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## Power Play: Why NHL's Prohibition on Player Participation in Future Olympics Would Violate Sherman Antitrust Act

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## Comments

### POWER PLAY: WHY NHL'S PROHIBITION ON PLAYER PARTICIPATION IN FUTURE OLYMPICS WOULD VIOLATE SHERMAN ANTITRUST ACT

#### I. INTRODUCTION

The National Hockey League ("NHL") is the only major American sports league to pause its season in order to allow its players to compete in the Olympics.<sup>1</sup> Yet, the 2014 Winter Games in Sochi, Russia, potentially marked the final Olympic Games with NHL players in attendance.<sup>2</sup>

The NHL has permitted players to compete in the last five Winter Olympics; however, one of the highly contentious issues in the recent Collective Bargaining Agreement ("CBA") discussions between the NHL and the National Hockey League Players' Association ("NHLPA") was the involvement of players in future Winter Olympics.<sup>3</sup> While players relish the opportunity to compete for their countries, allowing player participation in the Games creates scheduling problems for the NHL, increases the risk of player injuries, and fails to provide the league any financial benefit.<sup>4</sup> Ulti-

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1. See James Larry, *Wanna Go?: A Discussion of the Potential Fight Between NHL Owners and Players over Participation in the 2014 Olympic Games in Sochi*, 32 Nw. J. INT'L L. & BUS. 3A, 17A (2012), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1003&context=njljb> (noting three-week shut down of NHL in middle of its regular season).

2. See Larry, *supra* note 1, at 9A (describing ownership's less enthusiastic viewpoint of continuing Olympic participation). See also *NHL Season To Go On Hold So Players Can Compete In Sochi 2014 Olympics*, CBS NEW YORK (Jul. 19, 2013, 3:20 PM.), <http://newyork.cbslocal.com/2013/07/19/nhl-season-to-go-on-hold-so-players-can-compete-in-sochi-2014-olympics/> (estimating nearly 120 NHL players will play for international teams).

3. See Ryan Lake, *The Games Must Go On: 2014 Sochi Winter Olympic Games and the National Hockey League*, LAWINSPORT (Jan. 13, 2014), <http://www.lawinsport.com/articles/regulation-a-governance/item/the-games-must-go-on-2014-sochi-winter-olympic-games-and-the-national-hockey-league> (noting prior CBA agreements included clauses permitting player involvement in then future 2006 and 2010 winter Olympic games). *But see id.* (stating current CBA agreement remained moot on issue but included a clause allowing NHL, NHLPA, IOC, and IIHF to negotiate a deal for 2014 games).

4. See CBS NEW YORK, *supra* note 2 (quoting NHL commissioner Gary Bettman, "Our outstanding athletes take tremendous pride in representing their homelands on the global stage"). See also Lake, *supra* note 3 ("The NHL and NHLPA's hesitation to go to the games was largely due to the rising cost of player insurance, and restrictions on the NHL's ability to commercialize their participa-

mately, the two sides failed to reach a decision and left the issue in flux.<sup>5</sup>

The International Olympic Committee (“IOC”), International Ice Hockey Federation (“IIHF”), and National Broadcast Company (“NBC”), which holds the Olympic television broadcast rights within the United States, collectively rely on NHL player presence to increase the Games’ appeal and to generate profits.<sup>6</sup> Absent NHL players, the Winter Olympics’ profitability, marketability, and mass appeal would collectively diminish.<sup>7</sup>

The NHL initially allowed player involvement in the Olympic Games in an attempt to benefit financially from the increased worldwide exposure.<sup>8</sup> However, due to the IOC’s restrictive marketing, advertising, and broadcast guidelines, which effectively ban outside organizations’ media access and licensing agreements, the NHL has not successfully translated the added exposure into revenue.<sup>9</sup> Because of the IOC restrictions, the League remains unable to commercialize NHL players’ involvement through any League sponsored marketing of NHL Olympians, advertising promotions, or re-broadcasting of full games and highlights.<sup>10</sup>

On top of the League missing out on potential commercial benefits, team owners are concerned about Olympic players returning to the NHL season fatigued or even injured.<sup>11</sup> As some

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tion in the tournament.”). *But see* Larry, *supra* note 1, at 18A (“Regardless of their willingness to ignore the league’s edict, the players want the league to agree to continued Olympic participation.”).

5. *See infra* notes 56-62 and accompanying text (discussing implications stemming from absence of this contractual language).

6. *See infra* notes 63-82 and accompanying text (discussing financial impact of having NHL players attend the Winter Olympic Games).

7. *See* Scott Burnside, *Bettman, Fasel Step Up Sideshow*, ESPN.com (Feb. 18, 2014, 12:22pm), [http://espn.go.com/olympics/winter/2014/icehockey/story/\\_/id/10474956/2014-sochi-olympics-future-nhl-players-olympics-debatable](http://espn.go.com/olympics/winter/2014/icehockey/story/_/id/10474956/2014-sochi-olympics-future-nhl-players-olympics-debatable) (suggesting NHL’s unilateral decision-making process is “part[ ] of the past” and that IOC should have further say pertaining to future Olympic participation (alteration added)).

8. *See* Larry, *supra* note 1, at 16A-17A (discussing dramatic difference between 2006 and 2010 NHL Olympic participation).

9. *See infra* notes 21-24 and accompanying text (discussing IOC’s restrictive media stance).

10. *See* Lake, *supra* note 3 (“[T]he IOC has traditionally limited the NHL’s ability to [market] their participation in the Games.”). Further, “[owners] have never been keen about [players] participating in the Olympics [since] [owners] shut down their league for free, [and owners] don’t think they get the marketing bump the NHL was looking for when it originally signed up for the Olympics in 1998.” *See id.* (third and fifth alterations in original) (citation omitted) (footnote omitted) (internal quotation marks omitted).

11. *See* Bob Ford, *Olympics a Big Loss for the NHL*, PHILLY.COM (Jan. 31, 2014), [http://articles.philly.com/2014-01-31/sports/46833175\\_1\\_vancouver-outdoor-](http://articles.philly.com/2014-01-31/sports/46833175_1_vancouver-outdoor-)

owners suggest, the potential rise in both injury and fatigue unfairly benefits NHL teams without Olympians on the roster.<sup>12</sup>

For these reasons, NHL President, Gary Bettman, and the majority of league owners do not support sending NHL players to the 2018 or 2022 Olympic Games in South Korea and China, respectively.<sup>13</sup> As an alternative to the Olympics, the NHL plans to implement a World Cup of Hockey, an NHL sponsored quadrennial tournament held in September during the same years as the Summer Olympic Games.<sup>14</sup>

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games-olympic-hockey-tournament (noting players returning from Olympic games to frenzied schedule, increasing chances of player injuries); Rob Vollman, *Olympic Hockey Injuries That Will Have the Biggest Impact When the NHL Returns*, BLEACHERREPORT (Feb. 25, 2014), <http://bleacherreport.com/articles/1972002-olympic-hockey-injuries-that-will-have-the-biggest-impact-when-the-nhl-returns> (“The Olympics can be a stressful time for NHL front offices as they watch their most valuable athletes compete for national glory, but at the risk of getting injured”); Ryan Dadoun, *Fedor Tyutin Suffered Sprained Ankle with Russia*, PROHOCKEYTALK (Feb. 22, 2014, 10:41 AM), <http://prohockeytalk.nbcsports.com/2014/02/22/fedor-tyutin-suffered-sprained-ankle-with-russia/> (stating several noteworthy NHL players were injured in 2014 Sochi games including “the New York Islanders’ John Tavares (torn MCL), Rangers’ Mats Zuccarello (fractured hand), Panthers’ Tomas Kopecky (head) and Aleksander Barkov (knee), and Pittsburgh’s Paul Martin (hand).”).

12. See Jason Brough, *Wings, Blues, and Blackhawks tops with 10 Olympic participants*, PRO HOCKEY TALK (Jan. 7, 2014, 3:58 PM), <http://prohockeytalk.nbcsports.com/2014/01/07/wings-blues-and-blackhawks-tops-with-10-olympic-participants/> (comparing teams like Red Wings, Blues, and Blackhawks—which all sent ten players to Sochi—with Flames, Panthers, Oilers, Senators, and Predators, which all sent two players); Josh Smith, *The Olympic Effect*, THE HOCKEY WRITERS, <http://thehockeywriters.com/olympic-effect/> (Feb. 20, 2014) (showing that after 2010 Winter Olympics, NHL Olympians’ points per game average dropped from 1.07 prior to Games, to .96 points per game after Olympics and by comparison NHL non-Olympians’ points per game average dropped from .97 to .96 points per game).

13. See Kerry Gillespie, *Sochi 2014: Bettman Favours World Cup of Hockey Over Olympic Participation*, SPORTS REPORTER, (Nov. 11, 2013) [http://www.thestar.com/sports/hockey/2013/11/11/sochi\\_2014\\_bettman\\_favours\\_world\\_cup\\_of\\_hockey\\_over\\_olympic\\_participation.html](http://www.thestar.com/sports/hockey/2013/11/11/sochi_2014_bettman_favours_world_cup_of_hockey_over_olympic_participation.html) (stating Olympic break is an “imperfect solution,” according to Gary Bettman); Larry Lage, *NHL Won’t Commit to Olympics Beyond Sochi Games*, AP (Jan. 27, 2014, 7:23PM), <http://wintergames.ap.org/article/nhl-wont-commit-olympics-beyond-sochi-games-0> (suggesting lack of appeal for NHL to allow players to go Olympic games beyond Sochi). Both destinations present fewer opportunities for casual fans to watch hockey games on primetime television hours in the United States. See *id.* (stating that Gold medal rematch between Canada and US, would occur at 4 pm in Sochi and 7 am or earlier in US).

14. See Gillespie, *supra* note 13 (“Bettman’s interest in bringing back World Cup of Hockey would be better plan going forward.”); Lake, *supra* note 3 (suggesting NHL response to strict IOC marketing restrictions sparked “a desire to expand its international presence through the revitalization of the World Cup and other potential international tournaments”).

League representatives announced plans for a World Cup of Hockey to be held in Toronto in 2016.<sup>15</sup> Numerous benefits to the NHL of hosting the World Cup include: the ability to directly profit from broadcast, marketing, sponsorship and advertising fees; the prevention of the hardships involved with pausing a season; and the full and total control over all aspects of the tournament.<sup>16</sup> However, as suggested by the NHL Commissioner and League Office, the NHL's World Cup of Hockey "could spell the end of NHL participation at the Olympics[.]"<sup>17</sup>

As the sole employer to the world's elite ice hockey players, the NHL holds considerable leverage over the IOC.<sup>18</sup> In order for the 2014 Games to feature NHL players, the League and team owners stipulated that players would not attend unless the IOC pay upwards of \$10 million in player insurance.<sup>19</sup> The League also pressured the IOC to allow the League unprecedented media access for the NHL-owned television station, the NHL Network.<sup>20</sup>

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15. See Chris Peters, *Report: World Cup of Hockey Expected to Return in 2016 in Toronto*, CBSSPORTS.COM (Jun. 4, 2014, 8:23pm), <http://www.cbssports.com/nhl/eye-on-hockey/24580740/report-world-cup-of-hockey-expected-to-return-in-2016-in-toronto> (maintaining NHL's purpose for instituting World Cup of Hockey event was to "expand [the NHL's] presence in international hockey, while also having more control . . . and creating another revenue stream"). See also *id.* (stating that NHL and players association would generate estimated \$100 million in revenue through competitive bidding process for any subsequent World Cup of Hockey).

16. See Jeff Klein, *NHL and Players Differ Over 2018 Games*, NEW YORK TIMES, (Feb. 22, 2014), <http://www.nytimes.com/2014/02/23/sports/hockey/nhl-and-players-differ-over-2018-games.html> ("Players would still risk injury, but the league would share in the revenue, travel would be limited, and if played in the preseason, the tournament would not interfere with the N.H.L. schedule."). See also Lake, *supra* note 3, ("[T]he league expressed a desire to expand its international presence through the revitalization of the World Cup. . . .").

17. See Peters, *supra* note 15 (alteration added) (replacing Olympics with World Cup of Hockey "is believed to be the preferred route of the owners.").

18. See *infra* notes 183-198 (discussing market for top professional hockey players).

19. See Lake, *supra* note 3 ("The NHL and the NHLPA believed that the IOC should cover the cost of insurance for their players to participate in the Games") David Shoalts, *NHL, IOC Inch Toward Sochi Winter Olympics*, THE GLOBE AND MAIL (Jun. 24, 2013, 10:27pm), <http://www.theglobeandmail.com/sports/hockey/nhl-ioc-inch-toward-sochi-winter-olympics/article12792135/> (forcing IOC and IIHF to pay record insurance sum restricts IOC and IIHF spending in other areas prior to Sochi games). See also *id.* (indicating that due to increased insurance costs, "only the wealthiest federations, such as Hockey Canada and Hockey USA, may be able to afford the cost of having their Olympians scrimmage.").

20. See Lake, *supra* note 3 (indicating IOC as strictly opposed to granting outside media networks access to any portion of Olympics because of restrictive partnership and broadcasting deals); John Ourand & Christopher Botta, *NHL Network on ice*, SPORTSBUSINESS DAILY (Jul. 1, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/07/01/Media/NHL-Network.aspx> (stating that in 2012, NHL's owned NHL Network, which reached 43 million homes, and charges

The IOC utilizes sponsorship exclusivity deals to generate a majority of its revenue; and, permitting inside access to an outside sponsor and partner, like the NHL, threatens those rights.<sup>21</sup>

Although the IOC appeased the NHL and granted the League limited access to certain highlights and player access, the League refused to agree to future Olympics unless given full media access and control.<sup>22</sup> The NHL's bullish negotiation stance suggests it will not cease using its leverage over the IOC and IIHF until the organizations relent to the media and control demands or refuse and suffer the prospect of an Olympics without NHL players competing.<sup>23</sup> Even if the international organizations comply, the NHL will still attempt to upstage the IOC by turning the NHL-controlled World Cup of Hockey into the world's preeminent ice hockey tournament.<sup>24</sup>

If this course of action persists, the League's conduct of banning players from the Olympics, but permitting them to attend the World Cup of Hockey, would violate United States' primary anti-

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twenty-nine cents for subscription raised \$53 million in fees for NHL league and owners). "NHL Network has turned into a nice business for the league. It is profitable, and league executives expect to see rapid growth[.]" *Id.*

21. See Tara Clarke, *The Companies Spending the Most on 2014 Sochi Olympics – And What They Really Gain*, MONEYMORNING (Feb. 14, 2014), <http://moneymorning.com/2014/02/14/companies-spending-2014-sochi-olympics-really-gain/> (suggesting \$1 billion of total revenue for Sochi Olympics generated through exclusive sponsorship deals). See also *id.* (stating that in exchange for sponsorship exclusivity fees, advertisers retain sole right to use Olympic logo in advertising and marketing).

22. See Lake, *supra* note 3 ("[B]y keeping the CBA silent on the issue, the League was able to increase its leverage with the IOC and thereby put the NHL and NHLPA in a position to negotiate a more favorable agreement." (alteration added)); *'NHL Revealed' all-access show extends league's reach to Sochi Olympics*, NHL.COM (Jan. 23, 2014, 5:45pm), <http://www.nhl.com/ice/news.htm?id=701888> ("It's even more progressive to have inside access at the Olympics, one of the more rightsholder-controlled events in all of sports."); see Sharon Terlep, *NHL Casts Doubt on Sending Players to 2018 Olympics*, WSJ ONLINE (Jan. 8, 2014), <http://online.wsj.com/news/articles/SB10001424052702304887104579306522788311320> (suggesting NHL commissioner and owners infuriated by IOC refusal in 2010 to permit widespread access to NHL Network because they were not permitted to air interview of NHL commissioner). *id.* ("The NHL [received] more [broadcasting rights and] material this year than in 2010 but still can't air whatever it wants.").

23. For a detailed discussion of the legality of the NHL's negotiating stance, see *infra* notes 162-173 and accompanying text.

