

Exclusivity is a recognized means of enhancing the value of the product to the advertiser (hence to the telecaster and supplier as well) of giving the telecaster the incentives to maximize promotion. It also is important to a network as a means of determining the content and thus the value of the product being purchased as well as maintaining the value of the purchase once the bargain has be consummated.

Time period exclusivity has an additional justification. Games televised in back-to-back or staggered time periods, rather than simultaneously, tend to expand the total football audience for advertisers by allowing any given viewer to watch two games rather than have to choose one of two games.<sup>1/</sup> Simultaneous telecasts of programming aimed at the same demographic group force an advertiser either to purchase one audience that is smaller than what it actually desires or to make what it regards as less efficient purchases of two or more smaller audiences with a substantial overlap of viewers.

In sum, the exclusivity granted by the CFA to its television contractors represents a response to advertiser and network demand. It provides a more cost-efficient means of delivering the predictable larger, more valuable audiences the advertiser wants, facilitates determination and preservation of the value of the television rights purchased, and tends to expand the total audience for college football. It is an important

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<sup>1/</sup> Not only is the potential audience expanded for both games, but advertisers are protected against erosion of their investment due to channel changing (*i.e.*, "zapping").

competitive tool for the telecaster, and it increases the incentives for increased supply of the product.

The CFA time exclusivity provisions likewise do not operate to keep games off television that would otherwise be on. Such exclusivity, first of all, is actually quite limited. The late afternoon network window is only partially protected. At the early edge of that window it may overlap with games played in the early afternoon window. Later in the afternoon, ABC may face competition from both ESPN and NBC. ABC, moreover, is not protected in its time period from regional pay-per-view, point-to-point closed circuit, or local point-to-point telecasts. Similarly, ESPN has limited protection for its late afternoon and prime time telecasts.

**D. The Appearance Limitations and Constituent Group Requirements of the CFA Contracts Are Efficiency Justified and Procompetitive.**

The CFA contracts limit the number of appearances any one team can make within the CFA package and require the telecaster to allocate appearances to a certain extent among

the seven constituent groups within the CFA.<sup>1/</sup> However, significantly different from NCAA's plan, a team in CFA's plan may appear as often as it wants outside the CFA packages.

The CFA has a legitimate concern for promoting the competitive strength and well-being of its members because the broader the base of strong teams at the highest level of college football, the broader will be the base of public interest and support for the product those schools have to offer.

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<sup>1/</sup>The CFA constituent groups are the Atlantic Coast Conference (ACC), Big Eight Conference, Southeastern Conference (SEC), Southwest Athletic Conference (SWC), and the Western Athletic Conference (WAC), the Northern Independents, and the Southern Independents.

Without the appearance allocation requirements of its contracts, ultimately telecasters would become more conservative, programming an increasingly smaller group of schools in the interest of short-term ratings advantages, gradually diminishing the strength of the larger pool which was made possible by moderately comparable football teams. This in turn would make the product less attractive to the consumer and to advertisers, thereby slowly destroying its marketability.

The CFA's allocation requirements thus constitute an effort to maintain and promote product quality over the longer term. Only a broad-based organization like the CFA would be willing or able to justify the sort of investment in long-term viability that is desirable for the health and well-being of the sport.<sup>2/</sup>

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<sup>2/</sup>If a CFA institution determines that its individual economic interest is better served, temporarily or otherwise, by not agreeing to this distribution of television exposure for the weaker schools, it is free to do so by selling its rights outside the CFA's plan, and several have. In 1989, Notre Dame appeared four times on CBS, twice on ESPN, twice on ABC, twice on Sports Channel America and once on Raycom. Notre Dame had one other game, against Stanford, which was tentatively scheduled by ABC but dropped because of Stanford's record. The game was televised locally in the South Bend area. Starting in 1991, Notre Dame will televise all its home games outside the CFA package.

There is no significant anticompetitive effect resulting from the contracts' appearance and constituent group requirements. The limitations upon team appearances are liberal enough that most teams are able to appear on television as often as they want within the package. Moreover, if a team does want more than its maximum appearances, and if there is sufficient demand for more, the team is able to appear outside the CFA package. These requirements simply do not keep games off television for which there is substantial consumer demand.

