

indicating a fair chance of success on the merits."¹⁸⁸ Thus, were we to adopt the Regents case as our own, at most we could only conclude that the CFA/ABC contract in force at the time "raised serious questions" under the antitrust laws.¹⁸⁹

127. However, we must also take note of the dissent in the case which agreed that while "serious questions" may have been raised by the plaintiffs, the plaintiffs should have been held to a higher standard of proof: "a strong likelihood of success on the merits." The dissent concluded that the likelihood of success on the merits shown by plaintiffs was not sufficiently strong and that close issues were presented for trial. Significantly, the dissent noted that the contract's exclusivity provisions might have a lawful procompetitive purpose -- allowing ABC and the CFA to develop a national college football television package. Moreover, the dissent argued that the agreement could be fairly characterized as a vertical non-price restriction, which would stimulate interbrand competition among competing network television packages.¹⁹⁰

128. The approach of the dissent in Regents is consistent with the rule of reason approach that the Department of Justice suggested we apply in this proceeding. Significantly, the dissent's reasoning in Regents was also followed by the court in INTV,¹⁹¹ a case in which INTV challenged, inter alia, predecessor CFA/ABC and CFA/ESPN contracts, similar to those at issue here, and made virtually identical claims about the anticompetitive effect of those contracts. Of particular importance to our analysis is that in its court case against the CFA and ABC, INTV sought a summary determination that the agreements at issue violate the antitrust laws. The court, faced with a record that appears far more developed than the record

¹⁸⁸ Relying on the trial court's findings, the Ninth Circuit concluded that the CFA contract presented serious questions under both per se and "quick look" rule of reason analyses. The court concluded that a per se approach might be appropriate, because unlike the NCAA's vital relationship to college football found by the Supreme Court (468 U.S. at 101-102), the CFA contract had little bearing on the operative rules of college football. Thus the court held that a per se label might be applied to plaintiffs' boycott and price-fixing allegations. Regents, 747 F.2d at 517. Alternatively, applying the truncated rule of reason analysis, the court held that the ABC/CFA arrangement, like the NCAA television plan, "shares the dual infirmities of an intentional restriction in output along with the imposition of sharp restraints on individual school competition." Id. at 518. The court also rejected the CFA's argument that, rather than being a cartel, the CFA imposes non-price vertical restraints on the ultimate distribution of its product. Id.

¹⁸⁹ We also understand that subsequent to the Regents case, the crossover provision was removed from the contract.

¹⁹⁰ Such vertical restraints have long been approved under the rule of reason analysis.

¹⁹¹ 637 F. Supp. 1289.

in this proceeding,¹⁹² concluded that questions of material fact on virtually every relevant issue precluded grant of the motion.¹⁹³

129. Thus, for example, the court held on the record before it that INTV had not established beyond dispute that the agreements were naked restraints which would be subject to either per se treatment or the quick look rule of reason under NCAA.¹⁹⁴ Moreover, the court recognized that some horizontal arrangements "even though their force may be felt in usually sacrosanct areas such as price and production, may be justified if their purpose and effect are to increase competition as a whole."¹⁹⁵ In the case of college football, the court noted that notwithstanding the NCAA case,

[i]n the marketing of television rights, just as in the management of the live contest itself, some cooperation is necessary if the product, live college football television, is to be available at all. Such arrangements should not be denied fair market analysis unless and until it appears that they are naked restraints on competition.¹⁹⁶

However, on the record before it, the court found that genuine factual disputes precluded a finding that the provisions were naked restraints on price and output.

130. The court also held that the CFA's assertions that it was a legitimate joint venture, and that the restraints permitted the packaging and sale of an otherwise impossible national series of games, if true, entitled the CFA to further market analysis. Moreover, the defendants characterized the arrangements as marketing agreements that impose limited and necessary "intra-brand restraints" in order to enhance interbrand competition.¹⁹⁷ The court, however, noted that, on the record before it, it could not resolve the lawfulness of the restraints:

¹⁹² In INTV, the plaintiffs alone filed 15 volumes containing more than 1,200 exhibits in support of its motion, and a 28-page statement of undisputed facts comprising 68 numbered paragraphs.

¹⁹³ Under Fed. R. Civ. P. 56, a party is entitled to summary judgment if it can show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

¹⁹⁴ 637 F. Supp. at 1296, 1299 n.9.

¹⁹⁵ Id.

¹⁹⁶ Id. at 1297 (emphasis added).

¹⁹⁷ Id. at 1298.

Since the product of one college football team alone is without apparent value, some combinations of competing institutions must be necessary and therefore reasonable. These combinations also must be capable of enforcing some collective regulation upon their members to achieve intrabrand stability and thus bolster their competitive positions.¹⁹⁸

Thus, the court felt constrained to determine, as a threshold matter, whether each competitor, pair of competitors, conference, or larger combination of teams constitutes a "brand" of intercollegiate football. Moreover, in order to assess the reasonableness and competitive effect of the restraints, the court was required to determine the market power wielded by the entity imposing the restrictions.¹⁹⁹ The question of market power, however, turned on the definition of the relevant markets in which the defendants competed, which itself was a seriously disputed issue.²⁰⁰

131. With respect to output restrictions, the court noted that the alleged anticompetitive effects of each of the challenged provisions were contested. In particular, the court noted that the CFA plan was not as restrictive as the NCAA plan with respect to exception telecasts. The court found that the CFA has an open early afternoon window during which CFA members had the right to sell telecasts of those games not selected by ABC under its contract.²⁰¹ INTV complained, however, that requiring teams to move games from the Saturday afternoon schedule reduced output, since many CFA members refuse to reschedule their games. The defendants countered that the plaintiffs had failed to prove that more rather than different games were being telecast. On balance, the court concluded that factual disputes prevented the court from summarily judging the anticompetitive effects of the kickoff time restrictions imposed by the CFA plan.

132. As it does in this proceeding, INTV also complained of the network's right of

¹⁹⁸ Id.; see also Chicago Pro Sports, 961 F.2d at 676 ("Sharing is endemic in league sports. The prevalence of what is otherwise a hallmark of a cartel may suggest the shakiness of treating the clubs, which must cooperate to have any product to sell, as rival 'producers' in the first place.").

¹⁹⁹ INTV, 637 F. Supp. at 1298.

²⁰⁰ Id. at 1298-1302.

²⁰¹ In contrast, the plan struck down by the Court in NCAA did not give individual schools the right to sell games that were not selected for broadcast. Moreover, the NCAA controlled the entire inventory of college games and had the power to coerce compliance with its television plan. 468 U.S. at 94.

first refusal of the telecast rights to all CFA games until 12 days prior to the date of telecast.²⁰² Based on the record, the court found that it could not summarily discern whether the agreements were output restrictions, or if they were justifiable and procompetitive. Much as in the instant case, the purposes, necessity, and effect of both the time period exclusivity and the six to 12 day selection deadline were hotly disputed.

