

1 previously negotiated and executed contract (S.A.C. ¶ 41 and ¶41
2 of PAC-10's Answer to S.A.C., Hansen Depo. Ex. 9). Pursuant
3 thereto, Defendant ABC owns the rights to a minimum of 15 PAC-10
4 and BIG-10 exposures⁸ per season. (S.A.C. ¶ 42 and ¶42 of PAC-
5 10's Answer to S.A.C.)

6 On the west coast there are four (4) time windows, each
7 of approximately 3½ hours duration: 9:45 A.M.; 12:30 P.M.; 3:30
8 P.M.; and 7:00 P.M. (Hansen Depo. p. 93 ll. 22-25)⁹ For games
9 originating on the west coast, however, the 9:45 A.M. window is
10 not a viable option for a broadcaster because it is unrealistic
11 to expect fans to attend a game starting that early. (Hansen
12 Depo. p. 24, ll.6-18; p.100, ll.5-21)

13 Therefore, over a 12 week season there are three viable
14 windows per Saturday or a total of 36, 3½ hour windows
15 potentially available for broadcasters like plaintiff. ABC has
16 the right of first selection from the entire PAC-10 and Big-10
17 schedules. With the right to 15 exposures over the course of the
18 season, ABC was permitted three-doubleheaders in 1991. On three
19 occasions during the season, therefore, ABC could telecast two
20 exposures in two separate windows. (Hansen Depo. Ex.3, pp. 92-
21 93) When ABC's 15 exposures of ABC are combined with the 12
22 exposures allocated to PTN (and its sublicensee, ESPN) 27 of the
23
24

25 ⁸ "Exposure" is a national "release". (telecast) of a single
26 game, or multiple games distributed regionally. Hansen
27 Depo., Ex 3, p.1 ¶ 1(b).

28 ⁹ All time references are to Pacific Standard Time (PST).

1 total 36 PAC-10 windows are contractually committed.¹⁰
2 Therefore, broadcasters such as plaintiff, have potentially less
3 than one window per week in which to broadcast a game involving a
4 PAC-10 opponent and they may select only after ABC, PTN and ESPN
5 have selected. Further, on any given Saturday in 1991, all four
6 windows could have been filled by a combination of ABC, PTN and
7 ESPN (Hansen Depo., pp. 14-20, ll. 17-22, p.99 ll. 17-22; and
8 Exhibits 1, 2 and 3 thereto).

9 The process is further complicated, however, by the
10 fact that, with respect to most of the games, ABC selects only 12
11 days before the telecast and on 3 occasions during the season ABC
12 can wait until only 6 days before the telecast to make its pick.
13 PTN or ESPN usually make their selection within 24 hours of ABC's
14 selection. (Hansen Depo, pp. 156-157 and Exhibit 3 thereto, p.
15 6, ¶ 3(d)) Therefore, even as to the nine (9) potentially
16 available windows, any given window may not be available because
17 of the ability of ABC to change its mind as late as 12, or
18 sometimes 6 days before the telecast. Obviously, this poses a
19 scheduling nightmare for broadcasters who need to promote the
20 game and sell commercial time, and, therefore, impracticality
21 eliminates potential windows.

22 In 1989, Defendants PTN, CVN and ESPN contracted with
23 Defendant PAC-10 through the 1994 season. The contract includes
24 an option which could add the 1995 through 1998 seasons.
25 Pursuant to this contract Defendant PTN will offer ten (10) PAC-

26
27 ¹⁰ ESPN has an option to acquire 2 additional exposures for
28 the 1994 season. If exercised, 29 of 36 windows will
be pre-comitted.

1 10 telecasts annually over the life of the agreement, with
2 Defendant ESPN currently contracting for two (2) telecasts per
3 season. (See fn. 10, supra.) Defendants PTN and ESPN cablecast
4 during both the 3:30 and 7:00 p.m. windows and have exclusivity
5 except to the extent that both ESPN and PTN cable carry games
6 concurrently. The PAC-10 received \$4.5 million for the 1989
7 season, and if the option is exercised to extend the contract to
8 10 years, the total contract value will be \$66 million, or an
9 average of \$6.6 million annually. PTN and ESPN receive second
10 selection priority behind Defendant CAP CITIES/ABC and ABC
11 Sports. (Hansen Depo, Ex. 2)

12 The exclusivity windows of Defendants ABC, PTN, and
13 ESPN extend from 12:30 p.m. - 7:00 p.m. As a result, local free-
14 over-the-air broadcasting opportunities for broadcasters such as
15 Plaintiff are few and far between.

