EXHIBIT 4

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of Section 26 of	)	
the Cable Television Consumer	)	PP Docket No. 93-21
Protection and Competition Act	)	
of 1992	)	
	)	
Inquiry into Sports Programming	)	
Migration	)	

COMMENTS
OF
THE ASSOCIATION OF
INDEPENDENT TELEVISION STATIONS, INC.

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COMMENTS OF THE
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The Association of Independent Television Stations, Inc. (INTV) hereby files the following comments in the above captioned proceeding. Independent stations play a significant role in broadcasting local college and professional sports. In the past few years, it has become increasingly difficult for Independent stations to secure rights to local games. There has been a discernable shift in local sporting events away from over-the-air television. Unless this situation is rectified, local sporting events will become the exclusive province of "pay" services, disenfranchising many Americans from local sporting events. We trust the FCC will remain true to the statute's directive and recommend prompt Congressional action.

The FCC's statutory obligation extends far beyond market efficiencies. Obviously, the economics of sports on television is vitally important. Indeed, the economic imperatives of professional and college sports are forcing sports to leave over-the-air television and shift to pay subscription services. The object of the study is to examine and develop recommendations that will prevent games from leaving off-air television. This is a societal concern. One in which Congress has expressed an intense interest.

II. Sports Migration has become an acute problem for Independent television stations.

Independent television stations are a major supplier of televised sports in this country. Because Independent stations do not have network pre-emption problems, they are uniquely suited to cover local sporting events at both the professional and collegiate levels.

Unfortunately, much of the sports migration debate has involved the potential movement of major events such as the World Series or the Super Bowl. Certainly the migration of these events is a cause for concern. However, the most significant problem confronting local television stations today is the migration of regular season games. This is, fundamentally, a local issue. This is the essence of localism. However, arrangements with cable sports channels are leading to the

I. FCC's Focus on "Consumer Welfare" Economics is Misplaced.

Section 26 of the 1992 Cable Act requires the FCC to investigate and analyze, on a sport by sport basis, trends in the migration of such programming from carriage by broadcast stations to carriage over cable programming networks and pay-per-view systems, including the economic causes and the economic and social consequences of such trends.

In fulfilling this statutory requirement, the FCC has adopted several tentative assumptions which appear to conflict with the underlying objectives of the statute. The FCC posits that the relevant public policy goal is "consumer welfare." Taken as a strict economic concept, enacting policies that maximize value to viewers was not the primary Congressional concern. The objective of the study should be to examine whether sports programs are migrating away from over-the-air television.

Pure economic concepts such as consumer welfare are not the appropriate criterion on which this study should be based. For example, there may be a 30,000 individuals who would pay significant sums to watch their local hockey team on a pay-per-view service. The hockey team, seeking to maximize its return, moves all games to a pay-per-view service. It does so because it can garner more revenue from pay-per-view than by placing games on traditional off-air television stations. However, if the games remained on television, more than a million people could watch the game.

One could argue that because of the intensity of pay-per-view subscriber's interests, as measured by dollar votes, consumer welfare is maximized. The remaining 950,000 individuals simply did not have "enough" interest to watch the game. If they did, they would purchase it. There has been an efficient economic transaction and overall consumer welfare has been maximized.[1]

That's the problem! Congress was concerned that many individuals want to watch sporting events but are unable to access them. Congress' primary concern is not necessarily efficient economic exchanges. It is to keep sports programming on universally available off-air television. Casting this study in fundamentally economic terms is both a distortion of Congressional intent and unworkable.

First, as the FCC recognizes, off-air television broadcasting is based on a system of indirect payments through advertising. It is impossible to reduce the intensity of viewer preference to specific dollar votes. As a result, any attempts to analyze sports migration using strict economic "consumer welfare" analysis is faulty from the outset.

Second, maximizing "consumer welfare" presumes that consumers have equal technical access to subscriber based programming services. This is simply not the case. Over 40 percent of Americans do not subscribe to cable. Some can't afford it. Others live in areas that are not "wired."

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[1]This scenario is not fiction. As discussed, infra, this is precisely what happened with the Minnesota North Stars hockey team in the Stanley Cup Playoffs.