133. Using the approach suggested by the Department of Justice and aided by the detailed and thorough analysis of the INTV court, we likewise are unable to determine definitively on the record before us whether the preclusive contracts at issue here violate the antitrust laws. First, with respect to INTV's assertion that the contracts reduce output, we agree, as discussed above, that it may be correct that the number of games on local broadcast stations has decreased. However, without more, we cannot determine whether the preclusive contracts violate the antitrust laws. We note, as discussed above, that the overall amount of college football games on television, including both broadcast and cable, has increased almost fourfold in the past ten years. The record does reflect that Pac 10 exposure has increased as a result of its contracts with ABC and PTN. In addition, we are told that, as a result of time period exclusivity, the packaging of an "ACC Game-of-the-Week" program has become economically viable for distribution over a syndicated network of individual broadcast stations, and that time period exclusivity, first selection of member school games and twelve-day notice provisions all maximize opportunities for consumers to see the best games on a given Saturday. The record is unclear as to whether, in the absence of the preclusive contracts, more games, as opposed to different games, would be shown. The extent to which games that have not been selected for network or cable broadcast are available, but local broadcasters choose not to carry them, is likewise unclear. Nevertheless, there is some evidence in the record of a decline in some markets of local team games broadcast on local stations.

134. Second, even if we could conclude with some certainty that the preclusive contracts limit output in an antitrust sense, we cannot say with any degree of certainty, for the reasons indicated by the INTV court, that the restraints described in the record before us are unreasonable as a matter of law. As discussed above, the record reflects evidence adduced by several commenters that time period exclusivity provisions in their contracts with college football conferences are actually procompetitive and are the result of intense competition among telecasters.²⁰³ There is also evidence in the record from ABC that these preclusive

²⁰² As noted above, this right of first refusal may now be exercised six to 12 days prior to telecast.

²⁰³ INTV relies on the FTC proceeding and, in particular, on Complaint Counsel's Non-Binding Statement, supra note 160, for the proposition that time period exclusivity provisions are not procompetitive. We agree with commenters ARC and ESPN that INTV's reliance on the "finding" by the FTC is misplaced. ARC Reply at 18; ESPN Reply at 3-4. As we discussed above, there has been no adjudication of these questions in the FTC proceeding, and we believe it is inappropriate to rely on these materials as a basis for a finding that

contracts create significant efficiencies which increase the size of a network's viewing audience, thus enhancing the value of these telecasts to advertisers.

135. Third, the record reflects the view of certain commenters that college football contracts allow the most efficient distribution of an attractive package of college games. As discussed above, a number of courts and commenters have recognized the plausibility of this efficiency-enhancing justification. The conundrum with which we are faced, *i.e.*, whether the antitrust laws will condone an association of conferences and independent schools the size of the CFA as an efficiency-enhancing procompetitive vertical arrangement or condemn it as a cartel, has never conclusively been resolved by a court and cannot be resolved on this record.²⁰⁴ In the absence of an answer to that question, we simply cannot conclude whether the agreements at issue violate the antitrust laws.

136. Finally, with respect to the question of the market power of any of the participants and the definition of the relevant market, as discussed *supra*, we are faced with virtually the same conflicting evidence and allegations as the INTV court, and conclude that the record is insufficient to conclude with any certainty whether any of the preclusive contracts involve the use of market power, and indeed, what the relevant markets are. Although INTV argues that NCAA and INTV require us to define the market as broadcasts of intercollegiate football games, the INTV case is inconsistent with INTV's position, and commenters question the continued applicability of factual determinations made in NCAA as to the relevant product market.²⁰⁵ Nor are we persuaded to adopt ABC's much broader definition of the market -- including all sports and other entertainment programs -- without a more detailed factual analysis of the market, which neither ABC nor any other party has provided.

137. In sum, the so-called "preclusive contracts" at issue in this proceeding raise

challenged activities violate the antitrust laws.

²⁰⁴ See INTV, 637 F. Supp. at 1296. We also note that similar questions will likely face the various college leagues as the CFA is replaced with similar arrangements at the conference level beginning in 1996, and that many of the arguments used to justify the CFA, become even more compelling at the conference or league level. See INTV, 637 F. Supp. at 1298. See also Chicago Pro Sports, 961 F.2d at 672 (noting "lively debate" as to whether a sports league is a separate entity capable of conspiring with itself); INTV, 637 F. Supp. at 1299 n.8 (finding triable issue as to whether sports leagues are comprised of separate entities capable of conspiring).

²⁰⁵ The record reflects that there have been significant changes in the television industry and the college football industry since these cases were decided: cable is now available to considerably more homes; television coverage of college football games has increased overall; and college football associations have broken apart into smaller organizations representing a smaller number of schools.

questions under the antitrust laws that do not lend themselves to easy answers. While we do not intend to prejudge the legality of any of these arrangements, we certainly cannot say with any degree of certainty based on the record in this proceeding that these arrangements are completely consistent with the antitrust laws. However, as noted above, we are concerned that college football contracts which have these restrictive provisions, *i.e.*, provisions relating to notice and time of broadcast of local games, may have preclusive effects on the incentive and ability of local broadcasters to televise local team games, and thus we will continue to monitor this area. If evidence should develop in the future that the public interest is being harmed by a decline in the availability of local broadcasts of such games, we can initiate proceedings to determine what measures would be appropriate to safeguard the public interest.

IV. SPORTS SIPHONING RULES

A. Background

138. Prior to our Interim Report, the majority of commenters stated that the record did not warrant any legislative recommendations or regulatory action with respect to migration of sports programming. In our Further Notice, we invited comment on whether there is a public interest in government action to promote free access to sports programming. We asked commenters advocating sports migration rules to address the Commission's authority to adopt such rules in light of the HBO decision.²⁰⁶ In that case the D.C. Circuit vacated the FCC's siphoning rules leaving no pay cable programming rules in effect. We requested that commenters include any relevant changes in circumstances since that case was decided in 1977.²⁰⁷

139. In the HBO case, the Commission attempted to justify rules that would prevent siphoning of sports material from conventional broadcast television to pay cable. The Commission maintained that it was obligated to impose siphoning rules because "the overall level of public enjoyment of television entertainment would be reduced if sports events were shown only on pay cable or shown on conventional television only after some delay." Specifically, the Commission believed that its "mandate to act in the public interest" required that it strive to maintain the public's ability to receive free access to sports programming on broadcast television.²⁰⁸ The United States Court of Appeals for the District of Columbia Circuit disagreed, finding no reasonable public interest justification for imposing siphoning restrictions on cable carriage of sports programming.²⁰⁹

²⁰⁶ Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977) ("HBO").

