Does the NBA Still Have Market Power?
Exploring the Implications of an Increasingly Global Market for Men's Basketball Player Labor

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In the March 2002 case Fraser v. Major League Soccer, the First Circuit Court of Appeals upheld a jury’s finding that America’s twelve Major League Soccer clubs (“MLS”) compete in an international market for men’s professional soccer labor. The court then held that the MLS clubs do not have enough market power to collude illegally under Section 1 of the Sherman Act.

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2 284 F.3d 47 (1st Cir. 2002).

3 See Fraser v. Major League Soccer, 284 F.3d 59, 63 (1st Cir. 2001). (approving the district court’s jury instruction that the geographic market was “the geographic area to which players can turn, as a practical matter, for alternate opportunities for employment as professional soccer players.”).

4 See Fraser, 284 F.3d at 60-61; see also id. at 59 (“That inference [that the relevant market extends beyond just the United States] at a minimum creates uncertainty as to whether the jury could have found market power under section 1.”).
At the time when Fraser was decided, few believed the case would become relevant to America’s other professional sports leagues. Indeed, at that time, most other American sports clubs did not compete with foreign clubs for premier men’s player labor.

In recent years, however, the National Basketball Association has lost between 9% and 15% of their players to clubs in foreign leagues. In addition, National Basketball Association clubs now hire approximately 12% of their players directly from foreign countries.

This article examines whether a court today could reasonably find that clubs in the National Basketball Association ("NBA") compete in an international market for men’s professional basketball labor. Part I of this article discusses how antitrust law applies to professional sports leagues, and explains why sports leagues seek to convince courts that they operate in an international market for player labor. Part II discusses the history of player movement between U.S. and foreign basketball leagues. Part III explores whether a court today could reasonably find there to be an international market for premier men’s professional basketball players.

I. Applying Antitrust Law to Professional Sports Leagues

A. Antitrust Basics

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5 See Defendants-Appellees Major League Soccer’s Brief to the United States Court and Appeals, First Circuit, Fraser v. Major League Soccer, 2001 WL 36006544, at *17 (2001) (Major League Soccer’s own counsel sought to differentiate MLS from other sports leagues such as the NBA).

6 See generally id.

7 See infra, notes __ - __ and accompanying text.

8 See infra, notes __ - __ and accompanying text.
Section 1 of the Sherman Act, in pertinent part, states that “[e]very contract, combination ... or conspiracy, in the restraint of trade or commerce ... is declared to be illegal.” This section of antitrust law governs agreements to fix prices, fix wages, allocate markets, and refuse to deal with third parties.

A court will determine whether a particular restraint violates Section 1 of the Sherman Act by applying a three-step test. First, the court will determine whether the restraint involves an agreement among two or more parties that affects interstate commerce. Then,

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the court will determine whether the restraint harms competition.\textsuperscript{13} 
Finally, the court will determine whether any affirmative defense would negate a finding of antitrust liability.\textsuperscript{14}

In the context of a professional sport league, courts will determine whether a particular agreement harms competition by applying the full Rule of Reason test.\textsuperscript{15} This test requires that a plaintiff show three elements: market power, net anticompetitive effects, and harm.\textsuperscript{16}

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\textsuperscript{13} Edelman, Commissioner Suspensions at 640; see also Edelman & Harrison at 38-39.

\textsuperscript{14} See Edelman, Commissioner Suspensions at 641; Edelman & Harrison at 42 (citing Phillip Areeda & Louis Kaplow, Antitrust Analysis: Problems, Text, and Cases 106-22 (5th ed. 1997)).

\textsuperscript{15} See Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006) (unilateral decisions by a legitimate joint venture are not per se unlawful, and are more appropriately analyzed under the Rule of Reason); see also Madison Square Garden v. Nat’l Hockey League, No. 07 CV 8455, 2008 WL 4547518, at *7 (S.D.N.Y. Oct. 10, 2008) (“[T]here is no suggestion that the NHL is anything other than a legitimate joint venture.”); Brown v. Pro Football, Inc., No. 90-1071, 1992 WL 88039, at *8 (D.D.C. Mar. 10, 1992) (rev’d on other grounds) (it was undisputed by the parties that the NFL is a joint venture); Smith v. Pro Football, Inc., 593 F.2d 1173, 1180-81 (D.C. Cir. 1978) (noting the joint-venture characteristics of the professional football industry).

\textsuperscript{16} See Edelman, Commissioner Suspensions at 645; Edelman & Harrison at 57; see generally Sullivan v. Nat’l Football League, 34 F.3d 1091, 1111 (1st Cir. 1994) (noting that because Rule of Reason analysis involves a detailed factual inquiry, and the subjective interpretation of these facts are made by a jury, it may lead
Thereafter, courts will consider affirmative defenses. The affirmative defense most likely to protect a sports league’s labor restraints is the non-statutory labor exemption, which precludes a finding of antitrust liability against any restraint that emerges through the proper workings of collective bargaining. However, according to most courts, the non-statutory labor exemption may only apply if the restraint involves a mandatory condition of bargaining, which primarily affects the parties involved, and is reached through arms-length bargaining.

See Edelman, Commissioner Suspensions at 641.

See Edelman & Doyle at 415; see also Marc Edelman, Are Commissioner Suspensions Really any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade, 58 Cath. U. L. Rev. 631, 654-55 (2009) (noting that more specifically, there is a split in the circuits concerning how broadly the non-statutory labor exemption applies. Courts in the Third, Sixth, Eighth and D.C. circuits hold that the exemption applies only where an alleged restraint involves a mandatory subject of bargaining that primarily affects the parties involved and is reached through bona fide, arm's-length bargaining; by contrast, the Second Circuit holds that the non-statutory labor exemption may extend to any situation where the exemption's application would “ensure the successful operation of the collective bargaining process.”) (internal citations omitted).

B. Applying Antitrust Law to Agreements Among Sports Clubs

Applying the three-step test for antitrust liability, courts have found various agreements among sports clubs, in the presence of market power and in the absence of union approval, to violate Section 1 of the Sherman Act. Some of the agreements that courts have found illegal include salary caps, first-year player drafts, and age/education requirements.

Salary caps, which set the amount of money that clubs may spend on individual player salaries, have been found anticompetitive because they fix players’ wages at a predetermined rate. In terms of their economic effect, salary caps lead some players to receive contract

(E.D. Pa. 1972); but see Clarett v. Nat’l Football League, 369 F.3d 124, 142-42 (2d Cir. 2004)(finding the non-statutory labor exemption to apply more broadly).

See, infra, notes __ - __ and accompanying text.


offers for less than their fair market value. 23 Meanwhile, salary caps lead other players to receive no contract offers at all. 24 Thus, where sports leagues impose salary caps, some players who otherwise would choose to practice their trade might instead choose to retire. 25

First-year player drafts, meanwhile, allocate negotiating rights to players entering the league in a general inverse order of the clubs’ standings from the previous season. 26 Like salary caps, first-year player drafts have been found anticompetitive because they assign only one club per league the right to bid for each new player’s services. 27 This kind of restraint represents the classic illegal market allocation, as it “forces each seller of [his] services to deal with one, and only one buyer, robbing the seller … of any real

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26 See Smith v. Pro Football, Inc., 593 F.2d 1173, 1175 (D.C. Cir. 1978) (describing NFL league draft); see also Edelman & Doyle at 406-07 (“Under both the NBA and NFL draft rules, the team with the poorest playing-field record during the previous season has the first choice of a player seeking to enter the league for the following season. The team with the next poorest record has the second choice, and so on until the team with the best record has picked. After each team has selected one player, the next round of drafting then begins in the same order as the first. These rounds continue until an appropriate number of players is selected.”).
27 See Edelman & Doyle at 434.
bargaining power.”

League-wide age/education requirements likewise may violate Section 1 of the Sherman Act by preventing certain players from practicing their profession within a given league. According to one court, age/education requirements lead to three types of antitrust harm: (1) players who would otherwise enter a sports league become excluded; (2) teams that would otherwise sign these players become prohibited from doing so; and (3) consumers who may otherwise prefer to attend games featuring the excluded players lose the ability to signal their preferences through their buying behavior.

C. Failed Attempts by Sports Leagues to Avoid Antitrust Liability

Salary caps, first-year player drafts, and even possibly age/education requirements, when collectively bargained, are generally

28 See Smith v. Pro Football, Inc., 593 F.2d 1173, 1185 (D.C. Cir. 1978); see also United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (noting that “the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.”).


30 Denver Rockets v. All-Pro Management, Inc. 325 F. 1049, 1061 (1971).
insulated from antitrust liability. However, where sports leagues have imposed these restraints unilaterally the non-statutory labor exemption generally cannot apply. Thus, in these situations, sports leagues have raised three alternative defenses: (1) the “not interstate commerce” defense; (2) the “pro-competitive effects” defense; and (3) “lack of two or more parties” defense (“single entity defense”).

1. The “Not Interstate Commerce” Defense

The “not interstate commerce” defense emerges from early 1900s case law, in which the courts had narrowly defined the term “interstate commerce.” For instance, in the proverbial case Federal Baseball v. National League, Supreme Court Justice Oliver Wendell Holmes had held that conducting professional baseball games did not

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31 See Edelman & Doyle at 426-27, 434-35.


33 See infra, notes __ - __ and accompanying text.

affect interstate commerce because the act of “giving exhibitions of
base ball” involved “purely state affairs.”

Since Federal Baseball, the Supreme Court has adopted a more
inclusive definition of “interstate commerce,” thus making earlier
case law obsolete. For example, in the case United States v.
International Boxing Club, the Supreme Court held that championship
boxing events affect interstate commerce because “over 25% of the
revenue from championship boxing is derived from interstate operations
through the sale of radio, television, and motion picture rights.”

More recently, the Supreme Court has extended its definition of
interstate commerce to include all conduct of traditional sports
leagues. For example, in the case Radovich v. National Football
League, the Supreme Court held that the National Football League
engages in interstate commerce because a significant percentage of NFL
revenue comes from radio and television transmission across state
lines. Thereafter, in Haywood v. National Basketball Association,

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35 Federal Baseball Club of Baltimore, 259 U.S. at 209.
36 See, e.g., Wicker v. Filburn, 317 U.S. 111 (1942) (finding interstate
commerce even where the relevant act’s effect on such commerce is remote);
see also Marc Edelman, Are Commissioner Suspensions Really any Different from
Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy
38 International Boxing Club, 348 U.S. at 241.
39 See, infra, notes __ - __ and accompanying text.
41 Radovich, 352 U.S. at 453.
the Court held that the NBA clubs engage in interstate commerce for much the same reason. Then, most recently in *Flood v. Kuhn*, the Court explained that even though Major League Baseball’s reserve clause has historically enjoyed an antitrust exemption under *Federal Baseball*, the acts of staging professional baseball games—like the acts of staging professional football and professional basketball games—affect interstate commerce.

