Spring 1984

Sports Broadcasting and the Law

Robert Alan Garrett
Arnold & Porter

Philip R. Hochberg
Baraff, Koerner, Olender and Hochberg

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Communications Law Commons, and the Entertainment, Arts, and Sports Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol59/iss2/1

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Nearly forty-five years ago, on May 17, 1939, the Columbia and Princeton baseball teams squared off to battle for fourth place in the Ivy League. The game would have been as unremarkable as the issue it decided, but for the fact that it became the first sports event ever televised in America. By today’s standards, the telecast was of exceptionally poor quality. The celebrated Bill Stern, who announced the telecast, reportedly “prayed for all the batters to strike out” because that “was the one thing [he] knew the camera could record.”

Even less clear than the picture itself was the future that lay ahead for televised sports. Orrin E. Dunlap, Jr., who did The New York Times’ coverage of radio in those days, perhaps best expressed the skeptical view:

[S]eeing baseball by television is too confining . . . . To see the fresh green of the field as The Mighty Casey advances to the bat, and the dust fly as he defiantly digs in, is a thrill to the eye that cannot be electrified and flashed through space . . . . What would Christy Mathewson, Smokey
Joe Wood, Home Run Baker, Eddie Collins, Frank Chance, Tris Speaker, Ty Cobb, Rube Marquard and those old-timers think of such a turn of affairs—*baseball from a sofa!* Television is too safe. There is no ducking the foul ball . . . .

However safe and confining, “sports from a sofa” has now become entrenched in the American way of life. Billions of dollars have been invested with the conviction that people not only will sit at home to watch sports on television; they will even *pay* to do so. As a consequence, the economic well-being of the sports industry has become inextricably intertwined with television. In the words of former Baseball Commissioner Ford Frick “[T]he advent of television [has] really turned the economics of the game topsy-turvy.”

Often overlooked is the role that the law has played in this process. Quite simply, there would be no broadcast revenues if the law had not recognized certain property rights in the accounts and descriptions of sports events; the size of these revenues is itself a function of the way in which the law has defined and restricted such property rights. As this Article will illustrate, the relationship between sports and television has been, and will continue to be, defined in large measure by a multitude of judicial, legislative and administrative pronouncements.

3. Id. at 39.
5. This Article is not limited to questions arising under the normal patterns of television distribution which the sports industry has employed for decades—that is, the sale of rights to local over-the-air television stations and to conventional broadcast networks. The evolution in communications technology during the late 1970's and early 1980's has spawned many of the issues addressed in this article. Some of the forms of distribution used in recent years and examples of these include—

- Nationwide distribution of local television stations through cable television distant signal importation (*e.g.*, Atlanta Braves on the “superstation” WTBS);
- Basic local cable service, provided at no additional charge to cable subscribers, primarily as an inducement to subscribe (*e.g.*, Buffalo Sabres on International Cable);
- Basic national cable service, provided at little or no additional charge to cable subscribers (*e.g.*, the National Hockey League on USA Network);
- Per-channel pay cable service with flat rate payment per month (*e.g.*, Philadelphia Phillies, Flyers, and 76ers on PRISM);
- Per-program pay cable service with separate charge per event (*e.g.*, Leonard-Hearns fight);
- Over-the-air pay television (Subscription Television or STV) package with flat rate per month requiring special television set attachment (*e.g.*, SportsVision in Chicago) (see Over-the-Air Subscription Television Operations, 47 C.F.R. §§ 73.641–644 (1982));
- Multipoint Distribution Service (MDS) with flat rate per month requiring special antenna (*e.g.*, Phoenix Suns) (see Multipoint Distribution Service, 47 C.F.R. §§ 21.900–908 (1982));
- Closed circuit distribution for arenas and theatres (*e.g.*, Portland Trailblazers);
- Direct Broadcast Satellite-to-home (DBS), providing five program services for a flat monthly charge, including NCAA events on Entertainment and Sports Programming Network (ESPN) (see Docket Report and Order in Gen. Docket No. 80-603, 90 F.C.C.2d 676 (1982)).

Still other forms of distribution which may be in the offing include: Low Power Television
I. Establishing The Property Right

The law of sports broadcasting had its origin some five years before the Princeton-Columbia matchup when a Mr. A.E. Newton, who operated radio station WOCL from the basement of his Jamestown, New York home, decided to go into the sports broadcasting business. Since 1921, Major League Baseball had entered into contracts authorizing the broadcast of World Series games by various radio stations. Newton, however, conceived of a way to broadcast the 1934 World Series between the Cardinals and Tigers without negotiating (i.e., paying) for the right to do so. He simply provided his audience with "running accounts" of the games based upon information that he had received while listening to authorized radio broadcasts.

Newton's "play-by-play" subsequently formed the basis of a challenge to his license renewal before the Federal Communications Commission (FCC). The claim was that such conduct violated section 325(a) of the Communications Act of 1934, which prohibits one station from rebroadcasting, without consent, another station's programming. The FCC considered Newton's conduct to be "inconsistent with fair dealing," "dishonest in nature," "unfair utilization of the results of another's labor," "deceptive to the public upon the whole, and contrary to the interests thereof"—but not violative of section 325. Emphasizing that he had confined his sportscasting career to the 1934 World Series, the Commission renewed Newton's license.

---

6. 47 U.S.C. § 325(a) (1976) provides in part: "[N]or shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."


8. Id. at 285. The FCC dealt with a case similar to Newton's nearly twenty years later when the New York Yankees, Brooklyn Dodgers, and St. Louis Cardinals challenged the license renewal of radio station KELP (El Paso, Texas). In re Trinity Broadcasting Corp., 18 F.C.C. 501 (1954). Station KELP broadcast "recreations" of the games of these clubs, without their consent, based upon information received from authorized broadcasts. (See infra note 14.) The clubs argued that KELP's actions involved an unlawful misappropriation of private property rights, as well as violations of § 303 of the Communications Act (prohibiting "false or deceptive" transmissions) and § 325(a). 18 F.C.C. at 501. The Commission observed that a number of courts had held conduct such as KELP's to be unlawful. Id. at 503. However, one court in Texas, where KELP was located, had ruled to the contrary. (See infra note 17.) Noting that there may "well be difference of opinion with respect to the correctness of the legal doctrine adopted by the [Texas] court," the FCC nevertheless dismissed the challenge to KELP's license renewal. 18 F.C.C. at 503.

In a 1953 report the Senate Commerce Committee suggested that the FCC should "take into consideration" any unauthorized sports broadcasts when deciding whether to renew a station's license. S. REP. No. 387, 83d Cong., 1st Sess. 10-12 (1953). The Committee further noted that these broadcasts are typically "inaccurate and misleading," "deceptive of the public" and
Newton's was the first in a series of reported decisions involving the right of sports clubs to control the dissemination of the accounts of their games. The forum, however, soon shifted from the FCC to the state and federal courts, where the sports clubs were more effective than they had been before the Commission. Those who sought to follow in Newton's footsteps argued that the accounts of sports events constituted news in the public domain and that any person had the right to disseminate the news. The courts took a different view.

The leading case is *Pittsburgh Athletic Co. v. KQV Broadcasting Co.* The defendant in that case was a Pittsburgh radio station, KQV, which had broadcast play-by-play descriptions of the Pirates' baseball games without the consent of the Pirates. The KQV announcers obtained their information about the games from station employees positioned at vantage points outside the Pirates' Forbes Field. The Pirates, who had licensed their radio rights to NBC, sued to enjoin the unauthorized KQV broadcasts.

The 1938 Pirates had the rare distinction of losing the National League pennant to the Chicago Cubs. But they were victorious against station KQV. The court enjoined KQV's activities, concluding that the ball club "by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games." The court held that KQV had misappropriated the property rights of the Pirates in the "news, reports, descriptions or accounts" of the Pirates' games; that such misappropriation resulted in KQV's "unjust enrichment" to the detriment of the Pirates; and that KQV's actions constituted "unfair competition," a "fraud on the public" and a violation of unspecified provisions of the Communications Act.

A similar result obtained some seventeen years later in *National Exhibition*
Co. v. Fass. The defendant in that case, an "independent newsgatherer" named Martin Fass, listened to authorized radio and television broadcasts of the 1953 and 1954 New York Giants. Without securing the Giants' consent, Fass simultaneously teletyped reports of their games to radio stations across the country for immediate rebroadcast. The Giants made it to the World Series in 1954; Fass did not. Some three months before Willie Mays turned his back on the celebrated Vic Wertz fly ball, the court enjoined Fass' activities and awarded the Giants damages, concluding:

Plaintiff is the owner of the professional baseball exhibitions which it produces; and its property rights, as owner of such exhibitions, include the proprietary right to sell to others, who desire to purchase and to whom plaintiff desires to sell, licenses or rights under which the purchasers are authorized to [broadcast the games] in such geographical area or areas as may be agreed upon between plaintiff and such purchasers. . . .

. . . In creating the games, the competing clubs not only create an exhibition for the spectators at the game but also create, as the game unfolds, a drama consisting of the sequence of plays, which is valuable program material for radio and television stations and for which licensees have paid and are paying plaintiff substantial sums.

Other courts likewise have protected the sports clubs' property rights in the accounts and descriptions of their games, and have prevented the unauthorized exploitation of these rights. There appear to be only two cases


14. These stations presented what had been known as "recreations," perhaps the most celebrated of which were those done by Gordon McLendon:

Saving the expense of pickups from baseball parks, entrepreneur Gordon McLendon staged hair-raising play-by-play descriptions in a Dallas studio from information on a news-agency ticker while an engineer, like an organist selecting stops, faded sound-effects records in and out: quiet crowds, restless crowds, hysterical crowds. His selections stimulated the announcer, who invented reasons for any sudden crowd excitement: a fan had made an unbelievable one-hand catch of a foul, or a peanut vender had fallen downstairs. McLendon was scholarly too: he had tape recordings of "The Star-Spangled Banner" as played at each ball park. The McLendon broadcasts were often more exciting than the ball games.