²⁰⁷ Further Notice, 9 FCC Rcd at 1650.

²⁰⁸ HBO, 567 F.2d at 28-29.

²⁰⁹ Id. at 9.

140. Aside from jurisdiction, another major obstacle to siphoning rules is the First Amendment. The HBO court applied the three-prong test from United States v. O'Brien²¹⁰ to the FCC's siphoning rules. Any adoption of siphoning rules must meet the requirements of this test.²¹¹ First, the purpose of the rules must be neutral and unrelated to the suppression of free speech. Second, the rules must further an important or substantial governmental interest. Third, the incidental restriction on First Amendment freedoms must be no broader than is essential to further that interest. Despite the fact that the siphoning rules met the first prong,²¹² they were held to violate the First Amendment because they failed to meet the second and third requirements.²¹³

B. Comments

141. INTV argues that the marketplace has changed significantly since the Court's 1977 HBO decision; it asserts that cable is no longer the fledgling industry that it was in the mid-1970's and that the premises underlying the HBO decision no longer apply. INTV believes that the current evidence clearly illustrates the problem of sports siphoning, and that such siphoning must be checked in order to safeguard the public interest in free television. Therefore, INTV contends that the governmental interest in protecting against siphoning is sufficiently important and that the second prong of the O'Brien test can now be met. INTV also claims that the third prong of O'Brien, that of narrow tailoring, can also be satisfied. INTV states that the old siphoning rules treated many diverse types of programming equally.

²¹⁰ 391 U.S. 367 (1968).

²¹¹ The D.C. Circuit applied the O'Brien standard in HBO, even though the siphoning rules at issue in that case encompassed all entertainment, including sports programming. Many commenters believe that if the FCC were to adopt rules specifically regulating sports programming, the courts would consider such rules to be a content-based restriction on speech, and therefore deem them presumptively unconstitutional and subject to strict scrutiny. See, e.g., Supplemental Further Comments of the NBA, NFL, NHL and MLB at 3-9, filed May 18, 1994; see also R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992). For purposes of our analysis, however, we use the less demanding O'Brien standard in light of the court's instruction in the HBO decision.

²¹² The court held that the siphoning regulations met the first requirement because the government purpose in regulating pay cable -- protecting viewing rights of those without cable -- is not intended to curtail expression and is neutral in character. HBO, 567 F.2d at 48.

²¹³ The court held that the government interest was not demonstrated to be important or substantial because the problem of siphoning was not convincingly shown to exist. In addition, the court found the regulations to be overbroad, stating that for overbreadth purposes, restricted programs not broadcast must be readily available to cablecasters. Id. at 51.

According to INTV, a new rule aimed precisely at specific sports and/or the elimination of preclusive contracts can be sufficiently narrowly tailored to meet the First Amendment requirements as set forth in HBO.²¹⁴

142. Many commenters believe that nothing submitted during this proceeding should change the conclusions reached in HBO.²¹⁵ ABC contends that there is no basis for further legislative or regulatory intervention concerning the telecasting of college football or other sports.²¹⁶ Rainbow believes that cable has expanded the availability and diversity of sports programming, and that the FCC should refrain from adopting any rules that would artificially constrain cable's ability to compete in the sports licensing rights market.²¹⁷ ESPN states that the sale of telecasting rights to sports events is subject to an ever changing set of circumstances at the national, regional, and local level, which define at any given moment who the buyers and sellers are, what rights are for sale and at what price. ESPN argues that this system should not be disturbed by regulation or legislation which cannot possibly predict the future. ESPN adds that, given the large and growing range of sports programming available today, governmental action is not warranted.²¹⁸ Tribune believes there is a strong governmental interest in promoting free public access to televised sports programming and submits that Congress should consider various ways to promote such access.²¹⁹ Southland, however, asserts that regulations restricting cable carriage of sporting events would not serve the public interest.²²⁰

143. In addition to considering whether siphoning rules would serve the public interest, many commenters raise concerns regarding the First Amendment implications of such rules. Specifically, ESPN believes that siphoning rules would implicate First Amendment concerns by abridging colleges' right to choose their means of communicating. ESPN adds that sports migration rules would be content-based regulations and thus unconstitutional, or at least subject to strict scrutiny.²²¹ MLB contends that siphoning rules, which restrict the ability

²¹⁴ See INTV Comments at 38-43; INTV Reply at 49-54.

²¹⁵ See, e.g., ARC Comments at 18-22; ARC Reply at 24-26; ABC Comments at 22-24; NCTA Reply at 5; NHL Reply at 2.

²¹⁶ ABC Comments at 20-24.

²¹⁷ Rainbow Comments at 5-6.

²¹⁸ ESPN Comments at 7.

²¹⁹ Tribune Comments at 2.

²²⁰ Southland Comments at 3.

²²¹ ESPN Reply at 5-6.

of sports clubs to place programming on different media, raise serious constitutional problems -- particularly where such restrictions are not imposed upon other programmers with which sports clubs must compete for access to broadcast and subscription services.²²² The NHL argues that INTV's proposed remedy -- the reimposition of sports siphoning rules -- is both economically unnecessary and fails to pass constitutional muster.²²³ NCTA states that, regardless of the growth of the cable industry since 1977, the HBO court's First Amendment objections to the Commission's previous siphoning rules are still applicable today.²²⁴

C. Findings

144. The purpose of sports siphoning rules would be to give those not served by cable broader access to sports programming and to maintain a consistent level of free sports programming for the general viewing public. As we noted above, the majority of commenters believe the record does not warrant legislative recommendations or regulatory action. Based on our evaluation of the record, we conclude that siphoning or migration of sports programming is not sufficiently prevalent to justify intervention at this time.²²⁵ We therefore do not recommend adoption of siphoning legislation or regulations at this time.

V. ANTITRUST EXEMPTIONS

A. Background

145. The Sports Broadcasting Act of 1961 generally exempts television exhibition agreements entered into by professional football, baseball, basketball, and hockey leagues from the federal antitrust laws.²²⁶ In addition, professional baseball enjoys a broader exemption from the antitrust laws.²²⁷ In the initial Notice, we requested comment on the

²²² MLB Comments at 4.

²²³ NHL Reply at 2.

²²⁴ NCTA Reply at 5.

²²⁵ The HBO court stated that "where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible." 567 F.2d at 51.

²²⁶ 15 U.S.C. §§ 1291-1295. The Act provides for certain limitations to this antitrust exemption which are not relevant to our discussion herein. Note, however, that the Sports Broadcasting Act applies only to the specified professional sports and does not apply, for example, to college football.