2. The “Pro-Competitive Effects” Defense

The “pro-competitive effects” defense, meanwhile, emerges from sports leagues’ arguments that their labor restraints improve competition by reducing costs and making their sport’s game scores closer together. Like the “interstate commerce defense,” however, the pro-competitive effects defense has been repeatedly rejected by the courts.

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43 See *Haywood*, 401 U.S. at 1204.
45 *Flood*, 407 U.S. at 282.
46 See, e.g., *Brown v. Pro Football, Inc.*, No. 90-1071, 1992 WL 88039, at *9-*10 (D.D.C. Mar. 10, 1992) (rev’d on other grounds) (NFL argued that salary caps were pro-competitive based on positive impact on on-the-field competition); *Mackey v. Nat’l Football League*, 543 F.2d 606, 621 (8th Cir. 1976) (NFL argued that its labor restraint would improve competitive balance, as well as reduce player development costs); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-86 (D.C. Cir. 1978) (same argument with respect to first-year player drafts).
47 See, e.g., *Brown v. Pro Football, Inc.*, No. 90-1071, 1992 WL 88039, at *10 (D.D.C. Mar. 10, 1992) (rev’d on other grounds) (“The court finds that the NFL’s alleged pro-competitive purposes are either insufficient as a matter of
With respect to the argument that labor-side restraints are pro-competitive because they save clubs money, the Supreme Court has held as far back as 1897 in *United States v. Trans-Missouri Freight Assn.* that saving money is never a reasonable basis for concertedly restraining trade. In the 1940 case *United States v. Socony-Vacuum Oil Co.*, the Court further explained that if businesses were allowed to engage in concerted restraints simply to save money “the Sherman Act would soon be emasculated.”

As to the argument that sports leagues’ labor restraints are pro-competitive because they make game scores closer together, the Supreme Court has similarly rejected that view. Specifically, in the 1978 case *United States v. Professional Engineers*, the Court held that a proper Rule of Reason inquiry “does not turn on a court’s law because they fail to justify the necessity of the salary restraint or they are not relevant to the rule of reason analysis.”; *Mackey v. Nat’l Football League*, 543 F.2d 606, 621-22 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-86 (D.C. Cir. 1978).

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49 310 U.S. 150 (1940).

50 310 U.S. 150 (1940).

51 *Socony-Vacuum Oil Co.*, 310 U.S. at 221.


53 See, infra, notes __ - __ and accompanying text.

54 438 U.S. 681.
intuitive judgment of whether a particular practice seems sensible and equitable," but rather on whether the restraint increases or decreases competition in the same market as the alleged restraint.\textsuperscript{55} Thus, in accordance with Professional Engineers, several lower courts have held that the issue of whether fans prefer sporting contests that are closer in score is entirely irrelevant to any labor-side antitrust analysis.\textsuperscript{56}

3. The Single-Entity Defense

Finally, the single-entity defense emerges from sports leagues’ more recent attempt to adopt a broad reading of the Supreme Court’s

\textsuperscript{55} PAUL C. WEILER & GARY R. ROBERTS, SPORTS & THE LAW: TEXT, CASES AND PROBLEMS 42 (3d ed. 2004); see also United States v. Prof’l Engineers, 438 U.S. 681, 688 (1978) ("Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions."). Note that the Court’s holding in Professional Engineers overturned an older view, applied in some circuits, which prior to 1978 had considered broader public policy concerns in Rule of Reason analysis. See, e.g., Chicago Board of Trade v. United States, 246 U.S. 231, 241 (1918) (implying that shortening the work day or limited exacting work might have then been a precompetitive benefit under the Rule of Reason); Molinas v. National Basketball Ass’n, 190 F. Supp. 241, 243-44 (1961) (implying a court could balance “legitimate business reasons” against anticompetitive effects).

holding in *Copperweld Corp. v. Independence Tube Corp.*—a case that narrowly held that a parent company and its wholly owned subsidiary are incapable of conspiring under Section 1 of the Sherman Act.\(^{57}\)

While *Copperweld* has not been overturned, most courts recognize that its holding is narrowly tailored to the parent-subsidiary relationship and does not apply to professional sports leagues, where individual club owners have divergent economic interests.\(^{58}\) Thus, the U.S. Court of Appeals for the Second Circuit has explained that “the sound and more just procedure is to judge the legality of [sports league] restraints according to well-recognized standards of our antitrust laws rather than permit their exemption.”\(^{59}\)


\(^{59}\) *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982); see also McNeil v. Nat’l Football League, 790 F. Supp. 871 (D. Minn. 1992) (noting that most other courts have fully agreed with the Second Circuit’s interpretation of this issue, and that the single-entity sports

Given that none of the aforementioned defenses seem to save sports leagues from potential antitrust liability, a league such as the NBA, which in recent years has lost over 9% of its free agent workforce per year to foreign clubs, might attempt to argue that it lacks the power in an international labor market to violate Section 1 of the Sherman Act. Whether this defense proves successful, however, league debate is already well-settled and the argument “expressly rejected”). Thus far, the Seventh Circuit has been the only court to break from this view, holding in the case American Needle v. Nat’l Football League, that whether a sports league should be treated as a single entity should be considered “‘one league at a time,’ ... ‘one facet of a league at a time.’” Am. Needle, Inc. v. Nat’l Football League, 538 F.3d 736, 742 (9th Cir. 2008), cert granted 129 S.Ct. 2859 (2009). Nevertheless, even the Seventh Circuit in American Needle seems to acknowledge that in the labor context traditional sports leagues can never be single entities based on the existing level of competition among clubs for player labor. See American Needle, Inc. v. New Orleans Louisiana Saints, 496 F.Supp.2d 941 (N.D. Ill. Jul 11, 2007) (“Perhaps a proper reading of Copperweld leads to the conclusion that in the NFL and most other sports league contexts for league-wide policy other than labor disputes, the leagues are single entities.”).

Historically, courts have defined “market power” as “the power to control prices or exclude competition” within any relevant market, or, alternatively “the power to pay lower than competitive wages ... without having the sellers of those services [turn to another employer].” E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 27 (3d. ed. 1998) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391-92 (1956)); see also EDELMAN & HARRISON at 58; Fraser v. MLS, 284 F.3d at 62-63 (noting these are the “standard instructions on market definition,” which
would ultimately turn on how a jury interprets facts related to basketball player movement, as well as how a court instructs the jury about defining a geographic market.\textsuperscript{61} Indeed, in cases involving product markets (rather than labor markets), past opinions have found that a practicable overlap of as little as 20 percent between foreign and domestic sellers could support the finding of an international market.\textsuperscript{62}

Until the late 1970s, defining the relevant geographic market was largely irrelevant for sports-antitrust cases because sports league

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\textsuperscript{61} See generally Fraser v. Major League Soccer, 284 F.3d 59 (2002).

\textsuperscript{62} See, e.g., United States v. El Dia, Inc., 392 F.Supp.2d 118, 133 (D. Puerto Rico 2005) ("We do not believe a finder of fact could rationally exclude from the relevant market printers located outside Puerto Rico that currently sell significant quantities of shoppers into Puerto Rico. Currently, approximately 20 percent of the shoppers inserted in El Nuevo Dia are printed outside Puerto Rico, suggesting that offshore printers already compete substantially.").

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restraints were often deemed per se illegal.\textsuperscript{63} Thereafter, even under the Rule of Reason review as applied in the 1980s and 1990, courts generally limited the relevant geographic market for player services to either the United States or North America.\textsuperscript{64}

The Fraser case, however, seems to have marked a turning point on this issue, as it opened the door to find a broader geographic market.\textsuperscript{65} Specifically, the court in Fraser allowed MLS to introduce evidence that its players had competed in 67 foreign leagues prior to or after playing for MLS.\textsuperscript{66} This evidence ultimately helped the jury

\textsuperscript{63} See, e.g., Linseman v, World Hockey Ass’n, 439 F. Supp. 1315, 1323 (D. Conn. 1977) (finding per se illegal an agreement among World Hockey League clubs that prohibited drafting any player less than twenty years of age); Denver Rockets v. All-Pro Management, Inc. 325 F. Supp. 1049, 1066-67 (C.D. Cal. 1971) (finding per se illegal an agreement among National Basketball Association clubs that prohibited drafting any player is less than four years removed from high school graduation).


\textsuperscript{65} See Fraser, 284 F.3d at 59 (“Here, the jury said that neither the United States nor Division I delimited the relevant market: findings that imply that MLS faced significant competition for player services both from outside the United States and from non-Division I teams.); Defendants-Appellees Major League Soccer’s Brief to the United States Court and Appeals, First Circuit, Fraser v. Major League Soccer, 2001 WL 36006544, at *4 (2001) (“After a three-month trial on this claim, the jury rejected the plaintiffs’ contentions that the relevant market was restricted to the United States and included only the services of Division I (major league) soccer players.”).

\textsuperscript{66} See Fraser, 284 F.3d at 62.
to conclude that MLS clubs compete in an international market for players—a view that the First Circuit upheld in finding that the Major League Soccer clubs could not violate Section 1 of the Sherman Act.\footnote{See Fraser v. Major League Soccer, 284 F.3d 59 (2002).}

II. The Men’s Professional Basketball Industry

When physical education teacher James Naismith first invented the game of basketball, few could have imagined that the game would garner a broad following.\footnote{See Elliot J. Gorn & Warren Goldstein, A Brief History of American Sports 173 (Hill and Wang 1993) (explaining that Naismith originally created the game of basketball to teach his students about the importance of concentration and teamwork); Robert W. Peterson, Cages to Jumpshots: Pro Basketball’s Early Years 15 (Oxford University Press, 1990) (noting that during the Nineteenth Century the YMCA first began to integrate “physical training programs to supplement its primary interests in Bible study, education, and social welfare.”); Jack F. Williams, The Coming Revenue Revolution in Sports, 42 Willamette L. Rev. 669, 679 (2006).} However, within just one hundred years of the first men’s basketball game, people from around the world have come to play and watch basketball.\footnote{See Elliot J. Gorn & Warren Goldstein, A Brief History of American Sports 173 (Hill and Wang 1993); Jack F. Williams, The Coming Revenue Revolution in Sports, 42 Willamette L. Rev. 669, 679 (2006).}

A. Men’s Professional Basketball in the U.S.

1. The Early Years (1891-1949)

The game of basketball began humbly enough in Springfield, Massachusetts as part of a YMCA effort to integrate physical education
with bible study. As part of this effort, a young gym teacher by the name of James Naismith wrote basketball’s first set of rules, which he then introduced to his students at the local YMCA.

Although the game of basketball originally consisted of just thirteen rules, its simplicity and ease of play led many of Naismith’s students to take an immediate liking to it. Many of Naismith’s students even helped him to spread the game to YMCAs throughout the East Coast.