Third, there is the overriding societal concern. Most Americans have helped finance professional sports teams through tax breaks and the creation of new infrastructure. Rail service, highway extensions and building stadiums have all come from the taxpayer's pocket. In addition, professional sports teams enjoy special status under the antitrust laws. Public involvement in both private and public universities is even more significant. Most universities would not exist without a significant infusion of public money. It is simply unfair for professional sports teams and college athletic programs to rely on taxpayer support and then move all sporting events on to a pay cable service.

Finally, there is a fundamental question whether the economics of off-air television will enable it to compete against subscriber services for sports rights. For the foreseeable future, advertising over a single channel will be the primary source of revenue for local television stations. These stations must compete against multi-channel providers in their local markets that have revenue from both advertising and subscriber fees. Cable sports programming networks sell advertising and have their programming costs passed on to subscribers. In the future it may be possible for stations to shift their mode of operation, scramble their signals, and collect subscriber fees from all television viewers. But this is not what Congress intended. Its primary concern was to keep sports programming on over-the-air television for those Americans who cannot afford or technically access subscription services.

inexorable decline in television coverage of local sporting events.

A. College Football

The major college football powers, in their television practices, have a long and sorry history of ignoring the very fans and taxpayers who provide the bulk of the support for the schools themselves and their athletic programs.

In 1982, the United States Supreme Court ruled that the NCAA had violated the antitrust laws by limiting the number of college football telecasts to a handful of network games. In essence, the Court found that the NCAA had conspired to restrict the supply of college football games in an effort to drive up the television rights fees it collected.

> "The NCAA Television plan on its face constitutes a restraint upon the operation of a free market and the District Court's findings establish that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference."[2]

Under the scheme, the NCAA entered into contracts with two networks which allowed the telecasting of several games each Saturday. The number of times a given school could appear on TV was also severely restricted. <u>Individual schools were prohibited from negotiating their own television packages.</u>

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[2] <u>National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma</u>, 104 Sup. Ct. Rept. 2948, 2952 (1984).)

For a brief period, local universities did contract with television stations for the right to broadcast games. In 1984, there were over 190 local games telecast. Unfortunately this did not last long. The College Football Association, which represented 63 of the top college football schools, tried to replicate the NCAA's discredited arrangement with their own highly restrictive contracts with the national television networks. INTV, which had intervened in the NCAA case, was forced to bring separate antitrust actions against these parties. (INTV v. CFA, Civ. No. 84-2283-JB (consolidated with Sports View Co., Civ. No. 84-2367-JB) (W.D. Okl.) and (INTV v. CBS, Civ. No. 84-6917-RG (BX) (N.D. Calif.) .)

The essence of our complaint was that the Big 10, PAC 10 and CFA had entered into network contracts which locked up the most desirable time slots for network telecasts, then prohibited their individual members from telecasting games against those network broadcasts. The net effect of this practice was that individual stations, or groups of stations, could not contract separately with schools to televise games of local or regional interest; the national network games were the total sum of what was made available to the American public during the most popular viewing periods. These complaints were eventually settled out of court when the participants agreed to modestly ease the restrictions in their network/conference deals. However, in recent years it has become almost impossible to secure the rights to these games.

1. Time Period Exclusivity

Even if a station is ready, willing and able to pay the license fees for a particular game, contracts between college football conferences and sports programming channels or ABC prevent the games from being broadcast. These "preclusive" contracts have led to a decrease in college football games in recent years.

College football is played on Saturday afternoons. There are essentially 2, three and one half hour "windows" for broadcasting games live. Stations that are prevented from broadcasting games during these time periods must either convince the school to play the game at some other time period, an impossible task, or show the game on a tape delayed basis -- a very unsatisfactory alternative since the result of the game is already known. However, in many instances, it is becoming more difficult to show the game on a tape delayed basis.

a) ABC - CFA Contract

ABC's contract with the CFA has blocked out the rights to one of these windows. No other broadcast station can televise a game involving a CFA team during this time period. This holds true even if a particular game is not being televised by ABC. For example, if ABC is broadcasting the Ohio State vs. Iowa game, stations are precluded from broadcasting any other games involving CFA teams, even though ABC is not airing these games.

