to have significant adverse effects on competition.

. . .

B

The Eleventh Circuit's conclusion finds some degree of support in a general legal policy favoring the settlement of disputes. 677 F.3d, at 1313-1314. See also *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1074-1075 (C.A.11 2005) (same); *In re Tamoxifen Citrate*, 466 F.3d, at 202 (noting public's "'strong interest in settlement'" of complex and expensive cases). The Circuit's related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement. Any such litigation will prove time consuming, complex, and expensive. The antitrust game, the Circuit may believe, would not be worth that litigation candle.

We recognize the value of settlements and the patent litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.

First, the specific restraint at issue has the "potential for genuine adverse effects on competition." *Indiana Federation of Dentists*, 476 U.S., at 460-461. The payment in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product. Suppose, for example, that the exclusive right to sell produces $50 million in supracompetitive profits per year for the patentee. And suppose further that the patent has 10 more years to run. Continued litigation, if it results in patent invalidation or a finding of noninfringement, could cost the patentee $500 million in lost revenues, a sum that then would flow in large part to consumers in the form of lower prices.

We concede that settlement on terms permitting the patent challenger to enter the market before the patent expires would also bring about competition, again to the consumer's benefit. But settlement on the terms said by the FTC to be at issue here-payment in return for staying out of the market-simply keeps prices at patentee-set levels, potentially producing the full patent-related $500 million monopoly return while dividing that return between the challenged patentee and the patent challenger. The patentee and the challenger gain; the consumer loses. Indeed, there are indications that patentees sometimes pay a generic challenger a sum even larger than what the generic would gain in profits if it won the paragraph IV litigation and entered the market. The rationale behind a payment of this size cannot in every case be supported by traditional settlement considerations. The payment may instead provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market.

. . .

Second, these anticompetitive consequences will at least sometimes prove unjustified. As the FTC admits, offsetting or redeeming virtues are sometimes present. The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform-such as distributing the patented item or helping to develop a market for that item. There may be other justifications. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about the anticompetitive consequences we mentioned above. But that possibility does not justify dismissing the FTC's complaint. An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason. See, e.g., *Indiana Federation of Dentists*, *supra*, at 459.

Third, where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice. At least, the "size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power"—namely, the power to charge prices higher than the competitive level. An important patent itself helps to assure such power. Neither is a firm without that power likely to pay "large sums" to induce "others to stay out of its market." In any event, the Commission has referred to studies showing that reverse payment agreements are associated with the presence of higher-than-competitive profits—a strong indication of market power.

Fourth, an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed. The Circuit's holding does avoid the need to litigate the patent's validity (and also, any question of infringement). But to do so, it throws the baby out with the bath water, and there is no need to take that drastic step. That is because it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham). An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

Fifth, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. They may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point. Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.

In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments. In our view, these considerations, taken together, outweigh the single strong consideration—the desirability of settlements—that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements.

III

The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a "quick look" approach, rather than applying a "rule of reason." See *California Dental*, 526 U.S., at 775, n.12 ("Quick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects"); We decline to do so. In *California Dental*, we held (unanimously) that abandonment of the "rule of reason" in favor of presumptive rules (or a "quick-look" approach) is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." 526 U.S., at 770; *id*., at 781 (BREYER, J., concurring in part and dissenting in part). We do not believe that reverse payment settlements, in the context we here discuss, meet this criterion.

That is because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.

To say this is not to require the courts to insist, contrary to what we have said, that the Commission need litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible pro-defense theory. As a leading antitrust scholar has pointed out, "'[t]here is always something of a sliding scale in appraising reasonableness,'" and as such "'the quality of proof required should vary with the circumstances.'" *California Dental*, *supra*, at 780, 119 S. Ct. 1604 (quoting with approval 7 Areeda ¶1507, at 402 (1986)).

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation. We reverse the judgment of the Eleventh Circuit. And we remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Solvay Pharmaceuticals holds a patent. It sued two generic drug manufacturers that it alleged were infringing that patent. Those companies counterclaimed, contending the patent was invalid and that, in any event, their products did not infringe. The parties litigated for three years before settling on these terms: Solvay agreed to pay the generics millions of dollars and to allow them into the market five years before the patent was set to expire; in exchange, the generics agreed to provide certain services (help with marketing and manufacturing) and to honor Solvay's patent. The Federal Trade Commission alleges that such a settlement violates the antitrust laws. The question is how to assess that claim.

A patent carves out an exception to the applicability of antitrust laws. The correct approach should therefore be to ask whether the settlement gives Solvay monopoly power beyond what the patent already gave it. The Court, however, departs from this approach, and would instead use antitrust law's amorphous rule of reason to inquire into the anticompetitive effects of such settlements. This novel approach is without support in any statute, and will discourage the settlement of patent litigation. I respectfully dissent.

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The majority today departs from the settled approach separating patent and antitrust law, weakens the protections afforded to innovators by patents, frustrates the public policy in favor of settling, and likely undermines the very policy it seeks to promote by forcing generics who step into the litigation ring to do so without the prospect of cash settlements. I would keep things as they were and not subject basic questions of patent law to an unbounded inquiry under antitrust law, with its treble damages and famously burdensome discovery. See 15 U. S. C. §15; *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 558-559 (2007). I respectfully dissent.

The Governing Law—Case Excerpts

REALCOMP II, LTD. v. FTC
635 F.3D 815 (6TH CIR. 2011)
(EXCERPT)

Before: SILER, MOORE, and GRIFFEN, Circuit Judges.
KAREN NELSON MOORE, Circuit Judge.

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B. Restraint of Trade

Because "[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices ... overlaps the scope of § 1 of the Sherman Act . . . aimed at prohibiting restraint of trade," we rely upon Sherman Act jurisprudence in determining whether the challenged policies violated Section 5 of the FTC Act. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999); see *Ind. Fed'n*, 476 U.S. at 454–55, 106 S. Ct. 2009 (noting that the same analysis applies to both violations of Section 1 of the Sherman Act and Section 5 of the FTC Act). To determine whether Realcomp's actions constitute a violation, we assess: (1) whether there was a contract, combination, or conspiracy—or, more simply, an agreement; and, if so, (2) whether the contract, combination, or conspiracy "unreasonably restrained trade in the relevant market." See *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (internal quotation marks omitted) (identifying elements of a violation of Section 1 of the Sherman Act); *Bailey's, Inc. v. Windsor America, Inc.*, 948 F.2d 1018, 1027 & n. 4 (6th Cir.1991) (same). With respect to the first element, Realcomp is a combination of its members with respect to the challenged policies: Realcomp is owned by seven associations of competing real-estate brokers, is governed by members of those associations, and claims a membership of brokers competing in the market for real-estate-brokerage services. The website policy constitutes an agreement governing the Realcomp MLS among the Realcomp members. Realcomp is, therefore, a contract, combination, or conspiracy.

With respect to the second element, in evaluating whether Realcomp unreasonably restrained trade, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Ind. Fed'n*, 476 U.S. at 457-58, 106 S. Ct. 2009. Under per se analysis, "certain agreements or practices are so 'plainly anticompetitive,' . . . and so often 'lack . . . any redeeming virtue,' . . . that they are conclusively presumed illegal without further examination." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979) (internal citations omitted). "A court need not then inquire whether the restraint's authors actually possess the power to inflict public injury . . ., nor will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect." *United States v. Realty Multi–List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (internal citations omitted).

When restraints are not per se unlawful, and their net impact on competition not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market. *Ind. Fed'n*, 476 U.S. at 461, 106 S. Ct. 2009. A full rule-of-reason inquiry "may extend to a 'plenary market examination,'" *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) (quoting *Cal. Dental Ass'n*, 526 U.S. at 779, 119 S. Ct. 1604), which may include the analysis of "'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,'" *id*. (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed.2d 637 (1978)), "as well as the availability of reasonable, less restrictive alternatives," *id*. If Realcomp's challenged policies are shown to have an anticompetitive effect, or if Realcomp is shown to have market power and to have adopted policies likely to have an anticompetitive effect, then the burden shifts to Realcomp to provide procompetitive justifications for the policies. . . .[S]ee also *Worldwide Basketball*, 388 F.3d at 959.

An abbreviated or quick-look analysis, however, does not require "elaborate industry analysis," and applies when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n*, 526 U.S. at 770, 119 S. Ct. 1604 (internal quotation marks omitted); see *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 209-10 (3d Cir. 2005) (quick-look analysis applies when "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an alleged restraint). Thus, when a restraint is not "conclusively presumed illegal," *Broadcast Music, Inc.*, 441 U.S. at 8, 99 S. Ct. 1551, but "the likelihood of anticompetitive effects is . . . obvious," the proponent of the restraint must provide "some competitive justification" for it, "even in the absence of a detailed market analysis" showing market power or market effects, *Cal. Dental Ass'n*, 526 U.S. at 769-71, 119 S. Ct. 1604 (internal quotation marks omitted). Under a quick-look analysis, once a restraint is deemed facially anticompetitive, the burden shifts to its proponent for justification on procompetitive grounds. *Gordon*, 423 F.3d at 210.

Despite these different methods, "no categorical line" separates those "restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." *Cal. Dental Ass'n*, 526 U.S. at 780–81, 119 S. Ct. 1604. Rather, the Supreme Court has emphasized that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *Id*. at 779-80, 119 S. Ct. 1604 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)). Accordingly, the Court has moved "away from . . . reliance upon fixed categories and toward a continuum," *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005), within which "the extent of the inquiry is tailored to the suspect conduct in each particular case," *id*. at 34; see also 7 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1507 (3d ed. 2010) [hereinafter Areeda] ("[T]he quality of proof required should vary with the circumstances."). Therefore, we must make "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Cal. Dental Ass'n*, 526 U.S. at 781, 119 S. Ct. 1604. In all cases, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 104, 104 S. Ct. 2948.

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***IN RE* SOUTHEASTERN MILK ANTITRUST LITIG.**
739 F.3D 262 (6TH CIR. 2014)
(EXCERPT)

Before: ROGERS and COOK, Circuit Judges; VAN TATENHOVE, District Judge
Gregory F. Van Tatenhove, District Judge.

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A restraint may be deemed unreasonable "either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986) (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)). The less common method of determining whether the restraint is unreasonable is the per se rule. "Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused." *In re Cardizem CD*, 332 F.3d at 907 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)). The per se rule should only be used when the restraint has "such predictable and pernicious anticompetitive effect," that there is "limited potential for procompetitive benefit." *Id*. (quoting *State Oil Co.*, 522 U.S. at 10, 118 S. Ct. 275). Once applied, "no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition." *Id*. at 906-07 (quoting *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100, 104 S .Ct. 2948, 82 L. Ed. 2d 70 (1984)). Applying this standard, then, should be done reluctantly and infrequently, informed by other courts' review of the same type of restraint, and only when the rule of reason would likely justify the same result. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (citations omitted); see also *Nat'l Hockey League Players*, 325 F.3d at 718–19 (cautioning that the Supreme Court has described the per se rule as a "demanding" rule that should be applied "only in clear cut cases") (citations omitted).

Unless the restraint falls squarely into a per se category, the rule of reason should be used instead. *Expert Masonry*, 440 F.3d at 343. Unlike the per se rule, the rule of reason utilizes a burden-shifting framework that allows the court to "analyze the history of the restraint and the restraint's effect on competition." *Nat'l Hockey League Players*, 325 F.3d at 718. First, the plaintiff must establish a prima facie case by showing five elements: (1) a conspiracy (2) that produced anticompetitive effects; (3) that the scheme "affected relevant product and geographic markets"; (4) that the conspiracy's goal and related conduct was illegal; (5) and that the restraint was the proximate cause of the plaintiff's antitrust injury. *Expert Masonry*, 440 F.3d at 343 (citing *Care Heating & Cooling*, 427 F.3d at 1014). If a plaintiff passes over these hurdles, the burden then shifts to the defendant to produce evidence that the restraint in question has "procompetitive effects" that are sufficient "to justif[y] the otherwise anticompetitive injuries." *Expert Masonry*, 440 F.3d at 343 (quoting *Nat'l Hockey League Players*, 325 F.3d at 718). Finally, if the defendant meets this burden, the plaintiff may still prevail by showing that "any legitimate objectives can be achieved in a substantially less restrictive manner." *Id*. (quoting *Nat'l Hockey League Players*, 325 F.3d at 718) (quotation marks omitted).

When determining whether to use the per se rule or the rule of reason, courts must consider the type of restraint at issue—whether it is horizontal or vertical. *Expert Masonry*, 440 F.3d at 344. An agreement "between competitors at the same level of the market structure" is horizontal. *Sancap Abrasives Corp. v. Swiss Indus. Abrasives*, 19 Fed. Appx. 181, 191 (6th Cir. 2001) (quoting *Crane & Shovel Sales Corp. v. Bucyrus–Erie Co.*, 854 F.2d 802, 805–06 (6th Cir. 1988)). Horizontal restraints are considered to be more threatening, and thus result in per se treatment more regularly. See *Expert Masonry*, 440 F.3d at 344 (citing examples from cases). Vertical restraints—agreements between parties "at different levels of the market structure, such as manufacturers and distributors"—have more redeeming qualities (e.g., allowing for distribution efficiencies) and are subjected to the rule of reason. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008) (quoting *Leegin Creative Leather Products*, 551 U.S. 877, 127 S. Ct. 2705); see also *Expert Masonry*, 440 F.3d at 344-45.

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As explained above, when applying the rule of reason analysis, plaintiffs generally must establish the effect on the relevant geographic and product markets. However, courts have recently begun to view the rule of reason in a broader manner in certain cases. Plaintiffs contend that even if the Court applies the rule of reason to their case, under the so-called "quick look" rule of reason analysis, they still should not be required to prove geographic market because the adverse market effects are implied by the obvious violation of the Defendants. Once the district court decided that the rule of reason applied, it granted summary judgment to the Defendants, without addressing whether a quick-look analysis might be appropriate. "[T]he alleged agreements challenged by Plaintiffs ought to be subject to the rule of reason analysis, requiring that Plaintiffs establish the relevant geographic antitrust market, something they cannot do. For this reason, Defendants are entitled to summary judgment as to Count I of Plaintiffs' complaint." *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *12. Plaintiffs submit that this simple logic equation overlooks the recent deterioration of clearly defined types of market analyses in favor of a more case-by-case approach. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 826 (6th Cir. 2011) ("The Court has moved away from . . . reliance upon fixed categories and toward a continuum, within which the extent of the inquiry is tailored to the suspect conduct in each particular case.") (quoting *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34-34 (D.C. Cir. 2005)) (internal quotation marks omitted).

This Court has characterized "quick look" analysis as a third type of category arising from the blurring of the line between per se and rule of reason cases. See *Expert Masonry*, 440 F.3d at 343. This less-rigid approach aligns with the Supreme Court's recognition of the value of the "quick look" approach as an abbreviated form of the rule of reason analysis used for situations in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). Applying this test is useful when the anticompetitive nature of an agreement is so blatant that a detailed review of the surrounding marketplace would be unnecessary. *Id*. at 769-70, 119 S. Ct. 1604. In the same way that this analysis occupies territory between the per se and rule of reason tests, so the burdens and presumptions do as well. Once anticompetitive behavior is shown to a court's satisfaction, even without detailed market analysis, the burden shifts to the defendant who must justify the agreement at issue on procompetitive grounds by providing some "competitive justification" for the restraint at issue. *Realcomp*, 635 F.3d at 825.

Whatever tool is used to judge an agreement, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *Cal. Dental Ass'n*, 526 U.S. at 780, 119 S. Ct. 1604 (quoting *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 104, 104 S. Ct. 2948).

> [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Cal. Dental Ass'n, 526 U.S. at 780-81, 119 S. Ct. 1604.

The NCAA “Likeness” Litigation

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD O'BANNON, et al.

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; ELECTRONIC ARTS INC.; and COLLEGIATE LICENSING COMPANY,

Defendants.
________________________________/

No. C 09-3329 CW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Competition takes many forms. Although this case raises questions about athletic competition on the football field and the basketball court, it is principally about the rules governing competition in a different arena -- namely, the marketplace.

Plaintiffs are a group of current and former college student-athletes. They brought this antitrust class action against the National Collegiate Athletic Association (NCAA) in 2009 to challenge the association's rules restricting compensation for elite men's football and basketball players. In particular, Plaintiffs seek to challenge the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage. Plaintiffs contend that these rules violate the Sherman Antitrust Act. The NCAA denies this charge and asserts that its restrictions on student-athlete compensation are necessary to uphold its educational mission and to protect the popularity of collegiate sports.

A non-jury trial on Plaintiffs' claims was held between June 9, 2014 and June 27, 2014. After considering all of the testimony, documentary evidence, and arguments of counsel presented during and after trial, the Court finds that the challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools. The procompetitive justifications that the NCAA offers do not justify this restraint and could be achieved through less restrictive means. The Court makes the following findings of fact and conclusions of law, and will enter as a remedy a permanent injunction prohibiting certain overly restrictive restraints.