15. 143 N.Y.S.2d at 770.

16. E.g., Madison Square Garden Corp. v. Universal Pictures Co., 255 A.D. 459, 7 N.Y.S.2d 845 (N.Y. App. Div. 1938) (owner of New York Rangers stated a cause of action against defendants who had incorporated film of the Rangers' hockey game in a motion picture; defendants had been authorized to use the film in newsreels only); Mutual Broadcasting Sys., Inc. v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (1941) (defendant enjoined from retransmitting to paying customers plaintiff's broadcasts of the 1941 World Series); Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc., 165 Misc. 71, 300 N.Y.S. 159 (1937) (defendant enjoined from supplying radio station with "up to the minute" "ringside descriptions" of the Louis-Farr fight in Yankee Stadium); Southwestern Broadcasting Co. v. Oil Center Broadcasting Co., 210 S.W.2d 230 (Tex. Civ. App. 1947) (defendant enjoined from broadcasting high school football games, the broadcast rights to which had been licensed to the plaintiff). See also Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, Inc., 97 F.2d 223 (7th Cir. 1938) (radio station enjoined from broadcasting a professional football game, the rights to which had previously been granted to another station); Liberty Broadcasting Sys. v. National League Club of Boston, Inc., 1952 Trade Cas. (CCH) ¶ 67,278 (N.D. Ill. 1932) (concluding that each baseball club has
in which courts refused to do so—although it is unlikely that either of these decisions would be followed today.

The sports property right concept was strengthened by the Supreme Court in Zacchini v. Scripps-Howard Broadcasting Co. There, an Ohio television station broadcast a fifteen-second tape of the celebrated “Flying” Zacchini’s “human cannonball” performance without obtaining his consent. In response to Zacchini’s claim that the station had unlawfully misappropriated his professional property, the station responded that its broadcast was protected free speech. A five to four majority of the United States Supreme Court sided with the Flying Zacchini. Citing the Pittsburgh Athletic decision and other authority, the Court concluded:

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner . . . a prize fight . . . or a baseball game, where the promoters or the participants had other plans for publicizing the event.

a property right in its games and the “news, reports, descriptions and accounts thereof,” and the “sole right” to disseminate these accounts).


18. The court in Pittsburgh Athletic specifically rejected the Teleflash decision, characterizing it as an “incorrect” interpretation of the law. 24 F. Supp. at 493. Moreover, on several subsequent occasions, the New York state courts rendered decisions at odds with Teleflash. See authority cited supra note 16. The decision in Loeb v. Turner appears to be inconsistent with a sister court’s decision in Southwestern Broadcasting Co. v. Oil Center Broadcasting Co., 210 S.W.2d 230, which was not even mentioned in Loeb v. Turner.

In any event, the courts in Teleflash and Loeb v. Turner suggest that one could prevent persons located within the stadium from disseminating accounts of the sports event by conditioning admittance on this ground. See 24 F. Supp. at 488-89; 257 S.W.2d at 802. Many tickets and Working Press Passes have such a condition:

This pass is issued subject to the condition and by use of this pass each person admitted hereunder agrees that he will not transmit or aid in transmitting any report, description, account or reproduction of the baseball game, except . . . to the newspaper or press association represented by him . . . .


This working credential is issued to an organization for the sole purpose of providing stadium access to an accredited individual who has a legitimate working function (media or game service) in connection with this game. It is non-transferable. Any unauthorized use of this credential subjects the bearer to ejection from the stadium and prosecution for criminal trespass.


20. 433 U.S. at 574-75 (emphasis added) (citations omitted). See also Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co., 510 F. Supp. 81 (D. Conn. 1981), where the court ruled that a television station does not have “a constitutional right of special access” to a skating competition being held in a civic arena. The court upheld the defendants’ right to deny access to the station unless the station agreed not to broadcast footage of the event before the ABC television
Congress added a new dimension to the sports property right concept when it enacted the Copyright Act of 1976. At the urging of the professional sports leagues, Congress extended federal copyright protection to live sports broadcasts, thereby vesting the owners of these telecasts with the exclusive right to "perform" them "publicly." To be eligible for copyright protection, the broadcast must be "fixed" (i.e., recorded) simultaneously with its transmission. The remedies afforded by the Copyright Act are particularly valuable because they permit the copyright owner to recover statutory damages of between $250 and $50,000 for each act of infringement without regard to actual damages suffered.

network (to whom defendants had licensed the television rights) concluded its coverage. The court noted:

It is clear that the [International Skating Union] has a legitimate commercial stake in this event, and they, like Zacchini, are entitled to contract regarding the distribution of this entertainment product. . . . It is established . . . that the press has no constitutional right of special access to an event such as these skating championships.

. . . . [T]he entertainment here is the exposition of an athletic exercise. As such, it is on the periphery of protected speech (for purposes of a balancing of conflicting interests), as opposed, for example, to political speech, which is at the core of first amendment protection.

510 F. Supp. at 84-85, 86.

A similar case arose again in mid-1982, when Home Box Office and ABC had contracted to show delayed the Holmes-Cooney heavyweight championship fight in its entirety, but NBC News showed excerpts taken from the pay-television transmission. See infra note 112.

See also USA Today, Feb. 17, 1984, at 1-D (ABC, the purchaser of broadcast rights to the 1984 Winter Olympics, complained about NBC's unauthorized broadcast of highlights of an award ceremony and threatened to bar NBC from access to certain highlight film).


Once fixed, the live sports telecast qualifies for copyright protection as a "motion picture" which is a form of "audiovisual works." See 17 U.S.C. § 101 (definitions of "motion picture" and "audiovisual works"); 17 U.S.C. § 102(a)(6) (including "motion pictures and other audiovisual works" among the forms of copyrightable subject matter); 37 C.F.R. §§ 202.20(e)(2)(ii) & 202.21(g) (1983) (Copyright Office regulation concerning registration of copyrighted "television transmission programs").

It has been noted that many sports fans will be shocked to learn that since 1976 virtually every televised sports event has been "fixed." See Hochberg, Second and Goal to Go: The Legislative Attack in the 92d Congress on Sports Broadcasting Practices, 18 N.Y.L.F. 841, 863 n.97 (1973).

II. IDENTIFYING THE BENEFICIARIES OF THE PROPERTY RIGHT

Given the increasingly valuable nature of the property right which the sports clubs established in the accounts and descriptions of their games, it is not surprising that two other groups—broadcasters and players—have argued that they also are beneficiaries of this right. A somewhat related question, that has become important to colleges in particular, is which of the two teams involved in a game owns the rights to disseminate the accounts and descriptions of that game.

A. The Broadcasters' Claims

The legislative history of the Copyright Act of 1976 is replete with instances where the sports clubs assumed they would own the copyright that they urged Congress to create. Not once during the decade-long debates did the broadcasters assert anything to the contrary; on occasion, they even testified that the clubs would be the copyright holders. Nevertheless, when it came time to claim a share of the royalties paid by cable systems for retransmitting copyrighted television programming, the broadcasters' principal trade association—the National Association of Broadcasters (NAB)—argued that broadcasters have a copyrightable interest in sports telecasts which they produce, and that this interest entitles them to a share of royalties.

The Copyright Royalty Tribunal, the federal agency responsible for allocating the cable royalties among copyright owners, rejected the NAB's claims in the 1978 royalty distribution proceeding (the first such proceeding under the Copyright Act of 1976). Relying primarily on the legislative history of the Act, the Tribunal concluded that the sports clubs are the copyright owners of the telecasts of their games and are entitled to all of the cable royalties.


26. See, e.g., Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 526-32 (1973) [hereinafter cited as 1973 Senate Hearings] (testimony of James B. Higgins, representing the National Collegiate Athletic Association); id. at 533-36, 539-47 (testimony and statement of Bowie K. Kuhn, Commissioner of Baseball); id. at 550-51 (statement of Pete Rozelle, Commissioner of the National Football League); id. at 551-52 (statement of J. Walter Kennedy, Commissioner of the National Basketball Association); Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 785-810 (1975) [hereinafter cited as 1975 House Hearings] (testimony and statement of Bowie K. Kuhn, Commissioner of Baseball); id. at 810-17 (testimony and statement of Philip R. Hochberg, representing the National Hockey League); id. at 817-25 (testimony and statement of John O. Coppedge, representing the National Collegiate Athletic Association).

27. See 1975 House Hearings, supra note 26, at 785 (testimony of John Summers of the National Association of Broadcasters (NAB)); id. at 1377 (testimony of Vincent Wasilewski of the NAB); 1965 House Hearings, supra note 22, at 1244 (testimony of Ernest Jennes, counsel for the Association of Maximum Service Telecasters).

28. See infra notes 53-61 and accompanying text.
attributable to these telecasts—unless the broadcaster and club have a contractual agreement “specifically” to the contrary. 29 The United States Court of Appeals for the District of Columbia Circuit did not find the legislative history to be quite so dispositive of the question. Nevertheless it affirmed the Tribunal’s decision to award to the sports interests all of the 1978 royalties for sports programming. 30

The Copyright Act provides that cable royalties may be awarded only to copyright owners. 31 Thus, the court’s decision to affirm the Tribunal’s sports award leaves no doubt that the sports clubs are copyright owners of the telecasts of their games. The decision, however, suggests that the broadcasters also may have a copyrightable interest in sports telecasts which they produce, 32 and that the mission of the Tribunal is to evaluate the broadcasters’ interest in these telecasts vis-a-vis that of the sports clubs.