In short, the fact that the CFA's contracts limit team appearances and allocate appearances among groups is justified by valid efficiencies obtained through those mechanisms.

**E. The CFA Does Not Possess Market Power**

The reality of the market is that CFA college football competes directly for sales, advertising dollars, and viewers with other sports programming, such as professional football, Major League Baseball, professional and college basketball, and the Olympic games, and even with other non-sports programming, such as news, which generate audiences having a similar demographic composition.

Some four years after his original decision in NCAA, the same district judge ruled that the market had changed enough since that time that he could no longer accept "college football television" as the relevant market without resolving substantial factual disputes. Ass'n of Independent Television Stations v. The College Football Ass'n, 637 F.Supp. 1289, 1300-02 (W.D. Okla. 1986, Burciaga, J. sitting by designation). There Judge Burciaga allowed for the possibility that the market included professional football, all Fall sports programs, and other Saturday programming as well. Id. at 1300-001. He was no longer convinced that college football was uniquely attractive to advertisers or viewers. Id. at 1301.

Today, the market is far different from what it was in 1981 or 1982 owing to a number of factors, including the increased market penetration of cable, the decline in popularity of college football relative to other sports, and the results of the NCAA decision itself. In NCAA, the district court concluded that live televised college football constituted a distinct market because there were no reasonable substitutes for the product. 104 S.Ct. 2948, 2966, citing 546 F.Supp. at 1297-1300.

The college football audience is no longer uniquely attractive to advertisers, if it ever was. Professional football generates larger audiences than college football with similar demographic characteristics. The advertiser can choose to reach the audience it wants by buying time on college football, pro football, or both.

Other sports are substitutable for college football even on Saturdays. During the course of the 1989 college football season, network and cable telecasters at various times on Saturdays programmed major league baseball, preseason pro football, golf, pro basketball, college basketball, tennis, auto racing, college soccer, track and field, pro hockey, college hockey, boxing, bowling, horse racing, skiing, skating, and horse jumping *against college football*.

In sum, Judge Burciaga concluded in *NCAA* that the relevant product market was "live college football television" based on the premium prices paid for it by advertisers and the lack of suitable substitutes for it on Saturday afternoons. 546 F.Supp. at 1300. Neither of these fundamental premises appears to be sustainable today. CFA college football competes with a much broader range of sports and other programming and does not command the premium prices it did in the early 1980's. The increased availability of

In Board of Regents, the Supreme Court recognized that if the NCAA faced interbrand competition from available substitutes, then certain forms of collective action could be appropriate in order to enhance the NCAA's ability to compete. 468 U.S. at 115, n. 55. The CFA faces substantial interbrand competition, in two forms not existent when Board of Regents was decided. First, it faces intrabrand competition by the sale of competing packages, such as that of the Pac-10 and Big Ten Conferences, and the other regional and national packages to both broadcasters and cablecasters in the college football television market. Second, it faces interbrand competition from all forms of sports telecasts -- as the evidence will show. The market is, indeed a substantially different one, and the CFA does not possess or wield market power within it.

The availability of the NFL and other sports packages create a powerful check on the CFA's ability to negotiate higher prices. Because the networks and their advertisers have these available alternatives, the CFA is not in a position to demand prices that are disproportionately higher than what is charged for such other programs. The CFA simply does not control enough of the output of either college football or other sports and audience-comparable programming to be able to possess or exercise the power to raise rights fees above competitive levels.

programs. The CFA simply does not control enough of the output of either college football or other sports and audience-comparable programming to be able to possess or exercise the power to raise rights fees above competitive levels.

#### IV. ISSUES TO BE TRIED

At the outset CFA contends that *no* issues should be tried. The Commission plainly lacks jurisdiction over the CFA. The CFA, a nonprofit association, should not be put to the substantial burden and expense of discovery in this case, much less a trial on the merits, when Complaint Counsel has been unable to assert even an arguable basis for the assertion by the Commission of jurisdiction over CFA.