16 Because of their preclusive contracts with Defendant
17 PAC-10, non-defendant/co-conspirators BIG-10 and CFA, Defendants
18 ABC, ESPN and PTN control the exclusive rights to broadcast,
19 telecast or cablecast live over eighty-one percent (81%) of the
20 Division I-A football games played on Saturdays during the
21 collegiate football season between the hours of approximately
22 12:30 p.m. and 7:00 p.m. (S.A.C. ¶'s 38 and 52)

23 Defendants ABC, ESPN, PTN and PAC-10 and non-
24 defendant/co-conspirators BIG-10 and CFA have a joint interest in
25 fewer games being televised because effecting that result
26 artificially increases the price to be paid by video programming
27 vendors to conferences such as the PAC-10, or an organization
28 like the CFA, and artificially increases the advertising value of

1 the television package(s). (Hansen Depo. pp. 69-71; Mueller
2 Dec., pp. 13-17 ¶'s 24-31)

3 The general policy of Defendants CAP CITIES/ABC, ABC
4 Sports and ESPN has been to get exclusive rights to cover the
5 sports events they would show on television. They are concerned
6 that without the elimination of as much head-to-head competition
7 as possible, local stations would carry games of local interest
8 and viewers would elect to watch those games instead of the ABC,
9 ESPN or PTN games. Because games of local interest frequently
10 garner higher ratings in the local broadcast areas, defendants
11 want to eliminate those telecasts in order to preserve and
12 enhance their advertising revenues from advertisers and the value
13 of the television rights package. (S.A.C. ¶ 69; Hansen Depo,
14 pp.73, l.20 - pp. 75, l.5; Ordover Declaration, p. 8, ¶ 20)

15 There have been discussions since 1984-1985 between and
16 among Defendants ABC and ESPN on the one hand and Defendant PTN
17 on the other hand, whereby PTN would become a subsidiary of, or
18 an affiliate of Defendants ABC or ESPN in order to further
19 enhance market concentration and dominance under a single
20 corporate umbrella. Plaintiff has alleged that these discussions
21 also involved other means by which to continue the dominance and
22 control of the relevant markets. (S.A.C. ¶ 72; ¶ 14 of Answer by
23 ABC to First Amended Complaint)

24 The ultimate objective of this continuing conspiracy is
25 to "siphon" from free over-the-air broadcasters to cable
26 television all television sports rights in order to maximize the
27 number of subscribers, market coverage, revenues and profits by
28 making televised sports increasingly available on a "pay per

1 view" basis because the projected long-term revenues and profits
2 to be derived from pay per view will exceed those to be derived
3 from free over-the-air broadcasting. The precise phenomenon now
4 under study by the FCC and a conclusion obviously not lost on
5 defendant ABC given its acquisition and 80% ownership of ESPN.

6 B. MATERIAL ISSUES OF FACT EXIST WHICH
7 PRECLUDE SUMMARY JUDGMENT ON
8 PLAINTIFF'S STATE LAW CLAIMS.

9 Defendants PAC-10 and ABC¹¹ contend that Plaintiff's
10 state law claims against them cannot stand because Defendants'
11 asserted facts allegedly establish that there never was an
12 initial agreement for the live telecast of the FSU/WSU or FSU/OSU
13 games. The evidence, however, is far from undisputed.

14 PAC-10 contends that no one involved in the 'discussions
15 concerning the two 1991 football games "ever mentioned, much less
16 agreed, that the telecasts were to be live" (PAC-10's Material
17 Fact 1), and that the representatives of WSU and OSU "had no
18 reason to believe, and did not believe, that FSU wished to
19 arrange for live telecasts," but instead believed that delayed
20 telecasts were sought. (PAC-10's Material Fact 2.)

21 As demonstrated by Plaintiff's Separate Statement of
22 Facts and Evidentiary Support, however, live, not delayed,
23 telecasts had always been the custom and practice between the

24 11
25 Defendants ABC, ESPN, PTN, and CVN, INC., all rely upon and
26 incorporate the arguments and evidence presented by Defendant
27 PAC-10 on the issue of Plaintiff's state claims. Defendant ESPN
28 further incorporates the arguments and evidence proffered by ABC.
Thus, the contentions of all moving Defendants will be addressed
jointly herein.

1 parties. Indeed, within days after James Livengood first became
2 Athletic Director of WSU, on September 5, 1987, KMPH did a live
3 telecast of an FSU/WSU football game. (Livengood Depo, p. 7, l.
4 24-p. 8, l. 13; Cripe Dec. Ex. 1) As with the 1991 FSU/WSU game
5 at issue here, KMPH did not pay WSU rights fees for this 1987
6 live telecast. (Abercrombie Dec., p. 2, ¶ 3) Respecting the
7 1991 FSU/WSU game there was a mutual waiver of such rights fees
8 between FSU and WSU. (Gibson Dec., Ex. A) in Support of PAC-10's
9 Motion for Summary Judgment ("PAC-10 MSJ"))

10 By 1991, Livengood had delegated the responsibility for
11 making arrangements for televising WSU's football games to
12 Assistant Athletic Director Harold Gibson. (Gibson Dec., ¶ 2,
13 Livengood Depo, p. 38, ll. 6-11) When Scott Johnson, Assistant
14 Athletic Director for Communications and Sports Information at
15 FSU, telephoned Gibson and asked permission to televise the
16 September 14, 1991 FSU/WSU game, Gibson responded, "I don't see
17 any problems." (Johnson Depo, p. 8, l. 26-p. 9, l. 5; p. 134, ll.
18 1-11) Johnson then confirmed in a June 26, 1991 letter to Gibson
19 both permission for the KMPH telecast of the September 14th game,
20 and the reciprocal waiver of rights fees for that telecast and
21 the waiver of such rights fees for contemplated future telecasts
22 originating from FSU's home stadium. (Gibson Dec. in Support of
23 PAC-10 MSJ, Ex. A) Johnson has testified that it was his belief
24 that a live telecast was contemplated. (Johnson Depo, p. 100, ll.
25 17-21) Johnson told KMPH that KMPH had permission to do a live
26 telecast of the game. (Abercrombie Dec. II, p. 2, ¶ 11)