In the appeal of the 1978 cable royalty proceeding the court observed that the broadcasters’ interest was “quantitatively de minimis”; 33 thus, it upheld the Tribunal’s decision not to award any sports royalties to the broadcasters. In the subsequent appeal of the 1979 proceeding, however, the court determined that the valuation issue was one to be decided on the basis of the particular record before the Tribunal. Because the NAB had introduced new evidence in the 1979 proceeding on broadcasters’ contributions to sports telecasts and because the Tribunal had not evaluated this evidence, the court remanded the sports award to the Tribunal for such an evaluation. The court did make it clear, however, that the Tribunal need not award the broadcasters any royalties whatsoever for their contributions to sports telecasts. 34

Before the court of appeals had ruled in the 1979 case, the Tribunal, in the 1980 cable royalty proceeding, appeared to make the very record evalua-

---

30. See National Ass’n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 377-79 (D.C. Cir. 1982).
32. According to the court, “Congress clearly seemed to contemplate Tribunal recognition of the copyrightable interests claimed by NAB.” 675 F.2d at 378. Referring to the “banter of Howard Cosell and Don Meredith,” the court also adopted the perhaps not universally-shared conclusion that: “Anyone who has ever watched ABC’s Monday Night Football . . . knows that the commentary of the announcers and such effects as instant replay in slow motion add immensely to the quality of a sports telecast.” Id. at 378 (footnote omitted).
33. The court noted:

That the interests advanced by NAB are copyrightable does not get broadcasters to the promised land . . . . The Tribunal still must address the value of these interests . . . . By any standard . . . the theories advanced by NAB concern interests that are quantitatively de minimis. As the Tribunal observes, the work of television stations in broadcasting sports events and compiling broadcast days has minimal market value because “the public tunes in sports broadcasts mainly to see the sports performance, not the activities of the director and the cameramen.”

Id. at 379 (citation omitted) (emphasis added).
tion subsequently ordered by the court. The Tribunal concluded that the broadcasters’ contributions are, indeed, *de minimis* and do not warrant any increase in the broadcasters’ royalty award:

[T]he contribution of the broadcaster as compared with that of the teams is minimal . . . .

We find no evidence in our record, including that of the NAB sports witnesses, establishing that the contribution of the broadcaster in any significant respect contributes to a cable operator’s interest in sports programming, or the decision of an individual to subscribe to cable television.

. . . Proceeding from the broadcaster use of ratings to judge the value of programs, [a witness for the sports interests] testified that the factors that affect the ratings all relate to the sports teams, and that the quality of the production does not affect the ratings. We concur in this testimony. *We do not find it creditable that a cable subscriber would pass up viewing a game involving teams competing for the pennant to watch a Chicago Cubs game because of the quality of the production of the Cubs telecast.*

Although the Tribunal may have underestimated the loyalty of Cubs fans who typically are quite interested in watching their team lose, its observations otherwise appear to be accurate.

The broadcasters and sports interests ultimately resolved their differences before the Tribunal. The settlement provides that the sports interests will continue to receive all of the royalties attributable to sports telecasts; individual broadcasters can seek to enter into negotiations with their clubs as to how, if at all, these royalties might be shared. In adopting the settlement agreement, the Tribunal noted:

As we and the Court of Appeals have previously recognized, it is clear that a sports club owns a copyright in the telecasts of its games if simultaneously “fixed;” it is equally clear that a broadcaster who produces the telecasts of such games also owns a copyright in such telecasts.

35. 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9,552, 9,565-66 (1983) (emphasis added). On motion of the Tribunal, the order in the 1980 case subsequently was so vacated and remanded to the Tribunal in light of the court’s decision in the 1979 case. The remand proceeding is now pending before the Tribunal.

36. It is perhaps instructive to note that a trade association—the NAB—was the one to raise the sports issue before the Tribunal. Individual broadcasters have typically recognized in contractual agreement that the clubs own the copyright in the telecasts of their games, and that they (the clubs) are entitled to the cable royalties. For example, in the 1980 royalty distribution proceeding, Major League Baseball presented a survey showing that of the 15 Baseball contracts which specifically addressed the issue for the 1980 season, all provided that the club is the copyright owner; four other clubs had contracts covering subsequent seasons which specifically provided that the club is the copyright owner; of the seven remaining clubs, two produced their own telecasts and two were commonly owned with their flagship stations (thus, in these instances there was no controversy over the royalty distribution). Sports Ex. No. 44 in CRT Docket No. 81-1 (on file with authors). Typical contractual language is:

It is hereby recognized that the club, as the original owner of the copyright to each telecast made pursuant to this Agreement, possesses all rights afforded the copyright owner by the Copyright Revision Act of 1976, Public Law 94-553, with respect to these telecasts, including without limitation, the rights to receive royalties distributed pursuant to Section 111 of the Act and to sue for infringement under Chapter 5 of the Act.
These copyrightable interests have relative market values, the determination of which may be addressed in any royalty distribution proceedings. By adopting the approach of [the broadcasters and sports interests], it is not necessary that we make such a valuation; rather, we are simply allowing the parties themselves to do so in the context of their private negotiations.\textsuperscript{17}

\section*{B. The Players' Claims}

In May 1982 the Major League Baseball Players Association (MLBPA) sent a form letter to a number of the television stations, national television networks and cable networks broadcasting professional baseball games. The MLBPA claimed that the players possess property rights in the televised performances of baseball games; that there can be no broadcast of these performances without the players' consent; and that the Major League Baseball clubs, the leagues and the Commissioner of Baseball have no authority to grant such consent—although they have been doing so for nearly forty years.\textsuperscript{38}

The response of the Major League Baseball clubs has been to seek a declaratory judgment that the players have no rights to broadcast revenues. In \textit{Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n},\textsuperscript{39} the clubs have sought a ruling that they, as the employers of the players, possess all rights in the telecasts of their games based upon (1) the "works made for hire" doctrine in the 1976 Copyright Act;\textsuperscript{40} (2) the common law master-servant doctrine; (3) the Uniform Player's Contract;\textsuperscript{41} and (4) the doctrines of waiver.

\textsuperscript{39} No. 82 C 3710 (N.D. Ill. filed June 14, 1982). The suit was brought by all twenty-six Major League Baseball clubs. Two weeks later three players filed a counter-lawsuit, raising the same issue. Rogers v. Kuhn, No. 82 Civ. 4310 (S.D.N.Y. filed July 1, 1982). This case has been transferred to the Northern District of Illinois and consolidated with the \textit{Baltimore Orioles} litigation. Cross-motions for summary judgment were filed in late 1983.
\textsuperscript{40} See 17 U.S.C. §§ 101, 201(b) (Supp. V 1982); H.R. REP. No. 94-1476, supra note 24, at 121. This doctrine provides, in essence, that an employee's contribution to a copyrighted work becomes the property of the employer. See generally Angel & Tannenbaum, \textit{Works Made for Hire Under S.22}, 22 N.Y.L. SCH. L. REV. 209 (1976).
\textsuperscript{41} Paragraph 3(c) of the Uniform Player's Contract provides:

\begin{itemize}
  \item The player agrees that his picture may be taken for still photographs, motion pictures or television at such time as the Club may designate and agrees that all rights in such pictures shall belong to the Club, and may be used by the Club for publicity purposes in any manner it desires.
\end{itemize}
and estoppel and implied and express consent. A judicial decision upholding the clubs' position on any one of these theories would remove the controversy from the courts but not from the negotiating table; the issue of whether players may receive a direct share of the increasingly important broadcast revenues (over and above their current salaries) surely will surface during collective bargaining sessions.

C. Inter-Club Claims

Sports clubs have confronted challenges not only from broadcasters and players, but from other clubs as well. Because a game cannot be played without two teams, the question has arisen: Which team owns the right to distribute the accounts and descriptions of that game? Typically, this question is resolved by agreement.

One rather interesting case, where no contractual resolution had been reached, was *Wichita State University Intercollegiate Athletic Ass'n, Inc. v. Swanson Broadcasting Co.* This case involved a radio station in Wichita, Kansas, which had contracted with opponents of the Wichita State University (WSU) football and basketball teams to broadcast WSU's away games (that is, the opponents' home games). WSU, which itself had entered into a broadcasting contract with another Wichita radio station, sought to enjoin the other broadcasts in its home city of Wichita. It relied upon common law principles of misappropriation and contractual interference. The court granted a preliminary injunction, concluding:

> Wichita State University has the right to broadcast the sports events into their home territory, be it a "home game" or "away game." They do not have the right to make a determination who will broadcast that game to New York, Los Angeles, or Moose Jaw, Montana, but they do have a right to make a determination as to who they will contract with to broadcast that game into the Wichita area. It is an exclusive right and it is a right exclusive even of the opponent of Wichita State University; they cannot make that determination.

42. Compare National Football League v. The Alley, Inc., No. 83-0701 CIV-JWK (S.D. Fla. filed Mar. 25, 1983), Transcript of Bench Ruling at 3 (Nov. 22, 1983) ("The players and coaches consented to participate in the [National Football League] game and they waived their rights they may have had under [the Florida right of publicity statute] with respect to the public use of their game"). See also id., Order Containing Findings of Fact and Conclusions of Law, at Finding 17 and Conclusion 9 (Dec. 29, 1983).

43. For example, assume that the University of Pittsburgh is playing at the University of Maryland in an important Eastern game. Pitt's licensee for delayed broadcast in Pittsburgh decides to sell its tape for a delayed cablecast to USA Network without Maryland's permission. Can Maryland stop the USA showing? Suppose Maryland already had sold rights to ESPN?

