context are: (1) the extent of viewer interest (particularly in "neutral games"); (2) audience demographics and ability to attract advertisers; and (3) broadcasters' motivation to televise.

a. Viewer Interest

Neither cable programmers nor broadcasters invest capital cavalierly. Only when viewer interest reaches a given threshold does it become economical for broadcasters and cable programmers to consider carrying a given sporting event. To be sure, broadcasters and cable programmers become interested in a sporting event at different levels of viewer interest. This is a reflection of the fact that the number of programming slots cable must fill far exceeds broadcasters' demand for programming. As a result of its greater channel capacity and correspondingly higher demand for sports programming: (1) cable carries sports broadcasters never did, (2) cable carries sports (such as hockey and boxing) that broadcasters have abandoned as uneconomical, and (3) cable offers enhanced coverage of sporting events also carried by broadcasters (such as early round coverage of professional golf and tennis events).

Of the sports targeted in the Notice for scrutiny by the Commission[17] only one, professional hockey, has no substantial

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[17] See Notice at ¶ 5.

broadcast network exposure. The reason appears to be a lack of viewer interest in sufficient numbers to interest the networks. As John Ziegler, Jr., former President of the National Hockey League, stated:

> [T]here are many areas where our fandom is numbered in the hundreds, not thousands.... As a consequence, the major U.S. networks -- given their need to offer programming of relatively equal interest to their affiliated stations in all parts of the country -- are not a near term prospect for the NHL.[18]

The extent of viewer interest also plays a large role in determining the programming patterns of major sports which do have national network distribution. Such national network distribution encompasses widely varying percentages of all the games available for airing. In the case of professional football, the NFL's network contracts cover over 90% of its regular season games.[19] For professional baseball precisely the opposite is the case. In 1990, Fay Vincent, Jr., then Commissioner of Major League Baseball, pointed out that baseball "[i]s followed by its fans principally through local game telecasts."[20]

Former Commissioner Vincent explained the low percentage of games covered by baseball's CBS network package as a reflection

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[18] See 1990 House Hearing at 81.

[19] See 1990 House Hearing at 27.

[20] See 1990 House Hearing at 32 (statement of Francis T. Vincent, Jr.).

of viewer preference for local versus national telecasts.[21] This viewer preference for local games is undoubtedly a result of the diminished importance to a local fan of "neutral games" -- games in which his or her favorite team is not involved. Professional football's shorter season (in terms of number of games) and its expansive playoff structure may make neutral games more appealing. And this viewer interest in neutral games makes comprehensive football broadcast packages more appealing to the networks. Also, in the case of professional football, the networks do not face same sport competition from local broadcast programming.

Baseball will negotiate a new network TV contract after the current CBS contract expires at the end of the upcoming season. And because of falling ratings "the owners have been told to expect a reduction in revenues of up to 50 percent from the next network TV deal."[22] As a result, baseball is considering doubling its post-season play from four teams to eight, as well as allowing limited interleague play. "Rekindling the fans' interest . . . is what this plan is all about."[23] Stimulating

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[21] Id.

[22] Id. See also, Matt Stump, Sports Rights Prices: Out of

viewer interest by keeping more clubs in contention for playoff spots should boost ratings (particularly for "neutral games"), as should the possibility of "dream matchups" that interleague play would bring. This proposed restructuring demonstrates again the phenomenon of layering. Sports leagues, responding to changing economic conditions and fan interest will increasingly consider new packaging concepts designed to pique viewer interest and thereby optimize their television distribution revenues.

b. Audience Demographics and Advertiser Interest

The above discussion of viewer interest assumes that viewers are fungible from the vantage point of the advertisers who purchase air time to gain access to them. Clearly this is not the case. Different types of people watch different types of sports and advertisers are far from indifferent about the distinguishing characteristics of various sports audiences. Because the advertiser is the rights buyer's silent partner at the negotiating table, the rights buyer (whether a broadcaster or cable programmer) ignores audience demographics and advertiser interest only at great financial peril. And there is reason to believe that advertisers will bring additional power to bear in the future. Assessing the situation in 1990 an advertising trade publication noted:

> [W]hen compared to regular spot buys, etc., escalation of media pricing beyond general

> media inflation has increased the 'premium' required for advertiser participation [in sports programming] . . . . The basic rationale for those increases has been higher player salaries leading to higher rights fees leading to higher ad rates . . . Stations can no longer count on passing along any increases in rights fees. They . . . have to convince team owners that rights fees have to stabilize. If stations don't, they may jeopardize their financial viability because advertisers will not support uncontrolled greed.[24]

Advertiser interest in the sports programming is dynamic and shifting. Changes in product marketing strategies bring new advertisers in, cause others to shift their sports advertising priorities and cause still others to leave the field entirely. The extent of this fluidity and its effects on sports programming should not be underestimated. Chevrolet was a major sponsor of 50 local sports franchises in 1983. By 1990 that number had dwindled to less than twelve.[25] In 1989 several local baseball broadcasts lost their beer sponsors. Notwithstanding that observers found it "astounding," there were no other beer sponsors eager to replace them.[26]

Moreover, advertiser withdrawal is sometimes responsible for a broadcasters' decision to abandon a sport. Kevin Monahan, NBC's director of business development, explained the network's

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[24] See Robert I. Mitchell, II, Mediology: Crying Foul; As They See It, Marketing & Media Decisions, January 1990, at 69.

[25] Id.

[26] Id.

decision to abandon boxing in part on the reluctance of many advertisers to sponsor boxing telecasts.[27]

Such upheavals in sports advertising serve to blunt the establishment of predictable sports programming patterns and trends. Given the availability of other outlets for an advertiser's marketing dollar, the Commission should not assume that advertisers will pay whatever broadcasters and cable programmers see fit to charge. Instead, it should acknowledge that the negotiations of rights fees involves a triangular relationship between the sellers of rights, the buyers of rights -- broadcasters and cable programmers -- and advertisers.

As The New York Times observed earlier this month:

> Everybody knows that the rights fees now paid for baseball, football and the Olympics have been too high. Everybody, that is, but the sports rights-holders themselves. . . . [Advertising executive Dick Hobbs commented,] 'We're not at all convinced the owners of the various franchises in the sports know this is the case. We keep hearing about the huge increases in player salaries, leading us to believe that the owners are of the mind that they can continue to get rights fees increases.'[28]

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[27] See R. Thomas Umstead, Executives: Cable Could Be Doing Harm to Boxing, Multichannel News, March 22, 1993, at 21.

[28] See Richard Sandomir, Hard Ball, Networks, Let's Play Hard Ball, The New York Times, March 9, 1993, at B12.

c. Broadcasters' Motivation to Televise

Broadcasters are limited to a single channel in a geographic area. The amount of sports programming a broadcaster will carry is constrained by the need to create a programming mix that includes non-sports entertainment programming. Certain cable programmers, such as HBO, face a similar dynamic --attempting to present a balanced programming mix which includes both sports and non-sports programming. However, other program services, such as ESPN and regional sports networks, generally offer only sports and, therefore, they are not confronted with the need to balance non-sports programming and restrict the acquisition of sports programming. Further, while cable operators also seek to present subscribers with a mix of entertainment, sports and other types of programming, they do so in the context of multiple channels. This is a very different dynamic than programming only one channel. Moreover, broadcasters for the most part are confronted with the necessity of programming for mass audiences, while cable operators can program for narrower, more targeted audiences. This, too, results in different approaches to sports programming.

Many sports rights-holders place significant importance on live attendance, and therefore, many sports events are scheduled during the weekday evening period which is television's "prime time." This restricts the amount of sports on broadcast television because it forces broadcasters to choose between their

most attractive and popular entertainment programming and sports programming.