27 Further, on August 15, 1991, the television producer
28 for KMPH, pursuant to instructions from KMPH, Howard Zuckerman

1 and Associates, Inc., directed a letter to WSU's Athletic
2 Director. (Abercrombie Dec.II, p.2, ¶ 2) Livengood testified
3 that this letter indicated that KMPH intended to do a live
4 telecast of the September 14, 1991 game. (Gibson Depo, p. 17,
5 ll. 6-15 and Ex.11 ; Livengood Depo, p. 31, l. 24-p. 32, l. 19)

6 KMPH had, on September 21, 1985 and on October 1, 1988,
7 conducted live telecasts of FSU/OSU football games, originating
8 from OSU's home stadium (Cripe Dec., Exhibit 2). No rights fees
9 were paid to OSU by KMPH, despite the fact that the telecasts
10 were live, not delayed (Abercrombie Dec., p. 2, ¶ 3). Rights
11 fees, if paid, would have been paid by KMPH (Johnson Depo. p.22,
12 ll.11-14) In 1991, FSU's Assistant Athletic Director, Scott
13 Johnson, telephoned Mike Corwin, Assistant Athletic Director at
14 OSU, who himself had an extensive background in print and
15 electronic media, and who reported directly to OSU's Athletic
16 Director, Dutch Baughman, and handled assignments from Baughman
17 concerning the telecast of OSU's games. (Corwin Depo., p. 8, l.
18 23-p. 9, l. 22; Cowan Depo p. 11, ll. 5-23) By Corwin's own
19 testimony, "Scott was looking to telecast the OSU-Fresno State
20 football game. He referred to our past relationship in doing it
21 much along the lines that we had in the past." (Corwin Depo., p.
22 47, ll. 8-18; [Emphasis added]) As noted, previous FSU games had
23 been broadcast live from OSU. Johnson also confirmed, by letter
24 dated June 26, 1991, that there would be a reciprocal waiver of
25 rights fees with respect to the telecast of the September 21,
26 1991 FSU/OSU game. (Corwin Dec., Ex. A; Corwin Depo, p. 69, ll.
27 8-22, p.71 l.14 - p. 72, l. 2) Corwin received that letter
28 within a day or two of June 26, 1991. (Corwin Depo. p.44, ll.20-

1 23) Johnson told KMPH it had permission to do a live telecast.
2 (Abercrombie Dec. p. 2, ¶ 2) When the OSU Athletic Department
3 received a letter in mid-August of 1991 (dated August 14, 1991)
4 concerning the upcoming FSU/OSU game, there was no doubt that a
5 live telecast of the September 21, 1991 game was intended by
6 KMPH. (Baughman Depo, Ex.1 and Cowan Depo, p. 9, ll. 19-22; p.
7 22, ll. 5-18; p. 23, ll. 8-11)

8 Plaintiff has never done a delayed telecast of an FSU
9 football game. Johnson did nothing differently in arranging this
10 game than he had in 1985 and 1988. Both Johnson and KMPH
11 believed KMPH had permission to do a live telecast. (Markham
12 Dec. II, p. 2, ¶ 2; Johnson Depo, p. 26, ll. 2-6 and 10-11, p.
13 100, ll. 17-24; Abercrombie Dec. p. 2, ¶2)

14 Pursuant to the contract between FSU and KMPH dated
15 July 1, 1985, and as extended by agreement in March 1991, FSU was
16 obligated to make "all arrangements with the host institutions
17 for out-of-town games..." including those with WSU and OSU.
18 Consequently, FSU was acting as agent for KMPH concerning the
19 September 1991 games, just as it had in the past in its dealings
20 with WSU and OSU in arranging live telecasts. FSU was also
21 obligated, pursuant to its contract with KMPH, to negotiate with
22 the home team (WSU and OSU) to obtain a waiver of "any rights
23 fees payable to other teams that would normally be charged..." to
24 KMPH. Both WSU and OSU were well aware of this agency
25 relationship and indeed received consideration for the live
26 telecast of their games with FSU via the reciprocal waiver of
27 rights fee. (Markham Dec. II, p. 3, ¶ 5 and Ex.'s B and C;
28 Gibson Dec. in Support of PAC-10's MSJ, Ex. A; Corwin Dec. Ex. A)

1 a direct result of the preclusive agreements entered into by the
2 Defendants herein.

3 Defendants' disavowal of the existence of agreements for
4 the live telecast of the FSU/WSU and FSU/OSU games rests solely
5 upon the contention that there was no mutual assent to this term of
6 the contract. The lack of mutual assent cannot be established
7 merely by an after-the-fact disavowal of consent. It is the
8 outward manifestation or expression of consent which is
9 controlling, and assent to a contract term is determined according
10 to an objective, not subjective standard. Blumenfeld v. R. H. Macy
11 & Co. (1979) 92 Cal.App.3d 38, 46, 154 Cal.Rptr. 652; Stevenson v.
12 Oceanic Bank (1990) 223 Cal.App.3d 306, 316, 272 Cal.Rptr. 757;
13 American Star Ins. Co. v. Insurance Co. of the West (1991) 232
14 Cal.App.3d 1320, 1330, 284 Cal.Rptr. 45. Furthermore, as noted in
15 Restatement of Contracts 2d, Section 19, assent may be manifested
16 by conduct as well as words:

17 (1) The manifestation of assent may be
18 made wholly or partly by spoken words or by
19 other acts or by failure to act.