The net effect of the ABC/CFA contract is to reduce the number of college football games available to over-the-air television stations. Ironically, it was this very problem that led to the break up of the NCAA cartel in the early 1980s. Indeed, the draconian nature of the ABC/CFA contract has come under review by the Federal Trade Commission.

b)The Rise of Regional Cable Sports Channels

Complicating matters even further is the rise of regional cable sports channels. These program services, such as Prime Ticket, have entered into contracts with various college athletic conferences for the second three and one half hour "window" on Saturday afternoons. For example, under the PAC-10's contract with Prime Ticket, no local television station can broadcast a game involving a PAC-10 school during this window. This restriction applies even though Prime Ticket is not cablecasting the game. Thus, if Prime Ticket is presenting UCLA vs. USC, a local television station may not broadcast the Arizona v.

Washington game.[3] The restriction would apply even in locations where Prime Ticket is not offered by local cable systems.[4]

c) Impact of Generic Exclusive Windows

The following examples illustrate the preclusive impact of the above mentioned contracts.

For years KCPQ, Channel 13 in Seattle/Takoma has been a major provider of college football in Washington. In 1985, the station was able to secure the rights to five Washington State University football games. Beginning in 1988, the PAC 10 entered into a multi-year contract with Prime Ticket Sports. When combined with the ABC/CFA time slot, it became almost impossible for the station to acquire the rights to college football games. To obtain rights for broadcast, the station has to work around the generic exclusive time blocks.

Importantly, this is not a case where KCPQ is unable to secure rights to a particular game that will be broadcast by ABC

[3] The problem with cable sports channels is compounded by the fact that, on average, 40 percent of the population does not even subscribe to cable. Add to this the fact that on many cable systems, cable sports channels are "pay" channels, further disenfranchising individuals that simply can't afford the service.

[4] Of course one alternative is for local television stations to acquire rights by sublicensing programs from regional cable sports channels. However, it has become clear that, in many instances cable sports channels will not sublicense rights to Independent stations. The goal of most regional sports channels is to maintain exclusivity in an effort to drive cable penetration.

or cable cast on Prime Ticket. In many instances, the games are not telecast at all in the market.

The following outlines the broadcast and cable situation for KCPQ and its attempt to broadcast Washington State and University of Washington football games:

Washington State University
(Games Telecasted)

	1988	1989	1990	1991	1992
KCPQ	4	2	3	0	0
ABC	1	1	0	0	1
Prime Ticket/ ESPN	0	2	3	2	0
Games Not Shown	6	7	9	9	10

University of Washington
(Games Telecasted)

	1988	1989	1990	1991	1992
KCPQ	1	1	1	0	0
ABC	3	4*	4	6	6
Prime Ticket/ ESPN	0	1	1	1	3
Games Not Shown	6	6	5	5	3

The number of "Games Not Shown" represents the universe of games which could be made available to any local television station in the market. During this time period, KCPQ actively sought to acquire rights to games above and beyond the number it actually broadcast. For example, with regard to Washington State University games, KCPQ sought to acquire rights to six games in 1988, four games in 1989, six games in 1990, six games in 1991 and one game in 1992. For University of Washington games, KCPQ wanted three games in 1988, nine games in 1989, six games in 1990, four games in 1991 and three games in 1992. Comparing these figures to the number of "Games Not Shown" in the market reveals that additional games could have been provided. In the last two years the station has been effectively shut out.

Viewer support is not the problem. Between 1988 and 1990 the three University of Washington games carried by KCPQ averaged an 11.6 rating and a 27 share. During this period the Washington State University games averaged a 5.9 rating with a 15.4 audience share. In fact in 1989 and 1990 KCPQ carried the Apple Cup, the traditional rivalry between Washington State and the University of Washington. These two telecasts averaged a 27.05 rating and a 48 share.

A similar situation exists in Arizona. KUTP-TV Channel 45 in Phoenix had a contract with the University of Arizona to carry football in Phoenix for the 1989/1990 season. The station had an option to renew the contract for two years through the 1992/1993 season. The station broadcasted two away games in 1989 and five away games in 1990. In the past two years the station has been unable to secure the rights to any University of Arizona football games and passed on the option for the last two years.

The reason for the decline in Arizona games is Prime Ticket's contract with the PAC 10. The station is prohibited from airing any live Arizona games if Prime Ticket is airing PAC 10 football at the same time. This applies even though Prime Ticket is not telecasting the University of Arizona.