E. The Extent of Programming Migration Within a Sport is Likely to be Different for Local, Regional and National Programming

The variety of internal and external factors which impact each sport make it necessary for the Commission to explore not only the behavior of broadcasters and cable programmers, but the goals and practices of rights-holders and advertisers as well. This study proceed on a sport-by-sport basis for each sport presents unique economic and structural arrangements. But because the economic arrangements also vary depending on the viewing market being examined, the study should analyze local, regional and national programming separately.

The level of viewer interest for a given telecast varies so radically among local, regional and national audiences that from programming and marketing perspectives the same game is really three distinct products. While scheduling, playoff structure, and other factors accentuate this differential viewer interest in some sports and minimize it in others, it remains a dominating influence in sports programming.

The sports leagues have varying philosophies regarding the extent to which their programming strategies should emphasize local coverage of local games. These philosophies are no doubt a function of a variety of factors and we leave it to the leagues

to describe the forces that motivate their thinking in this regard. But it is important for the Commission to realize that the leagues' philosophies determine the structure of their rights offerings and ultimately the broadcast-cable programming mix.

Professional baseball and hockey are two sports which believe in the primacy of local game programming. Then Commissioner of Major League Baseball Fay Vincent told Congress:

> It is important to emphasize at the outset that Major League Baseball, unlike many other sports, is followed by its fans principally through local game telecasts. Television ratings over the last decade have revealed the preference of our fans for local telecasts versus national telecasts. . . .[E]specially through the great flexibility that has been preserved for fans to see their home teams on local stations, televised Baseball is now far more appealing to a greater number of fans.[29]

And former National Hockey League President, John A. Ziegler, Jr., stated to Congress:

> [T]he NHL recast its broadcast strategies over a decade ago. First, we elected to place highest priority on improving service to fans in the core areas where hockey is known and played. To do this we enacted internal legislation which encouraged our U.S. teams to expand the frequency and geographic range of their local team packages.[30]

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[29] See 1990 House Hearing at 32-34 (statement of Francis T. Vincent, Jr.).

[30] See 1990 House Hearing at 82 (statement of John A. Ziegler, Jr.).

Professional football's programming philosophy places much greater emphasis on regional and national coverage. In any given geographic area, most of the NFL games televised are nationally or regionally broadcast games not involving that area's home team. This emphasis on national and regional telecasts exists notwithstanding the fact that all NFL games are broadcast in the home city of visiting teams.[31]

The differing programming philosophies and organizational characteristics of various sports produce a different broadcast-cable programming mix for local, regional and national programming. In addition, the three external factors discussed above as affecting the broadcast-cable sports programming mix play out differently in different localities. Viewer interest and demographics vary from one locality to the next. In localities with poor demographics from a broadcast advertiser's perspective, the amount of sports programming appearing on broadcast stations is apt to be reduced. It is for these reasons that teams such as the NHL's Pittsburgh Penguins and Minnesota North Stars rely heavily on cable contracts. And if localities are characterized by a significant degree of cable penetration, the sports team is more likely to seek out a cable contract as an alternative source of revenue.

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[31] This requirement applies to both broadcasters and cable programmers alike. NFL games televised by cable programmers are shown on broadcast stations in both the home and visiting teams cities.

Just as viewer interest and demographics vary from locality to locality, so does the broadcasters' motivation to televise. A given locality has only a handful of stations. This scarcity of stations and the paucity of time slots it creates results in broadcasters in different localities valuing sports programming differently. Moreover, competitive factors vary from locality to locality. Localities with a full complement of professional sports teams (perhaps including multiple teams in the same sport) are more likely to produce more games than the local broadcasters want to televise. This is why a given sport might have much greater broadcast exposure in one locality than another, despite the existence of similar viewer demographics.

The Commission's study should treat local, regional and national sports programming separately. And when examining sports programming on the local level the Commission should be constantly cognizant of the extent to which these localities vary. Aggregating what are in reality discrete, highly unique local effects would produce a homogenized result that would not be accurate, descriptive or useful.