24. See Lake, *supra* note 3 ("In response to this, the League expressed a desire to expand its international presence through the revitalization of the World Cup."); Peters, *supra* note 15 (suggesting NHL profits could reach as high as \$100 million from cities bidding on hosting World Cup event). But see Lake, *supra* note 3 (stating NHL players have a greater interest in being Olympians and further noting that men's hockey is marquee event for Olympics because of NHL player participation).

trust legislation, the Sherman Act.<sup>25</sup> The Sherman Act attempts to prevent anticompetitive conduct and the monopolization of markets and products.<sup>26</sup> The Act “ensures that companies which hold a natural monopoly in a given market do not actively discourage the rise of similar products in that market.”<sup>27</sup>

In the present situation, if the League acts to prohibit future NHL participation in the Olympic Games, the NHL-sponsored World Cup of Hockey would be an attempt to replace the Winter Olympics’ prestigious ice hockey tournament.<sup>28</sup> Any such ban on players attending the Olympics will severely impact the IOC’s ability to attract top-level professional talent, thereby substantially limiting the ice hockey tournament’s worldwide appeal and profits.<sup>29</sup> Therefore, the burdens and consequences stemming from these actions “would affect players, fans and the business of the Olympics, but wouldn’t hurt the league itself.”<sup>30</sup> Thus, the NHL is using its role as the employer to the world’s most dominant and profitable ice hockey players as a means to achieve revenue domination in the international ice hockey market and extort control over Olympic organizers.<sup>31</sup>

This Comment discusses the legality of the NHL’s move towards implementing a quadrennial World Cup of Hockey and the subsequent banning of players from Olympic competition.<sup>32</sup> Part II

25. See Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890); see *infra* Section IV (discussing Sherman Antitrust legislation).

26. For a further analysis of the policies that supported the implementation of the Sherman Antitrust Act, see *infra* notes 112-128 and accompanying text.

27. GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 456 (ABC-CILO, 4th ed. 2010).

28. See NHL.COM, *supra* note 22 (“[If] NHL and the Players’ Association hammer out a deal for a return of the ‘World Cup of Hockey,’ it’s uncertain what will happen in regard to participation in the 2018 Olympics” (alteration added)).

29. See Klein, *supra* note 16. In a New York Times article, NBC Sports Group Chairman Mark Lazarus was quoted as stating the following about his interest in continuing tradition of NHL players at Olympics: “We’ve expressed that opinion to the National Hockey League and to the N.H.L. Players Association . . . [w]e can only tell them that it is our preference, that they’re there.” See *id.* (stating further that NBC, which owns rights to 2018 Winter Games, paid \$963 million for right to air 2018 games, wants players there).

30. Kavitha Davidson, *The NHL’s Fraught Olympic Decision*, BLOOMBERG VIEW, (Feb. 26, 2014, 2:26 P.M. EST) <http://www.bloombergvew.com/articles/2014-02-26/the-nhl-s-fraught-olympic-decision>.

31. See Klein, *supra* note 16 (“No matter how much the Winter Games raise the sport’s visibility in the United States, the league’s owners will weigh that against their business and competitive interests.”).

32. See Klein, *supra* note 16 (discussing differing opinions between NHL players and league owners and executives, noting player “participation is a joint decision”).

provides a background of the relevant entities and the history of hockey in the Olympics.<sup>33</sup> Part III discusses the NHL's proposed course of action and reviews the impact of the proposed action. Part IV discusses the applicable antitrust law: Sections 1 and 2 of the Sherman Antitrust Act.<sup>34</sup> Part V applies the Sherman Antitrust Act to the NHL's planned actions and suggests that the NHL has monopoly power over professional hockey players and would violate the Sherman Act if it prohibited players from playing in the Olympic tournament and allowed sole permission to instead partake in a League-sponsored World Cup of Hockey.<sup>35</sup> Part VI assesses the impact on all parties if the NHL executes its plan for Olympic prohibition and subsequent creation of the World Cup.<sup>36</sup>

## II. BACKGROUND OF ENTITIES AND ISSUES

### A. NHL and Winter Olympics

The NHL was formed in 1917 and was originally comprised of five teams.<sup>37</sup> Nearly one hundred years later, the League has expanded to thirty teams and generates over \$3.2 billion in annual revenue.<sup>38</sup> The thirty teams are separately owned and operate in concert with the League office, NHL Enterprises.<sup>39</sup> While players hail from nineteen nations, the majority of the athletes are from Canada.<sup>40</sup> The NHL attracts the elite hockey talent by offering su-

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33. For an overview of Olympic ice hockey history, Olympic profits and the relevant private companies and governing bodies, see *infra* notes 37-77 and accompanying notes.

34. For a discussion of each entities' fiscal interests in the Olympics, a summary of the proposed World Cup of Hockey and an introduction to Sherman Antitrust legislation, see *infra* notes 78-161 and accompanying text.

35. For a discussion of antitrust implications arising from the proposed World Cup of Hockey, see *infra* notes 162-237 and accompanying text.),

36. For a further analysis of the resulting antitrust violations and a suggested alternative course of action, see *infra* notes 238-264 and accompanying text.

37. See *National Hockey League (NHL) Opens its First Season*, THIS DAY IN HISTORY, <http://www.history.com/this-day-in-history/national-hockey-league-nhl-opens-its-first-season> (last visited Feb. 2, 2014) (stating NHL was originally five franchise league).

38. See *NHL Projects a \$1B Boost in Revenue*, STREET & SMITH'S SPORTS BUSINESS JOURNAL (Jun. 24, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/06/24/Leagues-and-Governing-Bodies/NHL-notebook.aspx> (suggesting within next three seasons' total revenue will grow another \$1 billion).

39. See Larry, *supra* note 1, at 6A ("Each NHL member club operates individually, with its own revenues and costs, and revenues gained on a league-wide basis, such as television and advertising revenues, distributed among the member clubs."). See also *id.* (stating operating decisions are made by members of each organization and commissioner of league, Gary Bettman).

40. See Derek Zona, *Border Wars: NHL 2012-13 Games Played By Country*, SB NATION (Jul. 30, 2013, 6:30 AM), <http://www.coppernblue.com/2013/7/30/>



perior salaries and competitive playing opportunities compared to European professional leagues.<sup>41</sup> As a result, the League is regarded as the premier professional ice hockey league in the world.<sup>42</sup>

Before the introduction of NHL players, the Olympic ice hockey tournament included amateur players and European semi-professionals.<sup>43</sup> In 1988, the IOC lessened the restrictions previously banning professional athletes from competing in the Olympics.<sup>44</sup> Although the Olympics were then open to professionals, the NHL contractually prohibited its players from competing in non-NHL games.<sup>45</sup> The League softened its position in 1995 due to in-

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4570158/border-wars-nhl-2012-13-games-played-by-country (showing Canada has highest percentage of NHL players at 52.9%).

41. See Ryan Lambert, *What We Learned: The KHL Isn't Going to Steal All Your Russians*, YAHOO SPORTS (Jul. 13 2013, 10:48 AM), <http://sports.yahoo.com/blogs/nhl-puck-daddy/learned-khl-isn-t-going-steal-russians-nhl-144857282.html> (stating out of twenty-six teams in Russian Professional Hockey (KHL), only ten could afford to pay \$1 million to NHL players to transfer to KHL and only four or five of total twenty-six teams come up even in revenue per year); Matthew Fisher, *KHL is Good Hockey, Bad Business*, NATIONAL POST (Oct. 19, 2012, 8:00 AM), <http://sports.nationalpost.com/2012/10/19/khl-is-good-hockey-bad-business/> (noting lack of feasibility for KHL to sustain increased player salaries compared to NHL).

42. See Lyle Richardson, *KHL Still No Serious Threat to NHL* (Feb. 8, 2012, 2:10 PM), [http://kuklaskorner.com/spektor/comments/khl\\_still\\_no\\_serious\\_threat\\_to\\_nhl](http://kuklaskorner.com/spektor/comments/khl_still_no_serious_threat_to_nhl) (noting prominent counterpart professional hockey league, KHL, does not attract high level of players compared to NHL due to KHL's inability to offer comparable salaries).

The KHL, for all the talk that it's trying to challenge the NHL in some kind of real way, remains a bit of a joke in terms of who actually plays there; it's the equivalent of baseball's AAA-quality players. Not quite good enough to hack it in the bigs, a little too good to be bussing it in the [NHL's minor league] AHL.

Lambert, *supra* note 41 (alteration added).

43. See Larry, *supra* note 1, at 9A (discussing Olympic hockey prior to NHL participation).

The NHL first allowed its players to participate in the Olympics at the 1998 Games in Nagano, Japan. Before that, Olympic hockey was effectively an amateur competition. NHL players most recently participated in 2010 Games in Vancouver, and it appears as though the players—especially the Russian players—desire to play in the 2014 Winter Olympics held in Sochi, Russia.

*Id.* (footnotes omitted) (citations omitted).

44. See Jamie Fitzpatrick, *The Olympic Hockey Timeline*, ABOUT.COM, <http://proicehockey.about.com/od/olympichockey/a/olympictimeline.htm> (last visited Oct. 2, 2014) (stating regardless of ban being removed, NHL owners remained uninterested at that time in pausing season to permit players to compete).

45. See Larry, *supra* note 1, at 11A (noting players were able to participate in few, non-NHL exhibition games while playing for their foreign teams).

creasing pressure from players, and agreed to permit the athletes to take part in the next Olympic Games.<sup>46</sup>

When NHL players entered Olympic competition in the 1998 Nagano, Japan Winter Games, the popularity of the ice hockey tournament exploded.<sup>47</sup> Since then, the ice hockey tournament has been one of the most watched events of the Olympics.<sup>48</sup> The number of NHL competitors steadily rose over subsequent years, and in the 2014 Sochi Games, all national teams' rosters had a percentage of their players on NHL rosters: USA (100%), Canada (100%), Sweden (96%), Finland (68%), Czech Republic (64%), Russia (60%), Slovenia (56%), Switzerland (36%), Austria (12%), Latvia (4%), Norway (4%), and Slovenia (4%).<sup>49</sup> Overall, nearly 150 NHL players competed in the Sochi Olympics.<sup>50</sup>

## B. International Participation Process

The International Olympic Committee ("IOC") and the International Ice Hockey Federation ("IIHF") conduct the Olympic hockey tournament in tandem.<sup>51</sup> The IOC is a non-profit organization that "oversees all aspects of the Olympic movement, but its

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46. *See id.* at 11A-12A (noting agreement was reached allowing NHL players to participate in Olympics after dissolution of Soviet Union and 1994-1995 NHL player-owner lockout).

47. *See* Lake, *supra* note 3 (stating presence of professional hockey players from NHL and KHL helped ignite hockey's worldwide popularity); Larry, *supra* note 1, at 11A (suggesting prior to 1998, NHL players who insisted on partaking in Olympics could not do so by rule of CBA). The agreement to let players participate in the 1998 Winter games took place in 1995 between the NHL, NHLPA, IOC, and IIHF. *Id.* For a discussion of the growth in popularity of the ice hockey tournament, see *infra* notes 63-66.

48. *See* *Skiing Tops Olympic TV Viewership, While Hockey Scores Online*, THE NIELSEN COMPANY (Feb 19, 2010), <http://www.nielsen.com/us/en/newswire/2010/skiing-tops-olympic-tv-viewership-while-hockey-scores-online.html> (showing that during Vancouver 2010 Winter Olympics hockey "most discussed Olympic sport online").

49. *See id.* (suggesting percentages increased over sixteen-year period between 1998 and 2014 Olympics due to NHL player involvement).

50. *See* *NHL Won't Commit to Olympics After Sochi Games*, SI.COM, <http://www.si.com/olympic-ice-hockey/ice-hockey/2014/01/27/nhl-sochi-olympics-2018-pyeongchang> (last visited Oct. 2, 2014) (noting every team in 2014 Olympics had at least one player from NHL on roster).

51. *See* *IIHF Mission Statement*, INTERNATIONAL ICE HOCKEY FEDERATION, <http://www.iihf.com/iihf-home/the-iihf/our-mission.html> (last visited Mar. 10, 2014) ("To govern, develop and promote hockey throughout the world, to develop and control international ice and in-line hockey . . . to operate in an organized manner for the good order of the sport." (alteration added)); *The International Olympic Committee is the supreme authority of the Olympic Movement*, INTERNATIONAL OLYMPIC COMMITTEE, <http://www.olympic.org/about-ioc-institution> (last visited Mar. 10, 2014) ("[t]he International Olympic Committee is the supreme authority of the Olympic Movement" and organizer to all Olympic games (alteration added)).

most visible role is that of supervisor for the summer and winter Olympic Games.<sup>52</sup> The IIHF is comprised of national hockey organizations worldwide with a common goal to broaden the sport's popularity.<sup>53</sup> For international hockey organizations to send players to the Olympics, the organizations must be members of the IIHF and meet the stipulations of the governing body.<sup>54</sup> While the IIHF deals specifically with ice hockey, the IOC is responsible has final authority and control over arranging and organizing all Olympic Games.<sup>55</sup>

For NHL athletes, the Olympic process requires that players qualify with their respective nation's IIHF organization and obtain NHL and team permission through an agreement between the League and the players union, the NHLPA.<sup>56</sup> The NHLPA "negotiates and enforces fair terms and conditions of employment for NHL players."<sup>57</sup> To achieve the union's goals, the NHLPA's representatives, the League office, and the team owners enter into a Collective Bargaining Agreement ("CBA"), which "sets out the terms and conditions of employment of all professional hockey players playing in the NHL."<sup>58</sup>

In 2012, the League representatives and the players agreed to a new, ten-year CBA.<sup>59</sup> The previous CBA contained terms specifically permitting the players to compete in the 2006 and 2010 Win-

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52. See WONG, *supra* note 27 at 27 (stating IOC controls administration of all Olympic aspects). See *id.* ("Beneath the IOC administration are the individual international federations (IFs). The IFs are nongovernmental bodies given the authority by the IOC to administer specific sports on the international level. IFs must adhere to the Olympic movement rules and regulations. . . [s]ince the IFs are responsible for individual sports on an international level, they are directly above the national governing bodies of each sport. As an example the NGB [National Governing Body] of basketball in the United States is called USA Basketball.").

53. See *IIHF Mission Statement*, *supra* note 51 and accompanying text.

54. See Larry, *supra* note 1, at 8A (indicating further that IIHF operates international competitions and settles disputes among member organizations).

55. See *IIHF Mission Statement*, *supra* note 51 and accompanying text.

56. See *Inside NHLPA*, NHLPA.COM, [www.nhlpa.com/inside-nhlpa](http://www.nhlpa.com/inside-nhlpa) (last visited Oct. 2, 2014) (noting NHLPA was initiated in 1967).

57. See COLLECTIVE BARGAINING AGREEMENT BETWEEN NAT'L HOCKEY LEAGUE AND NAT'L HOCKEY LEAGUE PLAYERS' ASS'N (Feb. 15, 2012) [hereinafter "NHL 2012 CBA"] available at [http://cdn.agilitycms.com/nhlpacom/PDF/NHL\\_NHLPA\\_2013\\_CBA.pdf](http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf) (last visited Oct. 2, 2014) (detailing NHL Collective Bargaining Agreement).

58. See *Inside Collective Bargaining Agreement*, NHLPA, <http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement> (last visited Oct. 2, 2014) (formatting structure of NHLPA with one representative from each of 30 teams who votes on Executive Director to act as primary liaison between league offices NHL Enterprises and players).