²²⁷ Federal Baseball Club v. National League, 259 U.S. 200 (1922); see also Flood v. Kuhn, 443 F.2d 264, 268 n.8 (2d Cir. 1971), aff'd, 407 U.S. 258 (1972).

extent to which sports distribution contracts would be different absent the antitrust exemptions provided to professional sports.²²⁸ As indicated by the Interim Report, however, few commenters responded to the Commission's inquiry. The commenters who did address this issue asserted that the Sports Broadcasting Act ensures wide-spread availability of professional sports to the viewing public, and that the shared revenues generated through television contracts have allowed for league expansions, thus increasing the overall number of games televised. The commenters accordingly did not recommend revision of the Act.²²⁹ The Further Notice again invited comment on the effect of the antitrust exemptions on sports programming availability.²³⁰

B. Comments

146. Subsequent to issuing the Interim Report, we solicited additional comments on antitrust exemptions, but few parties responded to that solicitation. Most of the commenters who expressed concern about the antitrust exemptions discussed the exemptions in the context of MLB. INTV claims that MLB has the unique ability to control and limit the supply of games to be telecast, and that the exclusivity arrangements MLB has with the broadcast and cable networks directly relate to MLB's government-sanctioned monopoly. Because MLB is not subject to the same pressures as other program suppliers, INTV submits, MLB can restrict the supply of games in order to increase its revenues.²³¹

147. The Major League Baseball Players Association ("MLBPA") asserts that MLB's exemption from the antitrust laws raises serious questions about the protection of the public interest in connection with the telecast of baseball games over all media, including broadcast, basic cable and pay-per-view. MLBPA states that MLB's exemption allows it to organize its telecasts without regard to antitrust laws or to any other form of public scrutiny, and that this does not suggest that the public interest will be considered, much less protected. Because of MLB's antitrust exemptions, MLBPA claims, the MLB team owners "get to decide whether to serve the public interest, and, indeed, what that interest is."²³² MLBPA also comments that MLB's new television contract, which replaces previous years' nationally televised play-offs with a regional format, would be subject to review if the antitrust laws

²²⁸ Notice, 8 FCC Rcd at 1496.

²²⁹ Interim Report, 8 FCC Rcd at 4890.

²³⁰ Further Notice, 9 FCC Rcd at 1651; see also Markey Letter.

²³¹ INTV Reply at 35-36.

²³² MLBPA Comments at 2.

applied to baseball.²³³

148. Sports Fans United, Inc. ("SFU"), believes that MLB's antitrust exemptions allow it to control supply and demand in ways that harm consumers and limit fans' access to televised baseball. SFU states that MLB has divided North America up into exclusive television territories, resulting in fans seeing far fewer baseball games than they would without MLB's antitrust exemption. SFU also believes that baseball's exemption allows MLB to limit the number of teams to fewer than the market will support, which in turn allows teams to threaten to relocate. Consequently, according to SFU, cities have little bargaining leverage with baseball teams.²³⁴

149. SFU also believes that Congress effectively provided an antitrust exemption to the NFL "through its congressionally approved merger with the AFL," which allows the NFL to maintain an "artificial scarcity" of televised games. The NFL's monopoly power is further enhanced, SFU contends, by the Sports Broadcasting Act. SFU states that it does not object to the Act in its entirety, as it is important to the survival of smaller market teams, but that Congress did not intend the Act to apply to anything other than broadcast television, which means to SFU that the NFL's national cable contracts are a violation of the antitrust laws.²³⁵ With respect to the NBA and the NHL, SFU urges the Commission to ask the Justice Department to investigate both the NBA's and the NHL's exclusive home market television territories to ascertain the extent to which consumers are being harmed by these practices.²³⁶

150. In addition, Tribune notes that, in its litigation against the NBA,²³⁷ the NBA has claimed that the Sports Broadcasting Act immunizes from antitrust attack the NBA's "Same Night Rule," which limits superstation carriage of NBA games. Tribune asks that our Report advise Congress of the NBA's position in this case.²³⁸

151. MLB did not address the antitrust exemptions in its comments in this proceeding. On the other hand, other parties discussed the benefits of the antitrust immunities

²³³ Id. MLBPA does not, however, go so far as to state that this arrangement would violate federal antitrust laws if it were not for MLB's exemptions.

²³⁴ SFU Comments at 5-6.

²³⁵ Id. at 7-8.

²³⁶ Id. at 9.

²³⁷ Chicago Pro Sports v. NBA, No. 90 C 6247 (N.D. Ill.), supra Section II.B.

²³⁸ Tribune Comments at 2-5. This matter is currently pending before the court. In this case, we decline to express a view on whether the Sports Broadcasting Act would sanction the NBA's superstation restriction.

in connection with other sports. For instance, the NHL states that the Sports Broadcasting Act has advanced the interests of fans and consumers by enhancing the ability of sports leagues to market national broadcast packages. According to the NHL, any repeal or modification of the Act would fragment the sale of television rights and would result in fewer games on broadcast television.²³⁹

152. Similarly, Turner states that the antitrust immunity granted by the Sports Broadcasting Act has increased the financial stability of the leagues as well as the individual teams. Turner asserts, however, that the compulsory license has served as an important counterbalance to this immunity, and that without the compulsory license, leagues could prevent superstation sports carriage.²⁴⁰

153. The NBA suggests that consumers have been well served by the ability of professional sports leagues to make joint national sales of exclusive television packages to broadcast networks. Without the Sports Broadcasting Act, the NBA states, every deal could be subject to antitrust attack by an unsuccessful bidder for national rights. Ensuring that such contracts may be entered into without antitrust challenge thus facilitates national over-the-air arrangements.²⁴¹

C. Findings

154. While the foregoing provides a useful summary of the commenting parties' perspectives with respect to the antitrust exemptions provided to the professional football, baseball, basketball and hockey leagues, the record before us does not provide us with sufficient information to support either the repeal or the modification of the Sports Broadcasting Act or MLB's antitrust exemption. Accordingly, we cannot, at this time, recommend modification of the Sports Broadcasting Act or MLB's antitrust exemption.

VI. POLICY ISSUES

155. This section examines INTV's critique of our definition of migration, the potential causes and consequences of migration, the NFL's plan to offer out-of-market games to sports bars and home satellite dish subscribers, and the impact of pay media on the availability of other sports programming. Our discussion of potential causes and consequences will encompass the issue of "whether there is a public interest in government action to promote free access to sports programming,"²⁴² and the impact of changing

²³⁹ NHL Comments at 5.

²⁴⁰ Turner Comments at 8.

²⁴¹ NBA Reply at 2-3.

²⁴² Further Notice, 9 FCC Rcd at 1650.

technology on the future availability of sports programming.