20 (2) The conduct of a party is not
21 effective as a manifestation of his assent
22 unless he intends to engage in the conduct and
23 knows or has reason to know that the other
24 party may infer from his conduct that he
25 assents. [Emphasis added.]

26 Thus, a "letter of intent" can constitute a binding contract,
27 depending on the expectations of the parties, and such expectations
28 may be inferred from the conduct of the parties and the surrounding

1 circumstances. California Food Corp. v. Great Amer. Ins. Co.
2 (1982) 130 Cal.App.3d 892, 897, 182 Cal.Rptr. 67; Merced County
3 Sheriff's Employees' Assn. v. Merced (1987) 188 Cal.App.3d 662,
4 672, 233 Cal.Rptr. 519; BAJI (7th Ed.), No. 10.54 (1990 New), 10.60
5 (1990 New); Corbin on Contracts , Section 18.

6 California's Civil Code Section 1636 provides that, "A
7 contract must be so interpreted as to give effect to the mutual
8 intention of the parties as it existed at the time of contracting,
9 so far as the same is ascertainable and lawful." (Emphasis added.)
10 See Ticor Title Ins. Co. v. Rancho Santa Fe Assn. (1986) 177
11 Cal.App.3d 726, 730, 223 Cal.Rptr. 175. As stated in Restatement
12 of Contracts Section 201(2), where the parties have attached
13 different meanings to an agreement or term, it is interpreted in
14 accordance with the meaning attached by one of them if, at the time
15 the agreement was made: "(a) that party did not know of any
16 different meanings attached by the other, and the other knew the
17 meaning attached by the first party; or (b) that party had no
18 reason to know of any different meaning attached by the other, and
19 the other had reason to know the meaning attached by the first
20 party." (Emphasis added.)

21 Civil Code Section 1647 specifically provides that, "A
22 contract may be explained by reference to the circumstances under
23 which it was made, and the matter to which it relates." Further,
24 evidence of circumstances is admissible if relevant to prove a
25 meaning of which the contractual language is "reasonably
26 susceptible." See Witkin, 2 Cal.Evidence, 3d, Section 984. Thus,
27 both usage of trade and custom may be looked to in order to either
28 explain terms of a contract or to imply terms where no contrary

1 intent appears from the language of the contract. California Civil
2 Code Section 1655; Rest.2d, Contracts, Section 222(1).
3 Furthermore, a course of dealing between the parties, like usage of
4 trade or custom, may be referred to in order to either determine
5 the meaning of contractual language or to annex an agreed to, but
6 unstated, term. See Rest. 2d, Contracts, Section 223 and Comment
7 b; 3 Corbin, Section 555, et seq.; 5 Williston 3d, Section 660.

8 Here, of course, Plaintiff has never done a delayed
9 telecast of any FSU football game, and the course of dealing in the
10 past between FSU, acting as KMPH's agent, and WSU and OSU was
11 likewise consistently for live, not delayed, telecasts. FSU's
12 Assistant Athletic Director, Scott Johnson, did nothing differently
13 from his past dealings between 1985 and 1990 with WSU or OSU in
14 arranging for the September 1991 games, and both Johnson and KMPH
15 clearly believed, based on the previous course of dealing, that
16 they had received permission for KMPH to conduct live telecasts of
17 these games.

18 Based on the foregoing authorities, therefore, it is
19 apparent that it is wholly insufficient to rest the argument that
20 there was no mutual assent to a live telecast based solely upon the
21 after-the-fact disavowal of assent to this term. The inquiry goes
22 to the time of the making of the agreement, and where the writings
23 are silent as to whether live or delayed telecasts were
24 contemplated, the past conduct of the parties may be looked to in
25 determining the intent of the parties. Furthermore, it is clear
26 from reference to the parties' past course of dealings that neither
27 Johnson nor KMPH had reason to know that any different meaning
28 would be attached by either WSU or OSU, while, on the other hand,

1 both WSU and OSU had every reason to know that Johnson, as agent
2 for KMPH, would expect live telecasts based upon their past
3 dealings. Under these circumstances, Defendants' blithe assertions
4 that no contract ever existed, and that therefore Plaintiff's state
5 law claims necessarily fail, is shown by the evidence to be
6 logically and legally unsound.