FINDINGS OF FACT

I. Background

A. The NCAA

The NCAA was founded in 1905 by the presidents of sixty-two colleges and universities in order to create a uniform set of rules to regulate intercollegiate football. Docket No. 189, Stip. Undisputed Facts, at ¶ 6. Today, the association has roughly eleven hundred member schools and regulates intercollegiate athletic competitions in roughly two dozen sports. According to its current constitution, the association seeks to "initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit." Ex. 2340, 2013-14 NCAA Division I Manual, at 15.[1]

To achieve these goals, the NCAA issues and enforces rules governing athletic competitions among its member schools. Id. at 4. These rules are outlined in the association's constitution and bylaws and cover a broad range of subjects. Among other things, the rules establish academic eligibility requirements for student-athletes, set forth guidelines and restrictions for recruiting high school athletes, and impose limits on the number and size of athletic scholarships that each school may provide. Id. at 3-5.

Since 1973, the NCAA's member schools have been organized into three divisions -- Divisions I, II, and III -- based on the number and quality of opportunities that they provide to participate in intercollegiate athletics. Stip. Undisputed Facts ¶ 27. Division I schools provide the greatest number and highest quality of opportunities to participate in intercollegiate athletics because they sponsor more sports teams and provide more financial aid to student-athletes than schools in Divisions II and III.[2] To qualify for membership in Division I, a school must sponsor a minimum of fourteen varsity sports teams, including football, and distribute a baseline amount of financial aid to its student-athletes. Trial Tr. 2043:13-:25 (Delany); Ex. 2340 at 365, 367. Roughly three-hundred and fifty of the NCAA's eleven

[1] All exhibit citations in this order are to the page numbers provided by the parties at trial, which do not necessarily correspond to the page numbers created by the original author of the exhibit.

[2] The NCAA's bylaws define financial aid to mean "funds provided to student-athletes from various sources to pay or assist in paying their cost of education at the institution." Ex. 2340 at 206. The Court adopts this definition for the purposes of this order.

United States District Court
For the Northern District of California

hundred schools currently compete in Division I. Trial Tr. 1743:23 (Emmert).

Division I itself further is divided, for the purposes of football competition, into two subdivisions: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS).[3] Trial Tr. 2144:9-:11 (Petr); Ex. 2340 at 364-67. FBS schools are allowed to offer up to eighty-five full scholarships to members of their football teams. In contrast, FCS schools are permitted to offer only a smaller number of full scholarships to members of their teams. Stip. Undisputed Facts ¶ 28. Because FBS schools are able to offer more football scholarships than FCS schools, the level of football competition within FBS is generally higher than within FCS. Currently, about one hundred and twenty schools compete in FBS. Id. ¶ 45.

In addition to the two football subdivisions, Division I schools are also organized into a number of conferences, which essentially function as smaller leagues within the NCAA. The conferences -- most of which contain between eight and fifteen schools -- typically have their own membership requirements. Most conferences also organize conference-specific games and events featuring their member schools, including regular season football games, regular season basketball games, and post-season basketball tournaments. Although the conferences are considered members of the NCAA and must comply with its constitution and bylaws, they operate independently for the most part and have the authority to

[3] Prior to 2006, FBS was known as Division I-A and FCS was known as Division I-AA. For the purposes of simplicity, this order uses “FBS” and “FCS” to refer to these subdivisions even when discussing student-athletes who played Division I football before 2006.

generate their own revenue and set their own rules, provided those rules are consistent with NCAA policy. Ex. 2340 at 22.

The rules governing participation and competition in Division I are enacted by an eighteen-member body known as the Division I Board of Directors, which typically receives proposals from the division's member schools and conferences. Trial Tr. 1744:16-1745:2 (Emmert); Ex. 2340 at 35. The Board is made up of university presidents and chancellors from eighteen different colleges or universities. Ex. 2340 at 35.

A school or conference that seeks to propose a new rule or rule change typically does so by submitting the proposal to a designated committee or task force appointed by the Board. Trial Tr. 1745:20-1746:15. That committee or task force then considers the proposal and, if it approves, may forward the proposal to a body known as the Division I Legislative Council, which is made up of athletics administrators from schools in each of the thirty-two Division I conferences. Id.; Ex. 2340 at 37. The Legislative Council may then forward the proposal to the Board of Directors, which has the ultimate authority to approve the proposal by a majority vote. Trial Tr. 1745:20-1746:15. Actions by the Board may only be repealed through an override process that involves a vote of sixty-two percent of the NCAA's member institutions. Id. 1747:6-:20. The NCAA's current president, Dr. Mark Emmert, does not have any voting power in this process. Id. 1746:19-:24.

B. Electronic Arts Inc. & Collegiate Licensing Company

Electronic Arts Inc. (EA) is a corporation which develops and manufactures videogames. Stip. Undisputed Facts ¶ 35. It created and sold an annual NCAA-branded college football videogame every year between 1997 and 2013. Id. ¶ 39. It also created and sold an annual NCAA-branded college basketball game every year between 1998 and 2010. Id. ¶ 40. In order to create these games, it entered into licensing agreements with the NCAA and its member schools and paid them for permission to use their intellectual property, including their marks, in the videogames. Id. ¶¶ 37-38; Exs. 1125, 1126. Collegiate Licensing Company (CLC) is a Georgia corporation that licenses trademarks of the NCAA and several of its member schools and conferences. Stip. Undisputed Facts ¶¶ 32-34. Although Plaintiffs originally brought claims against both EA and CLC in this action, they subsequently agreed to settle those claims.

C. Plaintiffs

Plaintiffs are twenty current and former student-athletes, all of whom play or played for an FBS football or Division I men's basketball team between 1956 and the present. Some, but not all, Plaintiffs went on to play professional sports after they left college. They represent the following class, which this Court certified under Federal Rule of Civil Procedure 23(b)(2) in November 2013:

> All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as "University Division" before 1973) college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.

Case No. 09-1967, Docket No. 1025, April 11, 2014 Order, at 47-48 (amending definition of previously certified class).

II. The Relevant Markets

As explained in previous orders, Plaintiffs allege that the NCAA has restrained trade in two related national markets, which they refer to as the "college education market" and the "group licensing market." Although these alleged markets involve many of the same participants, each market ultimately involves a different set of buyers, sellers, and products. Accordingly, this order addresses each market separately.

A. College Education Market

The evidence presented at trial, including testimony from both experts and lay witnesses, establishes that FBS football and Division I basketball schools compete to recruit the best high school football and basketball players. Trial Tr. 9:1-:7 (O'Bannon); 114:21-117:17 (Noll); 831:8-:11 (Rascher); 1759:21-:22 (Emmert); Ex. 2530. Specifically, these schools compete to sell unique bundles of goods and services to elite football and basketball recruits. The bundles include scholarships to cover the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services. Trial Tr. 40:2-:20 (O'Bannon); 582:6-:18 (Prothro); 1741:10-:20 (Emmert); Ex. 2340 at 207. They also include access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences. Trial Tr. 13:4-:12 (O'Bannon); 556:8-558:2 (Prothro); 1157:20-1158:7 (Staurowsky); 1721:3-1722:19 (Emmert). In exchange for these unique bundles of goods and services, football and basketball recruits must provide their schools with their athletic services and acquiesce in the use of their names, images, and likenesses for commercial and promotional purposes. Id. 109:5-110:12 (Noll). They also implicitly agree to pay any costs of attending college and participating in intercollegiate athletics that are not covered by their scholarships. See Ex. 2340 at 207.

The evidence presented at trial demonstrates that FBS football and Division I basketball schools are the only suppliers of the unique bundles of goods and services described above. Recruits who are skilled enough to play FBS football or Division I basketball do not typically pursue other options for continuing their education and athletic careers beyond high school. Plaintiffs' economic expert, Dr. Roger Noll, examined the rates at which elite football and basketball recruits accept athletic scholarships to play FBS football or Division I basketball. He observed that, between 2007 and 2011, more than ninety-eight percent of football recruits classified as four- or five-star recruits (the two highest ratings available) by Rivals.com accepted offers to play FBS football. Trial Tr. 113:2-114:13; Ex. 2529. None of the five-star recruits and only 0.2% of four-star recruits chose to play football at an FCS school and none chose to play at a Division II or III school during that period. Ex. 2529. Among three-star recruits, ninety-two percent of those offered a scholarship from an FBS school accepted one. Id. Less than four percent of all three-star recruits accepted an offer to play football at a non-FBS school. Id.

This pattern is even more stark for basketball recruits. Between 2007 and 2011, no four- or five-star basketball recruits and less than one percent of all two- and three-star recruits accepted offers to play for a non-Division I school. Id. Even among zero-star recruits, only one percent accepted offers to play basketball outside of Division I. Id. In contrast, roughly ninety-five percent of all recruits offered Division I basketball scholarships in the Rivals.com sample accepted one. Id. This data supports Dr. Noll's conclusion that "if the top athletes are offered a D-I scholarship, they take it. They do not go anywhere else." Trial Tr. 114:6-:7.

On cross-examination, Dr. Noll conceded that the Rivals.com data he used in his analysis came from recruits' self-reported information about the scholarship offers they received and accepted. Id. 486:7-:9. However, this fact does not render Dr. Noll's opinion unreliable. Recruits have a strong incentive to report accurate information to Rivals.com because the information is relatively easy to verify; after all, a recruit's lie about accepting a scholarship from a particular school will be discovered as soon as his name does not appear on that school's roster or list of committed recruits. In any event, the NCAA has not presented any data of its own to contradict the Rivals.com data nor any other evidence, expert or otherwise, to cast doubt on Dr. Noll's conclusion that there are no substitutes for the opportunities offered by FBS football and Division I basketball schools.

The only potential substitutes that the NCAA has identified are the opportunities offered by schools in other divisions, collegiate athletics associations, or minor and foreign professional sports leagues. None of these other divisions, associations, or professional leagues, however, provides the same combination of goods and services offered by FBS football and Division I basketball schools. Schools in FCS and Divisions II and III all provide a lower number of scholarships than FBS football and Division I basketball schools, which results in a lower level of athletic competition. The National Intercollegiate Athletic Association (NAIA), National Junior College Athletic Association (NJCAA), National Christian Collegiate Athletic Association (NCCAA), and United States Collegiate Athletic Association (USCAA) likewise provide fewer scholarships and offer a lower level of competition. What's more, the schools in these other divisions and associations are often smaller than FBS football and Division I basketball schools, spend much less on athletics, and may not even provide opportunities to attend a four-year college. Id. 2824:14-:24, 2826:16-2827:7, 2829:17-2830:12 (Stiroh). This is why, as Dr. Noll concluded, these other schools do not compete with FBS football and Division I basketball schools for recruits.

Dr. Noll also analyzed the Rivals.com data to show that FBS schools almost always defeated non-FBS schools in head-to-head recruiting contests for the same football recruit between 2007 and 2011. Id. 116:6-118:11, 474:23-475:14; Ex. 2530. His analysis of head-to-head recruiting contests for basketball players revealed the same discrepancy between Division I and non-Division I schools. Trial Tr. 116:6-118:11. Notably, he did not observe this discrepancy when comparing head-to-head recruiting contests among FBS football schools or Division I basketball schools. Id.; Ex. 2530 at 3. Even when he compared the success of the schools within the five major Division I conferences -- namely, the Pacific 12 Conference (Pac 12), Big 12 Conference, Atlantic Coast Conference, Southeastern Conference (SEC), and Big 10 Conference -- to that of schools in less prominent Division I conferences, he found that they were still in competition with each other. Trial Tr. 116:9-:13 ("And unlike the finding for other divisions and junior colleges and NAIA and all the rest that was in the first picture, what we find here is that although the major conferences win more than they lose, in competing against the lesser conferences, there is considerable competitive overlap."). Thus, the bundles of goods and services offered by schools in FCS, Divisions II and III, and other non-NCAA collegiate athletics associations are not substitutes for the bundles of goods and services offered by FBS football and Division I basketball schools.

Nor are the opportunities offered by the professional leagues that the NCAA has identified here. Dr. Noll noted that elite football and basketball recruits rarely forego opportunities to play FBS football or Division I basketball in order to play professionally. Neither the National Football League (NFL) nor the National Basketball Association (NBA) permits players to enter the league immediately after high school. Id. 68:17-69:6 (O'Bannon). Although other professional leagues -- such as the NBA Development League (D-League), the Arena Football League (AFL), and certain foreign football and basketball leagues -- permit players to join immediately after high school, recruits do not typically pursue opportunities in those leagues. Id. 482:11-:13 (Noll). When Dr. Noll was asked why he did not conduct an analysis of recruits who chose to play professionally in these leagues, he replied that too few had ever done so to conduct such an analysis. Id. 484:19-485:13 ("It would be hard to do an analysis of zero."). He also noted that many recruits may not even be given an opportunity to play in these leagues. Id. 482:14-:17 ("The opportunity is not given to very many high school athletes to play in Europe."). What's more, none of these leagues offers the same opportunity to earn a higher education that FBS football and Division I basketball schools provide. For all of these reasons, the Court finds that there are no professional football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide. These schools comprise a relevant college education market, as described above.

B. Group Licensing Market

Professional athletes often sell group licenses to use their names, images, and likenesses in live game telecasts, videogames, game re-broadcasts, advertisements, and other archival footage.[4] Plaintiffs allege that, in the absence of the NCAA's challenged rules, FBS football and Division I basketball players would also be able to sell group licenses for the use of their names, images,

[4] Plaintiffs presented some evidence at trial of a market for licenses to use student-athletes' names, images, and likenesses in other merchandise, such as jerseys and bobbleheads. The Court does not address this market because Plaintiffs previously abandoned all of their claims related to such markets. Docket No. 827, June 20, 2013 Hrg. Tr. 54:13-:16. In addition, the evidence they presented at trial regarding merchandise-related licenses did not constitute proof of a market for group licenses but, rather, only individual licenses.

and likenesses. Specifically, they contend that members of certain FBS football and Division I basketball teams would be able to join together to offer group licenses, which they would then be able to sell to their respective schools, third-party licensing companies, or media companies seeking to use student-athletes' names, images, and likenesses. Plaintiffs have identified three submarkets within this broader group licensing market: (1) a submarket for group licenses to use student-athletes' names, images, and likenesses in live football and basketball game telecasts; (2) a submarket for group licenses to use student-athletes' names, images, and likenesses in videogames; and (3) a submarket for group licenses to use student-athletes' names, images, and likenesses in game re-broadcasts, advertisements, and other archival footage.

1. Submarket for Group Licenses to Use Student-Athletes' Names, Images, and Likenesses in Live Game Telecasts

The Court finds that a submarket exists in which television networks seek to acquire group licenses to use FBS football and Division I basketball players' names, images, and likenesses in live game telecasts. Television networks frequently enter into licensing agreements to use the intellectual property of schools, conferences, and event organizers -- such as the NCAA or a bowl committee -- in live telecasts of football and basketball games. In these agreements, the networks often seek to acquire the rights to use the names, images, and likenesses of the participating student-athletes during the telecast. For instance, the NCAA's 1994 licensing agreement granting CBS the rights to telecast the

Division I men's basketball tournament every year from 1995 to 2002 includes a "Name & Likeness" provision that states:

> The Network, its sponsors, their advertising representatives and the stations carrying the telecasts of the games will have the right to make appropriate references (including without limitation, use of pictures) to NCAA and the universities and colleges of the teams, the sites, the games and the participants in and others identified with the games and in the telecasting thereof, provided that the same do not constitute endorsements of a commercial product.

Ex. 2104 at 16 (emphasis added). A 1999 agreement between the NCAA and CBS for the rights to telecast certain Division I basketball games contains a "Name & Likeness" provision with nearly identical language. Ex. 2116 at 17 (granting the "right to make appropriate references (including without limitation, use of pictures) to . . . the participants in and others identified with the games" (emphasis added)). An agreement between the FBS conferences, the University of Notre Dame, and Fox Broadcasting Company for the rights to telecast certain 2007, 2008, and 2009 bowl games similarly provides that the event organizer will be solely responsible for ensuring that Fox has "the rights to use the name and likeness, photographs and biographies of all participants, game officials, cheerleaders" and other individuals connected to the game. Ex. 2162 at 9. Plaintiffs also provided other contracts containing similar language. See, e.g., Ex. 2230 at 10 (granting the broadcaster "all name and likeness rights of all participants, officials, competing teams and any other persons connected with the Events that are reasonable or necessary for the Telecast of the Events"); Ex. 3078 at 2-3 (providing that the Big 10 would use "reasonable commercial efforts" to obtain from any non-conference opponent the "right . . . to use its respective players' names, likenesses, and that school's trademarks, logos and other items in promoting, advertising and Telecasting any such game"). These contracts demonstrate that there is a demand for these rights among television networks.

Plaintiffs' broadcasting industry expert, Edwin Desser, confirmed that provisions like these are common and that they have economic value to television networks. Trial Tr. 651:9-:11, 699:18-700:3, 681:18-:23 ("If you're running a business like a television network, a broadcast station, you would prefer to have consents, and you would like to have somebody stand behind those consents so that you don't have to worry about somebody coming after you later with a claim."). Thus, a market for these rights exists. Plaintiffs also demonstrated that this is a market for group licenses -- not individual licenses. Mr. Desser testified that a "television sports agreement is a bundle of rights and responsibilities that are all interrelated and that, you know, create value, provide comfort, and are [] integrated into the agreement." Id. 658:14-:19. A license to use an individual student-athlete's name, image, and likeness during a game telecast would not have any value to a television network unless it was bundled with licenses to use every other participating student-athlete's name, image, and likeness.