With this qualification, the issues to be tried, if the Commission had jurisdiction, would be:

1. Whether the basic design of the CFA television contracts, *i.e.*, the sale of selection rights from a inventory of voluntarily aggregated games at a single negotiated price, unreasonably restrains trade or is economically justified and procompetitive under a full rule of reason analysis.

2. Whether the limited time and network restrictions embodied in the CFA television contracts are supported by plausible and valid economic justifications.

3. Whether the time and network restrictions and appearance requirements contained in the CFA's television

plan are reasonably related to the procompetitive purposes advanced by the CFA.<sup>19/</sup>

4. What is the relevant product market?

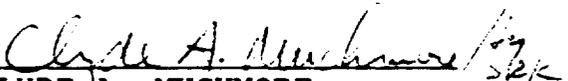
5. Whether the CFA has power to control prices or output in that relevant market?

6. Whether the position as to jurisdiction which Complaint Counsel has taken in this case is "substantially justified".

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<sup>19/</sup> The Commission correctly explained in its amicus brief in Board of Regents that the burden of the seller is to show that the challenged restraints are "reasonably related to" the procompetitive justification, id. pp. 28-29. The Commission observed that the utilization of a truncated rule of reason approach "does not mean, of course, that plaintiffs and courts can merely second-guess those participating in an otherwise legitimate enterprise, and invalidate any restraint that is not the 'least restrictive' imaginable or practicable. Like many antitrust questions, whether a restraint is 'reasonably related' or 'reasonably necessary' to procompetitive collaboration requires a court to exercise its judgment, . . . " Id., p. 12.

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of )  
 )  
COLLEGE FOOTBALL ASSOCIATION, )  
an unincorporated association, )  
 )  
and )  
 )  
CAPITAL CITIES/ABC, INC. )  
a corporation. )

DOCKET NO. 9242

CAPITAL CITIES' NONBINDING STATEMENT

Respondent Capital Cities/ABC, Inc. ("Capital Cities") submits this Nonbinding Statement pursuant to Rule 3.21(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.21(a) (1990).

I. Introduction

It is obvious from complaint counsel's Nonbinding Statement ("Nonbinding Statement") that their case focuses almost entirely on the College Football Association ("CFA") and its members. It remains unclear, even after the Nonbinding Statement, why Capital Cities was added as a respondent here.<sup>1/</sup>

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<sup>1/</sup> It may be that, because of the strength of the CFA's jurisdictional challenge to this proceeding, complaint counsel thought that adding Capital Cities might provide the necessary jurisdictional hook if the CFA were dismissed from the case. See CFA's Motion to Dismiss for Lack of Jurisdiction. But, as shown in Capital Cities' Motion to Dismiss, if there is no jurisdiction over the CFA, then this proceeding should be abandoned in its entirety. See Capital Cities/ABC, Inc.'s Motion to Dismiss for Lack of Jurisdiction at 5-10.

In any event, the Nonbinding Statement is more a legal brief than an aid to the conduct of this litigation. Complaint counsel's argument, in essence, is that the issues in this case are no different from the issues in NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984). That argument is untenable. Although we do not intend this Statement to be a legal brief, we will identify, both here and below, some of the many fundamental differences between this case and the NCAA case.

To start with, the CFA is very different from the NCAA. The NCAA had approximately 850 members. Its television plan governed all telecasts of every game of each of the hundreds of schools that played intercollegiate football. 468 U.S. at 89, 91-92. The CFA, by contrast, includes only 64 schools. Its arrangements account for only a small minority of college football telecasts.

In addition, the CFA's television arrangements are very different from the television plan at issue in the NCAA case. Indeed, they are different from any distribution arrangement which, to our knowledge, has ever been found to violate the antitrust laws. As the United States and the FTC emphasized in their amicus brief in the NCAA case, the essential vice of the NCAA television plan was that it "prevent[ed] the individual

schools from selling telecasts outside of the NCAA package."<sup>2/</sup>  
The CFA's contracts with Capital Cities, by contrast, permit CFA members to sell other telecasters the rights to live, nationwide telecasts on Saturday afternoons of every game that is not televised by Capital Cities. As a result, there has been and will continue to be an abundance of college football games shown on television. The vast majority of those games will be shown by telecasters other than Capital Cities.