7 Nor are Defendants' contentions regarding their own lack
8 of responsibility for the consequence of WSU's and OSU's breach of
9 the contract at all credible. Plaintiff was not merely some
10 incidental third party to the FSU/WSU and FSU/OSU agreements. FSU
11 instead acted directly as Plaintiff's agent in this context.
12 Moreover, Defendant appears to forget the central thrust of the
13 complaint herein. Plaintiff claims that the preclusive contracts
14 entered into by Defendants were not only the direct cause of
15 Plaintiff's inability to televise the September 1991 games live,
16 but that these preclusive agreements were intended to accomplish
17 that very goal, i.e., to restrict head-to-head competition for the
18 rights to conduct live telecasts, in order to reduce output and
19 increase revenues to the parties to the preclusive contracts at the
20 expense of broadcasters such as Plaintiff. Thus, the circumstances
21 involved here are entirely distinguishable from those presented in
22 DeVoto v. Pacific Fid. Life Ins. Co., 618 F.2d 1340 (9th Cir.
23 1980), where the object of the contract was unrelated to the
24 economic interests of the third party which merely had an
25 incidental interest in having the contract performed. Here, the
26 preclusive contracts were entered into with the conscious object of
27 interfering with the ability of broadcasters such as Plaintiff to
28 compete. Consequently, the specific intent found lacking by the

1 Ninth Circuit in DeVoto is amply present here.¹⁴

2 Defendants have rested their arguments concerning the
3 state claims entirely upon a claim that no contract ever existed
4 between FSU and WSU or OSU for live telecasts. Plaintiff has,
5 however, clearly met the burden of offering evidence disputing that
6 assumption. The evidence, including the past course of dealing
7 between the contracting parties, must determine whether contracts
8 for live telecasts were formed, not the after-the-fact self-serving
9 disavowals offered here. Further, since it is the preclusive terms
10 of Defendants' own agreements which prevented the live telecasts,

11
12 ¹⁴

13 The authority offered by Defendant ABC is similarly off target in
14 that ABC presumes the legitimacy of the preclusive contracts,
15 which are at present under investigation by the FCC for their
16 possible antitrust implications and are at issue here. ABC
17 principally relies upon Imperial Ice Co. v. Rossier (1941) 18
18 Cal.2d 33, 112 P.2d 631, 633. Yet ABC ignores the fact that the
19 decision not only limits the scope of permissible competition to
20 legitimate means, but on the same page cited by ABC, states that,
21 "It is well established, however, that a person is not justified
22 in inducing a breach of contract simply because he is in
23 competition with one of the parties to the contract and seeks to
24 further his own economic advantage at the expense of the other."
25 Pentow Constr. Co. v. Advance Mortgage Corp., 618 F.2d 611, 616
26 (9th Cir. 1980), merely reiterates Imperial's requirement that
27 the means used must themselves be legitimate, while Lawless v.
28 Brotherhood of Painters (1956) 143 Cal.App.2d 474, 300 P.2d 159,
162, turned on the question of a confidential relationship
according privilege to the defendant, circumstances not present
here. Tri-Growth v. Sildorf, Burdman (1989) 216 Cal.App.3d 1139,
265 Cal.Rptr. 330, 337, does not even speak to tortious
interference arising from enforcement of a preexisting contract,
as ABC contends, but rather was a decision overturning summary
judgment on the grounds that the means used to interfere, the
misuse by an attorney of confidential information, raised triable
issues concerning the legitimacy of the attorney's conduct.
Thus, Defendant ABC not only misses the issue, but cites wholly
inapplicable authority to this Court.

1 the question then becomes one of determining the legitimacy of
2 those agreements. If, as Plaintiff contends, the preclusive
3 contracts were designed to negatively impact competition in the
4 market, Plaintiff was a target of such illegitimate business
5 practices and its state claims must go forward. Clearly, however,
6 Defendants have not carried their burden of establishing a right to
7 judgment as a matter of law on this score.

8 B. PLAINTIFF HAS ALLEGED A JUSTICIABLE
9 ANTITRUST INJURY SUPPORTED BY
10 CREDIBLE EVIDENCE WHICH RAISES
11 NUMEROUS QUESTIONS OF FACT

12 Defendant PAC-10 accuses Plaintiff of attempting to "turn
13 non-existent tort claims into an antitrust case." (PAC-10 Memo.,
14 p. 14, ll. 6-7.) Given that the evidence offered on those tort
15 claims is far from undisputed, as Defendant claimed, it should come
16 as no surprise that the PAC-10's dismissive attitude towards the
17 antitrust violations alleged in the Complaint is equally
18 unwarranted. Certainly, Congress does not agree with this
19 attitude.

20 In 1992, Congress reiterated longstanding FCC policy¹⁵
21 that, "A primary objective and benefit of our Nation's system of
22 regulation of television broadcasting is the local origination of
23 programming. There is a substantial governmental interest in
24 ensuring its continuation," (Cable Television Consumer Protection
25 and Competition Act, Pub. L. 102-385, "Cable Act of 1992" ¶

26
27 ¹⁵ FCC 60-970-91874 En Banc Programming Inquiry Before the
28 Federal Communications Commission, Public Notice-B July
29, 1960.

