David Goodfriend
Chairman
Sports Fans Coalition
1300 19th Street NW
5th Floor
Washington, DC 20036

Sally Greenberg
Executive Director
National Consumers League
1701 K Street, NW Ste 1200
Washington, DC 20006

December 30, 2014

Chairman Patrick Leahy
U.S. Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Leahy,

The undersigned hereby respectfully provide a joint response to your letters of December 16, 2014 and the Questions for the Record from Sen. Grassley dated December 10, 2014 ("Questions").

First, in response to Question 1, the FANS Act does not condition the antitrust exemption "on the elimination of blackout requirements during contract negotiations." Instead, the FANS Act conditions the antitrust exemption on a league expressly prohibiting its television licensees from "intentionally removing" the league's games during or related to a programming carriage dispute.*

* The antitrust exemption does not apply to any professional sports league "that does not expressly prohibit sponsored telecast licensees of such league, and any agreement with any video licensee, from intentionally removing the live content of such league from a multichannel video programming distributor (as defined in section 602 of the Communications Act of 1934 (47 U.S.C. 522)), when such removal occurs during or is related to a negotiation regarding carriage of the games of such league by the multi-channel video programming distributor.'' S. 1721, The Furthering Access for Networks and Sports ("FANS") Act of 2013 (113th Cong., 2nd Sess.), at §3(a) (emphasis added).

All professional sports leagues enter copyright licensing agreements with broadcasters and pay-TV companies, usually with voluminous and detailed terms and conditions. Such copyright licensing is something with which leagues are very familiar-- we all have heard an announcer say, "any rebroadcast, retransmission, or account of this game, without the express written consent of [the league], is prohibited."

Under the FANS Act, to maintain its antitrust exemption, the league would have to include in its licensing agreements an express, written prohibition on the licensee intentionally taking down games during or related to a carriage dispute. As long as the league includes such language in its licensing agreements with broadcast networks and cable operators, the league has met its burden under the statute. If one of the league's licensees intentionally removed games in such a manner, then the league would be in a position to pursue penalties under its licensing agreement.

This is not a new concept. The Sports Broadcasting Act of 1961 ("SBA") already includes a similar provision. The statute as originally enacted conditions the antitrust exemption on professional sports leagues refraining from telecasting any games at times when college and high school teams typically play.[†] Thus, if a professional sports league chooses to schedule games at such times, in order to maintain its antitrust exemption under the SBA, its licensing agreements with broadcasters and pay-TV companies should (and probably do) expressly prohibit the televising of games at those times. The FANS Act simply takes this statutory device and applies it, not to the televising of games during college and high school games, but rather to the intentional removal of games during carriage disputes.

Second, in response Question 1(a), assuming that the leagues' licensing agreements today are silent with respect to intentional removal of games during carriage disputes, and assuming that the leagues wish to maintain their gift from the American taxpayer and voter of an exemption from criminal and civil antitrust liability, then yes—the leagues would have to exercise their rights under the existing contracts' "force majeure" clauses, which generally allow parties to revisit contractual terms when an act of government so necessitates. It should be noted that this is a fairly common occurrence and precisely why such clauses are included in almost all contracts.

Third, in response to Question 1(b), no, the legislation does not impose a duty or requirement on the leagues that they are unable to enforce due to lack of privity with a third party. As explained above, all the league must do is to include in its licensing agreements with TV providers a prohibition on the TV provider itself (the licensee) intentionally removing games during carriage disputes. Privity is met.

To illustrate, suppose the NFL enters a licensing agreement with CBS that includes the prohibition on taking down games during a carriage dispute. Suppose further that CBS, during a carriage dispute with cable operator Mediacom, takes down its CBS programming from all

[†] *See* 15 USC §1293.

Mediacom systems. The NFL might notify CBS that unless CBS offers to restore carriage temporarily during the broadcast of the forthcoming NFL game, it will be in violation of its NFL licensing agreement. If CBS offers Mediacom such interim carriage to the NFL's satisfaction, no violation of the NFL/CBS licensing agreement has occurred (regardless of whether Mediacom accepts the offer of temporary carriage during the NFL game). The FANS Act provision is met because the NFL included in its contract with CBS a prohibition on taking down games during contract disputes and has reasonably enforced that contract provision.

This entire fact pattern would arise under the FANS Act only if the NFL had been sued for antitrust violation by a third party, who asserted that the NFL's antitrust exemption under the SBA did not apply because the NFL did not sufficiently prohibit its licensee (CBS) from taking the NFL game off Mediacom. This would become a fact inquiry for the court to determine if the NFL had, in fact, met its burden under the FANS Act to prohibit the intentional removal of the NFL game by the licensee, CBS. If the court finds that the NFL, through its licensing provision and enforcement thereof, had sufficiently guarded against the intentional removal of the game by CBS, then the court would rule that the antitrust exemption remains in place for the purpose of the antitrust case in front of it.

Please let us know if you have any further questions. Thank you.

Sincerely,

David R. Goodfriend
Chairman,
Sports Fans Coalition

Sally Greenberg
Executive Director,
National Consumers League