A. The Definition of Migration

156. In the Interim Report we noted that the ideal way to measure sports programming migration would be to compare the number of games actually shown on broadcast television with the number of games that would be broadcast if there were no non-broadcast video distributors.²⁴³ We rejected this standard on the grounds that projections of games broadcast in the absence of subscription media are too speculative and retained our working definition of migration as the movement of sports programming from broadcast television to a subscription medium. One commenter, INTV, challenges this definition and suggests that we should assume that, in the absence of subscription media, the number of sports events on broadcast television would be higher than it is in the presence of subscription media.²⁴⁴

157. INTV supports its proposal by arguing that cable networks compete with television broadcasters for sports rights, and if broadcasters had no competitors bidding against them, they would acquire rights to more games. We decline to accept this argument. Television broadcasters have a wide range of programming, both sports and non-sports, from which to choose. They attempt to assemble the most profitable schedule that they can, comparing the expected advertising revenue from each program to the cost of acquiring it. Several commenters have suggested that the emergence of the Fox network has provided new and valuable programming that, in some cases, stations find more attractive than certain sports events.²⁴⁵ It is possible that, in the absence of subscription media, television broadcast rights fees would be lower (because there would be fewer bidders contending for those rights), but it is not clear how this would effect the relative profitability of sports and non-sports programming. We do not know how much lower these fees might be, and we do not know how viewer interest (i.e., ratings) would change as the number of games broadcast increased. This makes it impossible to calculate how profitability, i.e., the difference between revenue and cost, might differ in the absence of subscription media.

158. Although INTV agrees that if cable and broadcast stations are negotiating for different games or different rights packages, then the Commission's approach to assessing migration is appropriate, it asserts that this scenario does not apply to various major sports. INTV's view of the market does not seem consistent with our findings with regard to MLB telecasts, one of INTV's two areas of concern. There is a striking difference in the type of games broadcast and those cablecast -- in particular, local broadcasts are overwhelmingly of away games, while cablecasts show no such pattern. Broadcast of away games poses no

²⁴³ Interim Report, 8 FCC Rcd at 4877.

²⁴⁴ INTV Comments at 1-5.

²⁴⁵ See MLB Comments at 10-11; Turner Comments at 5-6; see also MLB Reply at 11.

threat to the live gate.²⁴⁶ If, in fact, teams prefer to license home games to cable networks, because they feel that the need to subscribe to cable provides some protection to the live gate or that cable rights fees provide some compensation for any decline in attendance caused by cable viewing, then home games and away games may be reasonably understood as "different rights packages." MLB data on flagship telecasts for 1994 show that 72.5 percent of local broadcasts are of away games.²⁴⁷ If one eliminates games on superstations WTBS and WGN (which provide separate national feeds with national advertising, the revenue from which balances some or all of the negative impact on the live gate of local broadcast of a home game), the figure is 77.7 percent. Eliminating the six other superstations (which may receive some increased revenue from national spot advertising sales and for whose cable carriage MLB receives some compensation via the compulsory license)²⁴⁸ yields a figure of 82.6 percent. Updated figures from MLB regarding regional cable network telecasts show a similar but slightly less pronounced pattern. For the 1994 season, 63.8 percent of regional cable telecasts were of home games and 36.2 percent were of away games.²⁴⁹

159. Similar patterns prevail for NBA and NHL telecasts. (Since all NFL games are distributed by national networks, the comparison makes no sense in the NFL context.) During the 1993-94 season, 85.8 percent of local NBA broadcasts were of away games, and 70 percent of regional cable network cablecasts were of home games.²⁵⁰ With regard to the NHL, during the 1993-94 season, 83.2 percent of local broadcasts were of away games, and 57.9 percent of regional cable network cablecasts were of home games.²⁵¹ These data are also relevant to the question of why the increase in cable exhibition of sports events has been

²⁴⁶ See MLB Comments at 13-14 (teams have a strong interest in protecting the live gate).

²⁴⁷ MLB Comments at Exhibit 1.

²⁴⁸ Turner estimates the current level of those payments to be \$20 million and notes that individual superstations also compensate MLB for their wide distribution of local games. Turner Comments at 7-8.

²⁴⁹ Ex Parte Letter from Bruce Henoch, Counsel for the Office of the Commissioner of Baseball, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 18, 1994).

²⁵⁰ Ex Parte Letters from Philip R. Hochberg, Counsel for the National Basketball Association, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 25, 1994 and June 1, 1994).

²⁵¹ NHL Comments at Appendix A, and Ex Parte Letter from Philip R. Hochberg, Counsel for the National Basketball Association, to Jonathan D. Levy, Office of Plans and Policy, Federal Communications Commission (May 31, 1994).

greater than the increase in broadcast exhibition.²⁵² Few commenters address this issue directly, but the NHL and NCTA both endorse the hypothesis, advanced tentatively in the Further Notice that the base level of cable coverage in 1980 was lower than the base level of broadcast coverage, leaving more "room for expansion" in cable coverage.²⁵³ The data on current local coverage of MLB, NBA, and NHL games demonstrate that broadcast coverage is overwhelmingly of away games and that cable coverage is primarily of home games. Comparable data on broadcast coverage in earlier years show that, in 1980, 74.4 percent of MLB local broadcasts were of away games; in 1982-83, 90.5 percent of NBA local broadcasts were of away games; and, in 1981-82, 85.2 percent of NHL local broadcasts were of away games.²⁵⁴ These figures are consistent with cable coverage expanding primarily by exhibiting games that were not previously available for broadcast.

160. These considerations lead us to retain our definition of sports programming migration and to reject INTV's claim that an increase in cable carriage provides per se evidence of sports programming migration. We agree that, in situations where broadcast carriage of sports programming has increased over time, we cannot rule out the possibility that, in the absence of subscription media, it would have increased by an even greater amount. We address this issue further in the subsection on potential causes and consequences of migration below.

B. Potential Causes and Consequences of Sports Programming Migration

161. We have concluded that only a small amount of sports programming migration has occurred, and virtually all of the commenters concur with this assessment. Nevertheless, because we wish to assess trends in sports programming exhibition, it is appropriate to consider how changes in video markets might affect future exhibition of sports programming. Moreover, we believe that, in order to respond adequately to those whose initial assumptions lead them to conclude that substantial migration has occurred, we should outline the consequences of migration and provide a suitable scheme for further analysis.

162. The most salient fact about video distribution since 1980 is the vast expansion

²⁵² Further Notice, 9 FCC Rcd at 1651.

²⁵³ See id.; see also NHL Comments at 5 ("Prior to 1980, sports was televised on broadcast television or not at all, and there is accordingly much more room for growth on cable than on broadcast television."); NCTA Comments at 3 (agreeing with the "more room for expansion" suggestion and noting the "remarkable growth and development of diverse satellite cable services, including national and regional sports networks" in the 1980's).