The NCAA's broadcasting industry expert, Neal Pilson, testified that sports broadcasters need not acquire the rights to use student-athletes' names, images, and likenesses and that the primary reason they enter into licensing agreements with event organizers is to gain exclusive access to the facility where the event will occur. Trial Tr. 720:5-:17. This testimony is not convincing. Mr. Pilson admitted that broadcasters must acquire certain rights even from visiting teams who do not control access to the event facility. Id. 803:5-804:8. He also acknowledged that broadcasting agreements -- like those quoted above -- sometimes refer expressly to name, image, and likeness "rights." Id. 805:2-:16. Accordingly, the Court finds that, absent the challenged NCAA rules, teams of FBS football and Division I basketball players would be able to create and sell group licenses for the use of their names, images, and likenesses in live game telecasts.

2. Submarket for Group Licenses to Use Student-Athletes' Names, Images, and Likenesses in Videogames

Like television networks, videogame developers would seek to acquire group licenses to use the names, images, and likenesses of FBS football and Division I basketball players if the NCAA did not prohibit student-athletes from selling such licenses. EA seeks to make all of its sports-themed videogames "as authentic as possible." Trial Tr. 1656:7 (Linzner). One of the company's vice presidents, Joel Linzner, explained, "We have found that it is pleasing to our customers to be able to use the real athletes depicted as realistically as possible and acting as realistically as possible." Id. 1658:3-:6; see also Ex. 2007 at 50-54 (describing demand for use of student-athletes' names, images, and likenesses in videogames). To do this, the company typically negotiates licenses with professional sports leagues and teams to use their trademarks, logos, and other intellectual property in videogames. Trial Tr. 1656:10-1657:25. It also negotiates with groups of professional athletes for licenses to use their names, images, and likenesses. Id. EA would be interested in acquiring the same rights from student-athletes in order to produce college sports-themed videogames, if it were permitted to do so. Id. 1669:24-1670:24. Accordingly, the Court finds that, absent the challenged NCAA rules, there would be a demand among videogame developers for group licenses to use student-athletes' names, images, and likenesses.

The NCAA asserts that such demand would not exist because it has ceased licensing its intellectual property for use in videogames, making it unlikely that any developer would seek to develop a videogame using the names, images, and likenesses of student-athletes. This assertion is not supported by the trial record. Although the NCAA recently declined to renew its license with EA, it has not presented any evidence suggesting that it will never enter into such an agreement again in the future. None of its current bylaws preclude it from entering into such an agreement. Furthermore, the evidence presented at trial demonstrates that, prior to this litigation, the NCAA found it profitable to license its intellectual property for use in videogames. Indeed, it continued to renew its annual licensing agreement with EA, even as the company evaded the NCAA's rules prohibiting it from using student-athletes' images and likenesses in videogames. Throughout the late 2000s, EA's NCAA-branded videogames featured playable avatars that could easily be identified as real student-athletes despite the NCAA's express prohibition on featuring student-athletes in videogames. The EA avatars played the same positions as their real-life counterparts, wore the same jersey numbers and uniform accessories, haled from the same home state, and shared the same height, weight, handedness, and skin color. Trial Tr. 27:14-28:11 (O'Bannon); 568:6-569:24 (Prothro); 930:5-931:7 (Rascher). For all of these reasons, the Court finds that a submarket would exist for group licenses to use student-athletes' names, images, and likenesses in videogames if student-athletes were permitted to receive compensation for such licenses.

3. Submarket for Group Licenses to Use Student-Athletes' Names, Images, and Likenesses in Game Re-Broadcasts, Advertisements, and Other Archival Footage

Plaintiffs have shown that television networks, advertisers, and third-party licensing companies seek to use archival footage of student-athletes in game re-broadcasts, commercials, and other products. Several of the live telecasting agreements discussed above included provisions granting the television network the rights to use archival footage, as well. See, e.g. Ex. 3078 at 2-3 (granting the Big 10 Network the rights to use certain student-athletes' names and likenesses in "promoting, advertising and Telecasting" a game); Ex. 2230 at 2 (granting Fox Sports Net the "right to re-Telecast the Selected Events," the "right to distribute highlights of the Selected Events," and the specific right to use the "names and likenesses of the players" to promote certain games as well as the network itself). Tyrone Prothro, a former wide receiver for the University of Alabama, saw footage in a commercial of a famous catch that he made during a game. Trial Tr. 565:24-566:8. Finally, one of the NCAA's vice presidents, Mark Lewis, established that the NCAA has licensed all of its archival footage from past NCAA championships to a third-party licensing company, T3Media, which acts as the association's agent in licensing that footage for use in game re-broadcasts, advertisements, and any other products. Id. 3206:13-:25. Although T3Media is not permitted to license footage of current student-athletes, it still acquires the rights to this footage while the student-athletes are in school for later use (after acquiring the student-athletes' consent). This is enough to show that demand for this footage exists. Based on this evidence, the Court finds that, absent the NCAA's challenged rules, there would be a demand among television networks, third-party licensing companies, and advertisers for group licenses to use student-athletes in game re-broadcasts, advertisements, and other archival footage.

III. The Challenged Restraint

NCAA rules prohibit current student-athletes from receiving any compensation from their schools or outside sources for the use of their names, images, and likenesses in live game telecasts, videogames, game re-broadcasts, advertisements, and other footage. Plaintiffs contend that these rules restrain trade in the two markets identified above.

The NCAA imposes strict limits on the amount of compensation that student-athletes may receive from their schools. Most importantly, it prohibits any student-athlete from receiving "financial aid based on athletics ability" that exceeds the value of a full "grant-in-aid." Ex. 2340 at 208. The bylaws define a full "grant-in-aid" as "financial aid that consists of tuition and fees, room and board, and required course-related books." Id. at

207. This amount varies from school to school and from year to year. Any student-athlete who receives financial aid in excess of this amount forfeits his athletic eligibility. Id. at 208.

In addition to this cap on athletics-based financial aid, the NCAA also imposes a separate cap on the total amount of financial aid that a student-athlete may receive. Specifically, it prohibits any student-athlete from receiving financial aid in excess of his "cost of attendance." Ex. 2340 at 208. Like the term "grant-in-aid," the term "cost of attendance" is a school-specific figure defined in the bylaws. It refers to "an amount calculated by [a school]'s financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance" at that school. Id. at 206. Because it covers the cost of "supplies, transportation, and other expenses," the cost of attendance is generally higher than the value of a full grant-in-aid. The gap between the full grant-in-aid and the cost of attendance varies from school to school but is typically a few thousand dollars.[5]

The NCAA also prohibits any student-athlete from receiving compensation from outside sources based on his athletic skills or ability.[6] Thus, while a student-athlete may generally earn money

[5] Under certain circumstances, a student-athlete who has an unexpected "special financial need" may be permitted to receive additional aid beyond the cost of attendance. Trial Tr. 2144:25-2145:14 (Petr). This additional aid comes from his school's "student assistance fund" and could include money for "needed clothing, needed supplies, a computer," or other academic needs. Ex. 2340 at 238.

[6] The NCAA's bylaws contain a minor exception permitting student-athletes to receive limited compensation for educational expenses "awarded by the U.S. Olympic Committee or a U.S. national governing body." Ex. 2340 at 211.

from any "on- or off-campus employment" unrelated to his athletic ability, he may not receive "any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability." Id. at 211. Student-athletes are also barred from endorsing any commercial product or service while they are in school, regardless of whether or not they receive any compensation to do so. Id. at 86.

Dr. Noll testified that these rules restrain competition among schools for recruits. If the grant-in-aid limit were higher, schools would compete for the best recruits by offering them larger grants-in-aid. Similarly, if total financial aid was not capped at the cost of attendance, schools would compete for the best recruits by offering them compensation exceeding the cost of attendance. This competition would effectively lower the price that the recruits must pay for the combination of educational and athletic opportunities that the schools provide. As Dr. Noll explained, "if the scholarship value is suppressed, that means the net price paid by a student-athlete to attend college is higher." Trial Tr. 105:24-107:1. Thus, he explained, because the NCAA has the power to and does suppress the value of athletic scholarships through its grant-in-aid rules, it has increased the prices schools charge recruits. Id. 127:20-129:13.

Dr. Noll's opinions are consistent with the opinions of the NCAA's own economic expert, Dr. Daniel Rubinfeld, who testified that the NCAA operates as a "joint venture which imposes restraints" on trade. Id. 2922:20-:21. Dr. Rubinfeld specifically acknowledged that "the NCAA does impose a restraint, the restraint we have been discussing in this case." Id. 2921:8-:9. Although he opined that this restraint was lawful because it serves procompetitive purposes, he never denied that the NCAA restricts competition among its members for recruits. In fact, his own economics textbook specifically refers to the NCAA as a "cartel," which he defined during his testimony as "a group of firms that impose a restraint." Id. 2975:3-:4. Although the NCAA's other economic expert, Dr. Lauren Stiroh, testified that the NCAA does not restrain competition in any market, her opinions were based on the theory that anticompetitive effects cannot arise unless consumers in a "downstream market" are harmed. Id. 2766:16-:22. In this case, those consumers would be people who watch or attend college football and basketball games or purchase goods using the names, images, and likenesses of student-athletes. The Court rejects Dr. Stiroh's theory that Plaintiffs cannot show any anticompetitive effects caused by the alleged restraint without demonstrating some harm to these consumers. The evidence cited above demonstrates that student-athletes themselves are harmed by the price-fixing agreement among FBS football and Division I basketball schools. In the complex exchange represented by a recruit's decision to attend and play for a particular school, the school provides tuition, room and board, fees, and book expenses, often at little or no cost to the school. The recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect. Thus, the Court finds that the NCAA has the power -- and exercises that power -- to fix prices and restrain competition in the college education market that Plaintiffs have identified.

Dr. Noll testified that elite football and basketball recruits -- the buyers in Plaintiffs' college education market -- could also be characterized as sellers in an almost identical market for their athletic services and licensing rights. Id. 143:21-144:8. In that market, FBS football and Division I basketball schools are buyers seeking to acquire recruits' athletic services and licensing rights, paying for them with full grants-in-aid but no more. From that perspective, the NCAA's restrictions on student-athlete compensation still represent a form of price fixing but create a buyers' cartel, rather than a sellers' cartel. Just as in Plaintiffs' college education market, schools would engage in price competition in the market for recruits' athletic services and licensing rights if there were no restrictions on student-athlete compensation; the only difference would be that they would be viewed as buyers in the transactions rather than sellers. Thus, because Plaintiffs' college education market is essentially a mirror image of the market for recruits' athletic services and licensing rights, the Court finds that the NCAA exercises market power, fixes prices, and restrains competition in both markets.

IV. Asserted Purposes of the Restraint

The NCAA asserts that the challenged restrictions on student-athlete compensation are reasonable because they are necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product.

A. Preservation of Amateurism

The NCAA asserts that its challenged rules promote consumer demand for its product by preserving its tradition of amateurism in college sports. It relies on historical evidence, consumer survey data, and lay witness testimony to support this assertion. The Court does not find this evidence sufficient to justify the challenged restraint.

Dr. Emmert testified that "the rules over the hundred-year history of the NCAA around amateurism have focused on, first of all, making sure that any resources that are provided to a student-athlete are only those that are focused on his or her getting an education." Trial Tr. 1737:8-:12. The historical evidence presented at trial, however, demonstrates that the association's amateurism rules have not been nearly as consistent as Dr. Emmert represents. In fact, these rules have changed numerous times since the NCAA -- then known as the Intercollegiate Athletic Association (IAA) -- enacted its first set of bylaws in 1906. The IAA's first bylaws governing amateurism provided,

> No student shall represent a College or University in an intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial concession or emolument as past or present compensation for, or as prior consideration or inducement to play in, or enter any athletic contest, whether the said remuneration be received from, or paid by, or at the instance of any organization, committee or faculty of such College or University, or any individual whatever.

Stip. Undisputed Facts ¶¶ 6-7. This rule would have barred even today's athletic scholarships. Despite the breadth of this written prohibition, the IAA's member schools recruited students using "player subsidies" and other illicit forms of payment. Id. ¶ 10.

In 1916, after changing its name to the NCAA, the association adopted a new rule stating that an amateur was "one who participates in competitive physical sports only for pleasure, and the physical, mental, moral, and social benefits directly derived therefrom." Id. The NCAA amended that definition in 1922 to define an amateur as "one who engages in sport solely for the physical, mental or social benefits he derives therefrom, and to whom the sport is nothing more than an avocation." Id. ¶ 14.

Most schools continued to ignore these rules for the first few decades of the NCAA's existence. Id. ¶¶ 17-20. Then, in 1948, the NCAA enacted a strict set of rules known as the "Sanity Code" designed to curb violations of its bylaws. Id. ¶ 20. The Sanity Code "required that financial aid be awarded without consideration of athletics ability," which, again, would have prohibited today's athletic scholarships. Id. The NCAA repealed the Sanity Code the following year and, in 1952, created its first enforcement committee to address and prevent rules infractions. Id. ¶ 24.

In 1956, the NCAA enacted a new set of amateurism rules permitting schools to award athletic scholarships to student-athletes. Id. ¶ 25. These rules established a national standard governing athletics-based financial aid and imposed a limit on the size of athletic scholarships that schools were permitted to offer. Id. That limit -- now known as a full "grant-in-aid" -- precluded student-athletes from receiving any financial aid beyond that needed for "commonly accepted educational expenses," including tuition, fees, room and board, books, and cash for incidental expenses such as laundry. Id.

The NCAA continued to revise its scholarship limits after implementing the grant-in-aid limit in 1956. In 1975, for instance, it removed the cash for incidental expenses from the full grant-in-aid. Walter Byers Depo. 21:21-22:14, 24:6-:17. It amended the grant-in-aid rules again in 2004 by allowing student-athletes who receive federal Pell grants to receive total assistance in excess of a full grant-in-aid and even in excess of the cost of attendance. Trial Tr. 161:10-162:4 (Noll); Ex. 2340 at 208. As a result, student-athletes who qualify for a Pell grant are now eligible to receive a full grant-in-aid plus the value of their Pell grant -- currently, just over $5,500 -- even if that total exceeds the cost of attendance. Trial Tr. 1573:8-:16 (Pastides); Ex. 2340 at 208. The NCAA amended its rules again in 2013 to permit different levels of compensation for recruits in different sports. The new rules permit Division I tennis recruits to earn up to ten thousand dollars per year in prize money from athletic events before they enroll in college. Ex. 2340 at 75. Other Division I recruits, in contrast, remain barred from receiving any prize money in excess of their actual and necessary costs of competing in an event. Id.

The amateurism provision in the NCAA's current constitution states that student-athletes "shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." Ex. 2340 at 18. This conception of amateurism stands in stark contrast to the definitions set forth in the NCAA's early bylaws. Indeed, education -- which the NCAA now considers the primary motivation for participating in intercollegiate athletics -- was not even a recognized motivation for amateur athletes during the years when the NCAA prohibited athletic scholarships. The Court finds that the NCAA's current restrictions on student-athlete compensation, which cap athletics-based financial aid below the cost of attendance, are not justified by the definition of amateurism set forth in its current bylaws.

Although the NCAA sought to establish the importance of these restrictions by asserting that they increase consumer interest in FBS football and Division I basketball, its evidence supporting this assertion is unpersuasive. It presented testimony from a survey research expert, Dr. J. Michael Dennis, who conducted a survey of consumer attitudes concerning college sports in 2013. Dr. Dennis surveyed 2,455 respondents across the United States and observed that they generally opposed the idea of paying college football and basketball players. Trial Tr. 2613:24-2614:6. His survey contained an initial question that apparently affected many respondents' answers to the survey's substantive questions. The initial open-ended question asked respondents what they had heard about student-athletes being paid. Id. 2716:15-2717:7; Exs. 2629,

2630. Plaintiffs' survey expert, Hal Poret, noted that the "single most common response" to this question was that respondents had heard about student-athletes receiving some form of illegal or illicit payments. Trial Tr. 2714:2-:20; Ex. 2629. Many other respondents mentioned paying student-athletes a salary. Trial Tr. 2714:21-2715:2 (Poret); Ex. 2630. Although Dr. Dennis testified that his results remained the same even after he removed these specific 274 respondents from his sample, the fact that these respondents expressly mentioned illicit payments or salaries at the start of the survey strongly suggests that the question primed respondents to think about such illicit payments when answering the other survey questions.

The NCAA relies heavily on the fact that sixty-nine percent of respondents to Dr. Dennis's survey expressed opposition to paying student-athletes while only twenty-eight percent favored paying them. Trial Tr. 2604:21-2605:2; Ex. 4045 at 19. These responses, however, are not relevant to the specific issues raised here and say little about how consumers would actually behave if the NCAA's restrictions on student-athlete compensation were lifted. Although Dr. Dennis testified that these responses were consistent with those observed in other polls and surveys concerning college sports, he acknowledged that those other studies may "vary in their quality or their methodology and their implementation." Trial Tr. 2641:24-2642:11; Ex. 4045 at 20. Accordingly, the Court does not find these findings to be credible evidence that consumer demand for the NCAA's product would decrease if student-athletes were permitted to receive compensation.

The most relevant questions in Dr. Dennis's survey asked respondents specifically whether they would be more or less likely to watch, listen to, or attend college football and basketball games if student-athletes were paid. Thirty-eight percent of all respondents stated they would be less likely to watch, listen to, or attend games if student-athletes were paid $20,000 per year. Ex. 4045 at 23. Forty-seven percent stated that they would be less likely to watch, listen to, or attend games if student-athletes were paid $50,000 per year. Id. In contrast, only about four or five percent of respondents said that they would be more likely to watch, listen to, or attend games if student-athletes were paid $20,000 or $50,000 per year. Trial Tr. 2651:14-2652:8 (Dennis). The remaining respondents stated that they would be no more or less likely to watch, listen to, or attend games if student-athletes were paid these amounts. Id.