44. Case No. 81 C 130 (Sedgwick Cty., Kan. Dist. Ct.).

45. Transcript of Bench Ruling at 5 (January 23, 1981). But see Kelly Communications Corp. v. Westinghouse Broadcasting Corp., Case No. 83-377 Civil (Sup. Judicial Ct. for Suffolk Cty., Mass.). After Kelly had purchased the rights to Boston College football and sold them to one Boston radio station, Westinghouse's Boston station joined the Penn State radio network for a single game, Penn State at Boston College. In a bench ruling the day before the game, the appeals court dissolved a preliminary injunction which would have prevented Westinghouse from presenting the broadcast. Language in the *Pittsburgh Athletic* decision, discussed supra notes
The same issue arose in a case involving Michigan State University. The plaintiff in that case, Gross Telecasting, had been unsuccessful in its attempts to negotiate television rights with Michigan State. Consequently, it sought to purchase the rights to Spartan away basketball games from other Big Ten schools. Gross was able to obtain the rights for games played at Michigan, Minnesota and Iowa, but not for those played at Ohio State, Illinois, Indiana and Purdue, allegedly because Michigan State coerced those schools into not granting contracts. Gross sued on a number of grounds, including antitrust and first amendment issues and state law business tort claims. In mid-1983, it was agreed that "[t]he defendants would bring an appropriate motion so as to bring before the court the issue of whether defendant Michigan State University had a legally cognizable property right or interest in away game telecasts of its Big Ten basketball games." The case was dismissed with prejudice, however, before the motion was ever filed.

III. DEFINING THE SCOPE OF THE PROPERTY RIGHT

As the foregoing discussion makes clear, sports clubs have a property right in the accounts and descriptions of their games. Attempts to discern the precise boundaries which the communications, copyright, antitrust and other laws place upon this right are at the center of a number of lawsuits, laws and administrative regulations.
**A. Cable Retransmission of Sports Telecasts**

One of the most severe and anomalous limitations placed upon the sports clubs is that which involves the retransmission of their telecasts by cable systems. Under the Copyright Act of 1976, cable systems possess a "compulsory license" to retransmit whatever television programming is authorized by the rules of the FCC—that is, they may carry any of this programming without obtaining the consent of the copyright owners or the originating television stations (although cable systems do have the option of negotiating for program rights if they so choose). Cable is the only communications medium which has been permitted to present the accounts and descriptions of the clubs' games without negotiating for the right to do so. A substantial question

the legislative decisions in cable television, copyright, pooling and blackout discussed infra. For example, in 1976, the House of Representatives established a Select Committee on Professional Sports, chaired by California Democrat B.F. Sisk. The Sisk Committee heard from 89 witnesses, a number of which were in the area of sports broadcasting. See Hearings Before the House Select Committee on Professional Sports, 94th Cong., 2d Sess. (1976). The sole legislative recommendation was that a new anti-blackout bill be adopted in the 95th Congress. See H.R. Rep. No. 1786, 94th Cong., 2d Sess. (1977).

Complaints of abuses in the televising of sports events led to a specific investigation by the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce in late 1977. Serial No. 95-98, 95th Cong., 1st Sess. The Subcommittee was concerned with the role of the television networks in program procurement, particularly in regard to broadcast contracts for the 1980 Winter and Summer Olympics, boxing events, "winner-take-all" tennis matches and matters dealing with sports coverage. A subsequent staff study found numerous practices which the staff urged be referred to the Federal Communications Commission, Federal Trade Commission, Department of Justice, or the Investigations Subcommittee of the House Commerce Committee.


The Supreme Court had held that cable's retransmission of television signals did not constitute copyright infringement under the 1909 Copyright Act. See Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). Cable's copyright liability was debated by Congress for more than a decade before enactment of the 1976 law. For a number of years, the copyright bills considered by Congress excluded sports from compulsory licensing, in part because its ephemeral nature made it unique among programming fare. Senate Judiciary Comm., Draft Report To Accompany S. 1361, 93d Cong., 2d Sess. 33 (1974); S. Rep. No. 1035, 93d Cong., 2d Sess. 67-70 (1974); Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm., Draft Report To Accompany S. 543, 91st Cong., 1st Sess. 29 (1969). Ultimately, however, the sports issue was considered a matter of "communications" rather than copyright policy, and sports programming was included in the compulsory license. See S. Rep. No. 473, 94th Cong., 1st Sess. 80 (1975).

50. Apparently, no sports club has ever challenged a cable system under common law theories, such as in the Pittsburgh Athletic and National Exhibition cases discussed above. The activities of cable-systems would appear to be indistinguishable from those of the defendants in these cases. To the extent that a club records its telecasts, section 301(a) of the 1976 Act, 17 U.S.C. § 301(a) (Supp. V 1982), likely preempts such a challenge. Under section 301(b), 17 U.S.C. § 301(b), however, the preemption doctrine would not foreclose a common law claim with respect to telecasts that have not been recorded. See also H.R. Rep. No. 94-1476, supra note 24, at 52.
exists whether there is any justification for continuing this special privilege. Nevertheless, Congress has not yet demonstrated any willingness to abolish cable's compulsory license.

Because of the compulsory license, sports clubs have virtually no control over cable's distribution of games which are broadcast by conventional television stations. Their only right of control emanates from certain FCC rules which restrict some of cable's importation of sports telecasts from distant markets. Before considering the relevant FCC rules, it is useful to focus on the one and only benefit that the clubs receive from compulsory licensing—a share of the royalties paid by cable systems.

1. Royalty Payments

In return for its compulsory license, each cable system must deposit semi-annually a statutorily prescribed royalty fee with the Copyright Office. These royalties are then distributed by a second governmental agency, the Copyright Royalty Tribunal, to the copyright owners of non-network television programs which cable systems import into distant markets. The first royalty fund (that for the year 1978) amounted to about $15 million when distributed; the 1982 fund amounted to slightly over $40 million.

The Copyright Act does not provide the Tribunal with any guidance as to how the royalties should be allocated among eligible copyright owners. Thus, the question of how much the sports clubs and copyright owners of other television programming should receive has been the subject of extensive litigation before the Tribunal and the courts during the past few years.


52. One interesting question is whether the courts would strike down the compulsory license. At least one commentator has argued that cable's compulsory license is unconstitutional. See Winner, Cutting the Gordian Knot: Compulsory Licensing Under the Cable Portion of the Copyright Act, Antitrust, and Unpredictability, 3 COM. & L., Fall 1981, at 41, 60-61.


55. The major parties who have claimed a share of the royalty pool on behalf of their constituents include the Motion Picture Association of America (representing the producers and
Most of the parties originally supported a formula pursuant to which the royalties would be divided essentially according to the relative amount of time that the claimants' programming occupied. The Tribunal, however, adopted a sports proposal to focus upon the relative marketplace values of the various program categories—looking in particular to the relative benefit which cable systems receive, and the relative harm caused to the copyright owners, from the carriage of the programming categories. Utilizing these criteria, and based upon an extensive evidentiary record, the Tribunal awarded the sports interests twelve percent of the 1978 royalty fund; this share was increased to fifteen percent of the 1979 and 1980 royalty funds. The Tribunal's allocation of the 1978 and 1979 funds was, for the most part, affirmed by the United States Court of Appeals for the District of Columbia Circuit; the 1980 decision was appealed and then remanded, on the Tribunal's motion, for reconsideration in light of the court's opinion in the 1979 case.

The statutory fee schedule results in what Congress recognized would be only "modest" royalty payments. In fact, the payments amount to about only one percent of the cable industry's total revenues, less than the industry's...
bill for postage and stationery.\textsuperscript{60} The royalties received by the clubs each year are, therefore, relatively minor. The amount which each professional club currently receives on an annual basis, for example, is less than the average yearly salary of a single player.

In all probability, the size of the royalty pool (and thus the sports royalties) will increase in future years. Estimates are that the 1983 pool, for example, could approach $80 million. The increase in attributable largely to the fact that the royalties paid by cable systems are tied to their revenues, and cable revenues are growing. In addition, the Tribunal recently has raised the royalties paid for one class of distant signal programming—that which is carried as a consequence of the FCC's decision to repeal its most significant restrictions on importation of programming from distant markets.\textsuperscript{61} Nevertheless, the total cable royalties to be received by sports clubs in the foreseeable future likely will fall well short of what would be produced in a free marketplace setting.\textsuperscript{62}

2. FCC Cable Rules

As noted above, cable's compulsory license extends only to that programming which may be carried pursuant to the FCC's rules. For several years, the FCC restricted the number of distant signals that cable systems could import; with certain exceptions, cable systems located within television markets generally were not permitted to import any distant network affiliates or more than two distant independent signals. The FCC's 1979 decision to repeal these rules was challenged by the sports interests, as well as by other program suppliers and by broadcasters. However, the decision was affirmed by the United States Court of Appeals for the Second Circuit and became effective in June 1981.\textsuperscript{63}