Moreover, the addition of Capital Cities as a respondent introduces a significant new element into this case that was not present in the NCAA case. The NCAA case concerned what the Supreme Court described as "a horizontal restraint -- an agreement among competitors on the way in which they will compete with one another." 468 U.S. at 99. Capital Cities, however, does not compete with the CFA or any of its members. It is a customer of the CFA. Its contracts with the CFA are not agreements among competitors, but instead are contracts between a buyer and a seller. These are "vertical" rather than

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<sup>2/</sup> Brief for the United States as Amicus Curiae in Support of Affirmance at (I), NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (No. 83-271) (Questions Presented).

"horizontal" agreements.<sup>2/</sup> As such, they present new and different questions from those at issue in the NCAA case.

The discussion that follows is divided into two sections. First, Part II addresses the "vertical" issues raised by Capital Cities' contracts with the CFA. Then, Part III addresses the "horizontal" issues raised by the relationships between the CFA and its members and addresses whether Capital Cities is a proper respondent in a case alleging a horizontal restraint.

II. Capital Cities' Contracts with the CFA are Ordinary and Lawful Television Rights Agreements

A. Capital Cities Buys Television Rights from the CFA in Order To Help It Compete in the Intensely Competitive Advertising Market

Capital Cities operates a national over-the-air television network (ABC) and a national non-broadcast television programming service (ESPN), which is distributed primarily by cable television systems. It does not compete with the CFA or its members. Rather, Capital Cities is a customer of the CFA; it buys from the CFA (and from other competing sellers) rights to televise college football games (and other competing events).

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<sup>2/</sup> See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 & n.4 (1988). Complaint counsel do not dispute this denomination of the buyer/seller nature of the Capital Cities/CFA relationship. Their Nonbinding Statement acknowledges that "Capital Cities stands in a vertical relationship with the CFA schools." Nonbinding Statement at 25, n.36.

Capital Cities is in the business of selling advertising. It uses the television rights it acquires from the CFA to produce telecasts of CFA games. The telecasts, in turn, generate a viewing audience that Capital Cities "delivers" or "sells" to advertisers. Almost all of ABC's revenues come from advertising, and the advertising business is intensely competitive.<sup>4/</sup> Because ABC gets its revenues from advertising, its most basic objective is to televise programs that will attract audiences of the size and type that are most valuable to its customers -- the advertisers. ABC thus has every incentive to increase the attractiveness of its programming to viewers.

ABC's contract with the CFA is intended to serve that purpose. The contract enables ABC efficiently to put together a season-long CFA football package that is most likely to include the games that will be attractive to viewers and that can be marketed most effectively to advertisers. The contract achieves these objectives by making a large portfolio of games available to ABC over the life of the contract and by giving ABC options to select for telecast those CFA games that seem most attractive as

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<sup>4/</sup> ESPN also obtains significant revenues from fees paid by local cable system operators and its other non-cable affiliates, which are, in effect, the local or retail distributors of ESPN's telecasts. In this and other respects, the details of ESPN's contract with the CFA differ from ABC's. The differences do not affect the basic analysis, however, and for purposes of clarity in this necessarily preliminary Nonbinding Statement, the ensuing discussion will focus on ABC's contract.

the season progresses. The opportunity to select from such a portfolio enables ABC to offer viewers both simultaneous regional telecasts of games of regional interest and occasional national telecasts of games of national interest. By permitting ABC to select the CFA games it wishes to televise as the season unfolds, the contract enables ABC to assure viewers and advertisers that they will not be shown games selected months earlier, many of which would inevitably prove not to be as important or interesting as might have been expected before the season began.

ABC's contract with the CFA also provides ABC with an opportunity to acquire institutional prestige, which aids in the development of goodwill among affiliates as well as advertisers. There are, for example, a number of televised sports events that offer a telecaster the opportunity to identify with an attractive event, viz, "the network of the Winter Olympics." Such events include professional football, major league baseball, the Winter and Summer Olympics, college football, professional basketball, and the NCAA college basketball tournament.