While these questions are more germane to consumer behavior than the survey's findings about respondents' general opinions about compensating student-athletes, they still do not credibly establish that the specific rules challenged here contribute to consumer demand. Dr. Dennis did not ask respondents for their opinions about providing student-athletes with a share of licensing revenue generated from the use of their own names, images, and likenesses. Id. 2669:15-:18 (Dennis); 2709:6-:18 (Poret). Nor did he ask their opinions about paying student-athletes the full cost of attendance, or any amount less than $20,000 per year. Dr. Dennis also failed to ask respondents how their behavior would be affected if small or large amounts of compensation for the use of student-athletes' names, images, and

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likenesses were held in trust for them until they left school -- one of Plaintiffs' proposed alternatives here. Id. 2686:18-2687:3 (Dennis); 2711:21-2712:9, 2718:19-2714:12 (Poret).

In addition, numerous respondents provided internally inconsistent responses to different survey questions. Eighty-three of the respondents who said that they favored paying student-athletes also stated that they would be less likely to watch, listen to, or attend games if student-athletes were paid. Id. 2729:25-2730:9. Another thirty-three respondents stated that they opposed paying student-athletes but said that they would be more likely to watch, listen to, or attend games if student-athletes were paid. Id. These responses suggest that some respondents did not understand or did not take seriously some of the survey questions and illustrate the limits of Dr. Dennis's conclusions.

Based on these flaws in Dr. Dennis's survey, the Court finds that it does not provide credible evidence that demand for the NCAA's product would decrease if student-athletes were permitted, under certain circumstances, to receive a limited share of the revenue generated from the use of their own names, images, and likenesses. Although Plaintiffs did not provide their own opinion survey to counter Dr. Dennis's survey, the Court notes that the NCAA produced Dr. Dennis's survey as a rebuttal report, which may have limited Plaintiffs' opportunity to commission such a survey. What's more, Dr. Dennis himself acknowledged that it would be extremely difficult to ask the specific kinds of detailed survey questions most relevant to this case -- specifically, those relating to varying amounts and methods of payment for the use of student-athletes' names, images, and likenesses.

Plaintiffs presented other evidence illustrating the limits of opinion surveys as predictors of consumer demand for sports-entertainment products. Their expert on sports management, Dr. Daniel Rascher, described how opinion surveys conducted between 1970 and the present consistently showed that the public overwhelmingly opposed rising baseball player salaries but continued to watch, listen to, and attend Major League Baseball games at a high rate even as player salaries rose during this period. Id. 901:12-903:24; Ex. 2549. He specifically noted that many people felt that the removal of the reserve clause in the 1970s -- which ultimately enabled players to become free agents, thus leading to higher salaries -- would undermine the popularity of professional baseball. However, despite these predictions and fans' stated opposition to rising salaries, Major League Baseball revenues continued to rise after the removal of the reserve clause. Id. 903:13-:16 ("So even though the fans in polls say, 'Hey, we don't want the players to make so much money,' ultimately they continue to watch on television, you know, buy tickets, concessions, the whole thing." (internal quotation marks added)). Dr. Rascher highlighted another survey showing public opposition to the decision of the International Olympic Committee (IOC) to permit professional athletes to compete in the Olympics, even as consumer interest in the Olympics remained high and revenues generated by the event continued to rise during the same period. Id. 904:22-905:18; see also id. 226:15-227:17 (testimony of Dr. Noll that the Olympics are "much more popular now than they were

[when] amateur"). In addition to the Olympics, Dr. Rascher also pointed to various other formerly amateur sports associations -- such as those governing rugby and tennis -- whose events grew in popularity after they began to allow their athletes to accept payments. Id. 903:25-904:21.

Although the NCAA presented evidence showing that the Nielsen ratings for professional baseball and the Olympics have declined since the 1970s and 1980s, this does not cast doubt on Dr. Rascher's findings. As Dr. Rascher explained, Nielsen ratings measure the share of the population watching a particular event, not the raw number of viewers. Id. 986:7-:10, 1019:20-1020:9. As a result, Nielsen ratings have declined for virtually every television program or sporting event over the past few decades as the viewing population and number of television channels has grown. Id. Even a single event as popular as the Super Bowl, which has seen a dramatic increase in the raw number of viewers over the years, has experienced flat Nielsen ratings for several decades. Id. 1024:18-1026:7, 1025:6-:15.

Other historical evidence suggests that the NCAA's restrictions on student-athlete compensation have not contributed significantly to the popularity of FBS football and Division I basketball. The NCAA's former president, the late Walter Byers, testified during his 2007 deposition, for instance, that the NCAA's decision to remove incidental expenses from the grant-in-aid coverage in 1975 was not motivated by a desire to increase consumer demand for its product. Byers Depo. 21:21-22:14, 24:6-:17. In fact, he specifically noted that NCAA sports experienced a tremendous growth in popularity during the period between 1956 and 1975 when grants-in-aid still covered the full cost of attendance. Id. 25:15-26:8.[7] None of the evidence in the trial record suggests that the removal of incidental expenses or any other changes to the grant-in-aid limit had an impact on the popularity of college sports during this time.

Thus, the Court finds that the NCAA's restrictions on student-athlete compensation are not the driving force behind consumer demand for FBS football and Division I basketball-related products. Rather, the evidence presented at trial suggests that consumers are interested in college sports for other reasons. Mr. Pilson testified, for instance, that the popularity of college sports is driven by feelings of "loyalty to the school," which are shared by both alumni and people "who live in the region or the conference." Trial Tr. 757:20-758:13. Similarly, Christine Plonsky, an associate athletics director at the University of Texas (UT), testified that UT sports would remain popular as long as they had "anything in our world to do with the University of Texas." Id. 1414:23-:24; see also id. 1376:13 ("Longhorns are pretty loyal."). Dr. Emmert himself noted that much of the popularity of the NCAA's annual men's basketball tournament stems from the fact that schools from all over the country participate "so the fan base has an opportunity to cheer for someone from their region of the country." Id. 1757:1-:9; see also id. ("It's become extremely popular at least in part because there's someone

[7] The NCAA's objections to this testimony under Federal Rules of Evidence 602 and 701 are overruled. Walter Byers was the executive director of the NCAA between 1956 and 1975, Stip. Undisputed Facts ¶ 23, and therefore had personal knowledge of the popularity of NCAA sports during this period.

from your neighborhood likely to be in the tournament.”). He testified that college bowl games have the same appeal. Id. 1757:16-:19. This evidence demonstrates that the NCAA’s restrictions on student-athlete pay is not the driving force behind consumer interest in FBS football and Division I basketball. Thus, while consumer preferences might justify certain limited restraints on student-athlete compensation, they do not justify the rigid restrictions challenged in this case.

B. Competitive Balance

The NCAA asserts that its challenged restraints are reasonable and procompetitive because they are needed to maintain the current level of competitive balance among FBS football and Division I basketball teams. It further asserts that it must maintain this particular level of competitive balance in order to sustain consumer demand for its product.

The Court finds that the NCAA’s current restrictions on student-athlete compensation do not promote competitive balance. As Dr. Noll testified, since the 1970s, numerous sports economists have studied the NCAA’s amateurism rules and nearly all have concluded that the rules have no discernible effect on the level of competitive balance. Trial Tr. 229:8-234:2. He noted that one of the more recent articles addressing the subject, a 2007 study by economist Jim Peach published in the Social Science Journal, found that there is “‘little evidence that the NCAA rules and regulations have promoted competitive balance in college athletics and no a priori reason to think that eliminating the rules would change the competitive balance situation.’” Id. 232:22-233:1 (quoting Peach article). Dr. Rascher reached the same conclusion based on his review of the economics literature. Id. 920:9-922:16. He specifically cited one of the leading textbooks in the field of sports economics, by Rod Fort, which found that the NCAA's restrictions on student-athlete pay do not appear to have any impact on competitive balance. Id. 921:10-:18.

The academic consensus on this issue is not surprising given that many of the NCAA's other rules and practices suggest that the association is unconcerned with achieving competitive balance. Several witnesses testified that the restrictions on student-athlete compensation lead many schools simply to spend larger portions of their athletic budgets on coaching, recruiting, and training facilities. Id. 296:14-297:18 (Noll); 865:11-866:2, 910:2-911:7 (Rascher). In the major conferences, for instance, the average salary for a head football coach exceeds $1.5 million. Id. 1151:20-1152:14 (Staurowsky). The fact that high-revenue schools are able to spend freely in these other areas cancels out whatever leveling effect the restrictions on student-athlete pay might otherwise have. The NCAA does not do anything to rein in spending by the high-revenue schools or minimize existing disparities in revenue and recruiting. In fact, Dr. Emmert specifically conceded that it is "not the mission of the association to . . . try and take away the advantages of a university that's made a significant commitment to facilities and tradition and all of the things that go along with building a program." Trial Tr. 1774:23-1775:6.

This same sentiment underlies the NCAA's unequal revenue distribution formula, which rewards the schools and conferences that already have the largest athletic budgets. Revenues generated from the NCAA's annual Division I men's basketball tournament are distributed to the conferences based on how their member schools performed in the tournament in recent years. Docket No. 207, Stip. Re: Broadcast Money, at ¶ 10. As a result, the major conferences -- and the highest revenue schools -- typically receive the greatest payouts, which hinders, rather than promotes, competitive balance.

The only quantitative evidence that the NCAA presented related to competitive balance is a cursory statistical analysis conducted by Dr. Rubinfeld comparing the levels of competitive balance in FBS football and Division I basketball to the levels in the NFL and NBA. Nothing in Dr. Rubinfeld's analysis suggests that the NFL and NBA -- each of which has fewer teams than Division I -- provide an appropriate baseline for comparing competitive balance. More importantly, his analysis does not suggest that the NCAA's challenged rules actually produce the levels of competitive balance he observed.

Even if the NCAA had presented some evidence of a causal connection between its challenged rules and its current level of competitive balance, it has not shown that the current level of competitive balance is necessary to maintain its current level of consumer demand. Trial Tr. 228:20-229:2 (Noll). It is undisputed that the ideal level of competitive balance for a sports league is somewhere between perfect competitive balance (where every team has an equal chance of winning every game) and perfect imbalance (where every game has a predictable outcome). Id. 453:8-:22 (Noll); 3127:2-:21 (Rubinfeld). The NCAA has not even attempted to identify the specific level of competitive balance between those extremes that is ideal or necessary to sustain its current popularity. Given the lack of such evidence in the record, the Court finds that the NCAA's challenged rules are not needed to achieve a level of competitive balance necessary, or even likely, to maintain current levels of consumer demand for FBS football and Division I basketball.

C. Integration of Academics and Athletics

The NCAA contends that its restrictions on student-athlete compensation are reasonable and procompetitive because they promote the integration of academics and athletics. In particular, it asserts that its challenged rules ensure that student-athletes are able to obtain all of the educational benefits that their schools provide and participate in their schools' academic communities. According to the NCAA, the integration of academics and athletics increases the quality of the educational services its member schools provide to student-athletes in the college education market that Plaintiffs have identified.

For support, the NCAA relies on evidence showing that student-athletes receive both short-term and long-term benefits from being student-athletes. One of its experts, Dr. James Heckman, testified that participation in intercollegiate athletics leads to better academic and labor market outcomes for many student-athletes as compared to other members of their socioeconomic groups. Trial Tr. 1493:13-1494:25. Dr. Heckman found that these benefits are particularly pronounced for student-athletes from disadvantaged backgrounds. Id. The NCAA presented additional evidence, including its own data on student-athlete graduation rates, to show that student-athletes enjoy substantial benefits from participating in intercollegiate athletics. However, none of this data nor any of Dr. Heckman's observations suggests that student-athletes benefit specifically from the restrictions on student-athlete compensation that are challenged in this case. To the contrary, Dr. Heckman specifically testified that the long-term educational and academic benefits that student-athletes enjoy stem from their increased access to financial aid, tutoring, academic support, mentorship, structured schedules, and other educational services that are unrelated to the challenged rules in this case. Id. 1512:23-1516:17. FBS football and Division I basketball schools offer most of these services to their student-athletes independently and are not compelled to do so by the NCAA, particularly not by the challenged rules.

The same is true of the various other benefits of integration that the NCAA has identified. For instance, the benefits that student-athletes derive from interacting with faculty and non-student-athletes on campus are achieved mostly through the NCAA's rules requiring student-athletes to attend class and meet certain academic requirements. They are also achieved through the association's rules prohibiting schools from creating dorms solely for student-athletes or from requiring student-athletes to practice more than a certain number of hours each week. None of these rules is challenged here.

The only evidence that the NCAA has presented that suggests that its challenged rules might be necessary to promote the integration of academics and athletics is the testimony of university administrators, who asserted that paying student-athletes large sums of money would potentially “create a wedge” between student-athletes and others on campus. Id. 1591:2-:20 (Pastides). These administrators noted that, depending on how much compensation was ultimately awarded, some student-athletes might receive more money from the school than their professors. Student-athletes might also be inclined to separate themselves from the broader campus community by living and socializing off campus.

It is not clear that any of the potential problems identified by the NCAA’s witnesses would be unique to student-athletes. In fact, when the Court asked Dr. Emmert whether other wealthy students -- such as those who come from rich families or start successful businesses during school -- raise all of the same problems for campus relations, he replied that they did. Id. 1790:18-:22. It is also not clear why paying student-athletes would be any more problematic for campus relations than paying other students who provide services to the university, such as members of the student government or school newspaper. Nonetheless, the Court finds that certain limited restrictions on student-athlete compensation may help to integrate student-athletes into the academic communities of their schools, which may in turn improve the schools’ college education product.

Plaintiffs have produced anecdotal and statistical evidence suggesting that the NCAA’s current rules do not serve to integrate FBS football players or Division I basketball players into the academic communities at their schools. For example, Ed O’Bannon, the former UCLA basketball star, testified that he felt like “an athlete masquerading as a student” during his college years. Id.

33:11-:14. Plaintiffs also presented testimony from Dr. Ellen Staurowsky, a sports management professor, who studied the experiences of FBS football and Division I basketball players and concluded that the time demands of their athletic obligations prevent many of them from achieving significant academic success. Id. 1175:12-1176:21. Some of this evidence conflicts with the NCAA's data on student-athlete graduation rates and Dr. Heckman's observations surrounding academic outcomes for student-athletes. However, the Court need not resolve these factual disputes because, regardless of how they are resolved, the restraints on student-athlete compensation challenged in this case generally do not serve to enhance academic outcomes for student-athletes.

D. Increased Output

The NCAA asserts that its challenged rules are reasonable and procompetitive because they enable it to increase the number of opportunities available to schools and student-athletes to participate in FBS football and Division I basketball, which ultimately increases the number of games that can be played. It refers to this increased number of FBS football and Division I schools, student-athletes, and games as increased output.

The Court finds that the NCAA's restrictions on student-athlete compensation do nothing to increase this output. The number of schools participating in FBS football and Division I basketball has increased steadily over time and continues to increase today. Stip. Undisputed Facts ¶¶ 42-49. This is because participation in FBS football and Division I basketball typically raises a school's profile and leads to increased athletics-based revenue. Trial Tr. 872:1-874:20 (Rascher). Although Dr. Emmert and other NCAA and conference officials say that this trend is not the result of increased Division I revenues but, rather, because of schools' philosophical commitment to amateurism, this theory is implausible. Id. 1783:2-:14; 2080:11-:23 (Delany); 2418:5-:25 (Sankey); 3188:25-3189:17 (Lewis). Schools in some of the major conferences have specifically undertaken efforts to change the NCAA's existing scholarship rules, which suggests that the rules are not the reason that they choose to participate in Division I. Ex. 2095 at 4 (2013 presentation by representatives of the five major conferences requesting autonomy to raise existing scholarship limits); Ex. 2527 at 2 (2014 letter from Pac 12 urging other major conferences to support rule changes, including raising the grant-in-aid limit). What's more, there is no evidence to suggest that any schools joined Division I originally because of its amateurism rules. These schools had numerous other options to participate in collegiate sports associations that restrict compensation for student-athletes, including the NCAA's lower divisions and the NAIA. Indeed, schools in FCS, Division II, and Division III are bound by the same amateurism provisions of the NCAA's constitution as the schools in Division I. The real difference between schools in Division I and schools in other divisions and athletics associations, as explained above, is the amount of resources that Division I schools commit to athletics. Thus, while there may be tangible differences between Division I schools and other schools that participate in intercollegiate sports, these differences are financial, not philosophical.

For this reason, the NCAA's assertion that schools would leave FBS and Division I for financial reasons if the challenged restraints were removed is not credible. The testimony of Dr. Emmert and various other athletics administrators that most Division I athletic programs operate at a loss and would not remain in Division I if the challenged rules were removed conflicts with the clear weight of the evidence. Trial Tr. 1784:6-:18 (Emmert); 3188:25-3189:3 (Lewis). Indeed, some of the NCAA's own witnesses undermined this claim. Dr. Harris Pastides, the president of the University of South Carolina, for instance, specifically testified that his school "would probably continue to compete in football and men's basketball" if the challenged restrictions on student-athlete compensation were lifted. Id. 1598:23-:25. The commissioner of Conference USA, Britton Banowsky, similarly expressed skepticism that universities would leave Division I if the restrictions were removed. Id. 2371:25-2372:20. Ms. Plonsky also cast doubt on Dr. Emmert's assertion that most Division I sports programs operate at a loss by noting that UT's athletics department is not only self-sustaining but, in fact, generates surplus revenue that funds other university programs and expenses. Id. 1385:12-:18, 1465:20-1466:10. She indicated that UT was not abnormal in this regard and that the "vast proportion" of athletics programs across the country are operated by "self-sourced, self-generated" revenues. Id. 1467:22-1468:11. Mr. Lewis himself acknowledged that the NCAA's revenues, most of which are distributed back to its member schools and conferences, have increased in recent years. Id. 3195:19-3196:3.