\footnotesize
\begin{itemize}
\item \textsuperscript{60} Hatfield & Garrett, \textit{supra} note 53, at 437.
\item \textsuperscript{61} \textit{See} 47 Fed. Reg. 52,146 (1982) (to be codified at 37 C.F.R. § 308), \textit{aff'd}, National Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal, No. 82-2389 (D.C. Cir. Dec. 30, 1983); Hatfield & Garrett, \textit{supra} note 53; \textit{infra} notes 63-64 and accompanying text.
\item There is, however, legislation pending which would undercut substantially the Tribunal's rate increase. \textit{See} S. 1270 and H.R. 3419, 98th Cong., 1st Sess. (1983) (in effect exempting cable operations from having to pay the increased rates for carriage of "superstation" WTBS-TV (Atlanta, Georgia)); H.R. 2904, 98th Cong., 1st Sess. (1983) (permitting all cable operators to carry at least three distant independents before having to pay the increased rates).
\item \textsuperscript{62} As the Tribunal has noted:
\begin{quote}
\textit{[T]he current statutory rates [can]not be considered those that would result from full marketplace conditions if the compulsory license did not exist. The rates were established as a legislative compromise, they are arbitrary, and they were intended to require only a minimum payment on the part of cable operators.}
\end{quote}
47 Fed. Reg. at 52,154. \textit{Compare} 5 \textit{ENTERTAINMENT L. REPTR.} 20 (Nov. 1983) (noting that Belgian cable operators recently had agreed to pay 15% of their subscriber revenues to carry programming originated by various European broadcast stations).
\end{itemize}
The repeal of the distant signal rules has been a matter of concern to sports clubs. By limiting the number of distant signals that could be imported, the former rules necessarily restricted the number of distant signal sports events that could be brought into any club’s home territory. Absent the rules, cable systems may import literally hundreds of sports events. On any given day, for example, a sports club trying to attract fans to its stadium or viewers to its telecast may find itself having to contend with three or four telecasts involving other league members. Sports clubs have been concerned that such unrestrained importation adversely affects gate receipts and broadcast revenues. Moreover, cable operators themselves are increasingly becoming aware that the importation of distant signals has the potential for substantially undercutting their pay sports packages.

Two sets of FCC rules are still in effect and provide sports clubs with some limited—but nevertheless important—control over cable importation of distant sports events. The first is known as the “Sports” or “Same Game” Rule. Pursuant to this Rule, a club may require cable systems within thirty-five miles to delete the distant signal telecast of that club’s home game—provided that the home game is not televised locally. For example, assume that the Los Angeles sports clubs, concerned about their lack of control over cable’s distribution of conventional telecasts, would choose to present fewer of these telecasts over the years. See infra note 128. The FCC’s failure to consider the impact of its action upon the supply of sports programming formed the basis of sports’ appeal. The court, however, concluded that the FCC had not acted arbitrarily. See 652 F.2d at 1150.

64. Cable systems must, of course, pay compulsory licensing royalties to do so. For the larger systems (those with more $214,000 in semi-annual revenues from basic services), the size of their royalty payments is linked to the number of distant signals that they import. See 17 U.S.C. § 111(d)(2)(B), as amended, 37 C.F.R. § 308.2 (1983). The cable industry has argued that the Tribunal’s decision to raise substantially the rates for programming carried as a result of FCC deregulation (see supra note 61 and accompanying text) will deter cable operators from carrying this programming. Thus, cable contends, the Tribunal’s rate decision effectively reimposes the distant signal rules. See Brief of National Cable Television Association, at 27, National Cable Television Ass’n, Inc. v. Copyright Royalty Tribunal, No. 82-2389 (D.C. Cir. Dec. 30, 1983); Hearings on H.R. 2904 and H.R. 3419 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. (1983-84).


Colleges also have been concerned that cable’s retransmission of their local non-network “exception” telecasts into distant markets will result in their being charged with a “regional appearance,” thereby resulting in the loss of potentially hundreds of thousands of dollars in broadcast revenues. See, e.g., Arkansas Cable Television Ass’n, 62 F.C.C.2d 15 (1977). Reportedly, Notre Dame University actually paid certain cable systems not to import its non-network telecasts so that it would not be charged with a regional appearance, a circumstance which seems to set copyright ownership on its ear.

66. 47 C.F.R. § 76.67 (1983). This rule was adopted by the FCC in 1975 after several years of proceedings. See Report and Order in Docket No. 19417, 54 F.C.C.2d 265, on reconsideration, 56 F.C.C.2d 561 (1975).

67. The Sports Rule contains multiple exceptions, and requires the clubs to provide cable systems with timely and proper notification of the telecasts to be deleted. The Rule applies only to cable systems which are located within 35 miles of a specific reference point in the community with which the club is identified.
Angeles Lakers and Chicago Bulls are playing a game in Los Angeles. If the Lakers are not televising the game in Los Angeles, they may request affected cable systems in the Los Angeles area to delete the telecast of the game by the Bulls. A cable system which fails to comply with such a request would be subject to a fine by the FCC, as well as a copyright infringement action since its compulsory license extends only to programming which is authorized to be carried under the FCC’s rules.

The Sports Rule helps prevent cable systems from frustrating a club’s decision not to televise a particular home game. The primary effect of the Rule is to protect the club’s home gate. The Rule, however, also is important to protecting the clubs’ pay cable or subscription television contracts. For example, if a club could not prevent cable systems from importing its home games via the visitors’ telecasts from Atlanta, New York, Chicago and possibly elsewhere, important bargaining leverage against the cable or subscription television operator might be lost.

One other set of FCC rules which affords some limited control over the distribution of sports telecasts is that which involves network nonduplication. Professional sports clubs, either on their own or through their television flagship station, often establish a network of stations to televise their games. For example, the Cubs’ flagship, WGN-TV, feeds its telecasts to stations

68. Sports Rule protection also may be available where a cable system seeks to import the distant telecast of a game broadcast by a national network. The home club involved in that game may request the deletion of the distant telecast, provided that the telecast is not being carried by the local affiliate (and provided that none of the other Sports Rule exceptions is applicable).

69. See, e.g., Major League Baseball and the San Francisco Baseball Club, 50 R.R.2d 39, reconsideration denied, 50 R.R.2d 582 (Cable TV Bureau 1981) (imposing fines of between $500 and $1500 for the carriage of two telecasts in violation of the Sports Rule). See also Centre Video Corp., 64 F.C.C.2d 769, 770 (1977) (in a case where the systems failed to delete certain distant signal hockey telecasts, the FCC warned that the Sports Rule is “clear and unambiguous and we expect adherence to its provisions in the future. Failure to do so will result in appropriate administrative action.”).

70. The FCC’s principal concern was not with protecting the home gate per se, but ensuring the availability of sports programming on conventional television. The Commission concluded: Gate receipts are the primary source of revenue for sports clubs, and teams have a reasonable interest in protecting their home gate receipts from the potentially harmful financial effects of invading telecasts of their games from distant television stations. If cable television carriage of the same game that is being played locally is allowed to take place, the local team’s need to protect its gate receipts might require that it prohibit the telecasting of its games on television stations which might be carried on local cable systems. If this were to result, the overall availability of sports telecasts would be significantly reduced. In light of these considerations, most parties, including the NCTA, have recognized the reasonableness of a rule which would prohibit same game importations.

54 F.C.C.2d at 281 (footnotes omitted).

71. Part of this leverage is lost in any case since the FCC does not require cable systems to carry local STV transmissions, thereby potentially depriving a team (and its STV operator) of access to the cable-only market. See WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981). Clubs which take advantage of the Sports Rule do run the risk of incurring the wrath of those fans who feel they are entitled to view the telecast. It is not uncommon for cable systems to place a notice on the blacked-out channel suggesting that their subscribers telephone their complaints directly to the club.

located in various Illinois, Indiana and Iowa communities. Under the FCC's network nonduplication rules, the stations in these communities may be able to prevent local cable systems from carrying the duplicating WGN-TV telecast. This, of course, preserves the local station as the exclusive outlet for the event, thereby making the rights acquired by these stations more valuable.

B. Superstations

In December of 1976 the FCC authorized a so-called "resale common carrier" to distribute, via satellite, the signal of Ted Turner's television station WTBS (then WTCG-TV) (Atlanta, Georgia) to cable operators throughout the country. The Commission subsequently approved applications of other carriers to distribute via satellite the signals of stations WGN-TV (Chicago, Illinois) and WOR-TV (New York, New York). As of December 1983, these three "superstations" reached some 28 million, 11 million and 4 million distant cable households in the United States, respectively—as well as an undisclosed number of others in Mexico, Canada and the Caribbean.

73. See, e.g., Report and Order in Docket No. 19417, 54 F.C.C.2d 265, 281 n.60 (1975); Pioneer Cablevision Corp., 53 F.C.C.2d 325 (1975); Cable TV of Fairmont, 48 F.C.C.2d 991 (1974), reconsideration denied, 50 F.C.C.2d 976 (1975); Sonic Cable TV, 45 R.R.2d 1247 (Cable Bureau 1979), aff'd, 48 R.R.2d 1159 (1981); Valley TV Cable Co., 36 R.R.2d 315 (Cable Bureau 1976); Maine Cable Television, Inc., 34 R.R.2d 1452 (Cable Bureau 1975).

There may be some question as to the applicability of these rules where different announcers are utilized. See, e.g., Sonic Cable TV, 45 R.R.2d 1247, 1248-49 (Cable Bureau 1979), aff'd, 48 R.R.2d 1159 (1981); Memorandum Opinion and Order in Docket No. 19417, 56 F.C.C.2d 561, 569-70 (1975).


75. Eastern Microwave, Inc., 70 F.C.C.2d 2175 (1979); United Video, Inc., 69 F.C.C.2d 1629 (1978). See generally Tigerman, The Growing Problem of Involuntary Superstations, 12 J. of Arts Mgmt. & L. 51 (1982). Other stations approved by the FCC for full-time satellite distribution are WSBK-TV (Boston, Massachusetts); KTTV (Los Angeles, California); and KTVU-TV (San Francisco, California). KTVU-TV was, in fact, delivered via satellite for a period of time in 1978 and 1979. None of the other signals, however, has ever been placed on satellite. The resale carrier of WGN-TV, United Video, has announced that it will place WPIX-TV (New York, N.Y.) on satellite commencing May 1, 1984.