In its early years, basketball became most popular in the Mid-Atlantic States, with YMCA members from Trenton, New Jersey forming basketball’s first professional team in 1898. Then, over the next thirty years, basketball players from other East Coast cities formed rival clubs to the one from Trenton. The most famous of these rival clubs was New York’s “original” Celtics, which during its peak in the 1920s competed in 150 to 200 games per season. In the 1922-23

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70 See Peterson at 15.
71 See Peterson at 15.
72 See Peterson at 21-22.
73 See Peterson at 21-22.
74 Peterson at 44. Indeed, the term “professional” applied very loosely, as these teams received only very small sums of money. Peterson at 43. For example, the team from Trenton, NJ earned just $2.50 per home game and $1.25 per road game. Peterson at 43.
75 Peterson at 55.
76 Peterson at 70.
season, the “original” Celtics won an unprecedented ninety percent of their games, finishing with the unbelievable record of 193-11-1.77

During the 1930s and 1940s, most of the great barnstorming basketball teams joined into formal leagues.78 Many of these leagues quickly failed due to lack of funding.79 However, two leagues survived.80 One surviving league, the National Basketball League (“NBL”), was founded in 1937 by large Midwestern companies such as General Electric, Firestone and Goodyear.81 The other, the Basketball Association of America (“BAA”), was founded in 1946 by owners of leading East Coast hockey arenas.82

On August 3, 1949, the NBL and BAA merged together to form the National Basketball Association.83 To this day, the NBA remains America’s premier men’s basketball league.

2. The NBA Takes Form (1949–76)

Upon merging into a single league, the NBA club-owners first challenge was to elect a league commissioner.84 Ultimately, the club-

78 See Peterson at 70.
79 See Peterson at 70.
80 See, infra, note __ and accompanying text.
81 Peterson at 139 (noting that the NBL included teams such as the Minneapolis Lakers and Fort Wayne Pistons, and competed in a 44-game season).
82 Peterson at 139
owners settled on Maurice Podoloff, a Yale Law School graduate with significant sports business experience.\textsuperscript{85}

Upon taking the job, Podoloff made it his first priority to increase the game’s popularity in larger markets.\textsuperscript{86} One way that he attempted to accomplish this was by endorsing a 1954 rule that added a 24-second shot clock to the game.\textsuperscript{87} This rule immediately led to more shooting and more scoring.\textsuperscript{88} As a result, NBA attendance the following year increased by more than fifty percent.\textsuperscript{89}

Even as the NBA’s fan base grew, however, the league still faced occasional competition from rivals—the most successful of these being the American Basketball Association ("ABA"), which was founded in 1966.\textsuperscript{90} At first, the ABA attempted to differentiate itself from the NBA by using a red, white, and blue basketball, emphasizing the slam

\textsuperscript{84} See Sam Goldaper, Maurice Podoloff Dead at 95, Was First N.B.A. President, THE NEW YORK TIMES, Nov. 26, 1985, at B14.

\textsuperscript{85} See Sam Goldaper, Maurice Podoloff Dead at 95, Was First N.B.A. President, THE NEW YORK TIMES, Nov. 26, 1985, at B14 (noting that prior to becoming the NBA commissioner Maurice Podoloff had worked in professional hockey and for the Basketball Association of America); see also Joseph Siegman, JEWISH SPORTS LEGENDS: THE INTERNATIONAL JEWISH HALL OF FAME 32(Brassey’s 2000); Biography of Maurice Podoloff, http://hoopedia.nba.com/index.php?title=Maurice_Podoloff (last visited June 11, 2009).

\textsuperscript{86} TAYLOR at 36, 39.

\textsuperscript{87} TAYLOR at 36, 39.

\textsuperscript{88} TAYLOR at 36, 39.

\textsuperscript{89} TAYLOR at 36, 39.

\textsuperscript{90} See infra, notes __ - __ and accompanying text.
dunk and three-point shots, and placing teams in regional markets. However, by the early 1970s, some ABA owners decided to compete directly against the NBA clubs. ABA clubs in larger markets then proceeded to sign some of the game’s most prominent players.


92 Remember the ABA – 1967-68 Regular Season Standings and Playoff Results, available at http://www.remembertheaba.com/PlayoffPages/1968Playoffs.html (noting that the original ABA franchises included the following teams: Pittsburgh Pipers; Minnesota Muskies; Indiana Pacers; Kentucky Colonels; New Jersey Americans; New Orleans Buccaneers; Dallas Chaparrals; Denver Rockets; Houston Mavericks; Anaheim Amigos; and Oakland Oaks).

93 See Terry Pluto, LOOSE BALLS 50-51 (Simon & Schuster Paperbacks 2007)(noting that the ABA’s Oakland Oaks offered Rick Barry a contract offer that included a 15 percent ownership stake in the team); id. at 137 (noting that the ABA’s Indiana Pacers leased a corvette sports car for their second-round draft pick Bob Netolicky); id. at 62-63 (noting that basketball rookie accepted a $24,000 salary and $12,000 bonus from the ABA’s Minnesota Muskies rather than a $14,000 salary $12,000 bonus from the NBA’s Kansas City Royals); id. at 198 (noting that University of Maryland center Len Elmore, who after his playing days went on to become outside counsel to the NBA, signed a six-year, $1.335 million deal with the ABA’s Indiana Pacers, which included use of two
As ABA clubs began to pursue high-profile players, they often found themselves in bidding wars against NBA clubs. These bidding wars helped reduce the profitability of NBA clubs. They also led some of the ABA clubs toward bankruptcy.

With many ABA clubs struggling to earn a profit while competing for players against the NBA, the U.S. District Court for the Southern District of New York in 1976 approved a plan to allow the four most successful ABA clubs to join the NBA. The remaining ABA clubs then disbanded, leaving the NBA once again as America’s only premier men’s basketball league.

3. The NBA Emerges as America’s Dominant League (1976-Present)


97 See American Basketball Ass’n Players Ass’n v. Nat’l Basketball Ass’n, 72 F.R.D. 594, 596 (S.D.N.Y. 1976) (noting that these teams included the Denver Nuggets, Indiana Pacers, New York Nets, and San Antonio Spurs). The NBA expansion teams agreed to pay and guarantee payment of the ABA contracts of various ABA players on the rosters of ABA teams at the end of the 1975-76 season that did not secure NBA employment for the 1977 season. Id.
Since 1976, the NBA has capitalized on its lack of U.S. competition. Beginning with the appointment of David Stern as Executive Vice President in 1980 and then as Commissioner in 1984, the league has reduced its costs by introducing a number of labor-side restraints. In addition to these restraints, the league has also focused greatly on improving its brand equity through organized marketing.

In the 1983 season, the NBA became the first modern sports league to introduce a league-wide salary cap. The cap, which was approved in collective bargaining by the National Basketball Players Association, limited team payrolls to between 53 percent and 57 percent of the NBA's gross revenues. Despite some changes over the years to the cap’s formulaic aspects, the salary cap has remained an

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98 McCann, Reckless Pursuit, at 822; see generally Jack F. Williams, The Coming Revenue Revolution in Sports, 42 Willamette L. Rev. 669, 672-73 (2006) (pointing out that the sports business industry today generates over approximately $213 billion in revenue, which makes it twice the size of the automobile industry).

99 See, infra, notes __ - __ and accompanying text.

100 See, infra, notes __ - __ and accompanying text.

101 See McCann, Reckless Pursuit, at 822-24; Matthew Epps, Comment, Full Court Press: How Collective Bargaining Weakened the NBA’s Competitive Edge in a Global Sport, Vill. Sports & Ent. L.J. 343, 353-54 (2009) (“Since the mid-1980s, the owners have successfully advocated the inclusion of a salary cap limiting the amount any team in the NBA could spend on its collective salaries)

102 See McCann, Reckless Pursuit, at 822-23
important part of the NBA’s collective bargaining agreement ever since.¹⁰³

More recently, in January 1999, the NBA for the first time imposed a slotted salary system, which sets the salaries of the league’s more junior players based on their number of years in the league and order of draft selection.¹⁰⁴ Then, in 2005, the NBA added an age/education requirement that keeps out the league’s youngest players.¹⁰⁵ Like the NBA salary cap, each of these other restraints was approved in collective bargaining by the National Basketball Players Association (“NBPA”).¹⁰⁶ However, the NBPA might not permanently endorse these restraints.¹⁰⁷ Indeed, it would be wise for the NBPA to revisit at least its age/education requirement in light of its union duty of fair representation.¹⁰⁸

¹⁰³ See McCANN, RECKLESS PURSUIT, at 823.
¹⁰⁴ See Answers to Your Lockout Questions, NEW ORLEANS TIMES PICAYUNE, Jan. 7, 1999, at 2D.
¹⁰⁵ See EPPS at 353 (discussing the NBA’s negotiating of an age/education requirement into the 2005 collective bargaining agreement).
¹⁰⁶ See EPPS at 353.
¹⁰⁷ See infra, note __ - __ and accompanying text.
¹⁰⁸ See Marc Edelman, Are Commissioner Suspensions Really any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade, 58 CATH. U. L. REV. 631, 657 (2009) (discussing union’s duty of fair representation in professional sports context); see also Vaca v. Sipes, 386 U.S. 171, 190 (1967) (“A breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.”);
Nevertheless, these restraints have done more than just earn profits for owners; they also have allowed the NBA to devote more money to marketing efforts.\textsuperscript{109} Due to this enhanced NBA marketing, children from all around the world wear NBA paraphernalia, especially jerseys bearing the name and number of the leagues’ most prolific player, Michael Jordan.\textsuperscript{110}

Since Jordan’s retirement as a player in 2003,\textsuperscript{111} NBA executives have tried to shift fan attention onto two other players: Cleveland Cavaliers forward Lebron James and Los Angeles Lakers guard Kobe Bryant. However, unlike Jordan, who seemed to embrace being a symbol of the NBA brand, many of today’s players are less certain that they will play their entire careers in the NBA.\textsuperscript{112} Indeed, in several

\begin{footnotesize}
\textit{Peterson v. Kennedy,} 771 F.2d 1244, 1253 (9th Cir. 1985) (explaining the union duty of fair representation).

\textsuperscript{109} See infra, notes \_\_ - \_\_ and accompanying text.