1 2(a)(10)) "As a result of the growth of cable television, there has
2 been a marked shift in market share from broadcast television to
3 cable television services." (Id. at 2(a)(13)) Consequently,
4 although in 1984 Congress had acted in order to protect and
5 regulate a nascent industry, by 1992 Congress stated that its
6 policy in enacting the new law was to, "(1) promote the
7 availability to the public of a diversity of views and information
8 through cable television and other video distribution media," and
9 to "(2) rely on the marketplace, to the maximum extent feasible, to
10 achieve that availability," but to likewise "(5) ensure that cable
11 television operators do not have undue market power vis-a-vis video
12 programmers and consumers." (Cable Act of 1992) Lest the point be
13 missed, Congress further expressly provided that, "Nothing in this
14 Act or the amendments made by this Act shall be construed to alter
15 or restrict in any manner the applicability of any Federal or State
16 antitrust laws." (Public 102-385 Sec. 27-28 106 Stat. 1503 1992)

17 It was in this context of mounting Congressional concern
18 over the anti-competitive threats posed by the burgeoning cable
19 industry, and simultaneously with the enactment of the Cable
20 Television Consumer Protection and Competition Act of 1992, that
21 Congress directed the FCC to undertake its study of the trends in
22 migration of sport programming from broadcast stations to cable and
23 pay-per-view systems, with specific emphasis on the very kinds of
24 preclusive contracts at issue here. In the section requiring such
25 investigation and analysis to be made, the FCC was directed to
26 consult "with the Attorney General to determine whether and to what
27 extent such preclusive contracts are prohibited by existing
28 statutes." (supra. at p.2) That the statutes in question are those

1 establishing and penalizing antitrust violations is not in doubt,
2 since in its Interim Report of July 1993, the FCC stated its intent
3 to "seek further information to enable us to apply the 'rule of
4 reason' test applied by the U.S. Department of Justice to ascertain
5 compliance with the antitrust laws." (Interim Report, p. 35, ¶77.)

6 As Dr. Dennis C. Mueller explains in his supporting
7 declaration ("Mueller Dec" filed herewith), the exclusivity
8 features of the contracts between PAC-10/Big-10/ABC and PAC-10/PTN
9 (and its sublicensee, ESPN, "PTN/ESPN") protect ABC, PTN/ESPN from
10 competition in the broadcasting or cablecasting of PAC-10 games and
11 allows them to charge their advertisers higher fees. (Mueller
12 Dec., page 13, ¶ 25). The intent to limit head-to-head competition
13 has been consistently acknowledged by ABC executives. (Hansen
14 Depo., pp. 69-74) Nor is the reason for this desire to limit
15 competition at all obscure, since games of particular local
16 interest often obtain much higher ratings than games between
17 distant rivals, even games involving "powerhouse" teams such as
18 Notre Dame or Michigan. (Mueller Dec., p. 4-5, ¶ 8; p.14, ¶ 26,
19 page 1, Markham Dec. I, pp.2-3, ¶ 5, Cripe Dec. ¶ 16 and Ex. 15)

20 The higher revenues obtained by ABC, PTN and ESPN in turn
21 allow them to pay PAC-10 more for the rights to televise its games.
22 (Hansen Depo, supra) Thus, the contracts between the defendants
23 raise revenues for those parties, but do so as a direct consequence
24 of restricting output. Thus, as Dr. Mueller has concluded, these
25 preclusive contractual provisions have the classic features of a

1 "per se" violation of the antitrust laws. (Mueller Dec. pp.13-17)¹⁴

2 However, whether a "per se" analysis or a "rule of
3 reason" analysis is employed, the focus of inquiry remains the
4 same. As the Supreme court stated in NCAA v. Board of Regents, 468
5 U.S. 85 (1984):

6 Our analysis of this case under the Rule of
7 Reason, of course, does not change the
8 ultimate focus of our inquiry. Both per se
9 rules and the Rule of Reason are employed to
10 form a judgment about the competitive
11 significance of the restraint. National
12 Society of Professional Engineers vs. United
13 States, 435 U.S. 679, 692, 98 Supreme Court
14 1355, 1365, 55 Lawyers Edition 2nd 637 (1978).

16 ¹⁶ As stated by one treatise writer:

17 In extending the "per se" rule to cover particular form of
18 combination or agreement, the courts have generally looked to the
19 existence of two elements. First, the existence of the restraint
20 must virtually always exert an anti-competitive effect on the
21 market. Where the restraint may also bestow a countervailing
22 benefit, as tying arrangements occasionally do, the courts
23 determine whether the benefit could be secured absent imposition
24 of the restraint or by less restrictive alternatives.

25 The second factor which the courts weigh in determining the
26 applicability of the "per se" doctrine is the degree of
27 probability that utilization of the restraint will lead to a
28 position of market control. This is not to say that market power
constitutes an element of a "per se" offense, but rather that the
"per se" doctrine is directed primarily at those practices which
have a strong tendency to contribute to the formation of monopoly
power. Those are the type of restraints which are most
antagonistic to the underlying policies of the Sherman Act.

27 Kintner, 1 Federal Antitrust Law, § 8,3,p.367-368.

1 A conclusion that a restraint of trade is
2 unreasonable may be based either (1) on the
3 nature or character of the contracts, or (2)
4 on the surrounding circumstances giving rise
5 to the inference or presumption that they were
6 intended to restrain trade and enhance prices.
7 Under either branch of the test, the inquiry
8 is confined to a consideration of impact on
9 competitive conditions. Id., at 690, 98
10 Supreme Court, at 1364 (footnotes omitted).