Dr. Rascher offered similar testimony and documented that participation in FBS football and Division I basketball generates significant revenue and is highly profitable for most schools.

Id. 830:4-831:15. These revenues are what enable them to spend so much on coaches and training facilities. Dr. Rascher also noted that most FBS football schools used to spend even more on their student-athletes before the NCAA lowered its team scholarship cap from 105 to eighty-five. Id. 873:20-874:20. Furthermore, Dr. Noll testified that some of the schools that currently compete in FBS and Division I do so without providing the maximum amount of financial aid permitted under NCAA rules.

Based on this evidence, the Court finds that schools would not exit FBS football and Division I basketball if they were permitted to pay their student-athletes a limited amount of compensation beyond the value of their scholarships. The NCAA's challenged restrictions on compensation do not increase the number of opportunities for schools or student-athletes to participate in Division I.

V. Alternatives to the Restraint

Plaintiffs have proposed three modifications to the NCAA's challenged rules which, they contend, would allow the NCAA to achieve the purposes of its challenged rules in a less restrictive manner: (1) raise the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes; (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; or (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.

The Court finds that Plaintiffs' first proposed alternative -- allowing schools to award stipends -- would limit the anticompetitive effects of the NCAA's current restraint without impeding the NCAA's efforts to achieve its stated purposes, provided that the stipends do not exceed the cost of attendance as that term is defined in the NCAA's bylaws. A stipend capped at the cost of attendance would not violate the NCAA's own definition of amateurism because it would only cover educational expenses. Indeed, as noted above, the NCAA's member schools used to provide student-athletes with similar stipends before the NCAA lowered its cap on grants-in-aid. Byers Depo. 21:21-22:14, 24:6-:17. Dr. Emmert testified that raising the grant-in-aid limit to cover the full cost of attendance would not violate the NCAA's amateurism rules. Trial Tr. 1742:15-:18. Greg Sankey, the executive associate commissioner and chief operating officer of the SEC, expressed the same view during his testimony, as did Dr. Rubinfeld. Id. 2430:23-:24 (Sankey); 3117:2-:4 (Rubinfeld).

None of the evidence presented at trial suggests that consumer demand for the NCAA's product would decrease if schools were permitted to provide such stipends to student-athletes once again. Nor does any of the evidence suggest that providing such stipends would hinder any school's efforts to educate its student-athletes or integrate them into the academic community on campus. If anything, providing student-athletes with such stipends would facilitate their integration into academic life by removing some of the educational expenses that they would otherwise have to bear, such as school supplies, which are not covered by a full grant-in-aid. Ex. 2340 at 207. Raising the grant-in-aid cap to allow for such stipends also would not have any effect on the NCAA's efforts to achieve competitive balance or increase its output because, as explained above, its existing restrictions on student-athlete compensation do not advance these goals.

Plaintiffs' second proposed less restrictive alternative -- allowing schools to hold payments in trust for student-athletes -- would likewise enable the NCAA to achieve its goals in a less restrictive manner, provided the compensation was limited and distributed equally among team members. The NCAA's own witness, Mr. Pilson, testified that he would not be troubled if schools were allowed to make five thousand dollar payments to their student-athletes and that his general concerns about paying student-athletes would be partially assuaged if the payments were held in trust. Trial Tr. 770:25-771:18. Stanford's athletic director, Bernard Muir, similarly acknowledged that his concerns about paying student-athletes varied depending on the size of the payments that they would receive. Id. 254:3-:18 ("Where I set the dollar limit, you know, that varies, but it does concern me when we're talking about six figures, seven figures in some cases."). This testimony is consistent with Dr. Dennis's general observation that, if the NCAA's restrictions on student-athlete pay were removed, the popularity of college sports would likely depend on the size of payments awarded to student-athletes. The Court therefore finds that permitting schools to make limited payments to student-athletes above the cost of attendance would not harm consumer demand for the NCAA's product -- particularly if the student-athletes were not paid more or less based on their athletic ability or the quality of their performances and the payments were derived only from revenue generated from the use of their own names, images, and likenesses.

Holding these limited and equal shares of licensing revenue in trust until after student-athletes leave school would further minimize any potential impact on consumer demand. Indeed, former student-athletes are already permitted to receive compensation for the use of their names, images, and likenesses in game re-broadcasts and other archival footage of their college performances as long as they enter into such agreements after they leave school. The popularity of college sports would not suffer if current and future student-athletes were given the opportunity to receive compensation from their schools after they leave college. Likewise, holding compensation in trust for student-athletes while they are enrolled would not erect any new barriers to schools' efforts to educate student-athletes or integrate them into their schools' academic communities. The Court therefore finds that consumer demand for the NCAA's products would not change if schools were allowed to offer and student-athletes on FBS football and Division I basketball teams were allowed, after leaving college, to receive limited and equal shares of licensing revenue generated from the use of their names, images, and likenesses during college.

Although Drs. Emmert and Rubinfeld suggested that student-athletes could potentially monetize these future earnings while they are still in school by taking out loans against the trust, the NCAA could easily prohibit such borrowing, just as it currently prohibits student-athletes from borrowing against their future earnings as professional athletes. See Ex. 2340 at 236 (prohibiting student-athletes from accepting any loan issued based on the "student-athlete's athletics reputation, skill or pay-back potential as a future professional athlete"). None of the NCAA's witnesses testified that its current rules would not suffice to prevent student-athletes from borrowing against their future compensation. Nor did they rule out that the NCAA and its member schools could place the money in a special account, such as a spendthrift trust, to prevent such borrowing. Accordingly, the Court finds that allowing FBS football and Division I basketball schools to hold in trust a limited and equal share of licensing revenue for their recruits would provide a less restrictive means of achieving the NCAA's stated purposes.

Plaintiffs' third proposed alternative, however -- allowing student-athletes to receive money for endorsements -- does not offer a less restrictive way for the NCAA to achieve its purposes. Allowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools to protect against the "commercial exploitation" of student-athletes. Although the trial record contains evidence -- and Dr. Emmert himself acknowledged -- that the NCAA has not always succeeded in protecting student-athletes from commercial exploitation, this failure does not justify expanding opportunities for commercial exploitation of student-athletes in the future. Plaintiffs themselves previously indicated that they were not seeking to enjoin the NCAA from enforcing its current rules prohibiting such endorsements. In light of this record, the Court finds that

Plaintiffs' third proposed less restrictive alternative does not offer the NCAA a viable means of achieving its stated goals.

CONCLUSIONS OF LAW

I. Legal Standard under the Section 1 of the Sherman Act

Section 1 of the Sherman Act makes it illegal to form any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To prevail on a claim under this section, a plaintiff must show "'(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.'" Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (citing Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996)).

In this case, Plaintiffs allege that the NCAA's rules and bylaws operate as an unreasonable restraint of trade. In particular, they seek to challenge the set of rules that preclude FBS football players and Division I men's basketball players from receiving any compensation, beyond the value of their athletic scholarships, for the use of their names, images, and likenesses in videogames, live game telecasts, re-broadcasts, and archival game footage. The NCAA does not dispute that these rules were enacted and are enforced pursuant to an agreement among its Division I member schools and conferences. Nor does it dispute that these rules affect interstate commerce. Accordingly, the only remaining question here is whether the challenged rules restrain trade unreasonably.

"The rule of reason is the presumptive or default standard" for making this determination. California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011) (citing Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)). Although certain restraints may be examined under a truncated "quick look" or per se analysis, the Supreme Court has "expressed reluctance to adopt per se rules with regard to 'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citing FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-459 (1986)). The Supreme Court has specifically held that concerted actions undertaken by joint ventures should be analyzed under the rule of reason. American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) ("When 'restraints on competition are essential if the product is to be available at all,' per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." (citing NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 101 (1984))). Thus, as explained in prior orders, the Court analyzes the challenged restraint in this case under the rule of reason rather than a "quick look" or per se rule. See Case No. 09-1967, Docket No. 1025, April 11, 2014 Order, at 8-9; Case No. 09-1967, Docket No. 151, Feb. 8, 2010 Order, at 9–10.

"A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." Tanaka, 252 F.3d at 1063. Courts typically rely on a burden-shifting framework to conduct this balancing. Under that framework, the "plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'" Id. (citing Hairston, 101 F.3d at 1319). If the plaintiff satisfies this initial burden, "the defendant must come forward with evidence of the restraint's procompetitive effects." Id. Finally, if the defendant meets this burden, the plaintiff must "show that 'any legitimate objectives can be achieved in a substantially less restrictive manner.'" Id. (citing Hairston, 101 F.3d at 1319).

II. Anticompetitive Effects in the Relevant Markets

"Proof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential element of the rule of reason case.'" Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1405 (9th Cir. 1986) (citations omitted). The term "relevant market," in this context,

> "encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand."

Tanaka, 252 F.3d at 1063 (quoting Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988) (internal citations omitted)).

Here, Plaintiffs allege that the challenged restraint causes anticompetitive effects in two related national markets: (1) the "college education market," in which colleges and universities compete to recruit student-athletes to play FBS football or Division I basketball; and (2) the "group licensing market," in which videogame developers, television networks, and others compete for group licenses to use the names, images, and likenesses of FBS football and Division I men's basketball players in videogames, telecasts, and clips. The Court addresses each of these markets in turn.

A. College Education Market

1. Market Definition

As outlined in the findings of fact, Plaintiffs produced sufficient evidence at trial to establish the existence of a national market in which NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits. Specifically, these schools compete to offer recruits the opportunity to earn a higher education while playing for an FBS football or Division I men's basketball team.[8] In exchange, the recruits who accept these offers provide their schools with their athletic services and acquiesce in their schools' use of their names, images, and likenesses while they are enrolled. The recruits must also pay for any other costs of attendance not covered by their grants-in-aid.

The NCAA contends that it does not restrain competition in this market. In particular, it argues that FBS football and Division I basketball schools lack the power to fix prices in this market because they must compete with other colleges and universities -- such as those in other divisions and college

[8] This market could be divided into two submarkets -- one in which Division I basketball schools compete for elite basketball recruits and one in which FBS football schools compete for elite football recruits. However, because the parties' evidence and arguments in this case apply generally to both of these submarkets, there is no need to subdivide the broader market for the purposes of this analysis.

athletic associations -- in supplying educational and athletic opportunities to elite recruits. The NCAA also points to foreign professional sports leagues and domestic minor leagues which might likewise provide alternatives to playing FBS football or Division I basketball. By failing to account for these other schools and leagues, the NCAA argues, Plaintiffs have defined the field of competition in the college education market too narrowly.

The "field of competition" within a given product market consists of "the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989). This group is not limited to producers of the particular "product at issue" but also includes the producers of "all economic substitutes for the product." Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008). To determine whether a product has economic substitutes, courts typically consider two factors: "first, [the product's] reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another." Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984); see also Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). This analysis requires an examination of the price, use, and qualities of all potential substitutes for the product at issue. See Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1163 (9th Cir. 2003) ("For antitrust purposes, a 'market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered.'" (citations omitted)). An analysis of these factors in the present case demonstrates that Plaintiffs have properly defined the scope of a relevant college education market.

As set forth in the findings of fact, the product that FBS and Division I schools offer is unique. The combination of educational and athletic opportunities offered by schools outside of FBS football and Division I -- including schools in FCS, Divisions II and III, and associations like the NAIA, USCAA, NJCAA, or NCCAA -- differ significantly in both price and quality from those offered by FBS and Division I schools. Non-Division I schools typically offer a lower level of athletic competition, inferior training facilities, lower-paid coaches, and fewer opportunities to play in front of large crowds and on television. Furthermore, because many of these schools do not offer athletic scholarships, the cost of attending these institutions is much higher for many student-athletes than the cost of attending an FBS football or Division I basketball school. This is why recruits who receive scholarship offers to play FBS football or Division I basketball rarely turn them down and, when they do, almost never do so to play football or basketball at a school outside of FBS or Division I. In short, non-FBS and non-Division I schools do not compete with FBS and Division I schools in the recruiting market, just as they do not on the football field or the basketball court.

The same holds true for professional sports leagues such as the AFL, NBA D-League, and foreign football and basketball leagues. These leagues do not offer recruits opportunities to earn a higher education or regularly showcase their athletic talents on national television. The NCAA's own evidence demonstrates that FBS football and Division I basketball command a significantly larger domestic television audience than virtually every other football or basketball league, with the exceptions of the NFL and NBA (neither of which permits an athlete to enter its league directly from high school). The evidence shows that elite football and basketball recruits rarely pursue careers in these second-tier leagues immediately after high school and overwhelmingly prefer to play for FBS football teams and Division I basketball teams.

In sum, the qualitative differences between the opportunities offered by FBS football and Division I basketball schools and those offered by other schools and sports leagues illustrate that FBS football schools and Division I basketball schools operate in a distinct market. See Rock v. NCAA, 2013 WL 4479815, at *13 (S.D. Ind.) (finding plaintiff's allegations regarding "the superior competition, institutional support, overall preference, higher revenue, and more scholarship opportunities provided in Division I football, as opposed to Division II or NAIA football" sufficient to support his assertion that "Division II and NAIA football are not adequate substitutes for Division I football and, thus, not part of the same relevant market"); White v. NCAA, Case No. 06-999, Docket No. 72, at 3 (C.D. Cal. Sept. 20, 2006) (finding plaintiff's allegations that student-athletes had no reasonably interchangeable alternatives for the "unique combination of coaching-services and academics" offered by FBS football and Division I basketball schools sufficient to plead a relevant market). So, too, does the fact that historic fluctuations in the price of attending FBS and Division I schools resulting from changes in the grant-in-aid limit have not caused large numbers of FBS football and Division I basketball recruits to migrate toward other schools or professional leagues. See Trial Tr. 127:4-:17 (Noll); Lucas Auto. Engineering, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 767 (9th Cir. 2001) ("The determination of what constitutes the relevant product market hinges, therefore, on a determination of those products to which consumers will turn, given reasonable variations in price."). Taken together, this evidence shows that the various schools and professional leagues that the NCAA has identified lack the power to deprive FBS football and Division I basketball schools of a significant number of recruits. Accordingly, these other schools and leagues are not suppliers in the market that Plaintiffs have identified.

2. The Challenged Restraint

Because FBS football and Division I basketball schools are the only suppliers in the relevant market, they have the power, when acting in concert through the NCAA and its conferences, to fix the price of their product. They have chosen to exercise this power by forming an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit's athletic services along with the use of his name, image, and likeness while he is in school. If any school seeks to lower this fixed price -- by offering any recruit a cash rebate, deferred payment, or other form of direct compensation -- that school may be subject to sanctions by the NCAA.

This price-fixing agreement constitutes a restraint of trade. The evidence presented at trial makes clear that, in the absence of this agreement, certain schools would compete for recruits by offering them a lower price for the opportunity to play FBS football or Division I basketball while they attend college. Indeed, the NCAA's own expert, Dr. Rubinfeld, acknowledged that the NCAA operates as a cartel that imposes a restraint on trade in this market.

Despite this undisputed evidence, the NCAA contends that its conduct does not amount to price-fixing because the price that most student-athletes actually pay is "at or close to zero" due to their athletic scholarships. This argument mischaracterizes the commercial nature of the transactions between FBS football and Division I basketball schools and their recruits. While it is true that many FBS football and Division I basketball players do not pay for tuition, room, or board in a traditional sense, they nevertheless provide their schools with something of significant value: their athletic services and the rights to use their names, images, and likenesses while they are enrolled. They must also pay the incidental expenses of their college attendance. The Seventh Circuit recently observed that these "transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act." Agnew v. NCAA, 683 F.3d 328, 341

(7th Cir. 2012). The court reasoned that "the transactions those schools make with premier athletes -- full scholarships in exchange for athletic services -- are not noncommercial, since schools can make millions of dollars as a result of these transactions." Id. at 340.

A court in the Central District of California similarly concluded that these transactions take place within a cognizable antitrust market. In White, the court found that a group of student-athletes had stated a valid Sherman Act claim against the NCAA by alleging that its cap on the value of grants-in-aid operated as a price-fixing agreement among FBS football and Division I basketball schools. Case No. 06-999, Docket No. 72, at 4. The court specifically rejected the NCAA's argument that the plaintiffs had failed to allege a sufficient harm to competition. It explained,

> Plaintiffs' [complaint] alleges that student-athletes are consumers of the higher education and coaching services that the NCAA schools provide. Plaintiffs allege that the GIA [grant-in-aid] cap operates to restrict the price at which student-athletes purchase those services by forcing student-athletes to bear a greater portion of the cost of attendance than they would have borne if the GIA cap had not been in place. Taken in a light most favorable to the Plaintiffs, these allegations suggest that the GIA cap harms would-be buyers, forcing them to pay higher prices than would result from unfettered competition.