\textsuperscript{112} See infra, notes \_\_ - \_\_ and accompanying text.
\end{footnotesize}
recent interviews even James and Bryant have expressed that they would consider joining a foreign club if offered a substantial pay raise.113

B. Men’s Professional Basketball in the Rest of the World

It is not surprising that some of America’s top basketball players, when faced with salary caps and other labor restraints, have

considered pursuing overseas employment.\textsuperscript{114} Although many in the United States believe that basketball is an American sport, the game of basketball actually has been played outside of the United States for almost as long as it has been played within. In fact, the first foreign men’s basketball game took place in Paris, France in 1893—less than two years after Naismith founded the game.\textsuperscript{115}

In 1932, the paths of U.S. and foreign basketball significantly diverged.\textsuperscript{116} That year, representatives from eight nations (but not the United States) formed basketball’s first international governing body, the Fédération Internationale de Basketball ("FIBA").\textsuperscript{117} In 1957, FIBA then founded a non-U.S. professional basketball league consisting of European, Middle Eastern and Soviet teams, which became known as the Euroleague (or in 2000-01 as the SuproLeague).\textsuperscript{118} Again, the United States did not participate in this league.\textsuperscript{119}

\textsuperscript{114} See supra, notes __ - __ and accompanying text.
\textsuperscript{115} See GORN & GOLDSTEIN at 173; see also PETERSON at 24 (noting that the game was organized by a group of Christian missionaries from the YMCA);
http://www.fibaeurope.com/cid_BiFUQinLGrAPQAGXlbtZg0.html
\textsuperscript{116} See infra, notes __ - __ and accompanying text.
\textsuperscript{117} FIBA Website (FIBA History), available at http://www.fiba.com/pages/eng/fc/FIBA/fibaHist/p/openNodeIDs/987/selNodeID/987/fibaHist.html (noting that the founding nations of FIBA included Argentina, Czechoslovakia, Greece, Italy, Latvia, Portugal, Romania, and Switzerland.)
\textsuperscript{118} See The Euroleague History and Archive, available at http://www.euroleague.net/item/16117; see also FIBA Europe, available at http://www.fibaeurope.com/cid_f43ulKJBGLcVnbH-aqLVu2._.compID_,Uz02qBnJiADOq5VntEf53.html (last visited June 25, 2009) (noting the full list of SuproLeague teams included: Maccabi Tel Aviv,
At first, Euroleague competition was dominated by Soviet teams, with Latvia’s ASK Riga winning the league’s first four Champions’ Cups, and teams from Moscow and Georgia winning the next three. By the mid-1960s, however, clubs from Western Europe had largely surpassed the Soviet clubs, beginning with the Spanish team Real Madrid’s 1963-64 Champions’ Cup win over the Czechoslovakian team Spartak Brno.

After winning their first championship in 1963-64, Real Madrid emerged as the Euroleague’s most dominant team. This dominance lasted from that season straight through the 1970s—during which time they went on to win six more Cups. Real Madrid’s closest rivals during this period were the Italian team Ignis Vanese and the Israeli team Maccabi Tel Aviv.


119 See The Euroleague History and Archive, available at http://www.euroleague.net/item/16117; see also FIBA Europe, available at http://www.fibaeurope.com/cid_f43ulKJBGLcVnbH-aqLVu2._.compID_,Uz02qBnJiAD0q5VntEf53.html.


121 See http://www.euroleague.net/history/50-years/the-archive/i/16116/1609/the-sixties.

By the 1980s and 1990s, Croatian, Serbian and Greek basketball clubs had joined the Spanish, Italians and Israelis as the league’s elite. One Greek team that emerged as especially strong during the 1990s was the Athens-based Panathinaikos, which was purchased in 1987 by the Giannakopoulos family—a Greek family that owned the pharmaceutical giant Vianex. Beginning in the late 1990s, Panathinaikos began to occasionally sign former NBA superstars at the very tail end of their career such as former Atlanta Hawks forward Dominique Wilkins and former Los Angeles Lakers guard Byron Scott.123

In the summer of 2000, European basketball took a temporary step backward when a group of entrepreneurs from the region formed a rival league known as the Union of European Basketball Leagues (“ULEB”). ULEB’s founders induced the top clubs from Spain, Italy and France to leave FIBA’s Euroleague and to join the new structure.124 In doing so, ULEB diluted the talent pool of both leagues by splitting the best clubs into two separate competitions.125

By 2002-03, the FIBA and ULEB basketball league had merged back together.126 The merged league, as it still exists today, includes a premier conference with four divisions of six teams each, as well as many subordinate leagues on the national level that promote their most

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123 See http://en.wikipedia.org/wiki/Panathinaikos_BC.
126 http://www.uleb.net/history1.htm.
successful clubs into the Euroleague. Many of Europe’s top basketball teams today compete in both their national league and in Euroleague play.

Since the 2002-03 merger, three different clubs have each won two Euroleague Champions’ Cups: Maccabi Tel Aviv (Israel); CSKA Moscow (Russia); and Panathinaikos (Greece). A fourth team, FC Barcelona, has won one Cup.

C. Comparing Modern Euroleague Basketball to the NBA

While the Euroleague serves as the closest substitute to NBA basketball, the Euroleague and NBA are also in some ways quite different. Among the similarities, both the NBA and Euroleague are professional basketball leagues, and both consist of clubs that compete in a regular season, followed by playoffs and a league championship. In addition, both leagues host their games in arenas that hold upwards of 10,000 fans, and both broadcast their games on either local or national television networks.

With respect to differences, however, most notably the Euroleague operates under a pyramid structure that features a merit-based promotion and relegation system. Under this structure, Euroleague

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129 http://en.wikipedia.org/wiki/Euroleague
clubs are promoted from regional leagues, as well as demoted from the Euroleague, based on a combination of game results and business performance.\textsuperscript{131} Also, under this structure, new players seeking to join the league may sign with any club of their choosing without being restrained by either a mandatory first-year player draft or a salary cap.\textsuperscript{132}

In terms of season length, European clubs play approximately half as many games per season, including those games they play within their local league.\textsuperscript{133} Euroleague clubs also typically have more off days in between games.\textsuperscript{134}

\textsuperscript{131} See ULEB League Rankings, available at http://en.wikipedia.org/wiki/ULEB_League_Rankings (noting that business performance is judged based upon in terms of television revenues/rating, attendance figures, and arena capacities).

\textsuperscript{132} See Edelman & Doyle at 409 ("European sports leagues also do not require players to enter first-year player drafts. Instead, prospective European professional athletes are allowed to sign their first contract with any club of their choosing, at any salary they can obtain on the free market.").

\textsuperscript{133} See Ian Whittell, Can Europe Afford the NBA’s Biggest Stars, ESPN, available at http://sports.espn.go.com/nba/columns/story?page=nba-europe-080827 (total budgets for the 2007-08 season for various teams in the Euroleague are as follows: CSKA Moscow $50 Million; Panathinaikos Athens $42.12 Million; Real Madrid $39 Million; Olympiacos Piraeus $35.88 Million; FC AXA Barcelona $34.32 Million; Tau Vitoria $31.2 Million; Montepaschi Siena $17.16 Million; Maccabi Tel Aviv $16 Million; Virtus Bologna $14 Million; Aris TT Bank $12.48 Million; Efes Pilsen $12 Million; Fenerbahce Istanbul $11 Million; Lietuvos Rytas $11 Million; Zalgiris Kaunas $7 Million; Cibona
With respect to overall player demographics, 83 percent of the NBA players are originally from the United States; whereas a majority of Euroleague players are originally from Europe.\(^{135}\) In addition, whereas the NBA does not limit its number of foreign players, some of the feeder leagues into the Euroleague have quotas on the number of players they allow from non-European Union countries.\(^{136}\) The lowest quotas are in two of Europe’s most advanced national leagues: Spain’s Liga ACB and Greece’s A1 Ethniki—two of the more developed feeder leagues—which allow, at most, two Americans per club.\(^{137}\)

Zagreb $4.68 Million; Parizan Belgrade $4.68 Million; Olimpia $3.12 Million; Red Star Belgrade $3.12 Million.)


\(^{136}\) See infra, notes __ - __ and accompanying text.

\(^{137}\) See http://www.euroleague.net/uleb/domestic-leagues/domestic-leagues-2007-2008/main. Quotas by league currently stand as follows:

<table>
<thead>
<tr>
<th>Country</th>
<th>League Name</th>
<th>Maximum Number of Non-EU Players Allowed Per Team</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>Lega Basket Serie A (LEGA)</td>
<td>4</td>
</tr>
<tr>
<td>Greece</td>
<td>A1 Ethniki (HEBA)</td>
<td>2</td>
</tr>
<tr>
<td>Germany</td>
<td>Basketball-Bundesliga (BBL)</td>
<td>18 (no limit)</td>
</tr>
<tr>
<td>Spain</td>
<td>Liga ACB</td>
<td>2</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Lietuvos Krepšinio Lyga (LKL)</td>
<td>5</td>
</tr>
<tr>
<td>Belgium</td>
<td>Ligue Ethias (BLB)</td>
<td>15 (no limit)</td>
</tr>
<tr>
<td>Russia</td>
<td>Super League</td>
<td>3</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Federatie Eredivisie Basketball (FEB)</td>
<td>No limit</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>British Basketball League (BBL)</td>
<td>3</td>
</tr>
<tr>
<td>Austria</td>
<td>Admiral Basketball Bundesliga (ÖBL)</td>
<td>8 of 16 contracts must be Austrian</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Ligue Nationale de Basket (LNBA)</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>Ligue Nationale de Basket (LNB)</td>
<td>6</td>
</tr>
</tbody>
</table>
With respect to player salaries, NBA clubs generally pay more per season to their players than Euroleague clubs, with NBA club salaries ranging between $50.7 million (Oklahoma Thunder) and $91.4 million (Los Angeles Lakers). Euroleague club salaries meanwhile range between 3.12 million (Red Star Belgrade) and $50 million (CSKA Moscow). It is worth noting, however, that on a per game basis some Euroleague clubs actually pay their players higher salaries. In addition, some Euroleague rookies earn more money than NBA rookies because the Euroleague does not have either a slotted salary system or a first-year player draft.

D. Movement of American-Born Professional Basketball Players to Teams Outside of the United States

Recent seasons have seen steady growth in the number of American basketball players that have accepted employment in foreign leagues,

Id.


with more than sixty former NBA players now listed on foreign team rosters.\footnote{Awards 2008-2009, available at http://www.euroleague.net/competition/awards/awards-2008-09 (last visited June 29, 2009) (noting that some of the elite American-born players who have recently competed in the Euroleague include the following: Anthony Parker; Trajon Langdon; Bootsy Thornton; and Terrell McIntyre).}

1. Early Opportunities for American Basketball Players to Compete Abroad (1960s - 1989)

American-born men’s basketball players first began to compete outside of the U.S. in 1957, the year when the Euroleague was founded.\footnote{See Glen Rogers, NBA Talent Search Goes Global, SAN ANTONIO EXPRESS-NEWS, Feb. 10, 2002, at 19C; see also Marlon Manuel, Carr ‘Weights’ for his Chance Without Worry, ATLANTA JOURNAL & CONSTITUTION, Aug. 4, 1989, at F9; See generally Euroleague Basketball Nominees Player Nominees, available at http://www.euroleague.net/history/50-years/player-nominees (noting that some of the best American players who competed in Europe during the 1960s and 1970s due to lack of opportunities for them in the United States included the following: Miles Aiken; Wayne Brabender; Tal Brody; Mike D’Antoni (1969-90); Bruce Flowers; Clarence Kea; Clifford Luyk; Kevin Magee; Bob Morse; Audie Norris; Aulcie Perry; Walter Sczerbiak Sr.; Corny Thompson; and Michael Young).} It was not until 1965-66, however, when Princeton University All-American Bill Bradley accepted a Rhodes Scholarship to attend Oxford University that the Euroleague secured its first premier American player.\footnote{http://www.dailyprincetonian.com/2006/12/13/16976. As he departed for England in the fall of 1965, Bradley informed friends and media that he did not expect to play professional basketball when he returned to the United}
Bradley did not originally plan to play Euroleague basketball. Rather, he intended to devote himself to full-time academic study. Yet, upon arriving at Oxford, Bradley was visited by employees of the Italian club Olimpia Milano, who began to heavily recruit his services.