In recent years, ABC has been outbid by CBS and NBC for most of these events. In 1986, ABC was outbid by CBS for the CFA contract. Since then, it has been outbid by CBS and NBC for the Winter and Summer Olympics, major league baseball, the NBA, and the NCAA college basketball tournament. Not surprisingly, ABC regarded the chance to bid for rights to televise CFA games,

after the expiration of the CFA's current contract with CBS, as an attractive opportunity.

ABC outbid CBS (and perhaps others as well) for a contract with the CFA that is to begin with the 1991 football season. ABC's contract with the CFA is substantially the same as CBS's current contract with the CFA. In essence, ABC just bid on that contract when it came up for renewal and did not negotiate a materially different arrangement from the CBS contract. The contract enables ABC to televise as many as 35 CFA games and permits live nationwide telecasts by others of every CFA game not televised by ABC.

Although ABC's contract is virtually identical to CBS's, ABC's business plan, which was the basis for its bid for the CFA contract, calls for a significant increase in output in comparison to the current agreement between CBS and the CFA. ABC expects that it will increase (1) the number of games televised, (2) the number of time periods each week during which there are network telecasts of games, (3) the total audience for network telecasts of games, and (4) the average audience per network game and per network exposure.

B. The Exclusivity Provisions in the Contracts Are Ordinary, Procompetitive and Lawful

Complaint counsel's Nonbinding Statement focuses on two provisions in ABC's contract with the CFA that are also found in

CBS's contract. These provisions give ABC certain limited exclusivity rights to televise the home games of CFA members. One is a provision that prohibits the CFA or its members from selling television rights to other networks. The other restricts live telecasts on Saturday afternoons of games that begin after 12:10 p.m. local time (or 12:40 p.m. local time, in the case of games involving members of the Southeastern Conference).<sup>2/</sup>

Such exclusivity provisions are commonly incorporated in agreements governing the telecast of sporting events. While different sports have their own unique characteristics and requirements, all are televised pursuant to contracts that restrict the rights of other telecasters to carry games played by members of the associations or conferences that are parties to the contracts. The exclusivity provisions in ABC's contract with the CFA are less restrictive than those typically found in other television rights agreements. They permit live, nationwide

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<sup>2/</sup> The time-period restrictions do not give ABC an exclusive late afternoon window. To the contrary, the contracts permit non-ABC late afternoon telecasts in the home towns of the participating schools, closed-circuit and pay-per-view telecasts during the late afternoons, and national late afternoon cable telecasts. In addition, because the local time of the kickoff is controlling, West Coast games can be televised live in the East at mid-afternoon. A game beginning, for example, at noon in Los Angeles could be shown live at 3:00 in the afternoon in Washington, D.C.

telecasts on Saturday afternoons of every CFA game not televised by Capital Cities.<sup>6/</sup>

Exclusivity provisions in distribution contracts are endemic, not only in television, but throughout industry. Courts and commentators have widely recognized that they serve important and legitimate purposes. Indeed, no exclusivity provision like those in the CFA's contracts with Capital Cities has ever been held unlawful.<sup>7/</sup> Exclusivity provisions, in short, are not the kind of restraint that can properly be regarded as "inherently suspect" within the meaning of the Commission's decision in Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 602-04 (1988) ("Mass. Board").<sup>8/</sup>

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<sup>6/</sup> Complaint counsel's assertion that the contract prohibits other national telecasts (Nonbinding Statement at 10) is simply wrong. Superstations like WTBS and syndicators can and do provide live, nationwide telecasts of CFA games on Saturday afternoons.

<sup>7/</sup> Complaint counsel suggest that ABC's 1984 contract with the CFA was found to be unlawful in Regents of University of California v. ABC, Inc., 747 F.2d 511 (9th Cir. 1984). (Nonbinding Statement at 19). To the contrary, the case involved a preliminary injunction concerning a so-called "crossover" provision that, unlike any provision in the contracts at issue here, had the effect of precluding all network telecasts of certain games, no matter how important they might be. Even as to that provision, the district court held only that the plaintiffs had raised "serious questions" -- as opposed to a likelihood of success on the merits -- and that a preliminary injunction should issue because of the balance of hardships. See 747 F.2d at 522 (Beezer, J., dissenting) (quoting unpublished district court decision.) That narrow holding was affirmed, with Judge Beezer writing a long and thoughtful dissent.