11 Defendant PAC-10 argues that the conduct challenged
12 here, the exclusivity provisions of its contracts with other
13 defendants, simply do not operate as a restraint on the free market
14 because there were a combined 56 hours of live college football
15 available to Fresno area viewers on September 14th and 21st in
16 1991. As Dr. Mueller points out, however, the market for college
17 football is simply not comparable to the market for toothpaste, or
18 indeed any other product. (Mueller Dec. pp. 4-6, ¶ 7-9) Not only
19 is the market for college football unique and distinct, but there
20 is a clear preference by viewers for competitions involving local
21 institutions. (See Mueller Dec. pp. 4-5, ¶ 8; Markham Dec. I, pp.
22 2-3, ¶ 5; Cripe Dec. ¶ 16. Ex.15) Indeed, PAC-10's assertion that
23 any one hour of live college football is interchangeable with any
24 other hour flies in the face of the Supreme court's finding that
25 advertisers' willingness to pay a premium price per viewer to reach
26 audiences watching college football because of their demographic
27 characteristics is vivid evidence of the uniqueness of this
28 product." NCAA, 468 U.S. at 111. The demonstrable viewer

1 preference for games of local interest over others is further
2 indication of the uniqueness of the product here.

3 The argument concerning the purported lack of anti-
4 competitive impact presented by PAC-10 is notably similar to that
5 presented by the CFA in defending its multi-tiered contractual
6 arrangements as products of a free market in the case of
7 Association of Independent TV v. College Football Association, 637
8 F.Supp. 1289 (W.D. Okl. 1986).

9 As evidenced by the instant case, and by the obvious
10 Congressional concern embodied in the 1992 Cable Act, this utopian
11 free market prophecy has not come true. Instead, the effect of
12 preclusive contracts has virtually eliminated broadcast
13 opportunities for local broadcasters to telecast games of high
14 local interest for their viewers and produced an unprecedented
15 increase in the dominance of network broadcasts and cable
16 carriage. (Mueller Dec. pp.10-11, ¶19; Sigouras Dec. Ex.A)

17 That this result is not responsive to viewer preference
18 is of critical concern and deemed to be of paramount importance to
19 the Supreme Court in the NCAA case.¹⁷

20 Despite PAC-10's attempt to collapse the instant case

21
17

22 "Price is higher and output lower than they would
23 otherwise be, and both are unresponsive to consumer
24 preference. This latter point is perhaps the most
25 significant, since, "Congress designated the Sherman
26 Act as a "consumer welfare prescription" Reiter v.
27 Sonatone Corp., 441 U.S. 330, 343, 99 S.Ct. 2326, 2333,
28 60 L.Ed 2d 931 (1979). A restraint that has the effect
of reducing the importance of consumer preference in
setting price and output is not consistent with this
fundamental goal of antitrust law. NCAA, 468 U.S. at
107. [Emphasis added]

1 into a mere misunderstanding concerning only two games, it is
2 obvious that the complaint is directed at the general effect of the
3 preclusive contracts in the market. As Dr. Mueller points out, the
4 anti-competitive affect of these contracts goes to all games which
5 cannot be shown during the exclusivity periods, and the market
6 analysis prepared by the plaintiff, and relied upon by Dr. Mueller,
7 substantiates the decline in the number of PAC-10/Big 10 games
8 available at the lowest tier of free over the air broadcast since
9 these contracts took effect. (Mueller Dec., ¶'s 10-21, pp. 7-12;
10 Sigouras Dec., Ex. A.) It is for this reason that the complaint
11 seeks injunctive relief against the future effects of these
12 preclusive contracts and their exclusivity provisions, as well as
13 damages for the losses directly associated with the telecasts
14 prevented in 1991. (S.A.C. ¶'s 41,44,46,47,73 and Prayer pp. 45-46)

15 It falls to defendant PAC-10 to demonstrate that, as a
16 matter of law, there is no anti-competitive impact in the market
17 resulting from its preclusive contracts. Obviously, this is far
18 from undisputed. Consequently, the next question is whether PAC-10
19 has carried its burden of demonstrating, as a matter of law, that
20 the restraints evident from the preclusive contracts are
21 nevertheless justifiable. Here, too, PAC-10's arguments fail.¹⁸

22 ¹⁸ It should be noted that PAC-10's insistence that it is
23 engaged in a joint selling agreement is immaterial.
24 The instant case does not challenge PAC-10's existence
25 as a consortium of colleges collectively contracting
26 with the remaining defendants, but rather the contracts
27 entered into by PAC-10, contracts with concern prices
28 and quantities, "most importantly . . . the quantity of
games the PAC-10 members cannot sell and the anti-
competitive effect on local broadcasters and their
viewers as a direct result thereof." (Mueller Dec.,

1 In justification of the restraints, PAC-10 presents
2 testimony by Professor Ordover contending that there are
3 significant efficiency gains inherent in the PAC-10/ABC-PTN
4 contract. As demonstrated by Dr. Mueller, however, not one of
5 these identified efficiencies requires a time window exclusivity
6 provision in order to be achieved. (Mueller Dec. pp. 18-21, ¶ 31-
7 36, l.11)

8 The first supposed efficiency goal, that pooling of the
9 games allows the colleges of PAC-10 to offer a portfolio of games,
10 could as easily be achieved without the exclusivity provision. As
11 Dr. Mueller points out, this would allow the market to determine
12 what games would be televised, and the fact that this might
13 decrease revenues to the networks and the conferences is not a
14 reasonable justification for contracts which inhibit competition at
15 the expense of viewer preference. (Mueller Dec., pp. 18-19, ¶ 32)
16 Even Professor Ordover acknowledged that an arrangement wherein the
17 networks could negotiate with individual colleges would create
18 an even larger portfolio of games (Ordover Depo., p.150, ll. 6-15)

19 The second goal identified in Professor Ordover's
20 declaration was, "Clear transaction cost efficiencies." Dr.
21 Mueller, however, states that the cost efficiencies claimed by PAC-
22 10 are not clear at all. Indeed, this claim is contradicted by the
23 fact that during the brief period following the 1984 NCAA decision
24 when colleges were free to contract individually with stations and
25 networks for televising their games, fully 190 games were shown, or
26 four times the number of games broadcast in the year pre-NCAA.