59. See NHL 2012 CBA, *supra* note 57; Larry, *supra* note 1, at 12A (noting prior 2005 CBA expired on September 15, 2004).

ter Olympics.<sup>60</sup> However, in the 2012 CBA, the NHL purposefully negated mention of future Olympics so the League would no longer be obligated to allow the players to partake in Winter Games.<sup>61</sup> Although the NHLPA and League office can still negotiate the Olympics, without contractual language addressing international play within the CBA, players risk competing and possibly injuring themselves without compensation.<sup>62</sup>

### C. Olympic Ice Hockey Tournament Profits at Stake

The Olympic Ice Hockey tournament generates substantial revenue and viewership compared to the other Winter Olympic sports.<sup>63</sup> In Vancouver 2010, the Olympic hockey tournament portion of the Winter Olympics generated \$60 million in revenue for the IOC.<sup>64</sup> In 2010, the final game of the international tournament reached the largest audience in history for a Canadian hockey game.<sup>65</sup> Similarly, in the 2014 Sochi Games, the semifinal game between Canada and the United States set a new online streaming

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60. See Lake, *supra* note 3 (citing COLLECTIVE BARGAINING AGREEMENT BETWEEN NAT'L HOCKEY LEAGUE AND NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, § 24.8 (July 22, 2005) [hereinafter "NHL 2005 CBA"] available at <http://www.nhl.com/cba/2005-CBA.pdf>) ("[T]he NHL and the NHLPA commit to participate in the 2006 and 2010 Winter Olympics, subject to negotiation of mutually acceptable terms with the IIHF.").

61. See NHL 2012 CBA, *supra* note 57, § 24; Klein, *supra* note 16 ("[T]he anti-Olympic faction among owners and executives has many reasons for saying no to Pyeongchang, and last week's roll call of players who were injured at the Sochi Games touched off a renewed sense of opposition." (citation omitted)).

62. See Rob Gloster & Eben Novy-Williams, *NHL Owners Question Olympics Benefits as Players Want Medals*, BLOOMBERG (Feb. 25, 2014 2:52 PM), <http://www.bloomberg.com/news/2014-02-25/nhl-owners-question-benefits-of-olympics-as-players-want-medals.html> (noting "[t]he league and players union together have to agree on whether [the league] will participate").

63. See Brennan Barry, *Bettman Not to Blame If NHL Bans Olympic Participation, Midway Madness*, MIDWAY MADNESS (Feb. 11, 2013), [www.midwaymadness.com/2013/02/bettman-not-to-blame-if-nhl-bans-olympic-participation/](http://www.midwaymadness.com/2013/02/bettman-not-to-blame-if-nhl-bans-olympic-participation/) (noting 2010 Olympic hockey tournament generated over \$60 million). But see Brad Epstein, *NHL Players Are What Separates The Winter Olympics From The Summer*, NEXT IMPULSE SPORTS (Feb. 24, 2014) <http://nextimpulsesports.com/2014/02/24/nhl-players-separates-winter-olympics-summer-games/> (suggesting high NBC ratings linked closely to Olympic Ice Hockey Tournament). Following the USA loss to Canada in Sochi, viewership ratings in the United States over the final two days dropped dramatically, by nearly 40%. See *id.*

64. See Barry, *supra* note 63 (demonstrating substantial revenue earned from Olympic hockey tournament, with \$8.5 million in profits from 2010 gold medal game between United States and Canada).

65. See Nicholas Goss, *Why 2014 Sochi Olympics Will Give Revitalized NHL Another Big Boost*, BLEACHER REPORT (July 19, 2013), <http://bleacherreport.com/articles/1707486-why-2014-sochi-olympics-will-give-revitalized-nhl-another-big-boost> (noting 2010 Olympic hockey final between U.S.A and Canada most watched television broadcast in Canadian history).

record of more than 2.1 million viewers.<sup>66</sup> For the four-year Olympic cycle encompassing the 2014 Sochi Games and 2016 Rio De Janeiro Games the IOC raised nearly \$4.1 billion in revenue.<sup>67</sup> However, the IOC operates as a non-profit organization, splitting half of the revenue with the host city, distributing 90% of the remaining revenue to fund National Olympic Committee's, Organizing Committees, and International Federations, and retaining 10% revenue for operational and administrative expenditures.<sup>68</sup> These funds must cover all expenses for both the Summer and Winter games.<sup>69</sup> The success of future Winter Games depends on the Olympic ice hockey tournament, which has proven to be the financial keystone for a successful and profitable Winter Olympics.<sup>70</sup>

NBC has a significant financial stake in the Olympic Ice Hockey tournament, and paid nearly \$7.5 billion for the rights to Winter Olympic Games through 2032, fully expecting NHL players to participate.<sup>71</sup> The competitive edge NHL players provide the tournament increases viewer interest and proves a dominating factor supporting NBC's rationale for paying the substantial fee to broadcast the Olympics.<sup>72</sup> However without the NHL's continued involvement in the Winter Games, NBC's ratings and revenues

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66. See *NBC Sports Group Sets Streaming Record As More Than 2.1 Million Unique Users Live Stream Team USA-Canada Men's Hockey Semifinal*, NBC SPORTS GROUP (Feb. 21, 2014), <http://nbcspportsgroupspresbox.com/2014/02/21/nbc-sports-group-sets-streaming-record-as-more-than-2-1-million-unique-users-live-stream-team-usa-canada-mens-hockey-semifinal/> (observing that hockey game's streaming audience reached 2,122,447 people, exceeding 2012 Super Bowl's 1.2 million person stream viewership).

67. See David Owen, *IOC Broadcasting Revenues Set to Top \$4.1 Billion in Sochi-Rio Quadrennium*, INSIDE THE GAMES, (Sept. 9, 2013) <http://www.insidethegames.biz/olympics/1015932-ioc-broadcasting-revenues-set-to-top-4-1-billion-in-sochi-rio-quadrennium> ("This figure compares with a final total of \$3.85 billion for the Vancouver 2010-London 2012 Olympic cycle.").

68. See *id.*; Gus Lubin & Samuel Blackstone, *Meet The Secretive Group Earning \$8 Billion From The Olympic Games*, BUSINESS INSIDER, (Aug. 7, 2012, 11:29 PM) <http://www.businessinsider.com/finances-of-the-ioc-2012-8?op=1#ixzz3HSm2h6mz> ("The larger and more popular Summer Games receive a larger share of the money.").

69. See Lubin & Blackstone, *supra* note 68 (discussing how IOC not only bring in substantial revenue but receives beneficial treatment by localities hoping to secure contracts).

70. For a discussion of the financial implications of abstention, see *infra* notes 71-77 and accompanying text.

71. See Phillip Hersh, *NBC will remain the Olympic network in the United States*, CHICAGO TRIBUNE (June 7, 2012), [http://articles.chicagotribune.com/2011-06-07/news/chi-nbc-will-remain-the-olympic-network-in-the-united-states-20110607\\_1\\_olympic-network-nbc-s-olympics-usoc-and-ioc](http://articles.chicagotribune.com/2011-06-07/news/chi-nbc-will-remain-the-olympic-network-in-the-united-states-20110607_1_olympic-network-nbc-s-olympics-usoc-and-ioc) (noting NBC paid \$963 million for 2018 Winter Games).

72. See Klein, *supra* note 16 ("Asked what the N.H.L.'s absence from Pyeongchang would mean to NBC, [NBC Sports Group Chairman] Lazarus said, 'I can't answer that question, and I hope I won't ever have to.'" (alteration added));

would likely decline.<sup>73</sup> The NHL seemingly has an interest in appealing to NBC, as the League and television provider have a separate broadcasting deal worth \$2 billion over ten years for NBC's right to televise NHL regular season and playoff games.<sup>74</sup> In spite of the existing ten-year partnership deal, the NHL's path towards player prohibition will diminish NBC's revenues.<sup>75</sup> NBC expressed concern over the NHL's potential player restriction and stands to lose even further profits if the NHL chooses a separate media outlet to broadcast the inevitable World Cup of Hockey.<sup>76</sup> Thus, the future popularity and profits for NBC and the IOC will be inherently linked to the NHL's decision to permit players to attend or abstain.<sup>77</sup>

### III. OVERVIEW OF THE NHL'S PRIOR CONDUCT, PROPOSED COURSE OF ACTION & RAMIFICATIONS FOR IOC, IIHF AND NBC

#### A. Buildup to Sochi

For NHL athletes to play in the 2014 Olympics, the NHL required the IOC and IIHF to substantially lower the organizations' normally rigid guidelines.<sup>78</sup> The League demanded the IOC and participating IIHF national organizations pay nearly \$10 million in insurance coverage for the participating players.<sup>79</sup> The IOC and

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Epstein, *supra* note 63 ("But to keep [the tournament successful] the [Olympics] will need to keep the NHL stars. It needs to be elite.").

73. See Fluto Shinzawa, *NBC Will Have a say in NHL Participation*, THE BOSTON GLOBE, Feb. 23, 2014, <http://www.bostonglobe.com/sports/2014/02/23/torey-krug-making-power-play-impact/7lgKqajN8bf8rpFAjSwmL/story.html> ("[I]f amateurs play in 2018, hockey numbers won't just go down. They'll drop off Mount Everest." (alteration added)).

74. See Bob Condor, *NHL, NBC sign record-setting 10-year TV deal*, NHL (April 4, 2011, 10:08 PM), <http://www.nhl.com/ice/news.htm?id=560238> (noting NBC and NHL have \$200 million annual contract providing NBC rights to broadcast NHL regular season and playoffs; notably both Olympic and NHL deals were agreed upon within same calendar year).

75. See Davidson, *supra* note 30 ("NBC would take a particularly large hit after spending \$4.38 billion for television rights to the Olympics through 2020.").

76. See Gloster, *supra* note 62 (indicating NBC's preference to have NHL players in South Korea).

77. See Jake Mann, *NBC's New Olympics Deal: What the Experts Think*, THE MOTLEY FOOL (May 9, 2014), <http://www.fool.com/investing/general/2014/05/09/are-olympic-sponsorships-a-multi-billion-dollar-bu.aspx> ("[F]our of the last six Olympics to lose money occurred during the winter" (alteration added)).

78. See Lake, *supra* note 3 ("[T]he NHL and the NHLPA agreed that changes from the past agreements with the IOC and IIHF were needed in order for it to make commercial sense for the NHL to send players to Sochi." (alteration added)).

79. See *NHL, IOC Inch Toward Sochi Winter Olympics*, CARHA HOCKEY <http://www.carhahockey.ca/1040/nhl-ioc-inch-toward-sochi-winter-olympics> (last visited

wealthier IIHF federations paid this unprecedented sum, leaving poorer nations' hockey federations unable to pay for necessary pre-Olympic national training camps.<sup>80</sup> The NHL also stipulated that the IOC needed to liberalize their stringent media rights and coverage restrictions to permit the NHL Network increased access.<sup>81</sup> Although IOC regulations prohibit outside sponsors and media access to the Olympics, the committee appealed the League offices and team owners to enable player participation.<sup>82</sup> The NHL acknowledged the inducements, but refused to agree to further Olympics, partially due to the lack of total control over the Olympic ice hockey tournament.<sup>83</sup>

## B. NHL Player Prohibition and the World Cup of Hockey

The NHL's proposed prohibition of player involvement and reinstatement of the World Cup of Hockey, will have lasting implica-

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Oct. 20, 2014) (noting direct correlation between rise of player salaries and increased insurance costs).

80. *See id.* (discussing cost of insuring players).

The cost of insuring the players . . . is such that many of the [national IIHF] development camps planned for the summer may not have [pre-Olympic] on-ice practices. Since the camps are held outside the Olympics, the IOC does not pay for the player insurance so only the wealthiest federations, such as Hockey Canada and Hockey USA, may be able to afford the cost of having their Olympians scrimmage.

*Id.*

81. *See id.* (suggesting other professional leagues would use NHL negotiations with IOC as precedent for similar leverage to gain media access for their respective athletes at future Olympics); The Canadian Press, *IIHF President Willing to Find 'Solutions' to Keep NHLers in Olympics: Issues to be Discussed Between IIHF, IOC and NHL*, THE HOCKEY NEWS (Jan 8, 2013 5:23 p.m.), <http://www.thehockeynews.com/articles/49224-IIHF-president-willing-to-find-solutions-to-keep-NHLers-in-Olympics.html> (noting that NHL made attempts to gain access to "tickets, hotels and better hospitality for team owners [and] to larger things like sponsor recognition and a loosening of the IOC's notoriously strict guidelines on images, video and media." (alteration added)).

82. *See* Scott Burnside, *NHL Stars Returning to the Olympics*, ESPN.COM (July 19, 2013, 7:35 PM ET), [http://espn.go.com/olympics/hockey/story/\\_/id/9492359/nhl-players-given-nod-play-2014-winter-games-sochi](http://espn.go.com/olympics/hockey/story/_/id/9492359/nhl-players-given-nod-play-2014-winter-games-sochi) (reporting that NHL demands included "increased access and enhanced ability to collect and distribute Olympic-related content on NHL media platforms, and an improved ability to promote the NHL's participation in the Winter Olympics.").

83. *See* Scott Burnside, *Bitman, Fasel Step Up Sideshow*, ESPN.COM (Feb. 14, 2014 12:22PM EST), [http://espn.go.com/olympics/winter/2014/icehockey/story/\\_/id/10474956/2014-sochi-olympics-future-nhl-players-olympics-debatable](http://espn.go.com/olympics/winter/2014/icehockey/story/_/id/10474956/2014-sochi-olympics-future-nhl-players-olympics-debatable) ("In terms of the things that are tangible, the requests made by the NHL and the NHL Players' Association leading up to the Sochi Games couldn't have gone better."). For a thorough discussion of the implications arising from the leagues' assertion of power, see *infra* notes 162-237 and accompanying text.

tions on international hockey and future Winter Olympics.<sup>84</sup> To benefit financially from player involvement in an international tournament, the NHL has publicly floated plans to hold the World Cup of Hockey, starting in 2016.<sup>85</sup> The World Cup of Hockey was previously held twice, in 1996 and 2004, with the 2004 tournament occurring after the NHL began allowing players to attend Winter Olympics.<sup>86</sup> Both tournaments lacked the draw and success garnered by the Olympics, principally due to the lack of prominent NHL player involvement.<sup>87</sup> For the NHL's elite, the World Cup represents a secondary tournament for which the international prestige associated with the Olympics could not be successfully duplicated.<sup>88</sup>

However, the League staunchly suggests that a return to the tournament with an influx of top-level NHL talent would attract new interest for both participants and viewers.<sup>89</sup> Unlike the Olympics, the World Cup would occur in September to avoid overlap-

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84. See Dan Ryan, *Sochi 2014: Just How "NHL" are the Olympics*, SB NATION (Jan 10, 2014, 2:06 PM), <http://www.stanleycupofchowder.com/2014/1/10/5296016/sochi-2014-just-how-nhl-are-the-olympics> (discussing increased likelihood of World Cup of Hockey as replacement for Olympics).

85. See *NHL Won't Commit to Olympics After Sochi Games*, SPORTSILLUSTRATED.COM (Jan 27, 2014, 12:00 AM), <http://www.si.com/olympic-ice-hockey/ice-hockey/2014/01/27/nhl-sochi-olympics-2018-pyeongchang> ("The NHL and NHL Players' Association have been in talks about bringing back the World Cup of Hockey that wouldn't conflict with the league's regular season."); Joe Delessio, *Time for a Hockey World Cup?* SPORTSONEARTH.COM (Jan. 12, 2014), <http://www.sportsonearth.com/article/66502878/the-nhl-is-a-reluctant-participant-in-the-sochi-olympics> ("The NHL hates that it's not in control of such a high-profile event, particularly when international hockey has the potential to be so lucrative.").

86. See Terlep, *supra* note 22 (suggesting World Cup of Hockey does not generate same level of fan and player interest compared to Olympics, largely due to NHL players disinterest and lack of involvement).

87. See Christopher Botta, *Could World Cup of Hockey Make a Return*, STREET & SMITH'S SPORTS BUSINESS JOURNAL (June, 25, 2012), <http://m.sportsbusinessdaily.com/Journal/Issues/2012/06/25/Leagues-and-Governing-Bodies/Hockey-world-cup.aspx> (explaining that NHL Commissioner Gary Bettman believes resurgent World Cup will be different than previous ones because "both the league and the [NHL] Players' Association believe doing World Cups on a regular basis is both important and a great opportunity for the continued growth of the game" (alteration in original)).

88. See James Conley, *The NHL World Cup of Hockey Is Coming for Your Olympics*, SB NATION (Feb. 11, 2014, 11:00 AM), <http://www.pensburgh.com/2014/2/11/5400344/the-nhl-world-cup-of-hockey-is-coming-for-your-olympics-tuesday-slew> ("The Olympics are [sic] the preeminent international sporting tournament, and it would take years of successful and captivating World Cup tournaments to really replace them [sic] in the eyes of hockey fans and NHL players.").