F. Measurement of Migration Should Not be Based Solely on Aggregate Number of Games

The Commission proposes to measure migration separately for regular season and post-season games by "[c]omparing the total quantities of . . . games exhibited on broadcast and non-

broadcast media from year to year. . . ."[32] Time Warner believes that the measurement should be further refined in several respects. First, the programmer, the viewer, and the advertiser all distinguish between post-season games and championship games. The Commission should also.

Second, regular season games should be broken down by audience type (home, away, neutral). The primacy of the leagues' programming philosophies in determining the ultimate broadcast-cable programming mix makes such a distinction essential. The leagues deal differently with home, away and neutral games when selling rights. Only by measuring migration within each category can the Commission hope to measure the effect of such league policies. Moreover, from a consumer welfare standpoint, home, away and neutral games present different considerations.

G. Qualitative Differences in Coverage Must Be a Part of the Commission's Analysis

A numerical comparison of the number of sports events on broadcast television and cable will not reflect any qualitative differences in coverage. From the viewer's perspective, cable programmers and broadcasters can enhance a sports telecast or detract from it. The frequency of commercial interruption, the existence and duration of pre and postgame telecasts and the

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[32] See Notice at ¶ 8.

quality of the production affect viewer enjoyment and hence consumer welfare. The Commission should seek data from cable programmers and broadcasters alike to determine the extent to which their coverage of the same sport events differs. Moreover, the Commission should consider the extent to which the production quality of broadcast sports coverage has been maintained or enhanced (even in the face of higher rights fees) because cable has become a commercially viable alternative outlet for sports programming.

The Commission should also consider the impact of the broadcasters' economics on the starting times of championship events. The first pitch in World Series games in not thrown until 8:45 pm EST and the games are approximately three hours in length. As a result of late starting times, parents are faced with the prospect of denying their children the opportunity to watch marquee events (like the World Series or Major League Baseball's All-Star Game) or sending them to school bleary-eyed. The Republic will stand regardless, but it is undeniable that a valuable heritage is endangered as a result of early-inning demographics.

H. It is Appropriate that the Primary Focus of the Commission's Study be on Professional Baseball, Basketball, Football and Hockey, and on College Basketball and Football

Time Warner believes that the Commission's tentative conclusion to focus its study on the major professional and collegiate sports is appropriate. They are the behemoths of the sports programming landscape in terms of both viewer interest and the distribution of sports programming dollars.

But while the popularity and economics of these sports compels their examination, there sheer size obscures trends that affect them but are more readily observed elsewhere. Thus the Commission should not ignore sports such as boxing, golf and tennis. However, it must be careful not to impose conclusions it derives from studying the major sports which are the focal point of its study on these other sports.

III. Defining Characteristics of Sports Programming from 1980 to the Present

A. Broadcasters Have Abandoned Certain Sports Altogether

Earlier this year HBO marked the twentieth anniversary of its carriage of professional boxing. In those 20 years HBO has televised over 200 matches from all over the world, including 109 world championship prizefights. Together, HBO and TVKO televise about 20 professional prizefights each year.

The networks have determined that prizefights do not command a sufficient audience to justify airing them. As a consequence, CBS and NBC will not air any prizefights in 1993 and ABC is scheduled to air only five. By comparison, HBO, ESPN, Showtime and USA will among them televise over seventy fights. If cable did not exist, the only real viewing opportunity a fight fan would have is closed circuit television.