After some prodding from Il Messaggero executives, Bradley eventually agreed to make weekly trips from his home in Cambridge, England to Olimpia Milano’s workout facility in Milan, Italy. That season, despite trying to work simultaneously as a basketball player and as a scholar, Bradley still led Olimpia Milano to their first Euroleague Champions’ Cup.\(^{145}\)

After the 1965-66 season, Olimpia Milano invited Bradley to return for another year. However, having by then completed his Rhodes Scholarship, Bradley returned to the United States first to fulfill a brief military stint and then to pursue a basketball career with the NBA’s New York Knickerbockers. Since Bradley’s return to the U.S., no American player of his caliber in his prime has joined the Euroleague. Former NBA All-Stars such as Bob McAdoo and Dominique Wilkins have indeed performed extremely well in the Euroleague; however, both players were already at the very end of their playing days.\(^{146}\)

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2. Il Messaggero’s Pursuit of World Basketball Dominance (1989-92)

As Euroleague clubs struggled to recruit top American talent, one Italian club, Il Messaggero, finally broke into the American labor market in the summer of 1989.

Earlier that year, Il Messaggero’s ownership group had taken notice that a number of young NBA players made public statements expressing frustration with how the NBA salary cap, coupled with the first-year player draft, was restraining pay opportunities. Sensing this frustration, Il Messaggero’s owners began to target young American players who were seemingly mired in contract disputes with their NBA clubs.¹⁴⁷

That summer, Il Messaggero made contract offers to a number of unsigned NBA rookies and second-year players. Ultimately, the team landed two of them.¹⁴⁸ First, on August 1, 1989, Il Messaggero signed rookie forward Danny Ferry to a one-year contract worth $2 million, or double the amount that the NBA’s Los Angeles Clippers had offered to pay him.¹⁴⁹ Then, eight days later, Il Messaggero signed second-year

¹⁴⁸ See infra, notes __ - __ and accompanying text.
¹⁴⁹ See Frank Dell’Apa, Il Messaggero Offer too Tantalizing?, THE BOSTON GLOBE, Aug. 1, 1989, at Sports 69; see also David Moore, Stern Sees the Benefit of Foreign Invasion, DALLAS MORNING NEWS, Sept. 24, 1989, at 14B; Marlon Manuel, Carr ‘Weights’ for his Chance Without Worry, ATLANTA JOURNAL & CONSTITUTION, Aug. 4, 1989, at F9 (noting that Ferry “signed a five-year contract Tuesday with Messaggero Rome of the Italian basketball league that will pay him in excess of $1 million this season. Ferry can break the contract after each season to
American point guard Brian Shaw to a contract worth $1 million, or four times the amount the Boston Celtics had offered to him.\footnote{See Frank Dell’Apa, Shaw Going to Italy?, THE BOSTON GLOBE, Aug. 10, 1989, at 41; See Terry Pluto, Shaw is Coming Back, But Ferry is Still in Limbo, AKRON BEACON JOURNAL, Mar. 1, 1990, at C1, (noting that during the late stages of Il Messaggero’s negotiations with Shaw, Celtics General Manager Jan Volk was quoted it jest saying, “Tell Brian to brush up on his Italian.”); see also Frank Dell’Apa, Shaw was the Pioneer: He Helped Pave the Way to Europe, THE BOSTON GLOBE, Dec. 21, 1999, at E6 (In an interview over ten years later, Shaw told the Boston Globe that “[a]t that time, guys normally went overseas at the end of their NBA career or they were the last one released by the team [; however my] situation was different. I had started a lot of games and I was an integral part of the [Celtics at the time.]”)}

Adding Ferry and Shaw to their roster helped Il Messaggero to improve their on-the-court performance.\footnote{See infra, notes ___ - ___ and accompanying text.} After having finished the previous season with just 11 wins and 19 losses, an Il Messaggero team with Ferry and Shaw the next season won 16 games and lost just 14, advancing all the way to the second round of the Champions’ Cup.
In the playoffs, Brian Shaw emerged as both the team’s top scorer and rebounder, and as an overall on-the-court force.\textsuperscript{152} Although Ferry and Shaw both decided to return to the United States after the 1989-90 season, Il Messaggero did not give up on its pursuit of NBA-caliber players.\textsuperscript{154} The following season, Il Messaggero signed twelve-year NBA veteran Michael Cooper,\textsuperscript{155} as well as Croatia’s Dino Radja, who at the time was considering leaving his home team, Jugoplastika Split, in favor of the NBA’s Boston Celtics.\textsuperscript{156}

\textsuperscript{152} See http://www.nba.com/playerfile/brian_shaw/bio.html (noting that for the season, both Ferry and Shaw were amongst the league’s leading scorers, as Ferry averaged 22.6 points per game and Shaw averaged 25.0).

\textsuperscript{153} See Greg Boeck, Ferry’s Home to be Where Best Deal Is, USA TODAY, May 20, 1990, at 1C.

\textsuperscript{154} See Sam Goldaper, Basketball; Once Teammates in Rome, Now N.B.A. Foes, NEW YORK TIMES, Nov. 11, 1990, at B9 (before the start of the 1990-91 NBA season Ferry signed a contract for $34 million over ten years) and Jackie MacMullan & Frank Dell’Apa, Shaw at a Loss Appeals Court Turns Down Guard’s Request, BOSTON GLOBE, July 17, 1990, at 23 (Shaw must honor the five-year, $6.2 million contract he signed with the Celtics in 1990).

\textsuperscript{155} Cooper signed a two-year contract with Il Messaggero Roma. The terms were not disclosed, but Cooper is reportedly making more than his 1989-90 NBA salary of $600,000. See Il Messaggero Signs Cooper for Two Years, LOS ANGELES TIMES, Aug. 19, 1990, at 14,; Former Laker Star Cooper riding Italian Roller-Coaster, CHICAGO TRIBUNE, Mar. 17, 1991, at 10.

\textsuperscript{156} See Richard D. Lyons, Sports Becoming Major U.S. Export to European Youth, SEATTLE POST-INTELLIGENCER, June 17, 1991, at C6, (noting that Dino Radja had signed a five-year, $15 Million contract with Il Messaggero); see also Celtics Tell Radja to go But Keep His NBA Rights, WORCESTER TELEGRAM & GAZETTE, Aug. 3, 1990, at B1, (noting that Radja had signed a one year contract with
early 1992, Il Messaggero added American free-agent power forward Rick Mahorn, who had previously been an important starter on the NBA’s Philadelphia 76ers.\textsuperscript{157}

3. \textit{Downfall of Il Messaggero}

Once Il Messaggero added Rick Mahorn to its roster, the once struggling Roman basketball team seemed on the verge of becoming a Euroleague powerhouse. They were even rumored to have been in contract negotiations with one of the NBA’s all-time premier players, New York Knicks center Patrick Ewing.\textsuperscript{158}


\textsuperscript{158} NBA: Ewing Must go Shot Patrick to Western Contenders, Newsday, Jul. 31, 1991, at 135 (discussing Il Messaggero’s rumored five-year, $50 million contract offer to Patrick Ewing). Meanwhile, during the 1991 off-season it was rumored that Il Messaggero had offered contracts to all five starting members of the UNLV men’s college basketball team, as well as their coach Jerry Tarkanian. See Mark Heisler, NBA Draft: Answers Bring Questions when
However, Il Messaggero’s plan to take a more global approach to basketball came to an unexpected halt in early 1992 when Italy’s national economy crashed, leaving Il Messaggero’s team owners in both a legal and financial crisis. On October 21, 1992, the Il Messaggero ownership group reluctantly sold their team to Italian businessman Angelo Rovati, who was far less interested than his predecessors in the free spending pursuit of American basketball players. Upon taking control of the team, Rovati immediately released Rick Mahorn from his contract and returned to a roster built mainly around Italian players. Thus, this change in ownership for the


160 See U.S. will Meet Australia in ’93 Davis Cup Opener, SEATTLE TIMES, Oct. 20, 1992, at F5 (Italy’s Gruppo Ferruzzi Montedison is bowing out of basketball and America’s Cup yacht racing, citing difficult economic times. The industrial giant said it will sell its Il Messaggero team in the Italian basketball league to a group of industrialists headed by Angelo Rovati. Its America’s Cup yacht, Il Moro di Venezia, reached the finals before losing to America in May.”).
time marked an end to any real competition for players between NBA and Euroleague clubs.

4. The Renaissance of Foreign Interest in American Basketball Labor

Il Messaggero’s demise precipitated a ten-year period featuring very few Americans, other than those at the very end of their careers, choosing Euroleague basketball over the NBA. However, the 2002-03 Euroleague merger may have ushered a new era, in which signing top American talent has again become a Euroleague priority. Further, unlike the 1989-92 period in which most Euroleague signings came from just a single team, this time there are many Euroleague teams in the market for American labor.

Today, the Euroleague is no longer just a backup plan for NBA hopefuls. There are now more than sixty American players competing on either Euroleague club rosters or rosters of clubs that are eligible to be promoted into the Euroleague. These players include 17 in Italy’s Serie A league, 16 in Spain’s ACB League, 11 in

161 See MORROW at 689; see also Overseas Not Just a Backup Plan Anymore, CHARLOTTE OBSERVER, June 14, 2009, at 12.

162 See MORROW at 689; see also Overseas Not Just a Backup Plan Anymore, CHARLOTTE OBSERVER, June 14, 2009, at 12.

163 Awards 2008-2009, available at http://www.euroleague.net/competition/awards/awards-2008-09 (last visited June 29, 2009) (noting that some of the elite American-born players who have recently competed in the Euroleague include the following: Anthony Parker; Trajon Langdon; Bootsy Thornton; and Terrell McIntyre).

164 See Chart of Italy’s Serie A league (noting that the 17 United States natives in the Serie A league with past NBA experience include the following:

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This draft version of the article is intended solely for the purposes of publication review.
Travis Best (9 years); Tamar Slay (3 years); Reece Gaines (3 years); Mike Hall (1 year); Maurice Taylor (10 years); Harold Jamison (2 years); Allan Ray (1 year); Qyntel Woods (4 years); DJ Strawberry (1 year); Earl Boykins (10 years); Keith Langford (1 year); Brandon Hunter (1 year); Kiwane Garris (3 years); Casey Shaw (2 years); Jermaine Jackson (4 years); Joseph Forte (2 years). Italy’s Serie A league also has six non-American players with NBA experience. See id. (noting the other players include Croatia native Dalibor Bagaric (3 years); Nigeria native Ndudi Ebi (4 years); Senegal native Pape So (3 years); Slovenia native Uros Slokar (1 year); Slovenia native Premoz Brezac (7 years); and Venezuela native Oscar Torres (1 year).