89. See *id.* (recounting that return of World Cup of Hockey with NHL player participation would attract global audience similar to Olympics).



ping with an ongoing NHL season.<sup>90</sup> Additionally, whereas the international hockey tournament is only one of fifteen sports at the Winter Olympics, the World Cup of Hockey would not have any risk of popular winter sports competing with the World Cup for television airtime and popularity.<sup>91</sup> Further, the NHL would be able to broadcast the tournament and choose sponsorships and media rights, with all profits going to the League and the players.<sup>92</sup> Therefore, by substituting the Olympic Games with a World Cup of Hockey, the NHL and team owners will have an international tournament “they can own, control and profit from.”<sup>93</sup> In so doing, the NHL intends to “make a resurrected World Cup of Hockey the pinnacle of the game at the international level.”<sup>94</sup>

The players, through the NHLPA, must collectively vote and agree to attend the World Cup.<sup>95</sup> Any agreement between the NHL and its players may offer the players a fiscal incentive based on marketing and television revenues to lure players into attending the reinstated World Cup; however, each individual player would retain the option to participate.<sup>96</sup> Although there may be a nominal financial reward, the star players would be unlikely to attend the

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90. See Botta, *supra* note 87 (quoting NHL Chief Operations Officer John Collins as stating “[f]or years now, we have been essentially licensing our players to the Olympics and to the World Championships. Why not continue to build up an event like the World Cup, where the NHL and union can be partners, our sponsors can activate, and [that] our fans will embrace?” (alteration added)).

91. See Lage, *supra* note 13, (altering timetable and schedule of World Cup of Hockey would allow NHL to hold event in August or September, outside of winter sports calendar); Botta, *supra* note 87, (holding World Cup in September NHL hopes to directly benefit from ratings boost due to lull in sporting events between Super Bowl and NCAA March Madness).

92. See Botta, *supra* note 87, (believing league does not benefit as much from exposure of NHL players, particularly when Olympics are not in North America). The fan focus and interest boosted post-Olympic ratings when the games were held in Salt Lake City in 2002 and Vancouver in 2010. *Id.* (holding conversely, the 1998 Nagano, Japan and 2006 Turin, Italy Olympics each had lower ratings and press coverage in the United States).

93. See Greg Wyshynski, *Gary Bettman’s World Cup vs. the Winter Olympics*, YAHOO SPORTS (Nov. 11, 2013, 3:25 PM), <http://sports.yahoo.com/blogs/puck-daddy/gary-bettman-world-cup-vs-winter-olympics-202502902—nhl.html> (arguing Bettman views NHL’s player participation concession as “goodwill gesture” (internal quotation marks omitted)).

94. Mitchell Tierney, *Why Hockey is the Best Olympic Team Sport*, LASTWORDONSPORTS.COM (Jan. 29, 2014), <http://lastwordonsports.com/2014/01/29/why-ice-hockey-is-the-best-olympic-team-sport/> (discussing ramifications if World Cup supplants Olympics and NHL refuses to allow players in 2018 Winter Olympics).

95. For a discussion of the NHL and NHLPA agreement to create a World Cup of Hockey, see *supra* notes 13-17 and accompanying text.

96. For a discussion of the NHLPA’s lack of power to compel players to attend a potential World Cup of Hockey, see *infra* notes 166-167.

World Cup, resulting in fewer elite players than the Olympics.<sup>97</sup> While the League likely is mistaking the player interest level, the World Cup reintroduction coupled with the Olympics, demonstrates a shift toward the NHL dominating the landscape of international ice hockey.<sup>98</sup>

### C. The Ramifications for Future Olympic Games

The fiscal and competitive interest for the future of the Olympic hockey tournament is closely tied to NHL participation.<sup>99</sup> A successful NHL player ban would force the IIHF and IOC to find replacement players in the form of “second-tier pros from the North American minor leagues and European pro leagues[.]”<sup>100</sup> Without the world’s best hockey players the Olympic ice hockey tournament would diminish from a popularity and marketing standpoint because “there really is no better way to grow and promote a game that is often seen as an afterthought among many sports fans” than by showcasing top level talent.<sup>101</sup>

Any diminished popularity of the Olympic ice hockey tournament would directly impact the profits wrought by both the IOC and NBC.<sup>102</sup> By comparison, in the Summer Olympic Games, the

97. See Delessio, *supra* note 85 (suggesting elite level players would not be incentivized by World Cup of Hockey because “such a tournament would . . . have less cachet, and considering this generation of players has grown up with NHL Olympic participation—and has likely dreamed about representing their country—a World Cup could be perceived as a step down” (alteration added)).

98. See *id.* (“[S]kipping the Olympics in favor of a World Cup would mean a tournament with fewer eyeballs on it, and one with far less buzz, even if the United States is successful.” (alteration added)).

99. See Cam Cole, *Cole: NHL Plays Coy on its Olympic Future*, CANADA.COM (Feb 18, 2014, 10:54 AM), <http://www.canada.com/olympics/news/bettman-says-no-discussions-yet-about-nhl-participating-in-2018-olympics> (“[T]he IIHF desperately needs the NHL in the Olympics, and the NHL — though it has sent the cream of its workforce to five straight Games beginning at Nagano in 1998 — is very much divided on whether it’s going to make it six.” (alteration added)).

100. See *id.* (alteration added) (suggesting decreased and muted fan interest as result of NHL refusing to permit players to attend 2018 Games in Pyeongchang, South Korea).

101. See Tim Kolupanowich, *The Necessary Presence of NHL Players At the Olympics*, THEGOODPOINT.COM (Apr. 16, 2013), <http://thegoodpoint.com/nhl-players-olympics/>. See also Katie Carrera, *Alex Ovechkin, Steve Stamkos on Why NHL Players Should Participate in Olympics*, THE WASHINGTON POST (Feb. 14, 2013), <http://www.washingtonpost.com/blogs/capitals-insider/wp/2013/02/14/the-argument-for-nhl-players-to-participate-in-the-olympics/> (quoting former Olympian and NHL All-Star Steve Yzerman “[t]he Olympics is the one time the whole world is watching, and I believe we want our players there because we have the best players in the world” (alteration added)).

102. See ALAIN FERRAND, JEAN-LOUP CHAPPELET & BENOÎT SÉGUIN, *OLYMPIC MARKETING* 235 (2012) (“The example of the NHL clearly illustrates one of the key challenges for IOC marketing and its stakeholders. The stakes are high because it

IOC tends to generate substantial revenue and popularity because NBA players participate, adding a celebrity aspect to the Games, and, in return, the NBA receives exposure and increased worldwide viewership during the regular season.<sup>103</sup> Due to the added exposure, “[a]s a business and as a brand, the NBA has generated hundreds of millions of dollars as a direct result of allowing its players to appear in the Olympic Games[.]”<sup>104</sup> Even so, the Summer Games are not as fiscally dependent on basketball due to the popularity of swimming, gymnastics, and track and field.<sup>105</sup> On the contrary the Winter Games features less popular, less common sports and relies on the Olympic ice hockey tournament to generate profits.<sup>106</sup> The identifiable and popular stars from both the NHL and NBA provide the allure for their respective Olympic tournaments and are primarily responsible for the financial success of those events.<sup>107</sup>

The future success of the Winter Games relies on NHL talent, and “NHL players not attending would hurt the business of the

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is important for the IOC’s brand equity to have the best athletes compete in the Games.”). See also Adrian Wojnarowski, *NBA Owners Want to Kill Olympic Format to Protect Investment in International Players*, YAHOO!SPORTS (July 29, 2012, 7:10 PM), <http://sports.yahoo.com/news/olympics—nba-owners-want-to-kill-olympic-format-to-protect-investment-in-international-players.html> (noting National Basketball Association permits players to participate in Summer Games which “deliver[s] incredible revenue and value to the Olympic basketball tournament” (alteration added)).

103. See Alex Davidlow, *Olympic Basketball: Mark Cuban, David Stern Want IOC to Wake Up from Dream Teams*, BLEACHER REPORT (August 9, 2012), <http://bleacherreport.com/articles/1290379-olympic-basketball-mark-cuban-david-stern-want-ioc-to-wake-up-from-dream-teams> (stating “the IOC makes a significant portion of its revenue profiting off of Team USA[ because] . . . . [b]asketball is one of the biggest attractions at the Olympics”).

104. See Howard Bloom, *NBA Should Think Twice Before Trashing Role in International Hoops*, SPORTING NEWS (Aug. 5, 2014, 2:08 PM), <http://www.sportingnews.com/nba/story/2014-08-05/nba-olympics-ioc-paul-george-injury-update-usa-fiba-pacers-contract-salary>.

105. See Stephen A. Greyser & Vadim Kogan, *NBC and the 2012 London Olympics: Unexpected Success* 7 (Harvard Bus. Sch., Working Paper No. 14-028 2013), available at [http://www.hbs.edu/faculty/Publication%20Files/14-028\\_99a0100c-7dcc-4fc4-bf29-6c0bd2f5561d.pdf](http://www.hbs.edu/faculty/Publication%20Files/14-028_99a0100c-7dcc-4fc4-bf29-6c0bd2f5561d.pdf) (noting Summer Olympics have more popular relatable sports while Winter Olympics offers sports which are “more regional in their appeal”).

106. See *id.* at 7 (suggesting importance of ice hockey paramount to success of Winter Games because “Winter Olympics do[ ] not carry the same cachet as the Summer Olympics, [and] the overall return for advertisers is diminished”).

107. See Michael Rosenberg, *What the Loss of NHL Players Would Mean to the Winter Olympics*, SPORTSILLUSTRATED.COM (Feb. 23, 2014), <http://olympics.si.com/olympic-ice-hockey/2014/02/23/sochi-olympics-hockey-nhl-players-out-2018> (“If you want to hold a major sporting event, you need some recognizable sports . . . . [b]ut if this becomes a second-rate hockey tournament, then . . . the air will be sucked out of the Olympics.”).

Olympics and . . . NBC network".<sup>108</sup> Absent the top-tier talent, the IOC Olympic Committee will face challenges in marketing the Olympic hockey tournament because "the ability of [the IOC] to [create] value would be diminished if the best athletes did not participate."<sup>109</sup> Consequently, the IOC and NBC are increasingly reliant on keeping NHL players involved in future Winter Olympics.<sup>110</sup> Any future absence of NHL players will weaken the product, popularity, and revenue of the Olympic ice hockey tournament as well as the Winter Olympics collectively.<sup>111</sup>

#### IV. SHERMAN ANTITRUST SECTIONS ONE AND TWO

##### A. Background of Relevant Sections

In the late nineteenth century, Congress enacted the Sherman Act to foster competition and diminish the existence of monopolies.<sup>112</sup> Fearful of a single group or entity controlling and dominat-

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108. See Rob Gloster & Eben Novy-Williams, *NHL Owners Question Olympics Benefits as Players Want Medals*, BLOOMBERG (Feb. 25, 2014, 2:52 PM), <http://www.bloomberg.com/news/2014-02-25/nhl-owners-question-benefits-of-olympics-as-players-want-medals.html> (alteration added) (quoting Brad Adgate, Horizon Media Inc. Director of Research, as opining that regardless of viewership of Olympics, NHL should not expect direct regular season ratings to drastically rise because "[t]here's no halo effect, . . . [i]t's not like suddenly 25-plus million people watched this, so we'll have 25-plus million people watch the Stanley Cup Finals. That hasn't happened.").

109. See FERRAND, CHAPPELET & SÉGUIN, *supra* note 102, at 235 (discussing potential lack of player participation). See also Michael Willhoft, *Should NHL Players Be Allowed To Play in the Olympics?*, SPORTSILLUSTRATED.COM, <http://eyesonisles.com/2014/02/20/nhl-players-allowed-play-olympics/> (last visited Oct. 6, 2014) (noting unlikelihood of TV broadcasts drawing same audience if amateur athletes replaced NHL players).

110. See Willhoft, *supra* note 109 (arguing IIHF and IOC rely on NHL players because "having NHL players in the Olympic tournament creates the highest possible level of competition in a marquee event"). See also *id.* (adding without talent display "it's unlikely those TV broadcasts would draw that type of crowd").

111. See Ryan Lake, *The Games Must Go On: 2014 Sochi Winter Olympic Games and the National Hockey League*, n.11 LAWINSPORT (Jan. 13, 2014), <http://www.lawinsport.com/articles/regulation-a-governance/item/the-games-must-go-on-2014-sochi-winter-olympic-games-and-the-national-hockey-league#references>.

The inclusion of NHL players has increased viewership of the Olympic Tournament drastically. For example, in the 1992 Albertville Winter Olympics, which did not include NHL players, the tournament enjoyed 11.7 million viewers. However, the 2002 Salt Lake City Games and the Vancouver Games, which did include NHL players, enjoyed ratings of 17.1 million and 27.6 million respectively. *Id.* n.11 (citing Kevin Allen, *College Kids Perform Olympic Miracle*, ESPNCLASSIC, [http://espn.go.com/classic/s/miracle\\_ice\\_1980.html](http://espn.go.com/classic/s/miracle_ice_1980.html)).

112. See generally Sherman Antitrust Act, 15 U.S.C.A § 1 (2004) (declaring illegal contracts and agreements "in restraint of trade or commerce among the several States, or with foreign nations"). See also WONG, *supra* note 27, at 453 (discussing origins of antitrust law in United States).

ing a products' market, the government created the Act to protect consumers against a singular power restricting free trade.<sup>113</sup> In essence, the law exists to "promote competition and condemn cooperation among competitors."<sup>114</sup> The policy for antitrust is to prevent a business or group of businesses working to reduce an open market and to diminish consumer freedoms.<sup>115</sup>

## B. How to Apply Sherman Act Sections 1 and 2

In the context of sports, claims against major leagues are brought under Section 1 and Section 2 of the Sherman Act.<sup>116</sup> Section 1 generally states, "[e]very contract . . . or conspiracy, in restraint of trade or commerce among the several State, or with foreign nations, is declared to be illegal."<sup>117</sup> The policy behind Section 1 "prohibits anticompetitive behaviors in labor markets, such as in markets for professional athlete services."<sup>118</sup> Courts have interpreted this Section by holding it unlawful for the sole professional league in a "circuit of events [or] sport to put a fledgling competing league or circuit of events in that same sport out of business by means of improper conduct[.]"<sup>119</sup> As such, the Act's goal in the professional sports setting attempts to prevent individually

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113. See WONG, *supra* note 27, at 453 (acknowledging that every state has since passed legislation closely aligned to Sherman Act, however pertaining to sports industry, antitrust suits brought under federal act "due to the interstate travel by teams and television and radio broadcasting across state lines. However, if a sport league operates solely within a particular state's borders, then the state antitrust laws will be applicable.").

114. See Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing Scales after Brady v. NFL and Anthony v. NBA*, 45 U.C.D. L. REV. 1221, 1227 (2012) (hereinafter "Feldman I") (discussing origins of antitrust law in sports). See generally Sherman Antitrust Act, 15 U.S.C.A § 1 (2004).

115. See Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 413 (2009) (commenting that "reduction in freedom of choice is 'especially troubling because the consumer loses the opportunity to use purchasing power to indicate a preference for boycotted products, materials, or labor sources.'" (quoting Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Age/Education Requirement from a Legal, Ethical, and Cultural Perspective: Women, Men and the Professional Sports Landscape*, 3 NW J.L. & SOC. POL'Y 1, ¶¶ 35-36 (2008))).

116. See WONG, *supra* note 27, at 453 (stating only applicable antitrust claims brought against professional sports leagues fall under Sections One and Two).

117. See Sherman Antitrust Act, 15 U.S.C.A § 1 (2004).

118. See Edelman & Doyle, *supra* note 115, at 413 (citation omitted). "Enacted in 1890, during the rise of big business, the Sherman Act was intended to serve both political and economic purposes and to prevent any one business from becoming more powerful than the government." *Id.* at 412 n.58 (citation omitted).