In effect KUTP, like other local stations, have become fourth in the pecking order for college football games behind ABC, ESPN and now pay cable sports channels. Even if there is a game which appears to dodge all the exclusive windows, there is still no guarantee that stations will be able to broadcast games. ABC, ESPN an Prime Ticket are allowed to wait until eight to ten days prior to game time to select a specific game. It is absolutely impossible to develop and market a schedule under such circumstances. As a result, KUTP, like many other stations, will be forced out of college football.

In 1990 KMSB, channel 11 in Tucson had similar problems carrying Arizona State football. On July 12, 1988, the station signed a five year contract worth $1.2 million to televise Arizona football, basketball and baseball.[5] After the contract was signed, Arizona State informed KMSB that the PAC 10 had entered into an arrangement with Prime Ticket for coverage of PAC-10 football games. The University then informed the station that some of the games the station expected to carry would appear on Prime Ticket and that the station could only show the game on

[5]The Phoenix Gazette, October 11, 1990 at F2.

a taped delayed basis. The station brought suit against the University of Arizona and ultimately settled.

However, KSMB's situation illustrates an important point. The stations was fortunate to have had a pre-existing contract with the University. Otherwise, games that previously were broadcast live on over-the-air television would become the sole provence of pay cable networks. More importantly, moving games off over-the-air television disenfranchised many Arizona citizens. At the time, only 38 percent of Tucson area homes and only 30 percent of the Phoenix area homes had access to Prime Ticket.[6]

KMPH-TV, Channel 26 in Fresno, has had similar problems with Fresno State University. For 12 years KMPH has broadcasted Fresno State University football games. In 1985 the stations contracted with the university for a right of first refusal for sporting events. Fresno State is in the Western Athletic Conference.

In 1991, KMPH intended to broadcast six Fresno State games including away games with Washington State (September 14, 1991) and Oregon State (September 21, 1991). Under the PAC-10's policy of "home rule", visiting teams may have their games broadcast with the permission of the local school. Such permission was granted initially. However, on August 28, 1991, just a few weeks before the scheduled broadcasts, and after advertising commitments had been made, Washington and Oregon withdrew their

[6] Id.

permission for Fresno State to broadcast its games. The reason --- contractual arrangements between the PAC-10, Prime Ticket and ABC. The Prime Ticket exclusive windows would not permit the games to go on as scheduled and it was too late to re-arrange the game time.

Unbelievably, Prime Ticket did not even telecast the Fresno State games in question. Instead it telecast UCLA v. Tennessee and Cal. v. Arizona. Despite this fact, Prime Ticket refused to give KMPH a waiver that would have permitted it to broadcast the Fresno State games. KMPH offered Prime Ticket $25,000.00 for a waiver. However, Prime Ticket simply would not negotiate at any price, because the exclusive rights to PAC-10 games are important to Prime Ticket's efforts to drive cable subscribership.

Problems are not limited to the PAC-10. In the Big Ten Conference, ESPN has locked up the window from 12:30-3:30 PM EST. ABC has locked up the 3:30-6:30 PM EST time slot. There can be no live broadcast of a Big Ten game that conflicts with these exclusive windows. Generally, local stations may only contract with the universities to broadcast games on a tape delayed basis, after 10:30 PM EST.

In rare instances, a local television station may be able to avoid the exclusivity windows and contract with a university for a live broadcast. However, under the Big Ten contracts such a broadcast is limited to the "home" markets of the participating teams. These restrictions make it extremely difficult to broadcast Big Ten games.

For example, in 1990 KDSM-TV, Channel 17 in Des Moines, Iowa, wanted to broadcast the Iowa v. Iowa State Game. To make the production work, the station wanted to create an *ad hoc* network of stations to carry the game throughout Iowa and surrounding areas. However, because of the restrictive "home market" rule, the game could only been seen off-air in Des Moines and Cedar Rapids/Waterloo. The station simply could not afford to bear the production costs. Had KDSM been able to network the program, which it wanted to do, the citizens of Iowa would have seen the game on over-the-air television.