See Chart of Spain’s ACB league (noting that the 16 United States natives in the ACB league with past NBA experience include the following: Pete Mickeal (2 years); Andre Barrett (2 years); Venson Hamilton (1 year); Omar Cook (3 years); Marcus Hayslip (3 years); Coby Karl (1 year); James Augustine (2 years); Melvin Sanders (1 year); Shammond Williams (6 years); Curtis Borchardt (4 years); Quincy Lewis (4 years); Lou Roe (2 years); Vonteego Cummings (3 years); Taurean Green (2 years); Taquan Green (1 year); Tyrus Edney (4 years). Spain’s ACB league also has 22 non-American players with NBA experience. See id. (noting the other players include the following: Croatia native Stanko Barac (1 year); Argentina native Pepe Sanchez (3 years); Serbia native Igor Rakocevic (1 year); Serbia native Kosta Perovic (1 year); Serbia native Predrag Savovic (1 year); Serbia native Mile Ilic (1 year); Spain native Fran Vazquez (1 year); Spain native Raul Lopez (4 years); Spain native Carlos Jimenez (1 year); Spain native Albert Miralles (2 years); Spain native Ruben Garces (2 year); Brazil native Tiago Spitter (1 year); Australia native David Andersen (1 year); Czech Republic native Jiri Welsch (4 years); Turkey native Irsan Ilyasova (2 years); Puerto Rico native Daniel Santiago (4 years); Puerto Rico native Fuenlabrada Baloncesto (2 years); Belgium native Thomas Van den Spiegel (1 year); France’s Jerome Moiso
Greece’s A1 Ethniki league,\textsuperscript{166} 11 in Russia’s Super League,\textsuperscript{167} and four in Israel’s Ligat HaAl league.\textsuperscript{168}

\textsuperscript{166} See Chart of Greece’s A1 Ethniki league (noting that the eleven United States natives in the A1 Ethniki league with past NBA experience include the following: Steven Smith (1 year); Jamel Thomas (3 years); Josh Childress (4 years); Lynn Greer (1 year); Jannero Pargo (7 years); Mike Batiste (1 year); Anthony Grundy (1 year); Britten Johnsen (2 years); Lonny Baxter (4 years); Aaron Miles (1 year); and William Avery (3 years). Greece’s A1 Ethniki league also has four non-American players with NBA experience. See id. (noting the other players include Greek natives Andreas Glyniadakis (1 year), Antonin Fotsis (1 year), Vassilis Spanoulis (2 years), and Lithuanian native Saurunas Jasiukevicius (2 years)).

\textsuperscript{167} See Chart of Russia’s Super League (noting that the eleven United States natives in the Super league with past NBA experience include the following: Terrence Morris (3 years); Trajan Langdon (3 years); Marc Jackson (4 years); Kelly McCarty (1 year); Travis Hansen (1 year); Rawle Marshall (2 years); J.R. Bremer (2 years); Desmon Farmer (2 years); Marque Perry (1 year); Lionel Charmers (1 year); and Jumaine Jones (8 years). Russia’s Super League also has 10 non-American players with NBA experience. See id. (noting the other players include the following: Argentina’s Carlos Delfino (4 years); Belize’s Milton Palacio (7 years); Croatia’s Zoran Planinic (3 years); Poland’s Maciej Lampe (3 years); Russia’s Viktor Khryapa (4 years); Russia’s Sergey Monya (1 year); Russia’s Yaroslav Korolev (2 years); Serbia’s Ratko Varda (2 years); Slovenia’s Bostjan Nachbar (4 years); and Spain’s Jorge Garabajosa (2 years).

\textsuperscript{168} See Chart of Israel’s Ligat HaAl League (noting that the four United States natives in the Ligat HaAl League with past NBA experience include the
In addition, among the NBA’s 98 free agents to sign new contracts during the 2008-09 offseason, nine of them have signed with foreign clubs (9.4% of total free agent pool). When removing from this pool all of the NBA free agents who ultimately re-signed with their former NBA club, the percentage of NBA free agents who choose a foreign league over the NBA increases to just over 15 percent.

Beyond these numbers, empirical observation also seems to point in favor of finding increasing competition between U.S. and Euroleague clubs to sign certain mid-level NBA players. For instance, during the 2008 off-season, newspaper reports announced that NBA player Josh Childress rejected a five-year, $33 million contract with the NBA’s Atlanta Hawks ($6.6 million/year) to sign a three-year, $20 million deal ($6.67 million/year) with the Greek team Olympiacos—winners of the 2006-07 Euroleague championship. Another American, Jannero following: Carlos Arroyo (7 years); Roger Powell (1 year); Marcus Brown (4 years); and Dee Brown (1 year).


171 See infra notes ___ - ___ and accompanying text.

172 See Ex-Hawk Childress Signs with Greek Club Team, ESPN, available at http://sports.espn.go.com/nba/news/story?id=3501488 (see also Steve Springer, Around the NBA: Childress leaves Hawks for Greece, Los Angeles Times, July 24, 2008, at 7. [this cite includes Childress’ stats as well]); Josh Childress
Pargo, meanwhile accepted a one-year, $3.5 million contract with a top Russian team rather than offers from the NBA’s New Orleans Hornets (his former club), San Antonio Spurs and Atlanta Hawks.173

The 2008 and 2009 off-seasons have also exhibited certain Euroleague clubs bidding against one another for American players that the NBA clubs have deemed ineligible.174 For instance, in the summer of 2008, several European clubs competed to sign Californian point guard Brandon Jennings, who had been denied entry into the NBA based on both his age and lack of formal education. Jennings ultimately signed a guaranteed one-year contract with the Italian-based team Pallacanestro Virtus Roma—the same club that was formerly known as Il Messaggero.175 Including endorsements, Jennings is believed to have earned a 2008–09 salary that exceeded $1 Million.176

Stats, ESPN, available at


174 See infra, notes ___ - ___ and accompanying text.

175 See Pete Thamel, A Recruit Flees to Italy, Possibly Settinga Trend, NEW YORK TIMES, July 17, 2008, at D6; Jacob Leibenluft, The Great Basketball Exodus,
More recently, in the summer of 2009, another Californian, Jeremy Tyler, decided to forego his senior year of high school to turn professional at the age of 17. Like Jennings, Tyler was deemed ineligible by the NBA age/education requirement. His agent Arn Tellem, however, purportedly received numerous offers from European, Middle Eastern and Chinese clubs for Taylor’s services. Ultimately, Tyler signed a one-year, $140,000 contact with the Haifa Heat of Israel’s Ligat HaAl league, which is a feeder league into the Euroleague. Taylor purportedly chose the Heat over more lucrative

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177 See Pete Thamel, A Top Prospect Picks Europe Over High School and College, NEW YORK TIMES, Apr. 23, 2009, at B14 (noting that Tyler is being advised by Sonny Vaccaro, a former sneaker executive, who had also helped Brandon Jennings to reach his agreement in Italy); see also Overseas Not Just a Backup Plan Anymore, CHARLOTTE OBSERVER, June 14, 2009, at 12; Allon Sinai, Haifa Close to Signing US High School Phenom, JERUSALEM POST, June 14, 2009, at 12; Bernie Wilson, Going Pro Before High School Ends: Tyler Opt to Play Overseas to Hone His Hoop Skills, NEW JERSEY RECORD, May 5, 2009, at S12.

European opportunities because he preferred to play for a coach that was fluent in English.\textsuperscript{179}

E. Movement of Foreign Born Professional Basketball Players to the United States

Not only have recent seasons seen growth in the number of American players who compete overseas, but it also has seen an increase in the number of foreign-born players who have signed with NBA teams.\textsuperscript{180} Some of these foreign players have accepted multi-year NBA contracts; meanwhile others prefer deals that give them the flexibility to move freely between NBA and Euroleague clubs.\textsuperscript{181}

Movement of foreign-born basketball players into the NBA has occurred in three waves: (1) the arrival of political refugees from Cold War nations (beginning in 1988); (2) the arrival of Western Europeans who grew up watching the U.S. Olympic “Dream Team” (beginning in 1998); and (3) the arrival of post-Dream Team babies from the rest of the world (beginning with regularity in the early 2000s).

1. The First Wave: Political Refugees from Cold War Nations

\textsuperscript{179} Allon Sinai, Tyler Lands in Israel with Lofty Aspirations, JERUSALEM POST, Sept. 4, 2009, at 12.

\textsuperscript{180} See infra, notes ___ - ___ and accompanying text.

\textsuperscript{181} See, e.g., Jonathan Abrams, N.B.A. Looks Overseas for Draft Prospects, and Doesn’t See Much, THE NEW YORK TIMES, June 21, 2009, at 11(noting that Fran Vazquez, a player taken by the Orlando Magic with the 11th overall selection in the 2005 NBA draft, ultimately chose to stay in his home country of Spain and not accept the Magic’s contract offer).
The first wave of foreign players to enter the NBA came mainly from Eastern European countries at the end of the Cold War. These players were mainly political refugees who had dominated their home country’s leagues and wanted the chance to earn a larger income playing basketball in a capitalist country.

Two of the early Eastern Europeans to join the NBA were a pair of starters on the Soviet Union’s 1988 Olympic Gold Metal team: Alexander Volkov and Saurunas Marciulionis. Volkov, who had been the 1987 international player.


183 See Mike Vaccaro, Nightmare Led to the ‘Dream’ - 20 Years After the Soviets Took Us Kids to School, NEW YORK POST, Aug. 17, 2008, at 89; see also Mark Heisler, U.S. Team Gets the Rock Star Treatment, LOS ANGELES TIMES, Aug. 4, 2008, at 1; See International Players in the NBA: Twenty years ago, non-American players were a rarity in the NBA. Now they’re walking away with championship rings and MVP awards, EVENING STANDARD (London, UK), Oct. 8, 2007, at 5 (noting that the Americans finished with the bronze metal); Ailene Voisin, He Drew the Iron Curtain on the NBA, THE SACRAMENTO BEE, Aug. 17, 2005,
Soviet League’s Most Valuable Player, signed a one-year $650,000 contract to join the Atlanta Hawks. Meanwhile, Marciulionis, who was the leading Soviet scorer in the Olympics, accepted a three-year deal with the Golden State Warriors for roughly $1.3 million.

Another of these early Eastern Europeans to join NBA was Vlade Divac, who had starred on Yugoslavia’s 1988 Olympic Silver Medal at B1; David Sabino, Trivial Matters, SPORTS ILLUSTRATED, Aug. 9, 2004, at 38; Ailene Voisin, Coming To America…Adjusting to NBA Can Be Trying Experience For Europeans, THE SACRAMENTO BEE, Apr. 26, 1988, at C9.