119. See MICHAEL J. COZZILLO, *SPORTS LAW CASES AND MATERIALS* 470 (2nd ed. 2007) (positing that dominant league cannot use unfair business practices to gain monopoly power or act in "unreasonable, predatory, or exclusionary ways" ).

owned and operated competitors or leagues “from combining their economic power in ways that unduly impair competition or harm consumers[.]”<sup>120</sup> However, if franchises, teams, or clubs act in coordination as a ‘single-entity’, then Section 1 analysis is inapplicable, because the Section requires multiple competitors to act anti-competitively in unison.<sup>121</sup>

Section 2 guards against the attempted monopolization of a market.<sup>122</sup> It states, “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]”<sup>123</sup> Section 2 does not contain the same multiple entities requirement as in Section 1.<sup>124</sup> Rather, it permits that major sports leagues “behave as single entities when they form

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120. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 735-36 (2010) (alteration added) (including examples outside of sports such as coordinating “increased prices, diminished quality, limited choices, or impaired technological progress” (footnote omitted) (citations omitted)).

121. See generally *American Needle, Inc. v. National Football League*, 560 U.S. 183, 204 (2010) (holding NFL teams unable to claim single entity status). In *American Needle*, the NFL claimed the league was immune from Section One because the 30 club teams were acting as a single entity when licensing intellectual property exclusively to certain retail suppliers. See *id.* at 185-84 (discussing NFL’s argument). The Court held that “[e]ach of the teams is a substantial, independently owned, and independently managed business. ‘[T]heir general corporate actions are guided or determined’ by ‘separate corporate consciousnesses,’ and ‘[t]heir objectives are’ not ‘common.’” See *id.* at 197 (first alteration added) (citations omitted). See also McCann, *supra* note 120, at 735-36 (suggesting other leagues’ attempts will typically fail under such analysis per Supreme Court’s decision against NFL in *American Needle*).

122. See WONG, *supra* note 27, at 455 (describing Section Two as prohibiting “unilateral monopolization”).

123. See Sherman Antitrust Act, 15 U.S.C.A § 2 (2004).

124. See Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 842 (hereinafter “Feldman II”) (footnotes omitted). Professor Feldman provides the following explanation of how the Sherman Act’s multiple entity requirement aids parties asserting certain antitrust claims:

The concerted-unilateral distinction between Section 1 and Section 2 is critical, because it can be significantly easier to prove a violation of Section 1 than a violation of Section 2. The unilateral actions of a single firm are governed solely by Section 2 and are unlawful only if the firm threatens actual monopolization. In contrast, concerted actions between multiple entities are governed by Section 1 and are unlawful if the anticompetitive effects of the conduct outweigh its procompetitive benefits. It is not necessary for purposes of Section 1 to prove that that the concerted actions of the firms threaten monopolization. A firm treated as a single entity instead of multiple entities therefore has a greater chance of avoiding antitrust liability.

*Id.* (footnotes omitted) (citations omitted).

schedules, negotiate national television contracts, negotiate league-wide sponsorships, arrange for player drafts, and revenue sharing.”<sup>125</sup>

However, leagues acting beyond the scope of legislative intent may be liable for antitrust monopolization claims.<sup>126</sup> In order to prove the existence or attempted creation of a monopoly, a plaintiff must show “the possession of monopoly market power and the use of unacceptable means to acquire, entrench, or maintain that market power.”<sup>127</sup> Leagues dominating a market gained by means of superior quality products cannot increase their power over the market through the use of “predatory or exclusionary tactics.”<sup>128</sup>

### C. Review of Applicable Antitrust Tests

An antitrust review of a plaintiff’s claim against a professional league will generally fall subject to one of three applicable tests created by the Supreme Court: a *per se* test, a rule of reason analysis, or a quick-look approach.<sup>129</sup> The court will apply the tests after reviewing proof of “agreements that constitutes an unreasonable restraint on trade [based] upon the nature of the challenged conduct” or evidence demonstrating a monopoly power.<sup>130</sup>

Under Section 1 analysis, if conduct is “‘so pernicious that [it has] no redeeming value,’ a court will apply the *per se* test” and as-

125. See Marc Edelman, *How to Curb Professional Sports’ Bargaining Power Vis-à-Vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 293 (2003) (footnotes omitted) (citations omitted) (citing multiple sources supporting idea that leagues need to operate uniformly).

126. See Edelman, *supra* note 125, at 294 n.120 (“If each professional sports league is considered a single-entity and the court determines the product market is sport-exclusive, then courts would find each of the four, professional sports leagues to have monopolies.”).

127. See WONG, *supra* note 27, at 455 (discussing elements to prove monopoly claim against professional sports leagues).

128. See WONG, *supra* note 27, at 456 n.2 (indicating that examples of predatory tactics would involve professional sports league expanding into rival league’s territory in attempt to lower rival’s fan and media support). See *id.* (observing that second example suggests established league cannot increase the number of roster slots open to potential players upon the creation of a rival league in the same area as means to preclude rival league from filling spots with similarly talented athletes).

129. See Marc Edelman & C. Keith Harrison, *Analyzing the WNBA’s Age/Education Requirement from a Legal, Ethical, and Cultural Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW J. L. & SOC. POL’Y 1, 40 (2008) (citing *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 763-64, 770 (1999)).

130. See WONG, *supra* note 27, at 453, 453-57 (noting review of defendant’s actions conducted under Section One analysis).

sume the conduct violates antitrust doctrine.<sup>131</sup> Under a *per se* approach, plaintiffs must prove: “[1] The existence of an agreement among two or more distinct persons or entities[,] [2] [t]he activity unreasonably restrains trade[, and 3] [t]he activity affects interstate commerce.”<sup>132</sup> This test “facilitates legal certainty and promotes judicial economy,” for it involves common violations including price-fixing or group boycotts.<sup>133</sup> Often violations in this manner will be apparent at the outset of the court’s inquiry and require minimal research or findings.<sup>134</sup> Therefore, a court will only apply this test if the legality of the action is facially illegal or frequently questioned.<sup>135</sup> In *per se* analyses, courts will not analyze the rationales or defenses of the actions because of the presumptively illegal nature of the conduct.<sup>136</sup>

If a court does not believe a violation is sufficiently egregious to warrant the *per se* test, then the court will apply a rule of reason analysis.<sup>137</sup> The rule of reason test determines a violation by evaluating the “market power,” “anticompetitive effects,” and “harm.”<sup>138</sup>

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131. See Edelman & Doyle, *supra* note 115, at 413 (alteration in original) (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 140, 224 n.59 (1940)).

132. See WONG, *supra* note 27, at 453 (requiring interstate commerce permits claims against all major sports leagues while restricting claims against smaller intrastate amateur leagues).

133. See Edelman & Doyle, *supra* note 115, at 414 (internal quotation marks omitted) (footnote omitted) (citation omitted) (arguing courts are moving away from applying *per se* test because of low level of scrutiny). Instead, the majority of courts have begun moving instead towards application of quick-look or rational rule test. See *id.*

134. See Edelman & Doyle, *supra* note 115, at 414 (discussing courts’ familiarity with certain agreements that are generally accepted as illegal). “[A]s the courts gained experience with antitrust problems[,] they identified certain types of agreements which were so consistently unreasonable that they could be deemed illegal *per se*, without elaborate inquiry into their purported justifications.” Edelman & Doyle, *supra* note 115, at 414 n.70 (alterations in original) (quoting *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978)).

135. See James J. LaRocca, *No Trust at the NFL: League’s Network Passes Rule of Reason Analysis*, 15 UCLA ENT. L. REV 87, 93 (2008) (noting *per se* approach is applied less frequently due to complexity of antitrust claims and lack of facially invalid actions).

136. See WONG, *supra* note 27, at 454 (stating defendants will urge courts to apply more lenient approaches, commonly the rule of reason, and exclude the *per se* approach). Applying the rule of reason allows defendants to justify business actions and shifts the burden back to the plaintiff. See *id.* (discussing rule of reason approach).

137. See Edelman & Doyle, *supra* note 115, at 414 (noting that “full economic investigation” is done by the court to dissect whether illegal conduct was involved (citations omitted)).

138. See Edelman & Harrison, *supra* note 129, at 39 (citing 54 AM. JUR. 2d *Monopolies and Restraints of Trade* § 49 (2007)).



Thus, a court applying the rule of reason test will primarily determine whether the defendant's actions assist competitive results or promote anti-competition.<sup>139</sup> Distinct from the *per se* approach, the rule of reason test permits justifications of actions so long as the conduct is necessary and the least restrictive way to "achieve a legitimate business purpose."<sup>140</sup> Courts apply the rule of reason analysis frequently, because it thoroughly reviews and analyzes rationalizations to determine whether a defendant's anticompetitive actions are outweighed by the pro-competitive benefits.<sup>141</sup>

Lastly, a subset of the rule of reason analysis, the quick-look, or truncated rule of reason test, applies when conduct "is neither completely pernicious nor completely ambiguous."<sup>142</sup> This lower level of scrutiny applies when conduct or business tactics are not *per se* unlawful but the conduct promotes anticompetitive outcomes.<sup>143</sup> A court applying this standard of review will not need to fulfill the exhaustive requirements necessary in a rule of reason analysis because the conduct in question frequently harms competition.<sup>144</sup>

Section 2 analysis differs because it does not have the same multiple entity requirements as Section 1.<sup>145</sup> Under Section 2, the court will determine the relevant market of the product and whether the defendant attempted to monopolize or restrict com-

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139. See WONG, *supra* note 27, at 454 (noting to prove a violation under rule of reason plaintiff must demonstrate the following three elements: "1. There is an agreement between two separate entities. 2. The agreement adversely affects competition in a relevant market. 3. The anticompetitive effects of the agreement outweigh the procompetitive effects.").

140. See *id.* (noting absence of conduct would be detriment to defendant's business causing harm to customers).

141. See LaRocca, *supra* note 135, at 92-95 (discussing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984) and Court's holding that antitrust review of professional sports leagues requires higher level of scrutiny than "quick look" review permits due to inherently complex business practices).

142. See Edelman & Harrison, *supra* note 129, at 40 (discussing quick look test (citing Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 763-64, 770 (1999))).

143. See *Cal. Dental Ass'n*, 526 U.S. at 763 (citing the Ninth Circuit's allowing courts to identify easily discernable, not unlawful, actions, such as general restraints on prices, to dissuade competitors).

144. See Geoffrey D. Oliver, *Of Tenors, Real Estate Brokers And Golf Clubs: A Quick Look at Truncated Rule of Reason Analysis*, 24 ANTITRUST 40, 40 (2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/oliver\\_Anti\\_Spring2010\\_8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oliver_Anti_Spring2010_8.authcheckdam.pdf) (noting burden of proof shifts to defendant to prove precompetitive justification for conduct in question). If in fact the conduct can be plausibly justified then the court must undergo a rule of reason analysis. See *id.* (discussing burden shifting for applying different standards of review).

145. See *supra* notes 122-128 and accompanying text.

petitor access to the market.<sup>146</sup> Claimants will often allege both Section 1 and Section 2 violations because of the similar need to determine the relevant market.<sup>147</sup>

#### D. Clayton Act Exemption for Professional Sports Leagues

Following introduction of the Sherman Act, Congress passed the Clayton Act in 1914, which exempted labor unions from anti-trust law, so employers and employees could conduct business without restrictions.<sup>148</sup> Section Six of the Clayton Act holds, in pertinent part that:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>149</sup>

The purpose of the Act is to protect labor organizations by preventing employers from adopting antitrust regulations, which seek to unravel the union's collective bargaining power.<sup>150</sup>

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146. See WONG, *supra* note 27, at 455 ("It is important to note that monopoly market power is different from market share. A product may be superior to its competition and, for good reason, would hold a larger market share."). For a discussion of why the market share analysis would fail, see *infra* notes 205-208 and accompanying text.

147. See generally WONG, *supra* note 27, at 453-56 (noting overlap in analysis conducted by courts).

148. See WONG, *supra* note 27, at 457 (illustrating need for Clayton Act to counteract allegations made by labor unions). The Clayton Act was not applied to professional sports teams until early in the twentieth century. See *id.* at 458; Johnathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 *FORDHAM L. REV.* 1203, 1205 n.15 (1993) ("Before passage of the Clayton and Norris-Laguardia Acts, employers argued, and courts agreed, that the antitrust laws should be used to strike down union activity as an unlawful restraint of trade." (citing BENJAMIN J. TAYLOR & FRED WITNEY, *U.S. LABOR RELATIONS LAW* 38 (1992))).

149. Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914); 15 U.S.C.A. § 17 (West 2014).

150. See WONG, *supra* note 27, at 457 (noting need for labor unions' protection).

These laws would otherwise restrict, as a restraint of trade, the concerted activities that union members regularly practice during collective bargaining with employers. This statutory exemption does not, however, simi-

The Clayton Act applies uniquely to professional sports due to the nontraditional business formats of professional leagues.<sup>151</sup> Yet, leagues can use the Act to potentially bar antitrust claims.<sup>152</sup> Customarily, antitrust claims are not initiated against conduct involving the league and its players because of the unique employer-employee relationship, in this case the league and its players' association.<sup>153</sup> Since the nontraditional aspects of sports leagues require some form of coordinating and negotiating, professional leagues are given more leeway than other types of labor unions.<sup>154</sup>

Typically, professional leagues can claim either the statutory exemption per Section Six of the Clayton Act or plead a common law non-statutory exemption defense.<sup>155</sup> Generally, the former involves the leagues bringing suits against the players' associations for unfair business practices, such as picketing and striking.<sup>156</sup> The latter involves applying a culmination of common law antitrust law to

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larly [operate between union and nonunion parties]. Consequently, employers are not free to engage in anti-competitive activity that violates the Sherman Antitrust Act simply because they are bargaining with unions.

Shapiro, *supra* note 144, at 1206 (alteration added) (footnotes omitted) (citations omitted) (discussing collective bargaining).

151. See generally Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (exempting certain labor unions from Sherman Act).

152. See WONG, *supra* note 27, at 458-59 (noting that statutory exemption was typically reserved for sole benefit of labor unions and not leagues, "because the common interpretation of Section 6 of the Clayton Act is that the law was enacted solely for the benefit of labor unions[ ]" (alteration added)).

153. See Claudia G. Catalano, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. FED. 2d 1 (2013) (commenting that although claims arising during discussions between leagues and players' associations remain free from antitrust litigation, if conduct falls outside of collective bargaining process, that conduct is not protected).

154. See Feldman I, *supra* note 114, at 1233-34 (noting atypical relationship exists between players unions, franchises and league offices). "For example, to have [a professional league's] season, the individual [league's] teams must agree on the rules of the actual game, schedules, mechanisms for signing and trading players, and other terms and conditions of employment." Feldman I, *supra* note 114, at 1233-34 (footnote omitted) (citing North Am. Soccer Leagues v. Nat'l Labor Relations Bd., 613 F.2d 1379, 1383 (5th Cir. 1980)).

155. See *id.* at 1238 (noting non-statutory exemption generally works to protect collective bargaining agreement terms and negotiations between players and owners).

156. See Edelman & Doyle, *supra* note 115, at 415-16 (discussing applicability of statutory exemption); *Phila. World Hockey Club v. Phila. Hockey Club Inc.*, 351 F. Supp. 462, 498 (E.D. Pa. 1972) (noting that dominant case law "involved situations where the union had been sued for its active, conspiratorial role in restraining competition of a product market, and the union, not the employer, sought to invoke the labor exemptions[ ]").

sports leagues.<sup>157</sup> To determine whether a professional sports league may apply the non-statutory labor exemption, courts use a three-prong test.<sup>158</sup> The test requires: (1) “[T]he restraint on trade primarily affects only the parties to the collective bargaining” agreement, (2) the issue “concerns a mandatory subject of collective bargaining[,]” and (3) the issue “is the product of bona-fide arm’s length bargaining.”<sup>159</sup> Application of Section Six through either exemption does not automatically overcome Sherman Act violations.<sup>160</sup> Rather, courts are inclined to apply one of three foregoing antitrust tests to assess the overall conduct in question.<sup>161</sup>

#### V. NHL’S PROPOSED ACTIONS WOULD VIOLATE ANTITRUST LAW

If the NHL prohibits players from participating in future Olympics and institutes the Hockey World Cup as a substitute tournament, the NHL will be in violation of Sections 1 and 2 of the Sherman Antitrust Act.<sup>162</sup> The IOC, the IIHF, or NBC could each

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157. See WONG, *supra* note 27, at 490 (“[T]he courts found that unions have: 1. An implied labor exemption from antitrust laws to enter into contracts with multiemployer bargaining units. 2. The right to advance legitimate employee goals that restrain trade no more than is necessary to achieve those goals.” (alteration added) (citing collective holdings from *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945), *Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965))).