Id. (citations omitted). The same reasoning governs here, where Plaintiffs have shown that FBS football and Division I basketball schools have fixed the price of their product by agreeing not to offer any recruit a share of the licensing revenues derived from the use of his name, image, and likeness.

The fact that this price-fixing agreement operates by undervaluing the name, image, and likeness rights that the recruits provide to the schools -- rather than by explicitly requiring schools to charge a specific monetary price -- does not preclude antitrust liability here. Federal antitrust law prohibits various kinds of price-fixing agreements, even indirect restraints on price. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("[T]he machinery employed by a combination for price-fixing is immaterial. Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."). In Catalano, Inc. v. Target Sales, Inc., for instance, the Supreme Court held that an agreement among beer wholesalers to cease providing interest-free credits to retailers was "merely one form of price fixing" and could therefore be "presumed illegal" under § 1 of the Sherman Act. 446 U.S. 643, 650 (1980). The Court reasoned that the "agreement to terminate the practice of giving credit is [] tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing." Id. at 648; see also id. ("[C]redit terms must be characterized as an inseparable part of the price."). It noted that, prior to their agreement, the "wholesalers had competed with each other with respect to trade credit, and the credit terms for individual retailers had varied substantially." Id. at 644-45. The agreement to eliminate this practice thus "extinguish[ed] one form of competition among the sellers" and could be presumed unlawful, even though it did not

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ultimately require the sellers to set their prices at some specific, pre-determined level. Id.

Like the wholesalers' agreement in Catalano, the agreement among FBS football and Division I basketball schools not to offer recruits a share of their licensing revenue eliminates one form of price competition. Although this agreement may operate to fix prices indirectly, rather than directly, it is nevertheless sufficient to satisfy Plaintiffs' initial burden under the rule of reason. Plaintiffs need not identify an agreement as obviously unlawful as the wholesalers' agreement in Catalano to establish a per se violation, let alone to meet the lower burden imposed by the first step of a rule of reason analysis. See 446 U.S. at 644-45 ("[W]e have held agreements to be unlawful per se that had substantially less direct impact on price than the agreement alleged in this case.").

Indeed, in another case involving concerted action by members of a sports league, then-Judge Sotomayor observed that an antitrust plaintiff may sometimes meet its burden by identifying an agreement to fix prices indirectly. See Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring). In that case, the plaintiff sought to challenge an agreement among Major League Baseball teams to license their trademarks and other intellectual property exclusively through a designated third party called Major League Baseball Properties (MLBP). The plaintiff alleged that the agreement violated the Sherman Act because it eliminated price competition among the teams as suppliers of intellectual property. A three-judge panel of the Second Circuit rejected this claim, finding that the agreement did not constitute price-fixing. In a separate concurrence, then-Judge Sotomayor noted that, although she agreed that the licensing arrangement was lawful, she believed that the majority had endorsed "an overly formalistic view of price fixing." Id. at 334. She reasoned, "While the MLBP agreement does not specify a price to be charged, the effect of the agreement clearly eliminates price competition between the [teams] for trademark licenses. An agreement to eliminate price competition from the market is the essence of price fixing." Id. at 335; see also id. at 336-37 ("In other words, an agreement between competitors to 'share profits' or to make a third party the exclusive seller of their competing products that has the purpose and effect of fixing, stabilizing, or raising prices may be a per se violation of the Sherman Act, even if no explicit price is referenced in the agreement."). Then-Judge Sotomayor also noted that such an agreement could be unlawful, even if it was only meant to bind members of a joint venture. She explained,

> [T]he antitrust laws prohibit two companies A and B, producers of X, from agreeing to set the price of X. Likewise, A and B cannot simply get around this rule by agreeing to set the price of X through a third-party intermediary or "joint venture" if the purpose and effect of that agreement is to raise, depress, fix, peg, or stabilize the price of X.

Id. at 336.[9] Although she ultimately concluded that the MLBP agreement served a procompetitive purpose, because it increased

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[9] The Supreme Court recently relied on this language from then-Judge Sotomayor's concurrence in another Sherman Act case involving a challenge to concerted action by members of a sports league. American Needle, 560 U.S. at 202 ("[C]ompetitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or

the total number of licenses sold, her opinion nevertheless illustrates that price-fixing agreements take many forms and may be unlawful even if they are implemented by members of a joint venture.

Although Plaintiffs have characterized FBS football and Division I basketball schools as sellers in the market for educational and athletic opportunities, in their post-trial brief they argued that the schools could alternatively be characterized as buyers in a market for recruits' athletic services and licensing rights. The relevant market would be that for the recruitment of the highest ranked male high school football and basketball players each year. Viewed from this perspective, Plaintiffs' antitrust claim arises under a theory of monopsony, rather than monopoly, alleging an agreement to fix prices among buyers rather than sellers. Such an agreement, if proven, would violate § 1 of the Sherman Act just as a price-fixing agreement among sellers would. See generally Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 705 (7th Cir. 2011) ("Ordinarily, price-fixing agreements exist between sellers who collude to set their prices above or below prevailing market prices. But buyers may also violate § 1 by forming what is sometimes known as a 'buyers' cartel.'"); Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) ("Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint."

'joint venture.''" (quoting Salvino, 542 F.3d at 336 (Sotomayor, J., concurring)).

(citations omitted)). The Supreme Court has noted that the "kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization." Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 322 (2007) (citing Roger G. Noll, "'Buyer Power' and Economic Policy," 72 Antitrust L.J. 589, 591 (2005)).

In recent years, several courts have specifically recognized that monopsonistic practices in a market for athletic services may provide a cognizable basis for relief under the Sherman Act. See, e.g., Rock, 2013 WL 4479815, at *11 (finding that plaintiff had identified a cognizable market in which "buyers of labor (the schools) are all members of NCAA Division I football and are competing for the labor of the sellers (the prospective student-athletes who seek to play Division I football)"); In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) ("Plaintiffs have alleged a sufficient 'input' market in which NCAA member schools compete for skilled amateur football players."). Indeed, the Seventh Circuit recently noted in Agnew that the "proper identification of a labor market for student-athletes . . . would meet plaintiffs' burden of describing a cognizable market under the Sherman Act." 683 F.3d at 346. Given that Plaintiffs' alternative monopsony theory mirrors their monopoly price-fixing theory, the evidence presented and facts found above are sufficient to establish a restraint of trade in a market for recruits' athletic services just as they are to establish a restraint of trade in the college education market. As explained above, viewed from this perspective, the sellers in this market are the recruits; the buyers are FBS football and Division I basketball schools; the product is the combination of the recruits' athletic services and licensing rights; and the restraint is the agreement among schools not to offer any recruit more than the value of a full grant-in-aid. In the absence of this restraint, schools would compete against one another by offering to pay more for the best recruits' athletic services and licensing rights -- that is, they would engage in price competition.

The NCAA argues that Plaintiffs cannot prevail under a monopsony theory because they have not presented evidence of an impact on price or output in a "downstream market." Trial Tr. 2766:16-:22 (Stiroh). They cite Dr. Stiroh's testimony that the only way that a restraint on an input market -- such as a market for recruits' athletic services and licensing rights -- can give rise to an anticompetitive harm is if that restraint ultimately harms consumers by reducing output or raising prices in a downstream market. Whatever merit Dr. Stiroh's views might have among economists, they are not supported by the relevant case law. The Supreme Court has indicated that monopsonistic practices that harm suppliers may violate antitrust law even if they do not ultimately harm consumers. In Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219 (1948), the Supreme Court considered whether an agreement among sugar refiners to fix the prices they paid for sugar beets constituted a violation of the Sherman Act. It concluded that "the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are

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sellers, not customers or consumers." Id. at 235. Notably, the Court reached this conclusion despite a vehement dissent from Justice Jackson noting that the price of sugar had not been affected by the refiners' agreement. Id. at 247. The majority's decision, thus, "strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users." Telecor Communications, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1134 (10th Cir. 2002); see also Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000) ("The Supreme Court's references to the goals of achieving 'the lowest prices, the highest quality and the greatest material progress' and of 'assur[ing] customers the benefits of price competition' do not mean that conspiracies among buyers to depress acquisition prices are tolerated. Every precedent in the field makes clear that the interaction of competitive forces, not price-rigging, is what will benefit consumers." (emphasis added)).

This is consistent with a long line of cases, including some decided by the Ninth Circuit, recognizing that restraints on competition within a labor market may give rise to an antitrust violation under § 1 of the Sherman Act. See, e.g., Anderson v. Shipowners' Ass'n, 272 U.S. 359, 365 (1926) (holding that a multi-employer agreement among ship owners restrained trade in a labor market for sailors); Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.) (holding that a conspiracy among oil industry employers to set salaries at "artificially low levels" restrained trade in a labor market and noting that "a horizontal conspiracy among buyers [of labor] to stifle competition is as unlawful as one among sellers"); Ostrofe v. H.S. Crocker Co.,

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Inc., 740 F.2d 739, 740 (9th Cir. 1984) (holding that a multi-employer agreement in the paper lithograph label industry may restrain trade in a "market for personal services"). It is also consistent with the many recent cases, some of which are cited above, recognizing the validity of antitrust claims against the NCAA based on anticompetitive harms in a labor market. See, e.g., Agnew, 683 F.3d at 346 (recognizing that the NCAA's scholarship rules may restrain trade in a "labor market for student-athletes" and noting that "labor markets are cognizable under the Sherman Act"); Law v. NCAA, 134 F.3d 1010, 1015 (10th Cir. 1998) (finding that an NCAA rule capping compensation for entry-level coaches restrained trade in a "labor market for coaching services" and noting that "[l]ower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises"); In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d at 1150 (recognizing that the NCAA's scholarship rules may restrain trade in an "'input' market in which NCAA member schools compete for skilled amateur football players"). In fact, a court in the Southern District of Indiana recently rejected the NCAA's argument that a student-athlete would need to plead a "'market-wide impact on the price or output of any commercial product'" in order to state a valid Sherman Act claim challenging its former prohibition on multi-year football scholarships. Rock, 2013 WL 4479815, at *14 (S.D. Ind.) (quoting NCAA's brief). The court in that case found that the student-athlete's complaint "adequately plead[] anticompetitive effects of the challenged bylaws" in the "'nationwide market for the labor of Division I football student athletes'" based on his allegations that, in the absence of the challenged scholarship rules, the schools competing for his services would have offered him a multi-year scholarship. Id. at *3, *15 (quoting complaint). The court specifically noted that the plaintiff had identified a cognizable harm to competition by alleging that removing the challenged restraint would "would force the schools to 'compete' for recruits." Id. at *15. Plaintiffs here have presented sufficient evidence to show an analogous anticompetitive effect in a similar labor market. Accordingly, they have shown a cognizable harm to competition under the rule of reason.

The Court notes that Plaintiffs had not articulated a monopsony theory prior to trial. Their expert addressed it at trial in response to the Court's questions. For this reason, the Court has addressed Plaintiffs' monopoly theory in greater detail. However, Plaintiffs presented significant evidence to support a monopsony theory during trial. Both sides discussed the theory at length in their post-trial briefs. The evidence presented at trial and the facts found here, as well as the law, support both theories. The NCAA is not prejudiced by alternative reliance on a monopsony theory.

B. Group Licensing Market

Plaintiffs also allege that the NCAA has restrained competition in three specific national submarkets of a broader national group licensing market: namely, the submarkets for group licenses to use student-athletes' names, images, and likenesses in (1) live game telecasts, (2) videogames, and (3) game re-broadcasts, highlight clips, and other archival footage. The Court addresses each of these submarkets separately.

1. Submarket for Group Licenses to Use Student-Athletes' Names, Images, and Likenesses in Live Game Telecasts

As noted above, television networks compete for the rights to telecast live FBS football and Division I basketball games. In order to secure these rights, networks typically purchase licenses to use the intellectual property of the participating schools and conferences during the game telecast as well as the names, images, and likenesses of the participating student-athletes.[10] Because student-athletes are not permitted by NCAA rules to license the rights to use their names, images, and likenesses, the networks deal exclusively with schools and conferences when acquiring the student-athletes' rights.

As the Court found above, in the absence of the NCAA's restrictions on student-athlete compensation, student-athletes on certain FBS football and Division I basketball teams would be able to sell group licenses for the use of their names, images, and likenesses to television networks. They would either sell those licenses to the television networks directly or do so through some intermediate buyer -- such as their school or a third-party licensing company -- which would bundle the group license with other intellectual property and performance rights and sell the

[10] As discussed in the findings of fact, when a third party -- such as a bowl committee or the NCAA itself -- has organized a particular athletic event, the networks may also purchase a separate license from that party to use its intellectual property during the telecast. Because these transactions do not involve the transfer of rights to use student-athletes' names, images, and likenesses, they are not relevant to this discussion.

full bundle of rights to the network. Regardless of whether the student-athletes would sell their group licenses to the networks directly or through some intermediate buyer, however, a submarket for such group licenses would exist.

The NCAA denies that such a market exists as a matter of law. It argues that the First Amendment and certain state laws preclude student-athletes from asserting any rights of publicity in the use of their names, images, and likenesses during live game telecasts. The Court has previously rejected this argument. See April 11, 2014 Order at 21. Furthermore, even if some television networks believed that student-athletes lacked publicity rights in the use of their names, images, and likenesses, they may have still sought to acquire these rights as a precautionary measure. Businesses often negotiate licenses to acquire uncertain rights. See C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 826 (8th Cir. 2007) (Colloton, J., dissenting) ("CBC surely can 'agree,' as a matter of good business judgment, to bargain away any uncertain First Amendment rights that it may have in exchange for the certainty of what it considers to be an advantageous contractual arrangement."); Hynix Semiconductors, Inc. v. Rambus, Inc., 2006 WL 1991760, at *4 (N.D. Cal.) (crediting expert testimony that "a negotiating patentee and licensee generally agree to a lower royalty rate if there is uncertainty as to whether the patents are actually valid and infringed"). The NCAA's argument does not undermine Plaintiffs' evidence of the existence of a national submarket for group licenses.

That said, Plaintiffs have not identified any harm to competition in this submarket. As previously noted, an "essential element of a Section 1 violation under the rule of reason is injury to competition in the relevant market." Alliance Shippers, Inc. v. S. Pac. Transp. Co., 858 F.2d 567, 570 (9th Cir. 1988). That injury must go "beyond the impact on the claimant" and reach "a field of commerce in which the claimant is engaged." Austin v. McNamara, 979 F.2d 728, 738 (9th Cir. 1992) (citations and quotation marks omitted); see also Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 854 (9th Cir. 1995) ("Under the rule of reason approach, the plaintiff must show an injury to competition, rather than just an injury to plaintiff's business." (emphasis in original; citations and quotation marks omitted)). While Plaintiffs have shown that the NCAA's challenged rules harm student-athletes by depriving them of compensation that they would otherwise receive, they have not shown that this harm results from a restraint on competition in the group licensing market. In particular, they have failed to show that the challenged rules hinder competition among any potential buyers or sellers of group licenses.

The sellers in this market would be the student-athletes. Plaintiffs have not presented any evidence to show that, in the absence of the challenged restraint, teams of student-athletes would actually compete against one another to sell their group licenses. In fact, the evidence in the record strongly suggests that such competition would not occur. This is because any network that seeks to telecast a particular athletic event would have to obtain a group license from every team that could potentially participate in that event. For instance, a network seeking to telecast a conference basketball tournament would have to obtain group licenses from all of the teams in that conference. Under those circumstances, none of the teams in the conference would compete against each other as sellers of group licenses because the group licenses would constitute perfect complements: that is, every group license would have to be sold in order for any single group license to have value. See generally Herbert Hovenkamp, "Implementing Antitrust's Welfare Goals," 81 Fordham L. Rev. 2471, 2487 (2013) ("Perfect complements are goods that are invariably used together -- or, more technically, situations in which one good has no value unless it can be consumed together with the other good."). At the same time, the teams in that conference would never have to compete with teams outside of the conference because those teams -- as non-participants in the conference tournament -- would not be able to sell their group licenses with respect to that event in the first place. Thus, in this scenario, teams of student-athletes would never actually compete against each other as sellers of group licenses, even if the challenged NCAA rules no longer existed.

The same outcome would result whenever any network sought to telecast any other FBS football and Division I basketball event. Although the specific set of group licenses required for each event would vary, the lack of competition among student-athlete teams would remain constant: in every case, the network would need to acquire group licenses from a specific set of teams, none of which would have any incentive to compete either against each other or against any teams whose group licenses were not required for the telecast. These conditions would hold regardless of whether the student-athlete teams sold their group licenses to the television networks directly or through some intermediary, such as their schools, because the demand for group licenses would be dictated primarily by the identity of the teams eligible to participate in each event. To the extent that entire conferences might compete against each other in order to secure a specific telecasting contract with a particular network, the challenged NCAA rules do not inhibit this type of competition. Conferences are already free to compete against each other in this way. So, too, are any individual pairs of schools whose teams are scheduled to play against each other in specific regular season games. Like the conferences, these pairs may freely compete against other pairs of schools whose games are scheduled for the same time in order to secure a contract with whatever networks can show games during that time slot.[11] In any event, Plaintiffs have not presented sufficient evidence to show that student-athlete teams would actually compete against each other in any of these ways if they were permitted to sell group licenses to use their names, images, and likenesses.