Boxing is not the only sport that broadcast TV has abandoned as a matter of economic self-interest. Tennis used to be a Saturday afternoon network staple. Now, a tennis fan cannot even find all four of the Grand Slam events on broadcast television. Gymnastics, other than at the Olympics, has met a similar fate. And professional hockey has likewise been abandoned by the networks:

> [T]he major U.S. networks . . . are not a practical near-term prospect for the NHL. [B]y reason of market forces [the NHL] has been excluded from the extraordinary growth in revenues derived from major network agreements in the sports business. As a result, the NHL has vigorously searched for and continues to welcome alternative forms of program distribution.[33]

The economic decision by the commercial broadcasters not to carry a certain sport clearly has a dramatic impact on the mix of broadcast and cable carriage of sports programming. Just as

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[33] See 1990 House Hearing at 81 (statement of John A. Ziegler, Jr.).

clearly, a decision by cable programmers to carry these abandoned sports is very much in the public interest. But for cable carriage, consumers likely would have only an extremely limited opportunity to view boxing or hockey in their homes.

B. Broadcasters Have Partially Abandoned Professional Baseball and Football

The commissioners of professional baseball and football have testified that broadcasters are unwilling to carry as much of their respective sports as they would like to sell. Former Commissioner Vincent stated:

> A problem arises, sir, because the local free television outlets may not be interested in our games. We would like very much to expand free television in some jurisdictions, and simply do not have a market available for us to do so. We expect this problem will continue to exacerbate, and we are frankly concerned about it. . . .Each team could have 130 games on free television if they could find someone to show them. . . .
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> The elimination of a national, exclusive telecast every Saturday afternoon, was, in part, a response to steadily declining national ratings. It was also the result of a competitive bidding process in which only one network expressed any desire to telecast a baseball game every weekend.[34]

Although the dollar amounts involved in the sale of programming rights for major sports are massive, the number of

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[34] See 1989 Senate Hearing at 28-37 (testimony and statement of Francis T. Vincent, Jr.).

transactions is exceedingly small. This gives the Commission an opportunity to examine rights sales at the micro level. If the Commission does so, it will find that such sales follow a single pattern: The rights-holder and the broadcaster negotiate a deal in which the broadcaster determines how much product it is willing to buy. Once a price for this amount of product is agreed upon and the sale completed, the rights-holder offers the remaining unsold product to cable. Rights-holders lack either the incentive or the power to force broadcasters to buy more product than they feel they can profitably utilize.

Prior to the 1980's, fear of overexposure, the lesser level of cable penetration and a positive financial picture meant that sports leagues and teams had relatively little incentive to aggressively market their excess product. As labor demands and financial pressures continued to increase during the 1980's, this dynamic changed. Sports leagues and teams now have a powerful incentive to aggressively exploit every available programming opportunity. At the same time, cable's increased penetration level made it a viable outlet for local, regional and national sports programming.[35]

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[35] Between 1980 and 1991 the percentage of television households subscribing to basic cable service rose from 22.6% to 60.6%. The number of television households now passed stands at 96%. See National Cable Television Association, Cable Television Developments (October 1992) at 1-A and 2-A.

C. Economic Forces Have Operated to Maintain a Balance in the Distribution of Sports Programming Between Cable and Broadcast

Some broadcasters would have the Commission believe that sports programming is marching inexorably from broadcast to cable and only government intervention can prevent a "sports blackout"[36] on broadcast television. But the growth in the amount of sports programming appearing on broadcast television belies this conclusion. As does the immense collateral value of network television to a sport. As the president of the NHL's marketing arm recently noted:

> The value of network television for a sport [is that] it has topspin in so many areas -- the development of stars, of licensing, of image. It truly becomes an advertising vehicle.[37]

The vitality and discipline of the sports programming arena are forcefully demonstrated by two other phenomena: (1) so-called "reverse migration"; and (2) the less than optimal results of certain cable sports programming projects. As the Commission noted,[38] the early rounds of the NCAA basketball tournament recently moved from ESPN to CBS. Other sports could follow suit.

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[36] See 1989 Senate Hearings at 102 (testimony of Edward O. Fritts, President of the National Association of Broadcasters).

[37] See Stuart Elliott, The Media Business -- Advertising, The New York Times, January 6, 1993, at D-17.