²⁵⁴ MLB Ex Parte Letter, supra note 58; NBA 1993 Comments, Exhibit 6; NHL 1993 Reply, Appendix A.

in channel capacity, both within broadcast television and from non-broadcast media.²⁵⁵ Moreover, as several commenters point out, the development of the Fox network has increased competition in program supply to broadcast stations. Press reports indicate that two additional national broadcast networks may be formed soon. The expansion in broadcast capacity has increased fragmentation of the television broadcast audience. This and the increasing competition in program supply have likely reduced the relative attractiveness of certain sports programming. Parties such as MLB, MSG, and Time Warner suggest that, as fewer truly independent stations remain in local markets, the demand for local sports programming may decline.²⁵⁶ The expansion of cable offerings has also fragmented the video audience. This would be true even if there were no cable sports networks at all. Hence, the impact of cable on the market for sports programming goes beyond the mere addition of another bidder for local rights as suggested by INTV. The audience fragmentation is, to some extent, inherent in the nature of cable television; sports siphoning rules, even if otherwise legal and appropriate, would not eliminate it.

163. Thus, if sports migration does occur, it might be explained in part by irreversible changes in the structure of the video delivery market. For that reason, it is important to consider the economic and social consequences of migration. In the Further Notice, we cited trade press statistics that 98 percent of television households were passed by cable.²⁵⁷ No one contested those figures. Moreover, cable sports networks are also available via other media, such as home satellite dish and wireless cable.²⁵⁸ It appears that many of these services will also be available via the new Direct Broadcast Satellite ("DBS") Service. In general, then, the consequence of migration is likely to be not loss of access to sports programming, but the need to pay a fee to acquire it, frequently as part of a larger package of non-broadcast channels.

164. We understand that ESPN is not a premium service and that most of the

²⁵⁵ See Florence Setzer and Jonathan Levy, Broadcast Television in a Multichannel Marketplace (Office of Plans and Policy Working Paper No. 26, Federal Communications Commission) (June 1991).

²⁵⁶ One possible response to this is spreading local broadcasts over two or more stations in order to minimize the need to preempt other scheduled programming to accommodate sports. MLB offers two examples of this type of arrangement for local baseball telecasts during the 1994 season. The Baltimore Orioles and the Minnesota Twins each share their local broadcasts between two stations -- a network affiliate and an independent. MLB Comments at Exhibit 1.

²⁵⁷ Further Notice, 9 FCC Rcd at 1650-51.

²⁵⁸ See, e.g., ARC Comments at 23-24; ESPN 1993 Comments at 1.

regional cable networks are not premium services.²⁵⁹ Thus, as ARC points out, most cable sports channels are on tiers subject to local or Commission rate regulation in the absence of effective competition. ARC argues that, in most cases, we can assume that the rates will be held to "reasonable" levels. The implication is that subscribing to cable at regulated rates to acquire sports programming is not burdensome. ARC also points out that vertically-integrated cable sports networks are subject to Commission program access regulations, which will ensure that rival delivery systems (and their subscribers) have nondiscriminatory access to those networks.

165. Few commenters explicitly addressed the issue of whether there is a public interest in government action to promote free access to sports programming. INTV points out that professional and college teams generally receive public subsidies of one kind or another, such as direct appropriations from state legislature, tax concessions, or assistance in raising funds for stadium construction.²⁶⁰ INTV argues that this creates an obligation on the part of the teams to provide a certain amount of programming on broadcast television. INTV suggests no standards for deciding how much is appropriate, nor does it explain why the relevant government agencies could not condition their subsidies on provision of broadcast coverage of certain games. Presumably these agencies weigh the pros and cons of appropriations and subsidies prior to granting them and do not do so unless they determine that they bring an acceptable level of public benefits. INTV also refers to the antitrust exemptions under which professional sports operate. While Congress certainly could condition the Sports Broadcasting Act exemptions on some minimum level of broadcast exhibition, any level chosen would be arbitrary. For this reason, and because the Commission seeks to foster overall program diversity, encompassing not only sports but also other varieties of programming, we decline to recommend a minimum sports programming requirement.

166. SFU asserts that "the nation's professional and collegiate sports teams have a responsibility to keep the vast majority of their games accessible and affordable to the public that supports them" and notes that this support includes "a range of subsidies, tax breaks, and antitrust exemptions."²⁶¹ Like INTV, SFU proposes no standard for determining the appropriate level of broadcast coverage. It is not clear whether SFU's "accessible and affordable" criterion includes cable carriage. The other commenter that addresses this issue, albeit indirectly, is the National Licensed Beverage Association ("NLBA"). Its advocacy of a new compulsory license for sports bar carriage of sports programming is discussed below.

²⁵⁹ See INTV Comments at 28 n. 26; MLB Comments at Exhibit 3; ARC Comments at 22-24.

²⁶⁰ INTV Comments at 5.

²⁶¹ SFU Comments, Introduction (filed May 6, 1994). In the interest of assembling a complete record, we accept this late-filed submission.

167. The Commission has always sought to promote the availability of a broad and diverse menu of programming to the American public. We recognize that sports is an important component of that menu, but there are, of course, others as well. We cannot determine what is the "right" amount of sports programming on broadcast television. The record in this proceeding shows that there is a tremendous amount of sports programming on broadcast television and that, for most of the sports and geographic markets that we have studied, it is increasing. The "marquee" events, such as the Super Bowl, the World Series, the NBA Championships, and the NCAA basketball championships, remain on broadcast television. While many households decline to subscribe, cable or other multichannel video programming distributors are available to the overwhelming majority of viewers. Those media offer a vast additional amount of sports programming that, in general, supplements broadcast offerings. Based on this record, we discern no case for additional government intervention in the sports programming market at this time. As noted above, however, we are concerned with the decrease in the availability of local college football games on local stations, and if evidence of injury to the public interest is demonstrated, appropriate action will be taken.

C. The NFL "Season Ticket" Package

168. The NFL has announced that its new broadcast contracts call for encryption of the backhaul and network distribution feeds of NFL games.²⁶² Beginning with the 1994 season, the NFL plans to offer a "season ticket" package of out-of-market games to dish owners and certain commercial establishments, including sports bars. The NFL states that encryption is necessary to prevent "rampant" piracy, *i.e.*, unauthorized viewing by "individual homes, sports bars and other commercial establishments."²⁶³ The NFL package will include all Sunday afternoon regional telecasts except for those blacked out in the area pursuant to the NFL's blackout policy. The annual subscription fee for 1994 will be between \$100 and \$140 for dish owners (for a 17 week season) and \$700-\$2500 for sports bars depending on their seating capacity. The NFL will market the season ticket package through multiple non-exclusive distributors.²⁶⁴ The NFL asserts that this program does not reduce the number of games being broadcast but rather "extends a number of previously regional telecasts to a national audience."