Even prior to the FCC's action, these and other television signals have been distributed to cable operators via terrestrial microwave; many television signals continue to receive extensive microwave distribution, such as WPIX-TV (the Yankees' flagship which is available throughout New England and the mid-Atlantic states into West Virginia). The costs of transmitting via microwave are, however, distance-sensitive. Consequently, a principal effect of satellite distribution is that the stations can reach a much larger nationwide audience than those stations delivered only via microwave.


77. The FCC has authorized the resale carriers to provide the superstations to customers outside the United States, provided that they obtain the approvals necessitated by international law. See Transborder Satellite Video Services, 88 F.C.C.2d 258 (1981). Negotiations to obtain approvals from Bermuda have been successfully completed. See United Video, Inc., F.C.C. File No. I-T-C-3163 (Com. Car. Bureau released Aug. 19, 1983). The National Telecommunications and Information Administration (NTIA) of the Department of Commerce and the State Department have urged the FCC to stay its decision unless and until the United States has received assurances that the interests of U.S. copyright owners will be adequately protected. See also H.R. REP. No. 192, 98th Cong., 1st Sess. 82 (1983) ("expecting" that the State Department
A prime characteristic of each of the superstations is its heavy concentration of sports programming. These three stations alone present nearly 600 telecasts each season of Major League Baseball, National Basketball Association, National Hockey League and North American Soccer League games, as well as a number of collegiate sports telecasts. None of the sports clubs, however, has authorized the resale carriers to place its telecasts on satellite. The resale carriers have done so without the consent of, and without paying any compensation to, the clubs or any copyright owner or the stations themselves.

The question whether the resalers' activities constitute copyright infringement was addressed in litigation involving the New York Mets. Eastern Microwave, Inc. (EMI), the resale carrier of WOR-TV, sought a declaratory judgment that its unconsented retransmission of Mets' telecasts on WOR-TV is exempt from copyright liability under various provisions of the Copyright Act. In one of the few victories achieved by the 1982 Mets, a federal district court rejected EMI's position. The district court's decision was most signifi-

...
Indianapolis Journal of Law and Public Policy

and was supported by the Register of Copyrights in an amicus brief filed in the EMI litigation. Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 127 n.5 (2d Cir. 1982), cert. denied, 103 S. Ct. 1232 (1983).

The other claim rejected by the district court was that EMI's activities qualify for the "passive carrier" exemption of section 111(a)(3) of the Act, 17 U.S.C. § 111(a)(3) (1982). See 534 F. Supp. at 537-38. This exemption permits the retransmission of television signals by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cable, or other communications channels for the use of others.


83. 691 F.2d at 132-33.

During the pendency of the EMI litigation, the National Association of Broadcasters (NAB), the Motion Picture Association of America (MPAA) and the National Cable Television Association (NCTA)—without the involvement of the sports interests—entered into a compromise agreement concerning the cable provisions of the Copyright Act. In return for certain concessions made by the NCTA, the NAB agreed to an amendment which would have overturned the district court decision in EMI. See Letter from Vincent Wasilewski, President NAB, to Thomas Wheeler, President, NCTA at 2 (Mar. 18, 1982) (on file with authors). The compromise ultimately was embodied in a bill. See H.R. 5949, 97th Cong., 2d Sess. (1982). Consistent with the compromise, the committee report accompanying this bill stated that the district court incorrectly construed the passive carrier exemption. H.R. Rep. No. 559, 97th Cong., 2d Sess. 4-5 (1982).

The court of appeals in EMI found this committee report to be of "general interest;" however, it said that the report did not influence its interpretation of congressional intent surrounding the 1976 Act. 691 F.2d at 129 n.11. See also 128 Cong. Rec. S16006 (daily ed. Dec. 21, 1982) (statement of Senator Mathias) (provision of H.R. 5949 overturning the district court decision in EMI constitutes a "major change in the present copyright law and represents a sharp departure from prior policy"). The bill embodying the compromise was never enacted into law. See Fitzpatrick & Sherman, 97th Congress Reconciles Few Copyright Debates, Legal Times, Feb. 7, 1983, at 18, col. 1.

84. A Minnesota television station has sued WTBS and its resale carrier under the Copyright
of potential superstation distribution—most significantly direct broadcast satellites (DBS)—may renew copyright owner interests in securing control. Wholly apart from the EMI control issues, the superstation phenomenon has generated (and likely will continue to generate) other litigation involving the rights of sports interests which deal with the superstations. Two decisions illustrate this point.

The first involved a lawsuit by American Broadcasting Company (ABC) and a number of Major League Baseball clubs against the Atlanta Braves and its commonly owned flagship station WTBS. Under the terms of the then-existing contract between ABC and Major League Baseball, ABC possessed the exclusive nationwide rights to televise Baseball’s 1982 League Championship Series (LCS); the sole exception to the exclusivity granted ABC was that each of the participating teams had the right to televise their playoff games over their local flagship stations. At the time this exception was negotiated, only the most clairvoyant might have imagined that more than 25 million households across the country could view the WTBS telecasts of the Braves in the LCS. However, when it became apparent that “America’s Team” (as the Braves have been marketed) would play in the 1982 LCS, ABC and the clubs which comprised Baseball’s Television Committee filed a lawsuit. They sought to enjoin the WTBS telecast of the LCS, claiming that the satellite

---

Act. The station has alleged that it possesses the exclusive right to broadcast certain programming in its market, and that the retransmission of this same programming over WTBS into the station’s market is unlawful. The resale carrier has defended relying in part upon the passive carrier exemption. Hubbard Broadcasting Co. v. Southern Satellite Sys., Inc., No. 3-81-Civil 330 (D. Minn. filed May 29, 1981).

85. The FCC has authorized several entities to transmit programming and other material via satellite directly to individual homes equipped with special receiving antennae. See supra note 5. Reportedly station WTBS was set discussions with various DBS applicants about the possibility of their retransmitting the WTBS signal. See Multichannel News, July 4, 1983, at 5; Cablevision, July 11, 1983, at 17. The question which the EMI decision raises is whether the DBS operators need the consent of WTBS and affected copyright owners. See Broadcasting, Nov. 21, 1983, at 28 (quoting the President of the WTBS resale carrier to the effect that there are “‘tons of copyright problems’ . . . but there were solutions to them”).

A related issue is whether a resale entity like EMI could “cherry-pick” the most attractive sports and other programming broadcast by a number of stations throughout the United States—that is, compile a programming package with a Yankees’ telecast on one night, a Dodgers’ telecast on another night, and a Cubs’ telecast perhaps once every other year. Such program selection should fall outside the Copyright Act’s “passive carrier” immunity. In any event, a cherry-picked service would be substantially more costly to certain cable operators than any service which they currently receive.

Generally, those cable operators with more than $214,000 in semi-annual gross receipts from basic services must pay the full royalty for any distant signal imported, regardless of the amount of time that the signal is carried; carriage of a signal for even one day obligates the cable operator for a six-month payment. Letter from Jon A. Baumgarten, Copyright Office General Counsel, to R. Clark Wadlow, Esq. (July 18, 1978) (on file with the authors). Moreover, the distant programming carried would typically be subject to the higher royalty rates recently adopted by the Tribunal (see supra note 61 and accompanying text) because it could not have been carried under the former FCC rules. Thus, for example, a “cherry-picked” service which utilized the programming from four stations might cost a cable operator nearly 15% of its basic subscriber revenues in royalty payments.

distribution of the WTBS telecasts to millions of cable subscribers nationwide would violate ABC's contractual exclusivity. 7

The district court granted the requested preliminary injunction. In doing so, it found that the plaintiffs were likely to succeed in establishing that the broadcasts of the LCS by WTBS constituted a breach of Baseball's contract with ABC; tortious interference with this contract; and unfair competition against ABC. 8 The Braves did not last long in the LCS, losing three straight to the Cardinals, and efforts have been made to resolve the case without appellate review or a trial on the merits.

A second case involving the rights of sports interests vis-à-vis superstations was Cox Broadcasting Corp. v. National Collegiate Athletic Ass'n (NCAA), 9 where the Atlanta ABC affiliate challenged on contractual grounds the broadcast of NCAA football over WTBS. This challenge was unsuccessful. The Georgia Supreme Court held that there had been "no meeting of the minds" between ABC and the NCAA as to whether their contract for collegiate football telecasts would prevent NCAA from licensing a supplemental package of such telecasts to WTBS. Accordingly, the court overturned an order enjoining WTBS from telecasting NCAA football, 10 thereby allowing the nation-

---

7. Each of ABC's affiliates might have been able to require local cable systems to delete the WTBS telecast of the LCS pursuant to the FCC's network nonduplication rules. See supra notes 72-73 and accompanying text. However, ensuring that cable systems comply with network nonduplication requests poses a number of administrative and practical problems.


The court was not persuaded by the claim that the Braves and WTBS had no power to prevent the satellite distribution of the station. The court specifically referred to the "overwhelming" evidence that WTBS (unlike the other superstations) actively promoted and profitted from its nationwide coverage. It is not clear whether the court would have reached a different result in the case if such evidence had been lacking.

Also, the court's decision focused upon the particular contractual agreement involved in this case—specifically, (1) whether the Braves and other clubs had given the Commissioner of Baseball the authority to enter into an agreement which grants ABC exclusivity against competing cablecasts; and (2) whether ABC had waived its rights to prohibit such cablecasts because it had failed to exercise those rights in the past. The court further noted that WTBS had sold significant advertising time to a major brewery—in direct competition with ABC's sale to another brewery.