Similar problems can be found in the South East Conference. Once again ABC and ESPN have locked up the two primary windows. Each university can contract for the local presentation of games, however the games can only be shown on a tape delayed basis. There is one exception. Live games not selected by ABC or ESPN can be exhibited on a pay-per-view basis. Most SEC teams have developed pay-per-view packages of various games. For example the University of Tennessee has created a pay-per-view package for many of its games.

Even with tape delayed games, local television stations are being squeezed out of SEC games by cable sports channels. WTMV-TV Channel 32 in Tampa used to broadcast the Florida Gators games on Saturday nights at 11:30 PM. However, the rights to rebroadcast the game were acquired by a cable sports channel. The station was offered a third window during the week, but by that time the program has virtually no value.

In sum, there has been a dramatic shift in the amount of college football games broadcast by local over-the-air television stations. After the NCAA case, it was hoped that universities would be free to negotiate with local stations for the presentation of college football games. Unfortunately, the ability of local stations to contract directly with the schools lasted only a few years. ABC's contract with the CFA has become a major stumbling block. The most pernicious development, however, has been the rise of the pay cable sports channel and pay-per-view services.

The present situation raises several public policy concerns. First, for games that telecasted by cable, approximately 40 percent of the American public are denied access to these games. The number is even greater for those schools, like the Southeast Conference, that shifted to pay-per-view services. Second, the most outrageous element of the rise in pay channel college sports is the ability of cable channels to keep a game off-the-air even though the cable channel is not telecasting the game. Such a development is siphoning, pure and simple. Finally, even if a station can successfully dodge the various exclusive windows, it is last in the pecking order for selecting games. ABC, ESPN and cable channels have the right to shift games with only eight days notice. Such an arrangement makes it impossible for a stations to successfully market and promote college football.

B. Major League Baseball

Independent stations are the primary source of local regular season professional baseball games. However time tends to blur where we are today and where we started from. The commission has requested an analysis of siphoning starting in 1980. This may be a good starting point, but perhaps we should remember Commissioner Bowie Kuhn's promise made during the mid-1970's:

> "We don't want to siphon anything away from over-the-air television...As categorically as I can say anything, the Saturday game-of-the-week will not leave Free TV."[7]

How times have changed.

1. National Network Coverage

At the national level, there has been an inexorable decline in the number of baseball games appearing on network television. Network television rights are negotiated directly with Major League Baseball.[8]

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[7]Statement of Baseball Commissioner Bowie Kuhn, Cable Television Regulation Oversight, 94th Cong. 2nd Sess; No. 94-137 at 571.

[8]Data for this section was taken form Broadcasting Magazine's annual review of baseball rights. Broadcasting, March 10, 1980 at 33; Broadcasting, March 2, 1981 at 43, Broadcasting, March 1, 1982 at 47; Broadcasting, February 27, 1984; Broadcasting, March 4, 1985; Broadcasting, March 3, 1986 at 43; Broadcasting, March 2, 1987 at 47; Broadcasting, March 7, 1988 at 54; Broadcasting, March 6, 1989 at 40; Broadcasting, March 5, 1990 at 35; Broadcasting, March 11, 1991 at 29; Broadcasting, March 16, 1992 at 21; Broadcasting and Cable, March 15, at 39.

In 1980, ABC broadcast five games on Monday night and eight games on Sunday. That year NBC broadcast 26 Games of the Week.[9] The pattern continued throughout the 1980s. NBC's "Game of the Week" consisted of anywhere between 26 and 32 games. ABC generally broadcast 11 games, although in 1986 it televised 22 games. During the 1980's the only cable network purchasing games was the USA network which broadcast 45 games in 1982. While, USA did not renew its contract after 1982 there was a provision in the agreement that prohibited baseball from appearing on any other cable network until 1989.

In 1990, the now infamous CBS baseball contract became effective. The number of nationally televised regular season games dropped from approximately 40 games to 16. Essentially, it has remained at this level to this day.

More importantly for local baseball fans, ESPN contracted for 175 regular season games in 1990. The ESPN contract had a tremendous negative impact on the broadcast of regular season games by local television stations.