[38] See Notice at footnote 19.

And pay-per-view telecasts of college football and the Olympics have not been financial successes.[39]

The economics of cable sports programming is not universally positive. Moreover, broadcasters are fully able to compete effectively with cable programmers when they believe carriage of sports is in their own economic interest. These ebbs and flows, these successes and failures, prove that there is a flourishing and competitive sports programming business.

The Commission should not, therefore, recommend any limits on cable carriage of major sports. Such action is not only unwise but unnecessary. Unwise because it would deprive viewers of programming choice; unnecessary because the carriage of sports programming is appropriately and competitively balanced.

IV. The Future of Sports Programming

Sports programming in the 1980's was characterized by three simultaneous developments: a large increase in the demand for sports programming, a corresponding increase in the supply of sports programming (both on broadcast and cable), and an even larger increase in the cost to broadcasters and cable programmers

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[39] See e.g., Mark Heisler, NBC Wanted to Get the Games, But it Turned out to be Triple Jeopardy, Los Angeles Times, August 18, 1992, at C1; Olympic Television: View from the Booth 'We Were Wrong', Atlanta Constitution, August 7, 1992, at E2.

for carriage rights as player salaries soared.[40] There is no reason to believe that the demand for sports programming will abate. There is every reason to believe that broadcasters and cable programmers will meet this demand with additional and enhanced sports programming to the benefit of consumers.

A. The Nature of Rights Negotiations Works Against the Establishment of Sports Programming Trends

It is not an exaggeration to say that the major sports programming business reinvents itself with each new rights negotiation. Because rights are sold on a multi-year basis, the business environment in which a rights deal is negotiated often differs from its predecessor more than it resembles it. Rights negotiations are truly discrete events. And a given negotiation is much more likely to be influenced by concurrent negotiations

Rights sales do not follow settled patterns because the relevant actors occupy overlapping but not concentric economic spheres. Sellers bring changing labor markets and organizational structures to the table. Buyers bring changing competition, changing programming alternatives and changing degrees of advertiser interest and willingness to underwrite sports programming. This makes it impossible to predict what the next deal will look like even though both parties come to the table with intimate knowledge of whether the last deal was a winner or loser for them.

Moreover, a certain amount of the unpredictability of rights deals stems from cyclical economic forces. Many rights buyers (both broadcasters and cable programmers alike) share the view of Turner Broadcasting System's Terry McGuirk who stated: "The next time around, there is going to be an adjustment [of rights fees]. But while today's sports rights may be out of sync, its all very cyclical."[41] These cyclical forces are well understood, even if the timing of the cycles is not.

B. Recent Significant Changes Make Predictions of Sports Programming Trends More Difficult

The universe in which sports programming rights are bought and sold is about to undergo a period of dynamic change. The

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[41] See Matt Stump, Sports Rights Prices: Out of Sync, Broadcasting, June 10, 1991, at 43.

effect these changes will have on the outcome of rights negotiations is, to be frank, unknown. But what is known with absolute certainty is that they make prediction hazardous.

It will be several years before the combined effect on sports programming of implementation of the Cable Act and major structural changes in both professional football and baseball are fully apparent. Time Warner speculates below on the effect of these changes and we are sure other commenters will do likewise. The importance of these changes from the perspective of the Commission's study is that they will call into question over the short and particularly the long-term the efficacy of conclusions or recommendations based on observations of a sports programming universe that has since been radically altered.