27
28 _____
¶'s 37-38, pp. 21-22)

1 This is further corroborated by plaintiff's market study.
2 (Sigouras Dec., Ex. A) As stated by Professor Mueller, "If
3 transaction cost savings from writing a single television contract
4 with a consortium of colleges rather than individual contracts with
5 each college were significant, I would not expect such a dramatic
6 increase in the number of games televised in the high-transaction-
7 costs post NCAA period." Furthermore, despite his initial
8 statement of opinion, even Dr. Ordover conceded at his deposition
9 that the exclusivity provisions were not necessary to achieve
10 transaction costs savings. (Ordover Depo., p. 141, ll.19-25; p.142,
11 ll.2-8)

12 The third supposed benefit, the ability of lesser known
13 schools to contract with better known rivals for access to
14 nationwide or regional audiences, is, as Dr. Mueller states, an
15 argument unrelated to efficiency. As he points out, "Why is it
16 more efficient to televise Stanford v. FSU that, for example, only
17 500,000 people want to watch, than UCLA v. USC that, for example
18 5,000,000 people want to watch?" (Mueller Dec., p. 19 ¶'s 33-34)
19 The position presented by Professor Ordover not only echoes the
20 "competitive balance" argument rejected by the Supreme Court in
21 NCAA, but is one which the parties to these contracts, such as ABC,
22 apparently do not accept, since, "ABC does not commit itself to
23 broadcast a particular game until twelve days before it is played
24 precisely so that it has the flexibility to put on UCLA v. USC, if
25 they are highly ranked, or some other game if they are not."
26 (Mueller Dec., p. 19, ¶ 33) Furthermore, the identified goal of
27 providing lesser known schools television access would be better
28 served by eliminating the exclusivity provisions, which would

1 permit the FSU v. Stanford game to be televised if there was enough
2 local or regional interest, even if ABC elected to televise the
3 hypothetical UCLA v. USC competition. (Mueller Dec. p.19, ¶ 34)

4 Thus, there is considerable dispute as to whether any of
5 PAC-10's identified justifications have merit. Even assuming some
6 merit to the contended efficiencies, however, the question under a
7 Rule of Reason analysis is whether the exclusivity provisions
8 permit efficiencies that could not be readily achieved in another,
9 less restrictive manner. Professor Mueller states quite clearly
10 that this is not the case:

11 "All of the claimed efficiencies would be
12 realized with a contract that stipulated (a)
13 that ABC would broadcast x games and PTN
14 (ESPN) y games per year, (b) ABC/PTN (ESPN)
15 had first refusal on all PAC-10 games, and (c)
16 any PAC-10 school was free to contract for the
17 televising of any of its games that ABC-PTN
18 chose not to broadcast. Such a contract would
19 allow ABC, PTN and ESPN to achieve all of the
20 efficiency advantages of creating a portfolio
21 of PAC-10 games. Of course, if a school like
22 Stanford were to contract separately for the
23 televising of one of its games not shown on
24 ABC/PTN/ESPN, it would bear the extra
25 transaction costs involved. But presumably it
26 would only do so if it was more than
27 compensated for these costs by the
28 broadcaster. The contracting parties would,

1 of course, be free to make any provisions for
2 televising the games of lesser schools a part
3 of their contract that they chose. The only
4 substantive difference between these
5 hypothetical contracts and the ones currently
6 in effect would be the absence of the time
7 window exclusivity provisions. The absence of
8 these clauses would make the contract less
9 lucrative for ABC, PTN, ESPN and thus, less
10 lucrative for the PAC-10 and Big-10, but this
11 reduction in value would not be because of any
12 loss in the efficiencies generated by the
13 present contract, but rather from the removal
14 of its anti-competitive effect." (Mueller
15 Dec., pp. 20-21, ¶ 36)

16 As stated by the Supreme Court in the NCAA decision:

17 Thus, the NCAA television plan on its face constitutes a restraint
18 upon the operation of a free market, and the findings of the
19 District Court establish that it operated to raise price and reduce
20 output. Under the Rule of Reason, these hallmarks of anti-
21 competitive behavior place upon the petitioner a heavy burden of
22 establishing an affirmative defense which competitively justifies
23 this apparent deviation from the operation of a free market. See
24 Professional Engineers, 435 U.S., at 692-696, 97 S.Ct. at 1365-
25 1367. NCAA, 468 U.S. at 113.

26 Here, too, PAC-10, and its co-defendant participants in
27 the preclusive contracts, bear the heavy burden of demonstrating as
28 a matter of law that the restrictive terms of the exclusivity