184 See Tim Tucker, Hawks Pioneered International Draft Picks, ATLANTA JOURNAL OF CONSTITUTION, June 29, 2003, at G2; see also Mark Bradley, Pro Basketball: Hawks were amongst the First to Think Globally, ATLANTA JOURNAL & CONSTITUTION, May 5, 2002, at D9; Bob Ford, Spiraling Salaries Dizzy to the NBA, PHILADELPHIA INQUIRER, Aug. 11, 1989, at C8; Dave Mackell, Sports, Page Two Extra, SPORTS Roundup, WASHINGTON TIMES, Aug. 2, 1989, at D2.

185 See Unselfish Described Warriors: That’s What Former Golden State Fan Favorite Marciulionis Remembers of Nelson’s Previous Teams, CONTRA COSTA TIMES (Walnut Creek, CA), Feb. 15, 2007, at F4; see also Liz Robbins, Faces from Afar; European Pioneer, A Rough Road Paved the Way, THE NEW YORK TIMES, Jan. 9, 2005, at 82; Charles Elmore, Soviet Trade Trickles Down to Florida, PALM BEACH POST (Palm Beach, FL), Sept. 17, 1989, at 1D; Jan Hubbard, Sunday Special; The Courtship of a Soviet Star: The Warriors Beat out the Hawks for the Services of Olympic Basketball Hero Sarunas Marciulionis after a Lengthy Recruiting Battle that was Played out all over the World, NEWSDAY, Aug. 13, 1989, at 32 (“Marciulionis signed a three-year Warriors contract for $1.3 million a year. No one knows for sure how much each of the Soviet institutions got, but reports in the Bay Area indicate Marciulionis will keep about 25 percent of that money, or $325,000.”).
team. A wide-framed center with a soft passing touch, Divac initially signed a three-year, $2.7 million contract with the NBA’s Los Angeles Lakers. Although he spoke little English at the time of his signing, Divac quickly learned the language and earned regular playing time. Eventually, Divac distinguished himself as one of the NBA’s better all-around players.

On the heels of the debut of players such as Volkov, Maciulionis and Divac, nearly one-hundred other Eastern Europeans have since entered the NBA. There are currently 21 Eastern European players on NBA rosters, representing roughly five percent of the NBA’s overall population. These players come from several different countries,

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186 See Lakers Sign Yugoslavian Center Divac, HOUSTON CHRONICLE, Aug. 8, 1989, at 6.
188 See MORROW at 689.
189 See Christopher Clarey, Divac Opened Door and World Followed in the Arena, INTERNATIONAL HERALD TRIBUNE, Oct. 22, 2005, at 20 (noting that by the time Divac retired from the NBA, sixteen years later, he had become one of only three players in league history to record 13,000 points, 9,000 rebounds, 3,000 assists, and 1,500 blocks.)
190 This information was accumulated from the ESPN.com website page entitled NBA Basketball Teams, available at http://sports.espn.go.com/nba/teams (last visited January 17, 2009).
including Serbia, Slovenia, Lithuania, the Ukraine, Croatia, Georgia, Latvia, Poland and Russia.\footnote{This information was accumulated from the ESPN.com website page entitled NBA Basketball Teams, available at http://sports.espn.go.com/nba/teams (last visited January 17, 2009).}

2. The Second Wave: Western Europeans

The second wave of foreign players to enter the NBA then came from Western Europe. Unlike the Eastern European players, many of the Western Europeans were familiar with NBA, as well as commercial basketball.\footnote{See infra, notes __ - __ and accompanying text.} For many of these players, watching the United States Dream Team win the Gold Medal in the 1992 Olympics was the “zeitgeist moment” that made them want to become NBA stars, rather than just basketball stars.\footnote{MORROW at 690 (citing Diversifying/NBA Becoming an International League, HOUSTON CHRONICLE, June 2, 2002, at 1.); see also Paul Genender, Comment, Transcontinental Alley-Oop: Antitrust Ramifications of Potential National Basketball Association Expansion into Europe, 4 DUKE J. COMP. & INT’L L. 291, 294 (1994) (“The enthusiastic response to the 1992 United States Olympic basketball team, the ‘Dream Team,’ revealed the global popularity of the NBA and of basketball in general. In fact, according to some observers, the NBA advocated forming the ‘Dream Team’ in order to lay the foundation for international expansion.”); Dan Garcia, Draft Has European Feel To It, THE STAR-LEDGER (Newark, NJ), June 26, 1996, at 69 (quoting Lithuanian born professional basketball player Vitaly Potapenko as stating that “A lot of kids in Europe idolize Michael Jordan, Shaquille O’Neal and Patrick Ewing.”).}

The Western European who deserves the most credit for convincing NBA scouts to recruit in that region of the world is Dirk Nowitzki, a
German player who entered the NBA as the ninth overall selection of the 1998 draft. At the time Nowitzki was drafted, most American scouts did not believe he would not be able to adjust to the NBA’s longer schedule and more physical style of play. However, Nowitzki proved these scouts wrong, earning eight All-Star game appearances over eleven years, and winning the 2007 Most Valuable Player Award.

Nowitzki remains the NBA’s only active player born in Germany; however, he has since been joined by 22 other Western Europeans (6.3% of overall NBA workforce), including nine players from France alone (2.1% of overall NBA workforce). To date, the most successful French player has been San Antonio Spurs point guard Tony Parker, who was named to the All-Rookie First Team in 2001 and has starred in the league ever since. Parker’s skills began to draw U.S. national

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195 See International Players in the NBA: Twenty years ago, non-American players were a rarity in the NBA. Now they’re walking away with championship rings and MVP awards, EVENING STANDARD (London, UK), Oct. 8, 2007, at 5. See also http://www.nba.com/allstar2009/players/dirk_nowitzki.html

196 This information was gathered from ESPN.com, NBA Basketball Teams, available at http://sports.espn.go.com/nba/teams (follow “Roster” hyperlinks).

197 See Stephen A. Smith, Spurs Incomparable already Risen: Parker and Ginobili have Elevated San Antonio to New Heights, PHILADELPHIA INQUIRER, June 12, 2007, at E01; see also http://www.nba.com/playerfile/tony_parker/bio.html
attention in his second season when he played an important role in helping the Spurs win the NBA Championship.\(^\text{198}\)

Three Italian players have also made a recent impact in the NBA, including Andreas Bargnani, who was the first overall pick of the 2006 NBA draft, and Danilo Gallinari, who was selected sixth overall in the 2008 draft by the New York Knicks—a team coached by former Italian League player/coach Mike D’Antoni.\(^\text{199}\) Given how strong Italian teams have performed in Euroleague play, many basketball experts believe that there are many others from that region who would excel in the NBA.\(^\text{200}\) However, many top Italians teams have retained their best players by offering them salaries that exceed those available from NBA teams, given the NBA slotted salary system for rookies.\(^\text{201}\)

Finally, four players from Spain have also entered the NBA in recent season, beginning with 7’0” center Pau Gasol, who the Memphis Grizzlies selected with the third overall pick of the 2001 draft.\(^\text{202}\)

\(^{198}\) http://www.nba.com/playerfile/tony_parker/bio.html

\(^{199}\) This information was accumulated from the ESPN.com website page entitled NBA Basketball Teams, available at http://sports.espn.go.com/nba/teams (last visited January 17, 2009).


\(^{201}\) Dave D’Alessandro, Nets Size Up Italian Teenager, THE STAR-LEDGER (Newark, New Jersey), June 13, 2008, at 52 (noting that New York Knicks’ first round draft pick Danilo Gallinari likely could earn more money playing in Italy than the Knicks are allowed to pay him under the current NBA collective bargaining agreement).

Most recently, a fifth and highly-touted Spanish point guard, Ricky Rubio, was drafted into the NBA this year by the Minnesota Timberwolves. However, Rubio has stated that he does not plan to play in the NBA unless his rights are traded to a larger market club. As one Washington Times reporter colorfully described Rubio’s demands, in light of past NBA history, he is “dropping the Danny Ferry card.”

3. The Third Wave: Rest of the World

Beyond these waves of Eastern and Western European players, the NBA has even more recently has begun to see a scattered influx of players from other nations around the world. While it is harder for NBA clubs to scout these players because they do not compete in the Euroleague, there are three nations that are receiving special attention from NBA scouts: Argentina, Brazil and China.

Argentines have actively participated in basketball for nearly one hundred years, and were the lone country from North or South America to help form FIFA in 1932. Yet, even though Argentines have

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203 Tom Knott, This Pick May Leave Minnesota Out in Cold, WASHINGTON TIMES, June 29, 2009, at C01.

204 This information was accumulated from the ESPN.com website page entitled NBA Basketball Teams, available at http://sports.espn.go.com/nba/teams (last visited January 17, 2009) (noting that these players come from the following countries: Argentina (five); Australia (two); Brazil (three); Cameroon (one); Canada (four); China (three); Democratic Republic of Congo (two); Dominican Republic (two); Iran (one); Mexico (one); New Zealand (one); Nigeria (one); St. Vincent (one); Senegal (three); and Turkey (two), as well as two players each from Puerto Rico and the U.S. Virgin Islands).

205 See infra, notes __ - __ and accompanying text.

206 See supra, note __ - __ and accompanying text.
long played basketball, they still surprised many by winning the basketball Gold Metal in the 2004 Olympics—defeating even a team of American NBA stars. In 1999, the NBA’s San Antonio Spurs became the first team to select a player from Argentina when they drafted Manu Ginobili with the fifty-seventh overall pick in the 1999 NBA draft.\footnote{See Stephen A. Smith, *Spurs Incomparable already Risen: Parker and Ginobili have Elevated San Antonio to New Heights*, PHILADELPHIA INQUIRER, June 12, 2007, at E01.} However, since Argentina’s Olympic success, four other Argentines have joined the NBA including Houston Rockets forward Luis Scola and Chicago Bulls forward Andres Noccioni.\footnote{This information was accumulated from http://www.espn.com.}

Brazil similarly has sent three players to the NBA in recent years. The two most famous of these players are Leandro Barbosa, who was selected by the Phoenix Suns with the 28th overall pick in the 2003 NBA draft,\footnote{http://www.nba.com/playerfile/leandro_barbosa/bio.html. During the 2006-07 season, Barbosa was the recipient of the NBA Sixth Man of the Year Award, averaging 18.1 points, 2.7 rebounds, and 4.0 assists per game. http://sports.espn.go.com/nba/news/story?id=2846672. (see also Phoenix’s Barbosa Wins Sixth Man Award, THE WASHINGTON POST, Apr. 24, 2007, at E04).} and Nene Hilario, who was selected by the New York Knicks with the seventh overall pick in the 2002 NBA Draft.\footnote{http://www.nba.com/playerfile/nene/bio.html}

Chinese players meanwhile are also beginning to enjoy NBA opportunities, beginning most notably with 7’6” center Yao Ming, who the NBA’s Houston Rockets selected with the first overall pick of the
2002 draft. On the front end, getting Yao into uniform presented some challenge for the Rockets, as it required a separate agreement to secure Yao’s release from the government-run Chinese Association. However, now that Yao is in his seventh season, the challenge seems to have paid off. Indeed, another NBA club, the Milwaukee Bucks, has signed another Chinese player, Yi Jianlian, with the sixth overall pick in the 2007 NBA draft.