Plaintiffs have also failed to identify any situation in which buyers of group licenses might compete against each other. As noted above, there are two sets of potential buyers in this market: the television networks, which would buy group licenses directly from the student-athlete teams, and intermediate buyers,

[11] The evidence presented at trial suggests that most telecasting contracts, even for regular season games, are negotiated at the conference-wide level -- not the individual team level. Nevertheless, the Court notes that the challenged rules would not suppress competition in this market even if contracts to telecast regular season games were negotiated at the individual team level.

which would bundle those licenses with other rights and sell those bundles of rights to the networks. The first set of potential buyers -- the television networks -- already compete freely against one another for the rights to use student-athletes' names, images, and likenesses in live game telecasts. Although they may not be able to purchase these rights directly from the student-athletes, they nevertheless compete to acquire these rights from other sources, such as schools and conferences. The fact that the networks do not compete to purchase these rights directly from the student-athletes is due to the assurances by the schools, conferences, and NCAA that they have the authority to grant these rights. Such assurances might constitute conversion by the schools of the student-athletes' rights, or otherwise be unlawful, but they are not anticompetitive because they do not inhibit any form of competition that would otherwise exist.[12] Allowing student-athletes to seek compensation for group licenses would not increase the number of television networks in the market or otherwise enhance competition among them.

Nor would it increase competition among any potential intermediate buyers in this market, such as third-party licensing companies and schools. Third-party licensing companies are, like television networks, already free to compete against one another to acquire the rights to use student-athletes' names, images, and likenesses in live game telecasts. They may be barred from

[12] Plaintiffs voluntarily dismissed all of their claims against the NCAA for "individual damages, disgorgement of profits, and an accounting." Docket No. 198, Stip. Dismissal, at 2. They also dismissed their claims for unjust enrichment. Accordingly, the Court does not consider these claims here.

purchasing these rights directly from the student-athletes but they are not barred from competing to acquire these rights through other channels.

Unlike television networks and third-party licensing companies, schools do not currently compete for group licenses to use student-athletes' names, images, and likenesses in live game telecasts. This lack of competition, however, does not stem solely from the challenged restraint. Even if the restraint were lifted, each school would still only be able to purchase group licenses from its own student-athletes because those are the only licenses that the school could bundle with its own intellectual property rights for sale to a network. No school would be able to purchase a marketable group license from student-athletes at another school. To the extent that schools do compete against one another for the rights to use individual student-athletes' names, images, and likenesses, they do so only as sellers in the college education market or consumers in the market for recruits' athletic services and licensing rights. They do not compete as buyers in the market for <u>group</u> licenses.

Accordingly, Plaintiffs have failed to show that the challenged NCAA rules harm competition in this submarket. Although they have presented sufficient evidence to establish that they were injured by the NCAA's conduct, as noted above, "[i]njury to an antitrust plaintiff is not enough to prove injury to competition." <u>O.S.C. Corp. v. Apple Computer, Inc.</u>, 792 F.2d 1464, 1469 (9th Cir. 1986). Plaintiffs have shown an injury to competition only in the college education market or the market for recruits' athletic services and licensing rights.

2. Submarket for Group Licenses to Use Student-Athletes' Names, Images, and Likenesses in Videogames

Plaintiffs have presented sufficient evidence to establish that, absent the challenged NCAA rules, a national submarket would exist in which videogame developers would compete for group licenses to use student-athletes' names, images, and likenesses. This submarket is analogous to the live telecasting submarket discussed above. As in that submarket, the sellers of group licenses in the videogame submarket would be student-athletes on certain FBS football and Division I basketball teams. The buyers would either be videogame developers or intermediate buyers who would bundle the student-athletes' rights with other parties' rights and sell those bundles to videogame developers.

The NCAA contends that, even if student-athletes were permitted to receive compensation for the use of their names, images, and likenesses, this submarket would not exist. It notes that it and some of its member conferences recently decided to stop licensing their intellectual property for use in videogames. Without access to this intellectual property, the NCAA argues, videogame developers cannot develop marketable videogames and, thus, would not seek to purchase group licenses from student-athletes.

This argument overstates the significance of the decisions of the NCAA and some of its member conferences not to license their intellectual property to videogame developers. To begin with, videogame developers do not need the intellectual property rights of both the NCAA and <u>all</u> of its conferences in order to produce a college sports videogame. If a sufficient number of schools and conferences were willing to license their intellectual property for use in videogames, a submarket for student-athletes' group licenses would likely exist. Indeed, Mr. Linzner specifically testified at trial that EA remains interested in acquiring the rights to use student-athletes' names, images, and likenesses and would seek to acquire them if not for the NCAA's challenged rules and the present litigation. This testimony suggests that the recent decisions of the NCAA and some of its conferences not to license their intellectual property has not permanently eliminated the demand for group licenses to use student-athletes' names, images, and likenesses.[13] Accordingly, these decisions -- which could have been adopted due to this litigation and could be reversed at any time -- do not establish the lack of a videogame submarket.

Nevertheless, Plaintiffs have not identified any injury to competition within this submarket. Just as in the live telecasting submarket, the ultimate buyers in this submarket -- videogame developers -- would need to acquire group licenses from a specific set of teams in order to create their product. This set might include all of the teams within Division I, all of the teams within the major conferences, or some other set of teams

[13] The NCAA's other argument -- that videogame developers would not need to acquire group licenses because their use of student-athletes' names, images, and likenesses is protected under the First Amendment -- was rejected by the Ninth Circuit earlier in this litigation. In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir. 2013) (concluding that "EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment"); see also Hart v. Electronic Arts, Inc., 717 F.3d 141, 170 (3d Cir. 2013) (holding that "the NCAA Football 2004, 2005 and 2006 games at issue in this case do not sufficiently transform Appellant's identity to escape the right of publicity claim").

that the videogame developer believed would be necessary to produce a marketable product. Regardless of which teams were included within that set, those teams would not compete against each other as sellers of group licenses, even in the absence of the challenged rules, because they would all share an interest in ensuring that the videogame developer acquired each of the group licenses required to create its product. These teams would also not compete against any teams outside of the set because the videogame developer determined that those other teams' group licenses were not required to produce the videogame. Indeed, competition between teams (or conferences) is even less likely in the videogame submarket than the live telecasting submarket because videogame developers -- unlike television networks -- are not constrained by the number of group licenses that they could use to produce their product. The evidence presented at trial demonstrates that videogame companies could, and often did, feature nearly every FBS football and Division I basketball team in their videogames. Under these circumstances, competition among individual teams and conferences to sell group licenses is extremely unlikely. And, to the extent that it happens (or would happen), it is not restrained by the challenged NCAA restrictions on student-athlete compensation. Thus, just as with the live telecasting submarket, the challenged rules do not suppress competition in this submarket.

3. Submarket for Group Licenses to Use Student-Athletes' Names, Images, and Likenesses in Game Re-Broadcasts, Highlight Clips, and Other Archival Footage

Plaintiffs allege that the NCAA's challenged rules impose restraints on a national submarket for group licenses to use student-athletes' names, images, and likenesses in game re-broadcasts, highlight clips, and other archival game footage, both for entertainment and to advertise products. However, they have not presented sufficient evidence to show that the NCAA has imposed any restraints in this submarket. As found above, the undisputed evidence shows that the NCAA has designated a third-party agent to negotiate and manage all licensing related to its archival footage. That third-party agent, T3Media, is expressly prohibited from licensing any footage that features current student-athletes. It is also contractually required to obtain the rights to use the names, images, and likenesses of any former student-athletes who appear in footage that it has licensed. Thus, under this arrangement, no current or former student-athletes are actually deprived of any compensation for game re-broadcasts or other archival footage that they would otherwise receive in the absence of the challenged NCAA rules. What's more, even if Plaintiffs had made such a showing, they have not presented sufficient evidence to show an injury to competition in this submarket. In order to license all of the footage in the NCAA's archives, T3Media would have to obtain a group license from every team that has ever competed in FBS or Division I. These teams, once again, would have no incentive to compete against each other in selling their group licenses. Enjoining the NCAA from enforcing its challenged rules would not change that.

III. Procompetitive Justifications

Because Plaintiffs have presented sufficient evidence to show that the NCAA's rules impose a restraint on competition in the college education market, the Court must determine whether that restraint is justified. In making this determination, it must consider whether the "anticompetitive aspects of the challenged practice outweigh its procompetitive effects." Paladin Associates, 328 F.3d at 1156.

The NCAA has asserted four procompetitive justifications for its rules barring student-athletes from receiving compensation for the use of their names, images, and likenesses: (1) the preservation of amateurism in college sports; (2) promoting competitive balance among FBS football and Division I basketball teams; (3) the integration of academics and athletics; and (4) the ability to generate greater output in the relevant markets. The Court considers each of these procompetitive justifications in turn.

A. Amateurism

As noted in the findings of fact, the NCAA asserts that its restrictions on student-athlete compensation are necessary to preserve the amateur tradition and identity of college sports. It contends that this tradition and identity contribute to the popularity of college sports and help distinguish them from professional sports and other forms of entertainment in the marketplace. For support, it points to historical evidence of its commitment to amateurism, recent consumer opinion surveys, and testimony from various witnesses regarding popular perceptions of college sports. Although this evidence could justify some limited restrictions on student-athlete compensation, it does not justify the specific restrictions challenged in this case. In particular, it does not justify the NCAA's sweeping prohibition on FBS football and Division I basketball players receiving any compensation for the use of their names, images, and likenesses.

Although the NCAA has cited the Supreme Court's decision in Board of Regents as support for its amateurism justification, its reliance on the case remains unavailing. As explained in previous orders, Board of Regents addressed limits on television broadcasting, not payments to student-athletes, and "does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images, and likenesses." Oct. 25, 2013 Order at 15. The Supreme Court's suggestion in Board of Regents that, in order to preserve the quality of the NCAA's product, student-athletes "must not be paid," 468 U.S. at 102, was not based on any factual findings in the trial record and did not serve to resolve any disputed issues of law. In fact, the statement ran counter to the assertions of the NCAA's own counsel in the case, who stated during oral argument that the NCAA was not relying on amateurism as a procompetitive justification and "might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs." Oral Arg. Tr. at 25, Board of Regents, 468 U.S. 85. He further argued, "When the NCAA says, we are running programs of amateur football, it is probably reducing its net profits." Id. (emphasis added); see also id. ("The NCAA might be able to increase its intake if it abolished or reduced the academic standards that its players must meet."). Plaintiffs have also presented ample evidence here to show that the college sports industry has changed substantially in the thirty years since Board of Regents was decided. See generally Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) ("The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed."). Accordingly, the Supreme Court's incidental phrase in Board of Regents does not establish that the NCAA's current restraints on compensation are procompetitive and without less restrictive alternatives.

The historical record that the NCAA cites as evidence of its longstanding commitment to amateurism is unpersuasive. This record reveals that the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways. Rather than evincing the association's adherence to a set of core principles, this history documents how malleable the NCAA's definition of amateurism has been since its founding.

The association's current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism. A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of "core principles."

Nonetheless, some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball. If the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA's products -- specifically, FBS football and Division I basketball telecasts, re-broadcasts, ticket sales, and merchandise -- then the restrictions would be procompetitive. See Board of Regents, 468 U.S. at 120 (recognizing that "maximiz[ing] consumer demand for the product" is a legitimate procompetitive justification). Attempting to make this showing, the NCAA relies on consumer opinion surveys, including the survey it commissioned from Dr. Dennis specifically for this case. As noted above, however, this survey -- which contained several methodological flaws and did not ask respondents about the specific restraints challenged in this case -- does not provide reliable evidence that consumer interest in FBS football and Division I basketball depends on the NCAA's current restrictions on student-athlete compensation. Further, Plaintiffs offered evidence demonstrating that such surveys are inevitably a poor tool for accurately predicting consumer behavior. Dr. Rascher highlighted various polls and surveys which documented widespread public opposition to rule changes that ultimately led to increased compensation for professional baseball players and Olympic athletes even as Major League Baseball and the IOC were experiencing periods of massive revenue growth. This evidence counsels strongly against giving any significant weight to Dr. Dennis's survey results. What Dr. Dennis's survey does suggest is that the public's attitudes toward student-athlete compensation depend heavily on the level of compensation that student-athletes would receive. This is consistent with the testimony of the NCAA's own witnesses, including Mr. Muir and Mr. Pilson, who both indicated that smaller payments to student-athletes would bother them less than larger payments.

Ultimately, the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography. Mr. Pilson explained that college sports tend to be more popular in places where college teams are located. Similarly, Ms. Plonsky noted that popular interest in college sports was driven principally by the loyalty of local fans and alumni. She testified, "I would venture to say that if we [UT] offered a tiddlywinks team, that would somehow be popular with some segment of whoever loves our university." Trial Tr. 1414:25-1415:2.

The Court therefore concludes that the NCAA's restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products. Although they might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses.

B. Competitive Balance

The NCAA asserts that its challenged rules are justified by the need to maintain the current level of competitive balance among its FBS football and Division I basketball teams in order to maintain their popularity. This Court has previously recognized that a sports league's efforts to achieve the optimal competitive balance among its teams may serve a procompetitive purpose if promoting such competitive balance increases demand for the league's product. See April 11, 2014 Order at 33; American Needle, 560 U.S. at 204 ("We have recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" (citing Board of Regents, 468 U.S. at 117)). As the Supreme Court has explained, the "hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product." Board of Regents, 468 U.S. at 119-20.

Here, the NCAA has not presented sufficient evidence to show that its restrictions on student-athlete compensation actually have any effect on competitive balance, let alone produce an optimal level of competitive balance. The consensus among sports economists who have studied the issue, as summarized by Drs. Noll and Rascher, is that the NCAA's current restrictions on compensation do not have any effect on competitive balance.

Although Dr. Rubinfeld disagreed with this conclusion, he could not identify another economist who shared his view and did not offer any testimony to rebut the specific findings of the academic literature cited by Drs. Noll and Rascher. When the Court asked him whether his opinions were based on any academic literature, Dr. Rubinfeld directed the Court to the economic articles cited in his most recent report on competitive balance. But none of the articles cited in that report found that the NCAA's restrictions on student-athlete compensation promote competitive balance. In fact, the only article his report cited that actually examined competitive balance in college sports was a 2004 article by Katie Baird, which Dr. Noll quoted during his testimony. As Dr. Noll testified, that article concluded, "'[L]ittle evidence supports the claim that NCAA regulations help level the playing field. At best, they appear to have had a very limited effect, and at worst they have served to strengthen the position of the dominant teams.'" Trial Tr. 230:18-231:11 (quoting Baird article). Dr. Rubinfeld's independent analysis of competitive balance was also unpersuasive because it did not show a causal link between the NCAA's challenged rules and competitive balance. More importantly, his analysis did not show that consumer demand for the NCAA's product would decrease if FBS football or Division I basketball teams were less competitively balanced than they currently are. As found above, the popularity of college sports is driven primarily by factors such as school loyalty and geography. Neither of these is dependent on competitive balance.

In its post-trial brief, the NCAA cites a passage from Board of Regents which states that the district court in that case found that the NCAA's "restrictions designed to preserve amateurism" served to promote competitive balance. 468 U.S. at 119 (citing district court order, 546 F. Supp. 1276, 1296, 1309-10 (W.D. Okla. 1982)). That factual finding is not binding on this Court and, more importantly, is contrary to the evidence presented in this case. The record in this case shows that revenues from FBS football and Division I basketball have grown exponentially since Board of Regents was decided and that, as a result of this growth, many schools have invested more heavily in their recruiting efforts, athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes. This trend, which several witnesses referred to as an "arms race," has likely negated whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had on competitive balance. These changed factual circumstances -- in addition to the wealth of academic studies concluding that the restraints on student-athlete compensation do not promote competitive balance -- preclude this Court from giving any significant weight to the district court's factual findings in Board of Regents.

Accordingly, the NCAA may not rely on competitive balance here as a justification for the challenged restraint. Its evidence is not sufficient to show that it must create a particular level of competitive balance among FBS football and Division I basketball teams in order to maximize consumer demand for its product. Nor is it sufficient to show that the challenged restraint actually helps it achieve the optimal level of competitive balance.

C. Integration of Academics and Athletics

The NCAA asserts that its restrictions on student-athlete compensation help educate student-athletes and integrate them into their schools' academic communities. It argues that the integration of academics and athletics serves to improve the quality of educational services provided to student-athletes in the restrained college education market.[14] Courts have recognized that this goal -- improving product quality -- may be a legitimate procompetitive justification. See County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001) (recognizing that improving product quality may be a legitimate procompetitive justification); Law, 134 F.3d at 1023 (recognizing that "increasing output, creating operating efficiencies, making a new product available, enhancing service or quality, and widening consumer choice" may be procompetitive justifications).

The evidence presented by the NCAA suggests that integrating student-athletes into the academic communities at their schools improves the quality of the educational services that they receive. As noted above, several university administrators testified about the benefits that student-athletes derive from participating in their schools' academic communities. Plaintiffs confirmed that they appreciated receiving these educational

[14] In its post-trial brief, the NCAA argues that the integration of academics and athletics also increases consumer demand for its other product -- FBS football and Division I basketball games. It presented scant evidence at trial to support this assertion. In any event, to the extent that the NCAA contends that its restrictions on student-athlete compensation increase consumer demand for FBS football and Division I basketball games, the Court addresses that argument in its discussion of the NCAA's asserted procompetitive justification of amateurism.

benefits when they were student-athletes, while Dr. Heckman testified that these benefits also carry long-term value.