9. Two months before the close of the 1983 season, Turner sought a declaratory judgment that the Braves' then-anticipated performance in the 1983 LCS could be broadcast solely "within the local Atlanta Area." Turner Broadcasting Sys., Inc. v. National Broadcasting Co., Inc., No. C83-1647A (N.D. Ga. filed Aug. 5, 1983). This case also was settled. Under the terms of the settlement, Turner was permitted to assign the WTBS local broadcast rights to NBC's Atlanta affiliate, Station WXIA-TV. WXIA would be permitted to preempt the network feed and to broadcast the WTBS feed, complete with the Braves' announcers. Communications Daily, Sept. 7, 1983, at 7. The case was mooted, for all practical purposes, when the Braves dismantled Chief Nok-a-homa's teepee to make room for additional seats in the outfield. The Braves immediately went into a tailspin, losing the Western Division crown to the Los Angeles Dodgers.


91. Concluding that both ABC and the NCAA had engaged in "sharp practices in contract negotiations," the lower court reserved special criticism for the NCAA: "[A] tortured construction is necessary to find in said agreement that WTBS or any 'superstation' could broadcast the series; $17,500,000 [the price received by the NCAA] provides great incentive to twist words out of their clear meaning and plain intent." Cox Broadcasting Corp. v. NCAA, No. C-89120, slip. op. at 11 (Super. Ct. Fulton Cty., Ga. Aug. 20, 1982). In an apparent effort to fashion a rough sort of justice, the lower court granted relief which no one had sought. The court ruled that WTBS could carry the NCAA telecasts in 1982, but not in 1983, 1984, or 1985 (even though
wide distribution of these football telecasts over the superstation in competition with the ABC broadcasts (including those by the Atlanta ABC affiliate).

Both superstation lawsuits necessarily turn upon specific contractual interpretations. Thus, their precedential value may be limited. The litigation, however, underscores the legal problems that the sports interests face in dealing with the superstations. Because of the increasingly widespread and uncontrolled distribution of the superstations, any dealings between sports clubs and the superstations will be closely scrutinized by affected parties.

C. Piracy of Satellite Transmissions and Pay Telecasts

Sports clubs, leagues and their licensed broadcasters routinely utilize satellites to relay telecasts from game sites to the home market of the visiting club or to network control points. Technologically, these satellite transmissions may be intercepted by anyone possessing an “earth station” or receiving “dish.” With the recent proliferation of earth stations, sports clubs have become increasingly concerned about the unauthorized interception and rebroadcast of their satellite transmissions.

The FCC has issued various statements to the effect that such conduct violates the Communications Act of 1934. Section 605 of the Act prohibits

WTBS had not contracted for the latter two years). The court further held that the ABC affiliate which brought the suit could carry two Georgia and two Georgia Tech games, without those institutions being charged with NCAA appearances (even though the affiliate had not sought the right to originate these games). Id.

92. Sports and satellites go back a long way. In 1961 two minutes of a Cubs-Phillies telecast were placed on the Telstar satellite and beamed to millions of Europeans (unfortunately, none of whom were Cubs fans).

93. Program rights holders have considered “scrambling” the satellite transmissions so that they are available only to those with sophisticated decoders. Because of the costs and other problems associated with scrambling, scrambling may not be a viable means of protecting all satellite transmissions. See Hearings Before the House Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 89-91 (1981) (statement of Andy Setos).

94. The costs of owning earth stations have declined dramatically during recent years. While the price tag in 1976 was over $100,000, today acceptable equipment can be purchased for between $3,500 and $10,000. As a result, there has been a significant increase in the utilization of earth stations. By the end of 1981, there were some 30,000 such stations in place, and new units being produced at a rate of some 2,000 to 3,000 per month. Id. at 114-15.

On the other hand, the FCC recently has decided to decrease the orbital spacing between satellites. See Report and Order in CC Docket No. 81-704, 54 R.R.2d 577 (1983). This has raised questions in the industry as to whether many of the smaller, less expensive earth stations will become obsolete because of the increased potential for interference. See Multichannel News, July 4, 1983, at 8; Communications Daily, June 30, 1983, at 3-4.


the interception and retransmission of any "radio communications" which are not broadcast "for the use of the general public." Notwithstanding the FCC's pronouncements, various commercial establishments (such as bars, hotels and restaurants) seeking to attract sports-minded patrons have utilized earth stations to offer sports telecasts not otherwise available in their communities.97

In March 1983, the National Football League (NFL) and Miami Dolphins brought a lawsuit against a number of such commercial establishments in the Miami area which showed the intercepted satellite transmissions of certain Dolphins' home games.98 Because some of these games had not been sold out, the network telecasts of the games were to be "black[ed] out" within the Dolphins' home territory.99 Even where the games were shown on Miami television, the plaintiffs were concerned because the intercepted satellite transmission was of a "clean feed"—that is, it did not contain any of the commercials inserted by the networks or their affiliates.100 The NFL and Dolphins charged the defendants with copyright infringement under the 1976 Copyright Act; violations of section 605 of the Communications Act; and violations of state laws regarding the team's right of publicity.

After a bench trial on the merits, the district court held for the NFL and Dolphins on their copyright and section 605 counts, and entered a preliminary injunction against the defendants that had not settled. The court rejected defendants' claims that the telecasts of sports events are non-copyrightable news in the public domain; that defendants' showing of the telecasts did not constitute an actionable public performance; and that any performance was exempt under section 110(5) of the Act.101

97. See, e.g., LA Times, June 3, 1983, pt. III, at 4 ("Satellite dishes are becoming increasingly popular at restaurants and bars that cater to sports fans."); Sports Media News, Jan. 1983, at 6 ("The Canadian government is waging a campaign against the use of satellite-receiving dishes in Canada to pirate U.S. television signals; . . . they are . . . concerned with attendance at Canadian Football League games."); Variety, Mar. 30, 1983, at 94 ("[T]he CFL has complained that ticket sales have declined because bars in league cities where home games are blacked out on commercial television have pirated the signal from ESPN [the cable origination network which provides CFL games to cable systems via a U.S. satellite] . . . .").


99. See infra text accompanying notes 147-61.

100. In place of the commercials, the viewer was able to see and hear the supposedly "off-air" commentary of the announcer and other network personnel. Thus, it is understandable why ABC sportscaster Al Michaels has remarked, "I've learned you keep your mouth shut during commercial breaks . . . ." LA Times, June 3, 1983, pt. III, at 4.

101. Declaratory Judgment and Injunction (filed Sept. 18, 1983); Order Containing Findings
A related lawsuit has been brought by the National Broadcasting Company (NBC) and its Corpus Christi, Texas, affiliate against a cable system which had retransmitted to its subscribers the satellite “clean feed” of the 1983 Super Bowl XVII. The complaint charges the system with copyright infringement, as well as violations of section 605 of the Communications Act and a comparable Texas statute. Unlike the defendants in the Florida NFL litigation, the defendant here claimed that its carriage of the satellite transmission was inadvertent—that is, it allegedly did not know that its earth station was receiving the clean feed of the Super Bowl. It is not uncommon for cable operators, particularly those with large channel capacity, to be unaware of precisely what is being transmitted to their subscribers at any given time. Thus, this case may raise an issue whether cable systems have any affirmative obligations to ensure that they do not engage in the unauthorized interception of satellite transmissions.

Piracy of sports telecasts has not been limited to satellite transmissions. A case in point is that which was filed by SportsVision against some sixteen bars and restaurants in the Chicago area. SportsVision, a joint venture of the Chicago White Sox, Bulls, Blackhawks and Sting, presented the games of these teams over STV and pay cable. The defendants allegedly used special


It should be emphasized that the type of piracy at issue here—if left unchecked—could have serious consequences for the future ability of broadcasters to bring major sporting events to the public. It is essential that networks and stations which acquire and pay for sporting event rights on an exclusive basis have the benefit of this exclusivity. Advertisers who purchase time for their announcements do so on the basis that viewers who see television coverage of the event will also see their announcement. Piracy of the type which occurred here undermines the exclusivity which underlies the price paid by advertisers and, thus, to the source of revenue that makes broadcaster presentations of significant sporting events possible.

The NFL and Tampa Bay Buccaneers filed a similar lawsuit against Tampa area bars which intercepted clean-feed satellite transmissions of NFL games not intended for broadcast in the Tampa area. National Football League v. Campagnolo Enter., Inc., No. 83-1205-Civ.-T-13 (M.D. Fla. filed Sept. 22, 1983). This case was settled by the parties.

NBC also has filed a complaint with the FCC against this system and two others which had retransmitted Super Bowl XVII. In its FCC complaint, NBC has underscored the seriousness, from the broadcasters’ standpoint, of pirating “clean feeds.”

It should be emphasized that the type of piracy at issue here—if left unchecked—could have serious consequences for the future ability of broadcasters to bring major sporting events to the public. It is essential that networks and stations which acquire and pay for sporting event rights on an exclusive basis have the benefit of this exclusivity. Advertisers who purchase time for their announcements do so on the basis that viewers who see television coverage of the event will also see their announcement. Piracy of the type which occurred here undermines the exclusivity which underlies the price paid by advertisers and, thus, to the source of revenue that makes broadcaster presentations of significant sporting events possible.

The NFL and Tampa Bay Buccaneers filed a similar lawsuit against Tampa area bars which intercepted clean-feed satellite transmissions of NFL games not intended for broadcast in the Tampa area. National Football League v. Campagnolo Enter., Inc., No. 83-1205-Civ.-T-13 (M.D. Fla. filed Sept. 22, 1983). This case was settled by the parties.


103. The complaint alleges that the NFL, which is not a party, owns the copyright to the live telecast of the Super Bowl. However, the NFL (by written agreement) transferred to NBC the exclusive live U.S. television rights to the Super Bowl, and NBC transferred to its co-plaintiff the exclusive right to televise the Super Bowl in the Corpus Christi area.