<sup>8/</sup> Moreover, the Mass. Board case and its progeny have dealt only with horizontal restraints. See 110 F.T.C. at 603  
(Footnote continued on following page)

The cases and the commentary make clear that an exclusivity provision in a distribution agreement may be unlawful only if, among other things, it enables the distributor -- in this case, ABC -- to obtain or maintain market power that it would otherwise not have in the market in which it sells its products or services -- in this case, the advertising market. Absent proof of such market power, the exclusivity provisions impose no competitive injury on the purchasers of ABC's product and can be presumed to serve the legitimate efficiency-enhancing purposes that exclusivity provisions ordinarily serve.<sup>9'</sup>

In their Nonbinding Statement, complaint counsel argue that the exclusivity provisions in ABC's contract with the CFA serve no legitimate purpose. Their allegations about the provisions -- that they reduce the number of games shown by other telecasters, the number of outlets (i.e., television "exposures") for games, and viewer options -- are unproven and, we believe, untrue. They are, moreover, allegations that could be made about every exclusivity provision in any distribution contract. Those

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<sup>9'</sup>(Footnote continued from preceding page)  
("structure for evaluating horizontal restraints"). It is highly doubtful that the analytical framework set forth in that case can usefully or properly be applied to vertical arrangements like Capital Cities' contracts with the CFA.

<sup>9'</sup> See, e.g., VIII P. Areeda, Antitrust Law ¶ 1653 (1989), and cases cited; Krattenmaker & Salop, "Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price," 96 Yale L. J. 209, 214, 242 (1986); cf. Peterman, "The Federal Trade Commission v. Brown Shoe Company," 18 J. L. & Econ. 361 (1975).

arguments provide no basis for condemning ABC's contracts with the CFA because they make no distinction between those contracts and other, lawful exclusive distribution arrangements.

The fallacy in complaint counsel's theory is belied by their Nonbinding Statement, in which they assert that ABC "benefits" from the exclusivity provisions. (Nonbinding Statement at 26-27.) There are only two ways in which ABC could benefit from the exclusivity provisions: Either they create or enhance market power in the advertising market where ABC competes as a seller, or they create the kind of procompetitive benefits that exclusive dealing provisions ordinarily create for the benefit of the distributors. If the contracts do not give ABC market power in the advertising market, then there is no basis to doubt that those provisions serve legitimate purposes -- and there is no legal basis to find them unlawful.

Complaint counsel have not even alleged, and we are confident that they cannot prove, that ABC has market power in the advertising market.<sup>10</sup> We are also confident that the evidence will show that the exclusivity provisions in ABC's contract with the CFA serve legitimate, procompetitive purposes.

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<sup>10</sup> For this reason, complaint counsel's half-hearted comment about Capital Cities' having aggregated three college football contracts (Nonbinding Statement at 27, n.39) does not state a claim under the antitrust laws or Section 5.

Network Exclusivity. The provision that bars telecasts of games among CFA members by the other major networks serves to differentiate ABC from the other networks and telecasters. CBS and NBC have acquired exclusive rights to prestigious sports events, including the Summer and Winter Olympics, NBA games, the NCAA basketball tournament, and major league baseball. ABC competes against those networks and other telecasters for the goodwill and loyalty of affiliates, advertisers, and viewers. Exclusive access to attractive programs like CFA football helps ABC in that competition by enabling it to differentiate its programming from that of its competitors. Such differentiation is generally recognized as a legitimate procompetitive benefit that will justify even total exclusivity.<sup>11/</sup>

Exclusive access to network telecasts of CFA games also enables ABC to offer advertisers attractive multi-program advertising packages comparable to those offered by the other networks. And, just as CBS used its exclusive major league baseball telecasts to promote its other programs, so ABC's contract with the CFA affords it programming with which to promote its other telecasts, particularly its new entertainment programming in the Fall.

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<sup>11/</sup> E.g., Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Serv., 616 F. Supp. 502, 510 (D.N.J. 1985), aff'd mem., 791 F.2d 924 (3d Cir. 1986).