III. Could a Court Hold the NBA Clubs Lack Power in an International Market?

A. Factual Overview

Based on the foregoing, it is debatable whether NBA clubs could successfully defend an antitrust suit by arguing they lack power over an international labor market. On one hand, nearly 15 percent of the NBA’s players move freely between NBA and Euroleague clubs (a number not too significantly below the 20 percent threshold applied in some

211 See MORROW at 696-97; see also Dustin C. Lane, From Mao to Yao: A New Game Plan for China in the Era of Basketball Globalization, 13 PAC. RIM L. & POL’Y J. 127, 127 (2004); Johnny Ludden, Globalization of the Spurs and the NBA, SAN ANTONIO EXPRESS-NEWS, Oct. 1, 1986, at 4N (“China’s Yao Ming becomes the first international player with no American college experience to be the No. 1 overall pick.”).

212 See MORROW at 697; see also LANE at 129 (noting that at the time the Houston Rockets drafted Yao Ming there was “lingering uncertainty as to Yao’s ultimate availability”).

213 See http://www.nba.com/playerfile/yao_ming/career_stats.html

However, on the other hand, these players that choose to compete internationally generally fall into one of the following categories: (1) players who are marginal in their on-the-court ability; (2) players who are not originally from the United States; and (3) players already excluded by some labor restraint, such as the NBA age/education requirement.

Although there are several examples of American-born players who have chosen to compete overseas despite NBA opportunities, these players still represent the exception, rather than the rule. In addition, while it is widely rumored that some of the NBA’s highest profile players such as James and Bryant might have interest in playing overseas, there is no public information indicating that either player has made or received a good-faith offer from a club outside of the United States.

B. Defining the Proper Geographic Market

When it comes to defining the relevant market, a finder of fact must determine the relevant geographic market based on where a worker can turn for employment as a practical alternative. The U.S. Department of Justice and Federal Trade Commission Guidelines define this as being where a "small but significant and non-transitory" change in price within a given region would lead one to switch from

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215 See supra, notes __ - __ and accompanying text.

216 See supra, notes __ - __ and accompanying text.

217 See supra, notes __ - __ and accompanying text.

218 See Fraser, 284 F.3d at 59, 63 (1st Cir. 2001)
one employer to another.\textsuperscript{219} However, several courts have explained
this includes not only where workers may hope to work, but also where
doing so is “practicable.”\textsuperscript{220}

The definition of “practicable” is a source of much contention.
In theory, practicability could be defined three different ways: (1)
that it is always practicable for a worker to relocate for a job (the
Tanaka view); (2) that worker preference about where to live may be
considered in determining whether relocation is practicable, but that

\textsuperscript{219} Horizontal Merger Guidelines, U.S. Department of Justice and the Federal
Trade Commission § 1.21 (Geographic Market Definition, General Standards),
see also Fed. Trade Comm’n v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir.
1995); United States v. Mirant, 266 F.Supp.2d 1046, 1056 (N.D. Cal. 2003);
Defendants-Appellees Major League Soccer’s Brief to the United States Court
and Appeals, First Circuit, Fraser v. Major League Soccer, 2001 WL 36006544,
at *37 (2001) (stating that the District of Massachusetts in Fraser v. Major
League Soccer defined the relevant geographic area as the “area within which
MLS faces competition and to which players can turn, as a practical matter,
for alternative opportunities for employment as professional soccer
players.”).

\textsuperscript{220} See generally Fed. Trade Comm’n v. Freeman Hosp., 69 F.3d 260, 269 (8th
Cir. 1995) (citing Morganstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994);
Bathke v. Casey’s Gen. Stores, Inc., 64 F.3d 340 (8th Cir. 1995); see also
Plaintiff’s Breach to Supreme Court, Fraser v. Major League Soccer, at 77a
(Appendix E: Verdict on Special Questions to the Jury) (explaining that, in a
sports antitrust case involving the professional soccer labor market, the
relevant geographic market is the market in which one could turn “as a
practical matter” for opportunities of employment).
preference is never alone determinative (the Fraser view); and (3) the view that it is never practicable to require a worker to relocate to overcome a restraint imposed by employers (the Worker’s Rights view).

Whether the market for men’s basketball labor is found to be international would depend upon which of these views a court adopts.

1. The Tanaka View: Worker Relocation is Always Practicable

The view that worker relocation is always practicable has been adopted by at least one court, the U.S. Court of Appeals for the Ninth Circuit, in the case Tanaka v. University of Southern California.222 There, the court disregarded a plaintiff women’s collegiate soccer player’s preference to only accept employment near her family’s home in Los Angeles, CA in favor of the view that the market for her services was national.223 In reaching this conclusion, the court in Tanaka applied case law that applied to goods markets as being equally applicable to labor markets.224

221 See infra, notes __ - __ and accompanying text.

222 Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063, 1064 (9th Cir. 2001).

223 Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (“Of course, Tanaka’s personal preference to remain in the Los Angeles area is irrelevant to the question of whether Los Angeles is an area of effective competition for the services of women’s intercollegiate soccer players.”). In finding a national (rather than local) labor for intercollegiate soccer player services, the court focused instead on the fact that Tanaka had been “heavily recruited by universities across the country.” Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063, 1064 (9th Cir. 2001).

224 See Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063, 1064 (9th Cir. 2001) (citing various cases).
Although the Ninth Circuit is traditionally perceived as a plaintiff-friendly circuit, this standard might preclude a men’s basketball player from bringing a Section 1 Sherman Act case against the NBA clubs because a court might find the NBA clubs to lack market power given the opportunity for these players to sign with teams in foreign leagues. Thus, although quotas severely limit American opportunities in both Greek and Spanish leagues, as long as a number of opportunities in the same general pay range exist in other countries such as Italy or Israel, a jury might reasonably conclude under the Tanaka standard that there is an international market for premier men’s basketball player labor.\footnote{Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063, 1064 (9th Cir. 2001).}

2. The Fraser View: Worker Preference is One of Many Factors

The second view—that worker preference should be treated as one of many factors in determining the relevant geographic market for labor—has been adopted by the First Circuit in Fraser.\footnote{Plaintiff’s Breach to Supreme Court, Fraser v. Major League Soccer, at 78a (Appendix E: Verdict on Special Questions to the Jury). According to this set of instructions, “if, despite the existence of such preferences, players will in fact seek and accept employment alternatives that are not their first preference,” then “the scope of the relevant market would be defined by what actually occurs, rather than what preferences might be expressed.” Plaintiff’s Breach to Supreme Court, Fraser v. Major League Soccer, at 77a (Appendix E: Verdict on Special Questions to the Jury).} There, the jury ultimately found that the men’s professional soccer market was international.\footnote{See Fraser v. Major League Soccer, 284 F.3d 59, 63 (1st Cir. 2001).} However, the underlying facts regarding the men’s
basketball market are very different from that of the soccer market, thus leading to the possibility for a different conclusion.

Indeed, in many ways the market for soccer labor is far more global than that for basketball labor. For example, the facts in *Fraser* indicated that over 190 of Major League Soccer’s approximately 250 players had foreign professional soccer experience (76.0% of overall), and that between 119 and 185 of the league’s approximately 250 players had “opportunities to play professional soccer in a league comparable to or better than MLS in salary and quality of play.” 228 By contrast, in professional basketball, the number of players with NBA experience who are playing abroad is just 60 of the 495 total world players with NBA experience (12.4%). 229 In addition, the court in *Fraser*, explained that roughly 35-40% of the MLS’s players had foreign citizenship. 230 By contrast, only 17 percent of NBA players were born in a foreign country. 231

Finally, while both American and foreign sports teams are likely to remain competitors in the market for premier men’s professional soccer labor, in the market for premier men’s basketball labor there is a reasonable chance that the NBA teams will soon expand into


229 See supra, notes __ - __ and accompanying text.


Europe. As the NBA expands overseas, this potentially could drive the foreign-based leagues currently operating in those markets toward bankruptcy.

3. The Workers’ Rights View: A Worker Should Never Have to Move Across State Lines to Overcome a Market Restraint

The third view, meanwhile, is that it is never “practicable” for a worker to move across national boundaries to find work, and that no American citizen should ever have to do so to overcome a concerted restraint of trade. This view has not yet been adopted directly by any circuit. However, it appears to have support in some of the most famous antitrust cases of the early twentieth century, which conclude that, as a matter of public policy, labor-side antitrust must protect workers’ rights to “secur[e] employment in [their] chosen avocation, trade and calling.” For instance, writing on behalf of the Sixth Circuit, Judge William Taft noted in the case United States v. Addyston Pipe & Steel Co. that restraints are illegal where man becomes disabled from earning a livelihood because it creates the risk of man becoming a public charge, and “deprive[s] the community of the

232 See Edelman & Doyle at 404.

benefit of his labor.”234 Thus, to the extent foreclosing U.S. market opportunities would induce some men’s basketball players to retire rather than work overseas, the Worker’s Rights view would frown upon defining the men’s basketball market as being international.

IV. Conclusion

Back in 2002, even Major League Soccer had conceded that the NBA clubs do not compete in an international market for men’s basketball labor.235 However, over the past eight years, a growing number of American-born basketball players have rejected opportunities with NBA clubs in favor of signing with Euroleague clubs.236 In addition, an increasing number of foreign basketball players have accepted employment in the NBA.237 Thus, what was conventional wisdom about the NBA’s geographic market in 2002 may no longer be so today.

Although the NBA has not faced a labor-side antitrust lawsuit since 1987,238 whether a jury would likely deem the NBA to compete in an international market is a matter of great importance, as any belief by the NBA clubs that they would be found to compete in such a market may lead these clubs to maintain their salary caps, first-year player drafts or age/education requirements, even should the NBPA repeal its consent.

234 85 F. 271, 279 (6th Cir. 1898) aff’d 175 U.S. 211 (1899).


236 See, infra, notes __ - __ and accompanying text.

237 See, infra, notes __ - __ and accompanying text.

As a matter of law, it is unclear whether the NBA clubs compete in a global labor market. Much of the difficulty assessing this issue comes down to defining whether it is “practicable” for a men’s professional basketball player to accept employment overseas. Indeed, the issues of moving overseas are sometimes far more complicated than even moving cross-country, given the barriers that may arise in language and culture.

As a matter of fact, the issue is also far from certain. While it is certain that the market for men’s basketball player labor has far more international elements than the market for men’s football labor, the international elements of the men’s basketball market still pale in comparison to that of men’s soccer.

Indeed, at present the outcome of this issue may come down to a particular jury, as well as the particular jury instruction. Thus, based on the current split in jury instructions with respect to how to define what is “practicable”, it may be wise for any men’s basketball player seeking to bring a labor-side antitrust lawsuit against the NBA clubs to avoid bringing suit in the Ninth Circuit, where labor-side geographic markets have been applied most broadly. In addition, should a plaintiff bring suit it in the First Circuit, it must be prepared to differentiate the professional basketball marketplace from that of pro soccer.