158. See *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976). In *Mackey*, NFL players challenged a rule mandating NFL teams to pay compensatory cash and draft picks to a players’ former team upon signing the player as a free agent. See *id.* at 609, 609 nn.1-2. The court in *Mackey* determined that the NFL was restricting the free movement of players among teams by penalizing teams for any free agent acquisition. See *id.* at 615. The league raised the non-statutory exemption to demonstrate that the NFLPA bargained for the issue and had the opportunity to change the rule through the bargaining process. See *id.* at 613. The court disagreed with the application of the exemption, holding that the NFLPA would not be able to bargain the clause out of the agreement, and that the league held the vast majority of bargaining power. See *id.* at 615-16.

159. See *Mackey*, 543 F.2d at 614 (footnotes omitted) (citations omitted) (internal quotation marks omitted). See also *id.* at 616 (holding NFL failed to prove the third prong by obtaining position of unfair power over the players). See also BLACK’S LAW DICTIONARY (9th ed. 2009) (defining arm’s-length as “[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship” (alteration added)).

160. See *Feldman I*, *supra* note 114, at 1235 (“These agreements among the teams are subject to scrutiny under section 1 of the Sherman Act. The role of section 1—and antitrust law in general—is to act as a gatekeeper, ferreting out anticompetitive conduct.” (footnotes omitted) (citations omitted)).

161. For a discussion of the different tests courts apply, see *supra* notes 129-147 and accompanying text.

162. For a discussion of Section One and Two of the Sherman Antitrust Act, see *supra* notes 112-128 and accompanying text.

bring a claim against the League.<sup>163</sup> Any of the entities could argue that the NHL has monopolistic power over the relevant product and market of elite players and, through the use of anti-competitive and predatory tactics, the market as a whole.<sup>164</sup> Furthermore, if the NHL plead a Clayton exemption or single-entity defense it would be unsuccessful because third parties are affected and courts are unlikely to view the NHL as a single-entity.<sup>165</sup>

For the NHL to successfully prohibit players from attending future Olympics, the League would first need to ratify the 2012 CBA in coordination with the NHLPA.<sup>166</sup> If both the players' association and the NHL agree to forgo future participation, then the IOC and IIHF would be have no authority to compel players to attend.<sup>167</sup> However, it remains unlikely that such an agreement

163. For a discussion of the argument and rationale supporting claims, see *infra* notes 174-198 and accompanying text.

164. See WONG, *supra* note 27, at 455-57, 456-57 nn.1-4 (noting leagues cannot unreasonably restrain competition through application of monopoly power). See also Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918) (hereinafter "CBOT"). In *CBOT*, the Court stated the following to describe the rule of reason test:

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.

*Id.* at 238. For a discussion of why the NHL would fail under the framework of this test, see *infra* notes 174-198 and accompanying text.

165. For a discussion why the NHL would fail the single entity and non-statutory exemption, see *infra* notes 234-237 and accompanying text.

166. See NHL 2012 CBA § 24.5, *supra* note 57, at 156 (leaving absent, expressly, any information binding the NHL and players to future international tournaments, including the Olympics); see also Nicholas Cotsonika, *NHL vs. Olympics: Going to Games is Treat for Players, Troubling for Owners*, YAHOO!SPORTS (Feb. 7, 2014), <http://sports.yahoo.com/news/nhl-nhl-vs-olympics-going-to-games-is-treat-for-players-troubling-for-owners-174829606.html> (quoting former NHL player Tomas Kaberle as stating "I think all players are always going to push for the Olympics . . . . [t]hat's why we've got the union. They're always going to stay behind us.").

167. See *NHL Casts Doubt on Sending Players to 2018*, PC2018.COM, <http://pc2018.com/news/nhl-casts-doubt-on-sending-players-to-2018-olympics/> (last visited Feb. 26 2014) (reporting following quote of NHLPA executive director Don Fehr: "The union isn't convinced the Olympic participation should end . . . [t]here are a whole bunch of players who want to play. . . ."); see also Ansar Khan, *Should the NHL participate in 2018 Winter Olympics? Many Red Wings Say Positives Outweigh the Risks*, MICH.LIVE MEDIA GRP. [http://www.mlive.com/redwings/index.ssf/2014/02/should\\_the\\_nhl\\_participate\\_in.html](http://www.mlive.com/redwings/index.ssf/2014/02/should_the_nhl_participate_in.html) (last visited Oct. 5, 2014, 2:01 PM) (quoting Johan Franzen, NHL player for the Detroit Red Wings, as opining that "all the players want to go there. It's a little bit of a break for the league . . . but I

would occur, as the majority of NHL players enjoy the Olympic hockey break and relish the opportunity to play for their countries.<sup>168</sup> For the roughly six hundred NHL players not participating in the Games, the two-week-long break affords them the opportunity to recover from mid-season injuries and rest before the second half of the NHL season.<sup>169</sup>

Any League attempt to stop the players' involvement in future Olympics could be disregarded by the players, as it is not currently part of the 2012 CBA.<sup>170</sup> Players could participate without NHL consent; however, the League would likely impose stiff fines and penalties for a player's unexcused absence and insubordination.<sup>171</sup> Without the NHLPA's agreement, the NHL would be acting unilaterally to stop future participation.<sup>172</sup>

The player prohibition, coupled with the reinstatement of the Hockey World Cup, demonstrates how the NHL would violate the Sherman Act. This argument will be articulated in the following

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think they should continue doing what they've been doing because it's a big deal to win that gold." (alteration in original)).

168. See Chuck Gormley, *Should NHL Players Go To South Korea in 2018?*, CSN WASH. (Feb 22, 2014, 10:15 AM), <http://www.csnwashington.com/hockey-washington-capitals/talk/should-nhl-players-go-south-korea-2018> (reporting following quote of Washington Capitals defenseman John Erksine: "I think the Olympics is supposed to be the best athletes in every sport. . . . The NHL has the majority of the best players, so yeah, they should [go]. I think NHL players should be in every Olympics. I think if you ask the majority of the guys, they want to go." (alterations in original)); see also Larry, *supra* note 1, at 18A (polling of NHLPA players showed 95% of players support Olympic participation).

169. See Gormley, *supra* note 168. Gormley reported the following statement of Washington Capitals defenseman Karl Alzner:

The guys who have the chance to play in the Games love it. . . . And for the guys who aren't that [sic] get a chance to get 10 days off, it's unbelievable. Going into that break a lot of guys were feeling tired. You usually have that All-Star break for four days, so having this is great for the guys playing and great for the guys who aren't playing.

*Id.*

170. See Delessio, *supra* note 85 ("[T]he league and the players association would have to agree on participation in any tournament—which means the status quo [allowing Olympic participation] would still have to be an option.").

171. See Larry, *supra* note 1, at 18A (arguing significant number of NHL players would be willing to play in Olympics regardless of NHL's stance on abstaining from games).

172. See Gormley, *supra* note 168. Gormley reported the following statement of Washington Capital's wingman Brooks Laich:

I don't think I ever understand the owners' side of it . . . . I play the game because I love it . . . . If I . . . get the call to play for Canada I'm going. You're going to play just as hard for your [NHL] team when you get back. I can't look at it from an owner's standpoint. It's not an investment for us. We play this game because we love it. Of course it's a living for us, but to play for your country in the Olympics, man, it's a special honor.

*Id.* (fourth alteration in original).

form: (I) The applicable test is the rule of reason analysis, (II) the NHL dominates the relevant market of professional players, (III) there was an agreement between the NHL and the NHL's club members, and the agreement adversely affects the competitive market, (IV) the monopoly power over the market and the creation of a substitute Hockey World Cup demonstrates predatory tactics, and (V) the harm to the NHL would be minimal compared to the detriment to the IOC, IIHF, and NBC.<sup>173</sup>

### A. Applicable Test

A court would likely apply the rule of reason approach to an antitrust challenge brought by the IIHF, IOC or NBC.<sup>174</sup> The rule of reason test is applied when conduct is not *per se* invalid or clearly anticompetitive; rather, it "is used to determine 'whether the challenged agreement is one that promotes competition or one that suppresses competition.'<sup>175</sup> The majority of Sherman Act claims are brought under this test due to its flexible nature in market definition, and the ambiguity of certain conduct.<sup>176</sup> Courts will not apply the *per se* invalid standard of review because refusing the IOC and IIHF access to NHL players, and creating a substitute international tournament for the NHL's profit, are not facially invalid or anticompetitive.<sup>177</sup> Moreover, the quick look analysis will not apply

173. For an in depth discussion of this summary, see *infra* Section V(A)-(F).

174. For a discussion of the difference between the application of the *per se* approach and rule of reason, see *supra* notes 129-147 and accompanying text.

175. See Feldman II, *supra* note 124, at 840-41 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978)). See also LaRocca, *supra* note 135, at 92-93 (discussing rule of reason).

A rule of reason test examines the possible pro-competitive effects of anti-competitive actions. If the pro-competitive effects outweigh the anti-competitive effects, the court should not find an antitrust violation. As antitrust law has evolved, courts have broken the rule of reason down into a "full-blown" test, which carefully analyzes "power, purpose and effects issues[.]"

*Id.* (alteration added) (footnotes omitted) (citations omitted) (quoting KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 129 n.30 (Cambridge University Press 2003)).

176. See Feldman I, *supra* note 114, at 1245. Feldman argues that "[t]he Rule of Reason is the primary test for determining the legality of restraints under . . . the Sherman Act." See *id.* at 1248 (citing Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 885-86 (2007); State Oil v. Khan, 522 U.S. 3, 10 (1997)).

177. See generally NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101-03 (holding rule of reason analysis applicable because professional sports leagues exist in a gray area of antitrust legality due to the inherent need for some cooperation and coordination between the league office and member clubs). See also Feldman I, *supra* note 114, at 1234-5 (arguing that application of rule of reason suggests "restraint is unreasonable if its anticompetitive effects outweigh its pro-competitive benefits—if it is net anticompetitive" (citing *Leegin*, 551 U.S. at 885)).

because it is typically reserved for conduct that involves obvious and questionable anticompetitive actions without adequate defensive justification.<sup>178</sup> In the present situation, the NHL would attempt to defend the questionable conduct, as a protective business decision, to guard the League's primary assets: the players.<sup>179</sup>

To demonstrate that the rule of reason analysis applies, the claimant organizations would need to meet the standards of proof.<sup>180</sup> To demonstrate a Section 1 violation, the claimant must show "[t]here is an agreement between two separate entities[,] . . . [t]he agreement adversely affects competition in a relevant market[,] [and t]he anticompetitive effects of the agreement outweigh the procompetitive effects."<sup>181</sup> The less stringent Section Two analysis dictates only that a dominant league may not use predatory tactics to eliminate all competing organizations through the use of its monopoly power over a relevant market.<sup>182</sup>

### B. Same Relevant Market

To establish a violation of either Section of the Sherman Act, the NHL, IOC and IIHF must first compete in similar relevant markets.<sup>183</sup> Furthermore the agreement or conduct in question must

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178. See Oliver, *supra* note 144, at 40 (discussing burden of production). Most commonly, if a plaintiff can establish that a particular restraint is "inherently suspect" because it is of a type that always or almost always tends to harm competition, a [quick-look] analysis permits the plaintiff to satisfy its initial burden of production without presenting evidence that the defendant's challenged conduct caused or is likely to cause actual harm to competition.

*Id.* (alteration added).

179. See Delessio, *supra* note 85 (explaining value of player contracts at the Olympics as over \$2.1 billion). Delessio goes on to describe and discuss the NHL's best possible argument:

[T]he savvy way for the NHL to frame the discussion . . . [is to suggest] [t]here's a dollar figure mentioned, but the underlying issue when presented this way is one of player safety. When the league gives up its players, there's the risk they may not return as healthy as they were when they left.

*Id.*

180. See WONG, *supra* note 27, at 454 (noting Section One analysis particularly involves group boycotts, and "agreements that fix, control, raise, lower, maintain, or stabilize the prices charged for products or services").

181. See *id.* at 454 (discussing burden of proof).

182. See MICHAEL COZZILLO, SPORTS LAW CASES AND MATERIALS 487 (2ND ED. 2007) (noting blocking entrance into a market or unfairly eliminating all competing leagues constitutes Section Two violation).

183. See Timothy S. Bolen, *Singled Out: Application And Defense of Antitrust Law and Single Entity Status To Non-Team Sports*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 80, 84 n.28 (2010) (noting "Extra-league actions can occur when a rival or start-up league challenges a dominant league because it has monopolistic control over the market. . . . To succeed in such a suit the plaintiff must prove that the defendant had a



adversely affect the competition within that relevant market.<sup>184</sup> In *Philadelphia World Hockey Club v. Philadelphia Hockey Club Inc.*, the World Hockey Association, a minor hockey league unaffiliated with the existing NHL, filed Sherman Act violations against the NHL over its contractually binding clause that prohibited all players from playing in any lower level professional league.<sup>185</sup> The Court held that the NHL had a monopoly over the supply of professional players and could not prohibit those players from ever playing in competitor leagues.<sup>186</sup> The court reasoned the following:

The National Hockey League itself was primarily responsible for devising and perpetuating a monopoly over the product market of all professional hockey players via the reserve system. [For] [n]ot only did [the NHL] enforce and implement its restraints against players . . . but . . . it sought to enforce [the restraint clause] against outside competitors who wanted to enter the competition at the professional level.<sup>187</sup>

Pursuant to *Philadelphia*, a claim against the NHL defines the relevant market as the top-level professional ice hockey players, over whom the NHL has sole access.<sup>188</sup>

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monopoly over a defined market and acted improperly in obtaining the monopoly” (alteration added) (citations omitted) (citing GARY R. ROBERTS, PROFESSIONAL SPORTS AND THE ANTITRUST LAWS, in THE BUSINESS OF PROFESSIONAL SPORTS 135, 136 (Paul D. Staudohar & James A. Mangan eds., Univ. Illinois Press 1991))).

184. See WONG, *supra* note 27, at 454-56 (acknowledging courts’ definitions of relevant markets vary based on product or service).

185. See *Phila. World Hockey Club v. Phila. Hockey Club Inc.*, 351 F. Supp. 462, 466 (E.D. Pa. 1972) (stating growth of NHL from its inception in 1917 subjects it to Sherman Antitrust laws, for “despite . . . the glory of the sport of hockey and the grandeur of its superstars, the basic factors here are not the sheer exhilaration from observing the speeding puck, but rather the desire to maximize the available buck”).