²⁶² See NFL Comments at 7-10.

²⁶³ *Id.* The NFL asserts that interception of its unscrambled feeds is unlawful under the Copyright Act. The Commission has determined that unauthorized reception of network feeds is also prohibited by the Communications Act. See Report in Gen. Docket 86-336, 2 FCC Rcd 1669, 1694-98 (1987).

²⁶⁴ NFL lists Showtime, Netlink, Superstar Satellite Entertainment, Programmers Clearing House, and National Programming Service among its distributors. Turner indicates that it will be a distributor to the home dish and commercial markets and that ESPN will also sell this package to the commercial market. Turner Comments at 3-4.

169. NLBA, which represents sports bars and other commercial establishments which seek access to broadcast sports events, expresses concern with the announced cost of the NFL package, calling it "prohibitive."²⁶⁵ NLBA notes that various bars have been sued under the Communications and Copyright Acts for unauthorized reception of sports programming and reports that in "almost every instance, bar owners were found guilty of unauthorized reception of sports programming and, in many cases, were held liable and assessed penalties of more than \$100,000." NLBA expresses concern that other sports leagues will develop packages similar to the NFL program and urges the Commission to recommend passage of a bill to provide places of public accommodation a compulsory license to exhibit video coverage of games between professional sports teams and to direct the Copyright Royalty Tribunal to establish reasonable fees for such license.

170. Satellite Receivers, Ltd. ("SRL"), a distributor of home satellite equipment and programming, objects to not having been appointed a distributor of the NFL package.²⁶⁶ SRL suggests that the NFL should set standard qualifications for distributors and accept all who meet them. SRL asserts that it is prepared to conform to any specified requirements. In response, the NFL asserts that it has "developed reasonable, non-exclusive distributor qualifications criteria" and that they have been "applied in a fair and even-handed manner."²⁶⁷ Moreover, the NFL "remains open to working with any party, including SRL, which is willing to make the investments in marketing and customer service personnel and facilities that are required to promote the product and provide service to subscribers."²⁶⁸

171. As a threshold matter, we do not see the NFL package as a sports migration issue. It appears to be a net addition to output and to the choices lawfully available to dish owners and commercial establishments. We have no basis to question the announced price structure of the package, and thus no reason to endorse the proposed new compulsory license for sports bars. With regard to SRL's complaint, the NFL has appointed several non-exclusive distributors for its package and it is clear that dish owners and commercial establishments will have multiple options for subscribing. These factors, along with NFL's stated willingness to explore relationships with other prospective distributors, including SRL, lead us to conclude that the initial SRL complaint raises no public interest issues.

²⁶⁵ NLBA Comments at 1-3.

²⁶⁶ SRL Comments at 1-3.

²⁶⁷ NFL Reply at 2-3.

²⁶⁸ Id.

D. The Impact of Pay Media on the Availability of Sports Programming

172. With regard to the impact of new media and the expected expansion of channel capacity on sports programming, it is difficult to do more than speculate.²⁶⁹ To the extent that new media such as DBS attract subscribers who do not have access to cable or choose not to subscribe, access to sports programming will likely increase. Expanded channel capacity will likely have the same effect. More specifically, expanded channel capacity is likely to lead to increased out-of-market pay-per-view services. The NFL plan to offer a "season ticket" program of ten to twelve out-of-market games per week throughout the season to dish owners and sports bars may be an indication of things to come.²⁷⁰ This package will be distributed via C band satellite, a medium that already offers hundreds of channels. As cable channel capacity expands, it is possible that this (and perhaps other analogous packages yet to be created) will be made available to cable subscribers. Indeed, on a limited scale, ABC has been distributing a few out-of-market college football games each week since 1992 to cable operators.²⁷¹ We agree with the NHL that such out-of-market distribution should be construed as a net addition to output and not an example of sports migration.²⁷² On balance, it is likely to expand and enhance access to sports programming, particularly niche audiences such as fans of the Washington football team who live in Dallas. We received little specific comment regarding the future of pay-per-view sports. Those parties who addressed pay-per-view generally stated that their activities in this area are limited; some also indicated that they have no current plans to institute pay-per-view service.²⁷³

²⁶⁹ We do know, however, that the current pattern of national broadcast and cable exhibition of the four major professional sports examined herein will continue for the next three to five years. Specifically, the NFL broadcast and cable contracts expire after the 1997 season (NFL Comments at 5), the NBA broadcast and cable contracts expire after the 1997-98 season (NBA Comments at 4-5), the NHL cable contract expires after the 1996-97 season (ESPN Comments at 4), and the MLB broadcast and cable contracts expire after the 1999 season (NBC Comments at 4; ESPN Comments at 2).

²⁷⁰ See infra Section VI.C.

²⁷¹ Overall, the record indicates that the number of college football games distributed on a pay-per-view basis is minimal, and it does not appear that the use of pay-per-view will increase significantly in the future. See infra ¶ 103.

²⁷² See NHL Comments at 5.

²⁷³ See NHL Comments at 5 (pay-per-view in the NHL is "extremely limited and entirely local"); Turner Comments at 8 (neither the Atlanta Braves nor the Atlanta Hawks have "any current plan to develop a pay-per-view sports package"); Pac 10 Comments at 2 ("Pay-per-view has not yet been and probably never will be a substantial factor for regular-season college football." Pac 10 1993 pay-per-view revenue was \$20,000); see also Interim Report, 8 FCC Rcd at 4889-90.

VII. RECOMMENDATIONS AND CONCLUSIONS

173. In this inquiry, we have made an exhaustive examination of trends in the video exhibition of sports programming, focusing on professional football, basketball, hockey, and baseball, and on college football and basketball. We defined sports programming migration as the movement of sports programming from broadcast television to subscription media, and we examined national, regional, and local exhibition trends. By and large, the record established in response to the Further Notice confirms our earlier tentative conclusions. We see no evidence of migration of NFL or college basketball games. At the national level, we see no evidence of migration of NBA or NHL games. Indeed, the NHL seems to be a case of reverse migration at the national level. At the local level, the NBA record shows declines in broadcast coverage in a few markets and the less complete NHL record shows a decline in broadcast coverage in some local markets. We do not see a trend away from local broadcast coverage of NBA and NHL games.