That said, the NCAA has not shown that the specific restraints challenged in this case are necessary to achieve these benefits. Indeed, student-athletes would receive many of the same educational benefits described above regardless of whether or not the NCAA permitted them to receive compensation for the use of their names, images, and likenesses. They would continue to receive scholarships, for instance, and would almost certainly continue to receive tutoring and other academic support services. As long as the NCAA continued to monitor schools' academic progress rates and require that student-athletes meet certain academic benchmarks -- a requirement that is not challenged here -- the schools' incentives to support their student-athletes academically would remain unchanged. Similarly, the student-athletes' own incentives to perform well academically would remain the same, particularly if they were required to meet these academic requirements as a condition of receiving compensation for the use of their names, images, and likenesses. Such a requirement might even strengthen student-athletes' incentives to focus on schoolwork.

As found above, the only way in which the challenged rules might facilitate the integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community. Limited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal. As with the NCAA's amateurism justification, however, the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation, paid now or in the future, from licensing revenue generated from the use of student-athletes' names, images, and likenesses.

D. Increased Output

The NCAA argues that the challenged restraint increases the output of its product. Courts have recognized that increased output may be a legitimate procompetitive justification. See Board of Regents, 468 U.S. at 114; Law, 134 F.3d at 1023.

Here, the NCAA argues that its restrictions on student-athlete compensation increase the number of opportunities for schools and student-athletes to participate in Division I sports, which ultimately increases the number of FBS football and Division I basketball games played. It claims that its rules increase this output in two ways: first, by attracting schools with a "philosophical commitment to amateurism" to compete in Division I and, second, by enabling schools that otherwise could not afford to compete in Division I to do so. Docket No. 279, NCAA Post-Trial Brief, at 24. Neither of these arguments is persuasive.

The NCAA has not presented sufficient evidence to show that a significant number of schools choose to compete in Division I because of a "philosophical commitment to amateurism." As noted in the findings of fact, some Division I conferences have recently sought greater autonomy from the NCAA specifically so that they could enact their own rules, including new scholarship rules. These efforts suggest that many current Division I schools are committed neither to the NCAA's current restrictions on student-athlete compensation nor to the idea that all Division I schools must award scholarships of the same value.

Similarly, the NCAA's argument that the current rules enable some schools to participate in Division I that otherwise could not afford to do so is unsupported by the record. Neither the NCAA nor its member conferences require high-revenue schools to subsidize the FBS football or Division I basketball teams at lower-revenue schools. Thus, to the extent that schools achieve any cost savings by not paying their student-athletes, there is no evidence that those cost savings are being used to fund additional teams or scholarships. In any event, Plaintiffs are not seeking an injunction requiring schools to provide compensation to their student-athletes -- they are seeking an injunction to permit schools to do so. Schools that cannot afford to re-allocate any portion of their athletic budget for this purpose would not be forced to do so. There is thus no reason to believe that any schools' athletic programs would be driven to financial ruin or would leave Division I if other schools were permitted to pay their student-athletes. The high coaches' salaries and rapidly increasing spending on training facilities at many schools suggest that these schools would, in fact, be able to afford to offer their student-athletes a limited share of the licensing revenue generated from their use of the student-athletes' own names, images, and likenesses. Accordingly, the NCAA may not rely on increased output as a justification for the challenged restraint here.

IV. Less Restrictive Alternatives

As outlined above, the NCAA has produced sufficient evidence to support an inference that some circumscribed restrictions on student-athlete compensation may yield procompetitive benefits.

First, it presented evidence suggesting that preventing schools from paying FBS football and Division I basketball players large sums of money while they are enrolled in school may serve to increase consumer demand for its product. Second, it presented evidence suggesting that this restriction may facilitate its member schools' efforts to integrate student-athletes into the academic communities on their campuses, thereby improving the quality of educational services they offer. Thus, because the NCAA has met its burden under the rule of reason to that extent, the burden shifts back to Plaintiffs to show that these procompetitive goals can be achieved in "'other and better ways'" -- that is, through "'less restrictive alternatives.'" Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 n.4 (9th Cir. 1991) (citations omitted).

"As part of their burden to show the existence of less restrictive alternatives, [] plaintiffs must also show that 'an alternative is substantially less restrictive and is virtually as effective in serving the legitimate objective without significantly increased cost.'" County of Tuolomne, 236 F.3d at 1159 (citations omitted; emphasis in original). In addition, any less restrictive alternatives "should either be based on actual experience in analogous situations elsewhere or else be fairly obvious." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1913b (3d ed. 2006). A defendant may show that a proffered less restrictive alternative is not feasible with "evidence that the proffered alternative has been tried but failed, that it is equally or more restrictive, or otherwise unlawful." Id.

A court need not address the availability of less restrictive alternatives for achieving a purported procompetitive goal "when the defendant fails to meet its own obligation under the rule of reason burden-shifting procedure." Id.; see also Law, 134 F.3d at 1024 n.16 ("Because we hold that the NCAA did not establish evidence of sufficient procompetitive benefits, we need not address question of whether the plaintiffs were able to show that comparable procompetitive benefits could be achieved through viable, less anticompetitive means."). Thus, in the present case, the Court does not consider whether Plaintiffs' proposed less restrictive alternatives would promote competitive balance or increase output because the NCAA failed to meet its burden with respect to these stated procompetitive justifications.[15] Rather, the Court's inquiry focuses only on whether Plaintiffs have identified any less restrictive alternatives for both preserving the popularity of the NCAA's product by promoting its current

[15] The Court notes, however, that the NCAA could easily adopt several less restrictive rules if it wished to increase competitive balance or output. With respect to competitive balance, for instance, the NCAA could adopt a more equal revenue distribution formula. As noted above, its current formula primarily rewards the schools that already have the largest athletic budgets. This uneven distribution of revenues runs counter to the association's stated goal of promoting competitive balance. See, e.g., Salvino, 542 F.3d at 333 (noting that "disproportionate distribution of licensing income would foster a competitive imbalance" among Major League Baseball teams); Smith v. Pro Football, Inc., 593 F.2d 1173, 1188 (D.C. Cir. 1978) ("The least restrictive alternative of all, of course, would be for the NFL to eliminate the draft entirely and employ revenue-sharing to equalize the teams' financial resources [as] a method of preserving 'competitive balance' nicely in harmony with the league's self-proclaimed 'joint-venture' status."). As for the NCAA's stated goal of increasing output, the NCAA already has the power to achieve this goal in a much more direct way: by amending its current requirements for entry into Division I or increasing the number of athletic scholarships Division I schools are permitted to offer.

understanding of amateurism and improving the quality of educational opportunities for student-athletes by integrating academics and athletics.

As set forth in the findings of fact, Plaintiffs have identified two legitimate less restrictive alternatives for achieving these goals. First, the NCAA could permit FBS football and Division I basketball schools to award stipends to student-athletes up to the full cost of attendance, as that term is defined in the NCAA's bylaws, to make up for any shortfall in its grants-in-aid. Second, the NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires. The NCAA could also prohibit schools from funding the stipends or payments held in trust with anything other than revenue generated from the use of the student-athletes' own names, images, and likenesses. Permitting schools to award these stipends and deferred payments would increase price competition among FBS football and Division I basketball schools in the college education market (or, alternatively, in the market for recruits' athletic services and licensing rights) without undermining the NCAA's stated procompetitive objectives.

The NCAA notes that Dr. Noll did not discuss a system of holding payments in trust for student-athletes in his expert reports or during his testimony. However, this does not bar Plaintiffs from proposing such a system as a less restrictive alternative here. As noted above, courts may consider any less restrictive alternatives that are "based on actual experience in analogous situations elsewhere" or otherwise "fairly obvious."

Areeda & Hovenkamp, Antitrust Law ¶ 1913b. Plaintiffs' proposal for holding payments in trust falls squarely within this category. One of Plaintiffs' experts, Dr. Rascher, discussed the creation of a trust in his opening report, which was disclosed to the NCAA more than eight months before trial. See Sept. 2013 Rascher Report ¶¶ 80, 86. Although the Court does not rely on the content of Dr. Rascher's report here, it notes that the report provided the NCAA with ample notice of this proposal.[16] Plaintiffs' counsel

[16] The Court also notes that, over the past two decades, numerous commentators have suggested that the NCAA could hold payments in trust for its student-athletes without violating generally accepted understandings of amateurism used by other sports organizations. See, e.g., Sean Hanlon & Ray Yasser, "'J.J. Morrison' and His Right of Publicity Lawsuit Against the NCAA," 15 Vill. Sports & Ent. L.J. 241, 294 (2008) ("Searching for a solution to the problem posed by this Comment, commentators have suggested a 'have-your-cake-and-eat-it-too' approach whereby a trust would be created, allowing student-athletes the ability to preserve their amateur status while their athletic eligibility remains. The money generated through the use of the commercial value of their identity would be placed in a trust until the expiration of their athletic eligibility."); Kristine Mueller, "No Control over Their Rights of Publicity: College Athletes Left Sitting the Bench," 2 DePaul J. Sports L. & Contemp. Probs. 70, 87-88 (2004) ("One suggestion put forth is to create a trust for the athletes, which would become available to them upon graduation. . . . [This proposal] allows the athletes to reap the financial benefits of their labors, while maintaining the focus on amateur athletics."); Vladimir P. Belo, "The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity," 19 Hastings Comm. & Ent. L.J. 133, 155 (1996) ("Should the NCAA hold steadfastly to its notions of amateurism and resist payment to the athletes, the trust fund alternative could be a fair and reasonable compromise. First of all, it could be limited to certain merchandising monies, such as those associated with selling game jerseys or any other revenue from marketing a student-athlete's name and likeness."); Stephen M. Schott, "Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics," 3 Sports Law. J. 25, 45 (1996) ("Revenue from television rights, tickets sales, and donations from boosters could be used to establish these trust funds. Overall, some type of trust fund may provide the best alternative way of compensating the student-athlete and preserving the educational objectives of the NCAA."); Kenneth L. Shropshire, "Legislation for the Glory of Sport: Amateurism and Compensation," 1 Seton Hall J. Sport L. 7, 27 (1991) ("From an NCAA established trust fund the student athlete could receive a student life stipend.").

also raised the issue repeatedly during trial and several of the NCAA's key witnesses -- including Dr. Emmert, Mr. Pilson, and Dr. Rubinfeld -- were specifically given an opportunity to respond to the idea. None of these witnesses provided a persuasive explanation as to why the NCAA could not implement a trust payment system like the one Plaintiffs propose. The Court therefore concludes that a narrowly tailored trust payment system -- which would allow schools to offer their FBS football and Division I basketball recruits a limited and equal share of the licensing revenue generated from the use of their names, images, and likenesses -- constitutes a less restrictive means of achieving the NCAA's stated procompetitive goals.

V. Summary of Liability Determinations

For the reasons set forth above, the Court concludes that the NCAA's challenged rules unreasonably restrain trade in violation of § 1 of the Sherman Act. Specifically, the association's rules prohibiting student-athletes from receiving any compensation for the use of their names, images, and likenesses restrains price competition among FBS football and Division I basketball schools as suppliers of the unique combination of educational and athletic opportunities that elite football and basketball recruits seek. Alternatively, the rules restrain trade in the market where these schools compete to acquire recruits' athletic services and licensing rights.

The challenged rules do not promote competitive balance among FBS football and Division I basketball teams, let alone produce a level of competitive balance necessary to sustain existing consumer demand for the NCAA's FBS football and Division I basketball-related products. Nor do the rules serve to increase the NCAA's output of Division I schools, student-athletes, or football and basketball games. Although the rules do yield some limited procompetitive benefits by marginally increasing consumer demand for the NCAA's product and improving the educational services provided to student-athletes, Plaintiffs have identified less restrictive ways of achieving these benefits.

In particular, Plaintiffs have shown that the NCAA could permit FBS football and Division I basketball schools to use the licensing revenue generated from the use of their student-athletes' names, images, and likenesses to fund stipends covering the cost of attendance for those student-athletes. It could also permit schools to hold limited and equal shares of that licensing revenue in trust for the student-athletes until they leave school. Neither of these practices would undermine consumer demand for the NCAA's products nor hinder its member schools' efforts to educate student-athletes.

VI. Remedy

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations" of § 1 of the Sherman Act. 15 U.S.C. § 4. Although the NCAA asserts that Plaintiffs must make a showing of irreparable harm in order to obtain permanent injunctive relief here, it failed to cite any authority holding that such a showing is required in an action brought under the Sherman Act. The Sherman Act itself gives district courts the authority to enjoin violations of its provisions and does not impose any additional requirements on plaintiffs who successfully establish the existence of an unreasonable restraint of trade. Accordingly, this Court will enter an injunction to remove any unreasonable elements of the restraint found in this case.[17]

Consistent with the less restrictive alternatives found, the Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws.

The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires. Although the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust, it will prohibit the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically

[17] In a footnote to its post-trial brief, the NCAA argues for the first time that "a number of states have made it illegal to offer [student-athletes] compensation beyond a scholarship or grant-in-aid to entice them to attend a particular school." NCAA Post-Trial Brief at 35. However, all of the statutes it cites for support expressly exempt colleges and universities or distinguish between the prohibited payments and scholarships, financial aid, and other grants.

eligible to compete. The NCAA's witnesses stated that their concerns about student-athlete compensation would be minimized or negated if compensation was capped at a few thousand dollars per year. This is also comparable to the amount of money that the NCAA permits student-athletes to receive if they qualify for a Pell grant and the amount that tennis players may receive prior to enrollment. None of the other evidence presented at trial suggests that the NCAA's legitimate procompetitive goals will be undermined by allowing such a modest payment. Schools may offer lower amounts of deferred compensation if they choose but may not unlawfully conspire with each another in setting these amounts. To ensure that the NCAA may achieve its goal of integrating academics and athletics, the injunction will not preclude the NCAA from enforcing its existing rules -- or enacting new rules -- to prevent student-athletes from using the money held in trust for their benefit to obtain other financial benefits while they are still in school. Furthermore, consistent with Plaintiffs' representation that they are only seeking to enjoin restrictions on the sharing of group licensing revenue, the NCAA may enact and enforce rules ensuring that no school may offer a recruit a greater share of licensing revenue than it offers any other recruit in the same class on the same team. The amount of compensation schools decide to place in trust may vary from year to year. Nothing in the injunction will preclude the NCAA from continuing to enforce all of its other existing rules which are designed to achieve its legitimate procompetitive goals. This includes its rules prohibiting student-athletes from endorsing commercial products, setting academic eligibility requirements, prohibiting schools from creating athlete-only dorms, and setting limits on practice hours. Nor shall anything in this injunction preclude the NCAA from enforcing its current rules limiting the total number of football and basketball scholarships each school may award, which are not challenged here.

The injunction will not be stayed pending any appeal of this order but will not take effect until the start of next FBS football and Division I basketball recruiting cycle.

CONCLUSION

College sports generate a tremendous amount of interest, as well as revenue and controversy. Interested parties have strong and conflicting opinions about the best policies to apply in regulating these sports. Before the Court in this case is only whether the NCAA violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men’s basketball and FBS football players any more than the current association rules allow. For the reasons set forth above, the Court finds that this restraint does violate antitrust law.

To the extent other criticisms have been leveled against the NCAA and college policies and practices, those are not raised and cannot be remedied based on the antitrust causes of action in this lawsuit. It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here. Such reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress. Be that as it may, the Court will enter an injunction, in a separate order, to cure the specific violations found in this case.

The clerk shall enter judgment in favor of the Plaintiff class. Plaintiffs shall recover their costs from the NCAA. The parties shall not file any post-trial motions based on arguments that have already been made.

IT IS SO ORDERED.

Dated: August 8, 2014

CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD O'BANNON, et al.,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; ELECTRONIC ARTS INC.; and COLLEGIATE LICENSING COMPANY,

Defendants.

________________________________/

No. C 09-3329 CW

PERMANENT INJUNCTION

The Court, having duly considered the evidence presented at the bench trial in this matter and consistent with its findings of fact and conclusions of law, hereby orders as follows:

1. Defendant National Collegiate Athletic Association (NCAA), its respective officers, servants, employees, agents, and licensees, and all persons in active concert or participation with it, including its member schools and conferences, or any of them who receives actual notice of this judgment by personal service or otherwise, be, and are hereby, permanently restrained and enjoined from agreeing to:

a. Prohibit deferred compensation in an amount of $5,000 per year or less (in 2014 dollars) for the licensing or use of prospective, current, or former Division I men's basketball and Football Bowl Subdivision football players' names, images, and likenesses through a trust fund payable upon expiration of athletic eligibility or graduation, whichever comes first; or

United States District Court
For the Northern District of California

b. Prohibit the inclusion of compensation for the licensing or use of prospective, current, or former Division I men's basketball and FBS football players' names, images, and likenesses in the award of a full grant-in-aid, up to the full cost of attending the respective NCAA member school, as defined in 20 U.S.C. § 1087*ll* and calculated by each school's financial aid office applying the same standards, policies, and procedures for all students.

2. This injunction shall not affect any prospective student-athlete who will enroll in college before July 1, 2016.

3. Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

4. This Court shall retain jurisdiction to enforce this Order. In the event that any part of this Order is violated by the parties named herein or other persons, Plaintiffs may, by motion with notice to the attorneys for Defendant NCAA, apply for sanctions or other relief that may be appropriate.

IT IS SO ORDERED.

Dated: August 8, 2014

CLAUDIA WILKEN
United States District Judge