186. See *id.* at 500 (noting startup World Hockey Association wanted to use reserves from NHL franchises as a means to attract a higher level of talent to new league). The league managers argued a gross disparity existed between the NHL’s reserves and the rest of the talent pool from which to choose the applicable personnel. See *id.*

187. *Id.* at 500. See also *id.* at 500-05 (stating although Court ruled in favor of NHL regarding need for ‘reserve’ clause, league could not bind players in perpetuity for entire lengths of their playing careers). Allowing the NHL to forbid the players from ever signing with a fledgling competing league would ensure a monopolistic power. See *id.*

188. See generally *American Football League v. Nat’l Football League*, 323 F.2d 124 (4th Cir. 1963) (holding necessary to prove relevant market before considering whether monopolistic control could be questioned). In *American*, the Court determined the NFL and new emerging AFL competed not simply for players but for television rights, spectators, and sponsorships. See *id.*

In a suit by the IOC, IIHF and NBC, the claimant's application of the market test analysis would emphasize how the NHL dominates the market for all professional ice hockey players.<sup>189</sup> The IOC and IIHF rely on access to the relevant market of elite NHL ice hockey players.<sup>190</sup> Unlike a competing world professional league like Russia's KHL, which can groom talent separately and offer salaries somewhat comparable to those of the NHL, the non-profit IOC and IIHF have no financial incentives to offer players.<sup>191</sup> To illustrate this point, in the "2014 Sochi Olympics the men's ice hockey tournament . . . feature[d] 149 NHL players who made a combined \$629.74 million [in salary]."<sup>192</sup> In contrast the IOC—which generates substantial revenue through fundraising, marketing, advertising and broadcasting partnerships—"distributes over 90% of its revenues to organisations throughout the Olympic Movement to support the staging of the Olympic Games and to promote the worldwide development of sport. The IOC retains less than 10% of its revenue for the operational and administrative costs of governing the Olympic Movement."<sup>193</sup> The operational and administrative costs, for the 2009-2012 quadrennial Olympic cycle was projected at \$800 million.<sup>194</sup> This means that, in a four-year period, the costs to operate the entire IOC would scarcely cover the NHL player salaries alone for the 2014 games.<sup>195</sup> Incapable of luring players fiscally, the IOC and IIHF rely on national pride to draw athletes.<sup>196</sup> Therefore, any NHL constraint on the relevant market of players will force the IOC and IIHF to use inferior talent to the Games' detriment because the IOC would have no means to com-

189. See WONG, *supra* note 27, at 476 (noting NHL control over vast majority of professional hockey talent).

190. See *id.*

191. See INTERNATIONAL OLYMPIC COMMITTEE, ELIGIBILITY RULES OF THE INTERNATIONAL OLYMPIC COMMITTEE, ARTICLE 26, available at [http://www.olympic.org/Documents/Olympic%20Charter/Olympic\\_Charter\\_through\\_time/1964-Olympic\\_Charter\\_Eligibility\\_Rules\\_of\\_the\\_IOC.pdf](http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1964-Olympic_Charter_Eligibility_Rules_of_the_IOC.pdf) (noting athletes may not receive payment to participate in games).

192. See Stephen Pettigrew, *2014 Sochi Olympics: Why Canada Will Rule (Again) in Hockey*, WSJ ONLINE (Feb. 7, 2014), <http://online.wsj.com/articles/SB10001424052702304450904579367082662376324> (discussing professionally salaries of players who participate in Olympic hockey tournament).

193. See *Revenue Sources and Distribution*, OLYMPIC.ORG, <http://www.olympic.org/ioc-financing-revenue-sources-distribution> (last visited October 28, 2014) (discussing IOC's finance and operational structure).

194. See Lubin & Blackstone, *supra* note 68 (discussing Olympic earnings for IOC).

195. See *id.* (discussing earnings and operations of IOC).

196. See *id.* ("Around 70% goes to the Summer and Winter Olympic Organizing Committees . . . 20% goes to athlete organizations . . . 10% pays for operations at the IOC").

pensate the professional players.<sup>197</sup> Following a finding that competitors act in the same relevant market, a court would next determine the type of agreement to determine whether the conduct violates antitrust law.<sup>198</sup>

### C. Type of Agreement

#### 1. *Agreement Between Two or More Entities*

The Section 1 analysis requires a showing that two or more business entities agree or have conduct demonstrating an agreement, which violates the Act.<sup>199</sup> The conduct in this case would be two-fold: (1) the agreement between the NHL teams and League offices in not permitting NHL players to participate in the Olympics and (2) the implementation of an NHL World Cup of Hockey.<sup>200</sup> To fulfill the separate entities requirement, the plaintiffs must show that the NHL and member clubs were acting as more than two entities for the purposes of Section 1.<sup>201</sup>

In recent years, professional leagues have attempted to adopt a ‘single entity’ defense to the first requirement of multiple entities because the leagues “share broadcast revenue, licensing revenue, advertise collectively, and all the teams in the leagues fall under a single administrative body.”<sup>202</sup> Yet, courts have typically denied professional leagues the ability to use this defense, as most teams do not act in accordance with one another to a degree high enough to

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197. See Mitchell Tierney, *supra* note 94 (indicating Winter Olympic Games represent primary showcase of hockey’s finest talent in best-on-best international competition and removing such talent imposes significant burden on IOC and IIHF).

198. See *e.g.*, *Phila. World Hockey Club v. Phila. Hockey Club Inc.*, 351 F. Supp. 462, 472 (E.D. Pa. 1972) (“There is sufficient disparity between major league professional hockey on the one hand and minor professional league and amateur hockey on the other to distinguish the former from the latter.”).

199. See COZZILLO, *supra* note 119, at 253-55 (“Section One requires an agreement –there must be two separate persons or entities engaged in joint conduct for a violation of section 1 to occur.”).

200. For a discussion of the plan to disallow further NHL participation in the Olympics and the recreation of the World Cup of Hockey, see *supra* notes 84-98 and accompanying text.

201. See WONG, *supra* note 27 at 454 (stating “the plaintiff must show that there was a combination between parties, that the two parties acted in concert, and that they engaged in a conspiracy”).

202. See *id.* at 498 (implying if sports league can successfully argue application of single entity defense then league would be unable to fulfill Section One element requiring multiple entities).

warrant single entity status.<sup>203</sup> Therefore, the NHL would likely fail to claim a single entity defense; thereby, satisfying the first step.<sup>204</sup>

## 2. *Agreement Affects Competition*

The agreement would adversely affect competition because the IOC and IIHF have no equal market alternatives to substitute for the revenue loss from NHL player absences.<sup>205</sup> The NHL might be able to justify the restraint as necessary to prevent possible player injuries, and to diminish the profit loss incurred from missing several midseason weeks every four years.<sup>206</sup> Yet, the IOC and IIHF, which gained an estimated \$150 million from the ice hockey tournament in 2010, would fail to earn the majority of that revenue without NHL players.<sup>207</sup> The IOC commissioner commented that, if the NHL were to reap the entire value of that \$150 million, the League's revenue sharing system would provide merely \$5 million to each team, an insubstantial sum in comparison to the whole revenue generated by the IOC.<sup>208</sup> Therefore, the discrepancy in profit loss demonstrates that, although the justifications for the NHL might have merit, the restraint cannot be justified as necessary for

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203. See *American Needle, Inc. v. Nat'l. Football League*, 560 U.S. 183, 199 (holding although NFL club teams "depend upon a degree of cooperation for economic survival" that "does not mean the necessity of cooperation transforms concerted action into independent action").

204. See Timothy S. Bolen, *Singled Out: Application and Defense of Antitrust Law and Single Entity Status to Non-Team Sports*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 80, at 87 (2010) ("Most courts have denied the National Football League ("NFL"), National Basketball Association ("NBA"), and Major League Soccer ("MLS") single entity status." (footnote omitted) (citing *Los Angeles Mem'l Soliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1389 (9th Cir. 1984))).

205. See Tierney, *supra* note 94 ("It may not be even close to the most popular global team sport at the Olympic Games, but ice hockey is almost certainly the best they have to offer. Losing its fast-paced action would be a significant blow for the Winter Olympics.").

206. See Stu Hackel, *Olympic Ire*, SPORTSONEARTH, <http://www.sportsonearth.com/article/68286830/nhl-owners-questioning-future-participation-in-olympics> (last visited Feb 27, 2014) ("In addition to the risk of player injury and their potential mental and physical fatigue, [Jeremy Jacobs, NHL chairman of League's Board of Governer's], referenced the extended shutdown and how it impacts fans and corporate partners . . . . [h]e also noted the necessarily compressed NHL schedule.").

207. See *id.* (implying Olympic revenue correlated to crowd interest in seeing NHL players); Tierney, *supra* note 94 ("The undoubtable [sic] affect on the alteration of hockey's talent pool would be immense, something that can't be said for any other team Olympic sport.").

208. See Kerry Gillespie, *supra* note 13 (quoting IIHF President Rene Fassel as stating the following: "What is \$5 million for an NHL team? For me, it's a lot of money, for them it's zero, nothing, maybe petty cash").

the welfare of the league and the consumer.<sup>209</sup> Consequently the restraint affects competition, and while minimally impacting the NHL, would severely diminish the Olympic product.<sup>210</sup>

#### D. Unlawful Monopolization

Section 2 of the Sherman Act analysis requires only the unilateral monopolization of a market through a single entities action.<sup>211</sup> A challenge under Section 2 applies so long as the defendant is guilty of unlawful monopolization of the relevant market.<sup>212</sup> The goal of Section 2 is to “prohibit acquiring or maintaining a monopoly position by exclusionary, unfair, or predatory means.”<sup>213</sup> In *Philadelphia*, the Court held the NHL had a monopoly over the new upstart WHA because the League “overwhelmingly control[ed] the supply of hockey players . . . available to play in any major professional league.”<sup>214</sup> As the market discussion exhibits, the IOC has no direct league or comparable ability to employ top-level talent, and must rely on the participation of NHL professionals.<sup>215</sup> Although it is acceptable for a league to have a lawful monopoly over a relevant market, the professional league may not employ tactics to dissuade competitors from joining the market or stymie the growth of a competitor through predatory tactics.<sup>216</sup>

The NHL’s mandate prohibiting NHL players from participating in the Games would be the first demonstration of predatory tactics.<sup>217</sup> The NHL would unfairly apply its leverage as employer

209. See Hackel, *supra* note 206 (providing that there is substantial corollary between NHL participation in the Olympic games over previous twenty years and increased fan interest in NHL regular season). Any financial harm alleged by the NHL would be offset by the contrasting support demonstrating league actually benefits from Olympic tournament exposure. See *id.*

210. For a discussion of the financial consequences and disparate harm, see *supra* notes 99-111 and see *infra* notes 227-233 and accompanying text.

211. See WONG, *supra* note 27, at 455 (noting Section Two analyses between inter-league disputes more commonly benefit new challenging league).

212. See Sherman Antitrust Act, 15 U.S.C. § 2 (2004) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .”)

213. See COZZILLO, *supra* note 119, at 301-10.

214. See generally *Phila. World Hockey Club v. Phila. Hockey Club Inc.*, 351 F. Supp. 462, 509 (E.D. Pa. 1972) (noting new American Hockey League did not have access to professional talent due to lack of quality skilled players).

215. For a discussion of the relevant market of professional players and the impact on the IOC and IIHF, see *supra* notes 183-198 and accompanying text.

216. For a discussion of examples of predatory tactics, see *supra* note 128.

217. See Catalano, *supra* note 153, § 65 (“When one has acquired a natural monopoly by means which are not exclusionary, unfair, nor predatory . . . he is not disempowered to defend his position fairly.” (alteration added)).

to elite professional hockey players to the detriment of the Olympic organizations, NBC, and the consumer.<sup>218</sup> This action is contrary to the fundamental objective of antitrust law, which restricts entrenched organizations from stemming the rise of a smaller competitor's products.<sup>219</sup>

The second example of a predatory tactic would be the creation of the World Cup of Hockey as an alternative international tournament.<sup>220</sup> If the League prohibits its players from participating in the Olympic Games and subsequently coordinates the Hockey World Cup for the League's own fiscal benefit, the NHL would be taking advantage of its monopoly over the relevant market.<sup>221</sup> NHL player involvement would enhance the World Cup while diminishing Olympic Hockey.<sup>222</sup> This demonstration of market power would be impermissible, for the League cannot apply the monopoly power in a predatory manner.<sup>223</sup>

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218. See generally Lake, *supra* note 3 (stating NHL might only permit IOC player attendance at future Olympics if IOC agrees to widespread media access for NHL).

219. See WONG, *supra* note 27, at 456 (discussing policy objectives of antitrust law).

220. For a discussion of the plan to create the World Cup of Hockey, see *supra* notes 84-98 and accompanying text.

221. See WONG, *supra* note 27, at 472 (providing that league with monopoly power over a product cannot use that power to exclude competitors access to the market).

222. See Michael Peckerar, *2014 Winter Olympics Are Good For NHL*, RANTINSPORTS, <http://www.rantsports.com/nhl/2014/01/15/2014-winter-olympics-are-good-for-nhl/> (last visited Jan 15, 2014) (stating the 2010 Vancouver games drew the largest TV audience ever for Olympic ice hockey as a result of NHL player involvement: the game drew several million more viewers than the historic 'Miracle on Ice' 1980 gold medal game between the United States and Russia); INTERNATIONAL OLYMPIC COMMITTEE, INTERNATIONAL OLYMPIC COMMITTEE GLOBAL TELEVISION REPORT MAY 2006, available at [http://www.olympic.org/Documents/Reports/EN/en\\_report\\_1087.pdf](http://www.olympic.org/Documents/Reports/EN/en_report_1087.pdf) (noting 80% of Canada's television viewers watched part of Canadian medal games in Torino, Italy). Similarly, during the Canadian men's gold medal game 85% of market shares for television in Sweden watched to see the team win the gold medal. See *id.*

223. See Catalano, *supra* note 153, § 65 at 1, (discussing Phila. World Hockey Club v. Phila. Hockey Club Inc., 351 F. Supp. 462, 509 (E.D. Pa. 1972) (“[T]he NHL . . . had willfully acquired and maintained arrangements by which it overwhelmingly controls the supply of players who are capable and available for play in a new league where the level of internal competitions fairly approaches the levels currently existing in the NHL.” (alteration added))).

[In] such arrangements, including contracts and agreements with minor league, amateur, and semiprofessional hockey teams and league organizations, which . . . had the effect of maintaining the NHL's control of players [through the use of such anticompetitive contracts,] the court held that the control thus demonstrated was so probably violative of § 2 of the Sherman Act that it should preliminarily enjoin the NHL from further . . . enforcing the [anticompetitive] reserve clause of its standard player contract.

The NHL's final predatory tactic involves using its monopoly power to exert dominion over the IOC's sponsorship and media rights.<sup>224</sup> Although the League and partner station, the NHL Network, were granted unprecedented access to the Sochi Olympic games, the League offices and team owners would require an enhanced partnership between the League, IOC and NBC, for all future player participation.<sup>225</sup> By withholding player participation until the IOC and NBC alter the existing sponsorship and media rights, the League is abusing its financial leverage over the market of players to assert its dominance over the IOC.<sup>226</sup>

#### E. The Harm is Dissimilar

Although the Sherman Act does not require proof of harm, courts will look to the conduct's harmful effects to determine if an action was necessary or justifiable within the realm of professional sports.<sup>227</sup> The harm to the IOC, IIHF, and NBC is far greater than the relative harm incurred by the NHL caused by pausing its season for two weeks during Olympic years.<sup>228</sup> The NHL loses marginal revenue during the small time frame, and still maintains large profits despite the games.<sup>229</sup> However, the preclusion of elite players will fundamentally alter the makeup of the Olympic ice hockey tournament and severely diminish IOC, IIHF and NBC profits.<sup>230</sup>

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*Id.* (citations omitted).

224. See Lake, *supra* note 3 (stating NHL given increased media access to the Sochi games in show of good faith by IOC and IIHF). Lake also notes that media access is difficult to obtain because of the stringent rights that certain sponsors have for Winter and Summer Olympics. See *id.*

225. See Lake, *supra* note 3 ("While the details of the agreement are not public, it is clear that the NHL and NHLPA sought an agreement, which would allow the NHL Network greater rights than a typical broadcaster who does not hold the broadcasting rights from IOC.")

226. See generally *United States Football League v. Nat'l Football League*, 842 F.2d 1335 (2d. Cir 1988) (holding dominant league that imposes burdens on sponsors for dealing with new upstart league unlawful).

227. See Feldman I, *supra* note 114, at 1276 (suggesting "it follows that restraints that interfere with the efficient allocation of players and hamper competitive balance are anticompetitive and have the ability to harm the product and consumers" (footnote omitted) (citations omitted)).

228. See Joe Pelletier, *Sochi Last Olympics for NHL?*, GREATESTHOCKEYLEGENDS.COM, <http://www.greatesthockeylegends.com/2014/02/sochi-last-olympics-for-nhl.html> (last visited March 12, 2014) ("It would . . . be a [substantial] loss for the International Olympic Committee. Losing NHL players in the Winter Olympics' most valuable property would be a huge blow, with loss of sponsorships, ratings and television contract dollars to match.")