174. The two areas where comments on the Further Notice generated some debate are MLB and college football. MLB recently signed new contracts with ABC and NBC for national broadcast coverage and with ESPN for national cable coverage. The broadcast package contains a smaller number of regular season games and, due to the creation of a new round of divisional play-offs, a larger number of post-season games than earlier contracts called for. Moreover, the regular season coverage will be regionalized, as will the coverage of the divisional play-offs and LCS. We recognize that National and American LCS games will now be broadcast at the same time. Thus, it will no longer be possible for an individual to view every game of those series. On the other hand, the new configuration permits all LCS games to be broadcast in prime time, increasing the potential audience. While this change does not constitute migration, we recognize that it does change the overall availability of LCS games.

175. INTV argued that the MLB/ESPN contract, which calls for national cablecast of fewer than half as many games as the previous contract, should be considered "preclusive," by analogy to the statutory definition of preclusive contracts for college athletic conferences. Although the ESPN contract does provide Wednesday night exclusivity vis-a-vis broadcast coverage, it appears likely that the provision has had little effect on the number of games broadcast on local television stations. Rather, local stations have apparently increased their coverage of games on other days of the week. On balance, then, we consider the ESPN contract an addition to output rather than an example of migration or preclusive contracting. At the local level, there are instances of declining broadcast coverage of MLB games, but they appear to be isolated and not indicative of any overall trend.

176. Although we received a substantial amount of information regarding telecasts of college football games and the contracts governing them, certain ambiguities remain. Our assignment with regard to college football was twofold -- to assess whether games had migrated from broadcast television to cable and to evaluate possible preclusive contracts. The record provides some evidence that, at least in a few major markets, the number of

broadcasts by non-network stations has declined. While network broadcast coverage has increased in some of the markets for which we have data, that increase was not enough to offset the non-network decline. While cable coverage increased significantly during the period in question, we were unable to determine that migration of games from broadcast to cable coverage or preclusive contracts caused the non-network decline.

177. With regard to preclusive contracts, our analysis of the typical terms of contracts between college athletic conferences and video programming vendors, suggests that we cannot determine without the sort of factual evidence presented in a full-blown trial whether such contracts violate the antitrust laws. No commenter suggested that these contracts might violate any other statutes. It does seem clear that the college contracts generally do not prohibit local telecasts of local teams' games *per se*. However, the provisions that limit time periods available for local telecasts and the provisions that lead to many games being chosen for national or regional exhibition only six to twelve days prior to the game date clearly make it more difficult for local stations to contract for games. While it is possible for local stations to sign contingent contracts for carriage of certain local football games, provisions to increase the predictability of network carriage without compromising the benefits of timely selection of network games would certainly make the local stations' task easier.

178. The break-up of the CFA is likely to increase the broadcast coverage of college football, at least at the regional and national levels. However, in view of our concern about the decline in the availability of local college football games on local broadcast stations, we will continue to monitor this area. We therefore urge interested parties to file legitimate complaints with the Commission in the event that current or future college football contracts artificially and unfairly constrain local television stations' ability to televise local teams' games. Complaints should be as detailed and specific as possible. The Commission is committed to pursue such complaints vigorously and promptly. In this regard, should any such complaint indicate that a serious problem exists, we will take whatever further steps may be appropriate.

179. Few commenters explicitly addressed the question of whether additional government action to promote free access to sports programming would be appropriate. Because of the magnitude of sports programming on broadcast television, including the "marquee" events in all sports that we studied, and because our interest in the availability of a diverse menu of programming to the public encompasses both sports and non-sports programming, we have concluded that additional intervention is not warranted. Moreover, we note that because cable and other multichannel media have become widely available and are likely to become even more widely available, access to the vast array of non-broadcast sports programming is not a problem for most households. Most but not all cable sports networks are available on tiers subject to rate regulation. Regulation of cable rates pursuant to the 1992 Cable Act and, in the future, increased competition among multichannel media, provide assurance that rates will be reasonable. These factors mitigate concern regarding the affordability of access to sports programming on subscription media.

180. While it is hard to predict accurately, it appears likely that increased channel capacity on multichannel media will lead to increased availability of sports programming via those media, particularly out-of-market games. The out-of-market games appear conducive to pay-per-view or "pay-per-season" marketing. We recognize that broad and economical access to a variety of sports programming is instrumental to the Commission's goal of ensuring the availability of diverse programming. For that reason, should any significant threat to such access develop, we shall not hesitate to act, consistent with our statutory authority. Although, having fulfilled our statutory mandate, we are closing this docket, we shall remain open to submissions documenting any problems that might arise in the sports programming market. Moreover, we shall convey our findings in this inquiry to the Department of Justice and the Federal Trade Commission, the agencies with primary responsibility for antitrust enforcement. We call their attention particularly to the issue of preclusive college football contracts.

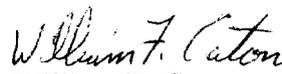
VIII. ADMINISTRATIVE MATTERS

181. This Final Report is issued pursuant to authority contained in Section 26 of the Cable Television and Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), and Sections 4(i) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 403.

182. IT IS ORDERED that the Secretary shall send copies of this Final Report to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate, and to the Attorney General and the Chairman of the Federal Trade Commission.

183. IT IS FURTHER ORDERED that this inquiry into sports programming migration is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX

Commenters

ABC	Capital Cities/ABC, Inc.
ARC	Affiliated Regional Communications, Ltd.
Arkansas	University of Arkansas
Big East	Big East Conference and Big East Football Conference
Denver	University of Denver
ESPN	ESPN, Inc.
Fox	Fox Broadcasting Company
INTV	Association of Independent Television Stations, Inc.
Miami	University of Miami
MLB	Office of the Commissioner of Baseball (Major League Baseball)
MLBPA	Major League Baseball Players Association
MSG	Madison Square Garden Corporation
NBA	National Basketball Association
NBC	National Broadcasting Company, Inc.
NCAA	National Collegiate Athletic Association
NCTA	National Cable Television Association, Inc.
NFL	National Football League
NHL	National Hockey League
NLBA	National Licensed Beverage Association
Pac 10	Pacific-10 Conference
Rainbow	Rainbow Programming Holdings, Inc.
SFU	Sports Fans United, Inc. (late-filed)
Southland	Southland Conference
SRL	Satellite Receivers, Ltd., dba Programming Center
Sun Belt	Sun Belt Conference
Time Warner	Time Warner Entertainment Company, L.P.
Tribune	Tribune Broadcasting Company
TSO	Texas Special Olympics
Turner	Turner Broadcasting System, Inc.
UIL	University Interscholastic League

Reply Commenters

ACC	Atlantic Coast Conference
ARC	Affiliated Regional Communications, Ltd.
CBS	CBS Inc.
ESPN	ESPN, Inc.
INTV	Association of Independent Television Stations, Inc.
MLB	Office of the Commissioner of Baseball (Major League Baseball)
NBA	National Basketball Association

NCTA	National Cable Television Association, Inc.
NFL	National Football League
NHL	National Hockey League
Tribune	Tribune Broadcasting Company