1. The Cable Act May Bring Change to Sports Programming

Some broadcasters have long argued that they cannot obtain rights to sports programming sought by cable programmers because they have a single source of revenue (advertising) and cable operators have two (advertising and subscribers).[42] To remedy

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[42] See e.g., 1989 Senate Hearing at 113-114 ("One reason that more sports are moving to cable is because of cable's ability to outbid local broadcast stations for the rights to air sporting events. And that ability to outbid broadcasters stems from a basic difference between cable and broadcasting: cable operators have two streams of revenue to support their operations, advertising and subscriptions, while broadcasters must rely only on advertising.") (statement of Edward O. Fritts, President of the National

the alleged "imbalance," they proposed retransmission consent and cable rate regulation. The intensity with which broadcasters believe that retransmission consent is the answer to "sports siphoning" is best expressed in their own words:

The President of the National Association of Broadcasters told Congress:

> We need a fair system to let us compete, and one which protects the fans as well. We want to offer three ideas or proposals for this subcommittee to consider . . . . And, third, you could create a plan to compensate broadcasters for the programming which cable now retransmits at very little cost. By establishing this fee, cable and broadcasters could be brought more into line in terms of leverage.[43]

And in response to questioning from Senator Metzenbaum, Preston R. Padden, the President of the Association of Independent Television Stations, Inc. testified:

> But the real answer to your problem of aren't we just complaining that somebody is competing with us -- there is an underlying issue here that I referred to, and Mr. Fritts mentioned it, of the broadcast subsidy of cable.

Association of Broadcasters); 1989 Senate Hearing at 159 ("Cable operators pay cable program services for the right to carry those services . . . . That charge is, of course, merely passed on to the cable subscriber. This pass-through of hundreds of millions of dollars provides the margin necessary for cable programmers to out-bid broadcasters for many sports-rights.") (statement of Preston R. Padden, President of the Association of Independent Television Stations, Inc.).

[43] See 1989 Senate Hearing at 103 (testimony of Edward O. Fritts) (emphasis supplied).

> I mean these folks come in here today and tell you that it is just a free market and we ought to step up to the plate and bid more. But there is an ugly little secret in the Copyright Act . . . that enables the cable industry to take all of our programming . . . and they don't share one nickel of that money with us.
>
> **SENATOR METZENBAUM.** If that copyright exemption were changed, what do you see as the impact?
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> **MR. PADDEN.** The impact would be simple. If a cable operator in New York wanted to carry channel 11, he would have to pay channel 11. So channel 11 would then have a second revenue stream to supplement its advertising revenues, just like ESPN does, and then channel 11 would be able to bid on a more nearly equal footing for the Yankee rights.[44]

The Cable Act gives broadcasters retransmission consent and regulates cable rates as well.[45] Whether these provisions will ultimately alter the sports programming mix remains to be seen. If the broadcasters are correct in their premise that the revenue structure of the cable industry has enabled cable programmers to systematically outbid broadcasters, retransmission consent will, as they say, level the playing field. If, on the other hand, the broadcasters simply do not want to increase the number of programming slots they devote to sports programming the

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[44] See 1989 Senate Hearing at 221-222 (testimony of Preston R. Padden).

[45] See Cable Act at §§ 3 and 6. Time Warner is currently challenging the constitutionality of certain provisions of the Cable Act, including retransmission consent, in federal court. See Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C. filed November 5, 1992).

broadcast-cable sports programming mix will not be greatly affected by retransmission consent.

In addition, the Cable Act and the Commission's implementing regulations likely will trigger changes in the cable programming business. Thus, provisions in addition to retransmission consent, such as rate regulation, program access and ownership rules have the potential to impact indirectly the carriage of sports on cable television.

2. Professional Baseball and Football Are Undergoing Profound Changes that Make it Difficult to Predict Future Sports Programming Trends

The recent restructuring of professional football's labor arrangements and the possible realignment of Major League Baseball are sources of potentially fundamental change in sports and sports programming. As is the case for the Cable Act, the effect of these changes on sports programming will not be known for at least a few more years. If professional football free agency operates to increase salaries, the NFL might reconsider its current programming strategy. If the contemplated Major League Baseball realignment occurs, baseball will have more playoff games to sell as well as inter-league games. In addition, the increased number of games against opponents in close geographic proximity might create new regional broadcast and cable programming opportunities. It is unknown how these