Pursuant to ESPN's contract, all teams are prohibited from permitting the off-air broadcast of <u>any</u> game on Wednesday nights. Historically, Wednesday night was the most popular night for baseball broadcasts. Despite the fact that every major league team has a game on Wednesday night, there are <u>no</u> games on off-air television. This means that television stations broadcasting regular season games must bear the expense of having their crews

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[9] <u>Broadcasting Magazine</u> 1980

stand by and do nothing. This can become very expensive when a station is covering road games.

To make matters worse, ESPN's Wednesday night restriction applies only to off-air broadcasts. A local team can authorize pay cable channels to telecast games. Such discriminatory behavior places local television stations at a significant disadvantage.

The Notice points out correctly that the major national network contracts are up for renegotiation. The central question becomes whether the major networks will be in a position to increase the number of games on television.

From an Independent station perspective, the key issue is the ESPN contract and continuation of the practice of Wednesday night exclusivity. ESPN has made it clear that exclusivity is an important part of its baseball strategy. INTV has no doubt that ESPN will push to retain such exclusivity and perhaps try to expand it to other nights. If this occurs, the number of local games seen on off-air television will decline dramatically.[10]

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[10]ESPN claims that it has lost between $160 million to $200 million dollars with its present contract. However, the losses may not be a great as they appear on paper. During the baseball season ESPN's ratings increase dramatically, permitting it to sell advertising on other programs at higher rates. Also, many in the business believe ESPN has considerably more bargaining leverage this time around. Major League Baseball has made it clear that it wants to keep baseball on ESPN. The blackout exclusivity arrangements will be important negotiating points. See Broadcasting, March 15, 1993 at 43.

2. Local Rights

Apart from losing Wednesday nights, the number of games appearing on local television stations has declined since 1980. The following provides some examples of siphoning in key baseball markets.

In 1980, the Boston Red Sox broadcast 105 regular season games on WSBK-TV, Channel 38 in Boston.[11] In 1983 the Red Sox were still broadcasting 103 games on off-air television.[12] In 1984, the New England Sports Network (NESN)[13], a pay cable network, began to telecast 90 games. The number of off-air games declined to 70.[14] Since that time the number of games on television has stabilized somewhat. For example in 1990 WSBK broadcasted 80 Red Sox games and NESN telecasted 97 games. In 1993, 75 games will appear on off-air television.[15] However, this is still a significant decline from the 105 games broadcast in 1980.

The New York Yankees have a long history on WPIX-TV in New York. In 1984, 1985 and 1986 WPIX carried 100 Yankee games.

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[11] Broadcasting, March 10, 1980 at 38.

[12] Broadcasting, February 27, 1984 at 46.

[13] NESN is a joint venture of the Boston Red Sox, Boston Bruins and Storer Communications (former owner of WSBK). While the station is a part owner, hence benefits from NESN's coverage, the fact remains that the number of games on off-air television has declined.

[14] Id.

[15] Broadcasting and Cable, March 15, 1993 at 41.

During this time, Sports Channel, a pay cable service, carried a compliment of 40 games. However in 1987 the number of games appearing on WPIX declined to 53. At the same time the number of games appearing on the Sports Channel increased to 100.[16] This ratio remained the same for the 1988 season.

The fortunes of Yankee baseball fans took a turn for the worse in 1990. During 1989 and 1990 WPIX broadcast 78 Yankee games. However, in 1990 the Yankees entered into an agreement with the Madison Square Garden network and all games moved to the pay cable service beginning with the 1991 season. This occurred at a time when many people in New York did not have cable service, let alone being able to afford to the Madison Square Garden Network.

Fortunately for Yankee fans and after much political pressure, the Madison Square Garden Network bought time on WPIX. As a result, 50 Yankee games appeared on over-the-ar television in 1991 and 1992. This situation will continue for the 1993 season, but there are no guarantees for 1994.[17] Nevertheless, the number of Yankee games are only half the number that were broadcast in 1984.

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[16] Broadcasting, March 7, 1988 at 59.

[17] In no way is this intended to impugn the motives of the Madison Square Garden Network. Its decision to purchase time on WPIX demonstrated a sensitivity to Yankee fans by keeping baseball on over-the-air television. It does demonstrate, however, that the Yankee ownership is willing to ignore the interests of millions of baseball fans and move all the games to a cable service. Mr. Steinbrenner is back and Yankee fans will have to wait and see whether the Yankees will once again ignore their interests.