229. See *id.* (stating more people watched the 2010 Olympic Hockey tournament than the 2010 Super Bowl).

230. For a discussion of the economic ramifications and profit implications, see *supra* notes 63-77 and accompanying text.

Moreover, interest in the Olympics increases fan and player awareness of the game, which boosts hockey's global appeal and may demonstrate why the NHL has gained popularity over the past two decades.<sup>231</sup>

Therefore, the final element of the antitrust analysis suggests the anticompetitive effects stemming from (1) the NHL's prohibition against player participation, and (2) creation of an NHL sponsored Hockey World Cup, outweigh the precompetitive effects.<sup>232</sup> The NHL may have business justifications, namely gaining profits missed during the Olympic break, preventing injuries caused at the Olympics, and avoiding stoppage of the regular season schedule; however, the League cannot employ the intended predatory tactics to the detriment of the IOC, IIHF, and NBC.<sup>233</sup>

#### F. Professional Sports' Exemptions Do Not Protect Against NHL's Antitrust Claims

The NHL would unsuccessfully claim a Clayton statutory or non-statutory exemption from antitrust law.<sup>234</sup> The statutory exemption does not apply because it is inapplicable in situations not benefiting the labor union, in this case the NHLPA.<sup>235</sup> The non-statutory exemption, similarly, does not apply, for the elements of the non-statutory exemption that require the restraint on trade to primarily affect only the parties that are involved in the collective bargaining.<sup>236</sup> Furthermore, the non-statutory labor exemption rejects the idea "that an employer can conspire with or take advan-

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231. See Gloster, *supra* note 62 (stating league benefits from global coverage of Olympic hockey). See also Delessio, *supra* note 85, (suggesting Olympics "provide [ ] a platform for the sport that it wouldn't otherwise have, since the Olympics have a built-in audience offering the kind of exposure for the sport that a Wednesday night NHL game on NBCSN never could [ ]"); Chris Peters, *Raw Numbers: Hockey's Growth in the United States — 1990-2010*, THE UNITED STATES OF HOCKEY (May 23 2011), <http://unitedstatesofhockey.com/2011/05/23/raw-numbers-hockeys-growth-in-the-united-states-1990-2009/> (documenting growth of hockey since 1990).

232. See WONG *supra* note 27, at 472 ("[T]o prove that a Section 1 antitrust violation exists, the plaintiff must show . . . the anticompetitive effects outweigh the precompetitive effects.").

233. See Delessio, *supra* note 85, (suggesting recreation of Hockey World Cup runs risk of ruining Olympic ice hockey tournament). For a discussion of similar issues existing between AFL and NFL prior to merger, see WONG, *supra* note 27.

234. See *supra* notes 148-161 and accompanying text (discussing differences between statutory and non-statutory Clayton exemptions from anti-trust law).

235. See WONG, *supra* note 27, at 458 ("Professional sports leagues have not often raised the statutory exemption as a defense because the common interpretation of Section 6 of the Clayton Act is that the law was enacted solely for the benefit of labor unions.").

236. See *id.* at 459 (stating elements for non-statutory exemption to apply).



tage of a union to restrain competition and seriously impair the business dealing and transactions of competitors.”<sup>237</sup>

## VI. CONCLUSION

A court will likely deem the NHL has a monopoly over the relevant market of professional players and by acting in this manner the NHL would be exerting that power to stymie competition and bolster its own profits.<sup>238</sup> The financial gain to the League and the subsequent penalty to the IOC, the IIHF, and NBC demonstrate that the anticompetitive result far outweighs the precompetitive effect.<sup>239</sup> Although the League management opposes player participation, players relish the opportunity to represent their countries.<sup>240</sup> Thus, the decision to deviate from previous practice and preclude NHL player participation in Olympics would be a unilateral abuse of the NHL’s power.<sup>241</sup>

Were the League to successfully justify its business rationale by citing player health and scheduling issues, the substitute World Cup of Hockey undercuts the League’s arguments.<sup>242</sup> Supplanting one international tournament with another does not limit the time players spent on ice and risk of injury.<sup>243</sup> Yet, the NHL’s interest in controlling a tournament’s operations and reaping the profits suggest the League may attempt such a unilateral action.<sup>244</sup> This con-

237. See *id.* at 458 (discussing statutory labor exemption). See also *id.* at 491-92 (discussing development of three prong test to non-statutory exemption).

238. See Don Barrie, *Enjoy Last NHL Olympics*, <http://www.thepeterboroughexaminer.com/2014/02/21/enjoy-last-nhl-olympics> (Feb. 21, 2014, 10:51 PM) ([T]he World Cup [has been] run by the NHL for the players and owners financial benefit. . . . For these owners and Commissioner Bettman, hockey is strictly a business. That \$5 billion deal between Rogers Communications is not about making hockey better for fans but strictly a financial decision.”).

239. See *id.* (suggesting lack of NHL benefit from resurgent World Cup because “event would be played in the late summer when hockey fans have other things on the go and the best players will be more interested in preparing themselves for the up-coming NHL season than making more money for NHL owners.”).

240. See Lage, *supra* note 13 (discussing belief of Detroit Red Wings’ Jonas Gustavsson that players desire to compete and “[taking] the best hockey players out of the Olympics would be wrong and would be a shame”).

241. See Gloster, *supra* note 62 (“[t]he league and players union together have to agree on whether [the league] will participate”).

242. See Dan Rosen, *Bettman: World Cup of Hockey could return*, NHL.COM (Feb. 18, 2014), <http://www.nhl.com/ice/news.htm?id=705381> (reporting NHL Deputy Commissioner Bill Baly as stating the following: “The World Cup is a piece of an international presence that we want to have[.]”).

243. See *supra* notes 13-17 and accompanying text (discussing proposed World Cup of Hockey).

244. See James Conley, *The NHL World Cup of Hockey is Coming for Your Olympics (Tuesday Slew)*, BLEACHERREPORT (Feb. 11, 2014, 11:00 AM), <http://www.pens>

duct further demonstrates the NHL's abuse of its monopoly power and indicates why it would ultimately fail an anticompetitive anti-trust analysis.<sup>245</sup>

The NHL overvalues the benefits of a World Cup and would harm its revenue by forbidding all Olympic participation.<sup>246</sup> The profits and popularity of sporting World Cups outside of soccer have proven inherently weak, as demonstrated by the quadrennial Basketball World Cup and World Baseball Classic.<sup>247</sup> The FIBA Basketball World Cup fields a tournament structure similar to that of the Olympics.<sup>248</sup> Yet, even with the participation of a formidable grouping of NBA players, only 900,000 people watched the 2010 FIBA World Cup Gold Medal game.<sup>249</sup> By comparison, over 12.5 million viewers in the United States alone watched the United States defeat Spain in the 2012 London Olympic gold medal basketball game.<sup>250</sup> The NBA's multibillion-dollar net worth can be attrib-

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burgh.com/2014/2/11/5400344/the-nhl-world-cup-of-hockey-is-coming-for-your-olympics-tuesday-slew ("The NHL realizes there is prestige and marketing potential in an international tournament.").

245. Commentator James Conley argues that the NHL is fully aware of current successes and recognizes the marketing potential of an international tournament. *See id.*

NHL executives have been quietly breadcrumbing the trail from Olympics to World Cup of Hockey throughout the Sochi saga. The WCOH hasn't taken place since 2004 and never generated the level of intrigue that the Olympics have . . . . an international tournament is just the place for them to try to flex their growing marketing muscle.

*Id.* (alteration added).

246. *See infra* notes 247-259 and accompanying text (implying revenue of World Cup will not amount to NHL's expectations).

247. *See infra* notes 247-259 and accompanying text (discussing lack of participation and viewership of FIBA Basketball World Cup and World Baseball Classic).

248. *See Competition Format*, FIBA.COM <http://www.fiba.com/basketballworldcup/2014/competition-format> (last visited October 25, 2014) (presenting 24-team 2014 FIBA competition format). *See also Competition Format*, FIBA.COM, [http://london2012.fiba.com/pages/eng/fe/12/olym/event-guide/p/competition\\_format.html](http://london2012.fiba.com/pages/eng/fe/12/olym/event-guide/p/competition_format.html) (last visited October 25, 2014) (providing breakdown of 12-team 2012 Olympic Basketball competition format).

249. *See Paulson, The Ratings Game: Team USA Hoops Victory Draws Fewer Than 900,000 Viewers*, SPORTS MEDIA WATCH, (Sept. 17, 2010), <http://www.sportsmediawatch.com/2010/09/ratings-game-team-usa-hoops-victory/> (noting 2010 regular season NBA games averaged 1.1 million viewers); *see also Durant's Withdrawal A Body Blow For The FIBA World Cup*, <http://ballineurope.com/durants-withdrawal-a-body-blow-for-the-fiba-world-cup/> (last visited October 27, 2014) ("Making the world accept that FIBA gold matters more than Olympic gold is another matter entirely. The fans still see the Olympics as by far the biggest deal and so too do the players.").

250. *See Alana Glass, USA Basketball Scores High London Olympics Ratings For NBC*, FORBES (Aug. 16, 2012, 2:11 PM) <http://www.forbes.com/sites/alanaglass/2012/08/16/usa-basketball-scores-high-london-olympics-ratings-for-nbc/> ("[V]iewership momentum established during the 2012 London Olympics [would] carry into the . . . NBA's 2012 regular season[ ]"); *see also* J.K., *The Dream*

uted partially to the League's expansion into the Olympics, which began with the 1992 "Dream Team" of NBA stars.<sup>251</sup> By including the basketball elite in the Olympics, "America transformed the Summer Games – basketball became one of its most-watched competitions – [and] simultaneously [made] an immeasurable impact on the NBA's popularity worldwide."<sup>252</sup> In contrast, the FIBA World Cup could not draw interest or the top NBA talent because, similar to NHL player sentiment, for NBA players "as long as the Olympics represent the premier international competition in top players' minds, alternatives will struggle to gain traction."<sup>253</sup> The stagnant ratings and general disinterest stem from the player and fan apathy towards the FIBA World Cup.<sup>254</sup>

Similarly, the World Baseball Classic, an event sponsored by Major League Baseball, fails to capture fans' attention, television ratings, or revenues due to major league players' indifference and refusal to participate.<sup>255</sup> The player deferrals "are a major reason why the [World Baseball Classic] still lags significantly behind the international tournaments of other sports in generating fan passion and television ratings."<sup>256</sup> Even with the World Baseball Classic available to them, players choose to join their club teams in spring

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*Tournament*, THE ECONOMIST (Aug. 15, 2012, 4:21 PM) <http://www.economist.com/blogs/gametheory/2012/08/basketball-olympics> ("The current scope and popularity of professional basketball give it a case as the world's second-most popular team sport, behind [soccer]. . .").

251. See Jim Eichenhofer, *Ten Ways David Stern Helped Grow the Game of Basketball*, <http://www.nba.com/pelicans/news/ten-ways-david-stern-helped-grow-game-basketball> (last visited October 27, 2014) (implying causal link between Olympic participation and league popularity).

252. See *id.* (suggesting Olympics and NBA benefitted from transition to NBA player participation).

253. See J.K., *supra* note 250 (arguing possible NBA transition away from Olympics negatively affects fans). See *id.* ("For fans. . . the potential loss of a vibrant international competition is galling, especially as other countries slowly but surely catch up with America (thanks in part to the internationalisation of NBA rosters).").

254. See Paul Sondhi, *The World Cup is On And No One Cares*, NYLOCAL (Sept. 12, 2014) <http://nylocal.com/city/2014/09/12/the-world-cup-is-on-and-no-one-cares/> ("The reasons for this lack of interest vary from the fact that our country's best players are not playing in the tournament (LeBron, Kevin Durant) to the idea that the FIBA World Cup is irrelevant and that Olympic play is the only international basketball showcase that Americans get up for.").

255. See Sean Gregory, *World Baseball Classic: Why Doesn't It Sizzle Like Other Global Sports Competitions?*, TIME (Mar. 6, 2013), <http://keepingscore.blogs.time.com/2013/03/05/world-baseball-classic-why-doesnt-it-sizzle-like-other-global-sports-events/> ("[I]f more big names from the U.S. major leagues played in the WBC, it would surely attract more domestic attention").

256. See Jon Michaud, *How to Fix the World Baseball Classic*, NEW YORKER, Feb. 28, 2013, <http://www.newyorker.com/the-sporting-scene/how-to-fix-the-world-baseball-classic>.

training, a likely outcome for NHL players similarly preparing for their regular season during a September World Cup of Hockey.<sup>257</sup> Provided the opportunity to expand the game internationally, baseball would gain more support and revenue if “like. . . hockey, it was attached to the marketing machine of the Olympics.”<sup>258</sup> The history, allure, and pride intrinsic to Olympic Games trumps the interest and viewership levels of comparable sporting world cups and serves as an indictment against the NHL’s reformation of the World Cup of Hockey.<sup>259</sup>

To prevent the abandonment of Olympic ice hockey the IOC, IIHF, NHL and NHLPA must come to a mutually beneficial compromise that provides the NHL a portion of the Olympic ice hockey tournament profits as well as the rights to certain advertising, marketing, and broadcasting fees.<sup>260</sup> Through such a compromise, the NHL would be inclined to advertise and support their Olympic players throughout the upcoming NHL regular season during Olympic years, a benefit to both the league and Olympic hockey viewership.<sup>261</sup> Further, the League can capitalize on the Olympic coverage, as “every second of national broadcast coverage of Olympic hockey is a glorified television commercial for the NHL’s product international. . . [and] the future of the game is interna-

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257. See *id.* (suggesting MLB players forego World Baseball Classic partially due to timing issue). See *id.* (maintaining NHL preseason begins shortly after proposed September date for World Cup of Hockey).

258. See *Lack Of Big Names Only Part Of WBC’s “Structural Issues” In The U.S.* <http://www.sportsbusinessdaily.com/Daily/Issues/2013/03/07/Events-and-Attractions/WBC.aspx?hl=Game%20Time%20Sports&sc=0> (Mar. 7, 2013).

259. For a discussion of the paucity of fan interest and enthusiasm of FIBA Basketball World Cup and World Baseball Classic, see *supra* notes 237-249 and accompanying text.

260. See J.K., *supra* note 250 (implying former NBA commissioner David Stern’s held similar idea regarding Olympic participation while serving as commissioner of NBA). See *id.* (suggesting Stern “appear[ed] to favour a partnership with FIBA instead of an outright takeover of international competition by the NBA. This would give the NBA a cut of the World Cup’s revenues, but not total control over its organisation. For the integrity of competition, this is preferable to an NBA-run tournament, in which team owners would surely restrict the participation of their biggest stars.”); for a discussion of the IOC’s stringent media restrictions and exclusive partnership deals, see *supra* notes 19-23 and accompanying text.

261. See *Olympic Sponsorship*, THE OLYMPIC MARKETING FACT FILE, International Olympic Committee (Sep. 2001) <http://info.hktcd.com/olympics/sponsorship.htm> (discussing numerous advertising and marketing benefits associated with IOC Sponsors and Partners, including but not limited to: “use of all Olympic imagery, as well as appropriate Olympic designations on products; direct advertising and promotional opportunities, including preferential access to Olympic broadcast advertising; [and] Protection from ambush marketing.”).

tional.”<sup>262</sup> Therefore, before banning Olympic participation, the NHL should look at the failed experiments in other professional sports and the inherent benefits to Olympic participation as support for finding compromise.<sup>263</sup> All parties stand to benefit from a negotiated agreement that generates improved revenues by allowing the stars to play and fans to enjoy.<sup>264</sup>

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262. See Gloster, *supra* note 62, (quoting Allen Walsh, representative to 23 of 148 NHL Olympians at Sochi).

263. For a discussion of the failures of previous World Cup Hockey tournaments, see *supra* notes 85-88 and accompanying text.

264. For a discussion of the benefits to the various organizations, see *supra* notes 260-262 and accompanying text.

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