104. Apparently, NBC and the NFL had authorized a major pay cable programming service, Home Box Office (HBO), to transmit a separate feed of the game to HBO executives in Puerto Villarta, Mexico. HBO used a satellite transponder which normally was devoted to another programming service. The defendant, a subscriber to this other service, simply failed to “turn off” the earth station when that service was not on the air.

decoder boxes to receive the programming without the consent of (and without paying any compensation to) SportsVision. The courts generally have held that such conduct is violative of section 605 of the Communications Act.106

D. Unauthorized Excerpting of Game Highlights

In recent years it has become commonplace for broadcasters to present, as part of their daily news shows, the videotaped highlights of games involving professional and collegiate sports teams.107 Because the telecasts of many games are relayed via satellite, local broadcasters equipped with earth stations have a wide variety of clubs whose highlights are potentially available; they are not limited to showing those broadcast by stations in their own area. Thus, sports fans across the country are routinely treated to the extraordinary plays of teams such as the Cubs and Mets, all of whose telecasts are available via satellite.108

The question whether game highlights may be broadcast without the consent of the clubs or their licensees was addressed by a federal district court in New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.109 There, the Boston Red Sox, Boston Bruins and Station WSBK-TV (Boston, Massachusetts) brought a copyright infringement action against the Entertainment and Sports Programming Network (ESPN) and certain Boston-area cable systems. ESPN, without the consent of and over the objections of the plaintiffs, taped the WSBK-TV telecasts of Red Sox and Bruins games and then excerpted highlights of these games for presentation on its nightly news show "Sportscenter." This show, along with ESPN's other programming fare, was delivered via satellite to cable systems throughout the United States, including those within the Boston area where plaintiffs had been selling their highlights to local television stations.


107. Since the three national networks have both something to offer (i.e., their own telecasts) and a need for other product (network and affiliated news and sports programs), network-produced events are freely traded back and forth. This does not necessarily apply to all events and certainly does not apply where there is no reciprocal footage to be offered. See Amdur, Who Gets to Use Olympic Footage, New York Times, Dec. 6, 1983, at B16, where ABC denied use of 1980 Olympic hockey footage to a packager of a 1983 U.S.-Soviet game on an independent network. See also USA Today, Feb. 17, 1984, at 1-D (ABC, the purchaser of broadcast rights to the 1984 Winter Olympics, complained about NBC's unauthorized broadcast of highlights of an award ceremony and threatened to bar NBC from access to certain highlight films); supra note 20.

108. There may be yet a newer form of nonbroadcast highlight distribution—giant video display boards (frequently known by their trade names, such as Diamond-Vision or AstroVision) which are becoming commonplace at stadiums and arenas around the country.

The district court entered a preliminary injunction against ESPN, concluding that the plaintiffs were likely to succeed in establishing that ESPN had infringed the copyright in the Red Sox and Bruins telecasts. ESPN voluntarily dismissed its appeal of the lower court ruling and ultimately negotiated a settlement with the plaintiffs. Under the terms of the settlement, ESPN agreed not to use highlights of the clubs' telecasts without paying a specified fee. The parties also agreed to submit to the district court the question of the amount of damages resulting from ESPN's unconsented use of the club's highlights during the 1979-81 seasons. The court awarded plaintiffs an amount slightly in excess of $60,000.

The ESPN case marks the first time that any court has considered whether a club's highlights may be broadcast without the appropriate consent. The court's decision to require such consent is particularly significant. Some clubs, of course, welcome the promotional exposure which comes with the showing of their highlights; and they have little interest in deterring the practice by charging a fee for the use of these highlights. What the ESPN decision says, however, is that the copyright owner of the telecast has the right to charge such a fee and to place appropriate restrictions on the showing of highlights.

As sports begin to recognize that their highlights have a marketable value, the ESPN decision will assume substantial importance.

E. Home Taping

The growing popularity of videocassette recorders (VCRs) has spawned considerable controversy over the legality of home videotaping of copyrighted

110. ESPN had defended the action relying upon the "fair use" doctrine, which permits the reproduction of copyrighted works under certain circumstances. The doctrine is codified in section 107 of the Copyright Act, 17 U.S.C. § 107 (Supp. V 1982). The court found that the doctrine did not shield ESPN's conduct. Perhaps most significantly, the court rejected the assertion that ESPN's use of no more than two minutes of each telecast is de minimis within the meaning of the doctrine, stating: "[I]t is the quality of the use rather than the quantity which is determinative. . . . The excerpts used by defendants in this case, although of relatively short duration, are the 'highlights' of each broadcast and as such their use may be considered substantial." 1981 COPYRIGHT LAW REP. (CCH) ¶ 25,293, at 16,627.

111. In Pacific & S., Inc., v. Duncan, No. C81-1106 (N.D. Ga. filed Oct. 13, 1983), a federal district court dealt with a similar issue. The defendant in that case was charged with infringing plaintiff's copyrighted newscasts, by taping the newscasts, excerpting them, and selling the excerpts to parties who appeared on the air. The court held that defendant's conduct constituted copyright infringement, and that neither the first amendment nor the fair use doctrine sanctioned such conduct. Bizarrely enough, however, the court refused to grant an injunction or statutory damages, and awarded actual damages of only thirty-five dollars.

112. The question becomes more than academic when delayed broadcasts of the entire event have been sold and critical footage is excerpted, as was the case with the Holmes-Cooney fight in June 1982. Taaffe, Tale of the Tape: No Pride Showing at NBC After Fight Replay Fiasco, Wash. Post, June 18, 1982, at D1. See also supra note 20.

113. In 1976 there were only about 80,000 VCRs in use. TV FACTBOOK No. 50, at 79a (1981-82 ed.). VCR sales for 1983 amounted to over 4 million units. Video Week, Jan. 24, 1984, at 7. One study predicts that by the end of 1988, 35 million households will own VCR's—or three times the number that currently do. Wash. Post, Feb. 23, 1984, at D2.
television programming. In the celebrated *Betamax* litigation, the Court of Appeals for the Ninth Circuit held that home taping constitutes copyright infringement; the Supreme Court, in a five-to-four decision, reversed. Of particular significance to the Supreme Court’s decision was record evidence that certain sports interests, as well as other copyright owners, did not object to home recording. The *Betamax* litigation has prompted the introduction of legislation which would permit home taping while requiring the manufacturers and importers of blank tape and recording equipment to pay a royalty fee to copyright owners. Under one current version of the legislation, the fee would be established by voluntary negotiation among the parties (subject to binding arbitration if agreement is not reached). These fees would be deposited with the Copyright Office and distributed to copyright owners, in a manner similar to cable’s compulsory licensing royalties.

One survey has shown that sports telecasts account for some 7.5% of the programming recorded by VCR owners—a percentage share which is even greater than the relative amount of time occupied by cable’s retransmission of distant non-network sports telecasts. Such data suggest that any home taping royalty pool might prove to be an additional source of income for sports clubs, as well as a source of controversy.

**F. Siphoning—Pay Cable and STV**

A major concern of broadcasters, regulators and legislators over the years has been “siphoning”—the shifting of sports events from conventional television to pay cable or subscription television (STV). In 1968, the FCC pro-
mulligated rules which, among other things, sharply restricted the showing of sports events by STV operators; these rules subsequently were extended to pay cable.\textsuperscript{119} In their final form, the FCC regulations prohibited pay TV, subscription and cable, from telecasting "specific events" (such as the Rose Bowl or World Series) which had been on free television at any time during the preceding five years. The regulations also placed limitations on the number of "non-specific" events (regular and pre-season home and away games) that could be placed on pay.\textsuperscript{120}

The anti-siphoning rules, at least insofar as they applied to pay cable, were struck down by the United States Court of Appeals for the District of Columbia Circuit in \textit{Home Box Office v. FCC}.\textsuperscript{121} The court found that the rules exceeded the Commission's jurisdiction with respect to cable; were not shown to be necessary to prevent siphoning; and were violative of the first amendment as being overbroad. Although the court in \textit{Home Box Office} did not invalidate the STV anti-siphoning rules,\textsuperscript{122} the Commission itself subsequently repealed these rules, concluding: "STV and pay cable are two communications activities in direct competition and as a result should be given equal treatment insofar as program availability is concerned."\textsuperscript{123}

There are suggestions throughout the \textit{Home Box Office} opinion that the anti-siphoning rules might have been upheld if there had been an adequate demonstration of the likelihood of siphoning and its harmful effects. Thus, the court appears to have left open the possibility that anti-siphoning rules

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{119}] See First Report and Order in Docket No. 19554, 52 F.C.C.2d 1 (1975), reconsideration denied, 54 F.C.C.2d 797 (1976); Memorandum Opinion and Order in Docket No. 18397, 23 F.C.C.2d 825 (1970); Report and Order in Docket No. 18893, 34 F.C.C.2d 271 (1972); Fourth Report and Order in Docket No. 11279, 15 F.C.C.2d 466 (1968).
\item[\textsuperscript{120}] If, for example, a team had broadcast less than 25% of its home games on conventional television in any of the preceding five years, the rules permitted it to show all the remaining home games on pay. However, if a team showed 25% or more of that category (home games) in any of the past five years, it could show only one-half the remaining games on pay. Moreover, the percentage of games available for pay was subject to a proportionate reduction if the number of games televised in the current season was less than any time in the past five years. For many teams whose broadcasting patterns would shift from year to year, the calculations would have made accurate media scheduling impossible.
\item[\textsuperscript{122}] The original STV rules had been upheld several years earlier in National Ass’n of Theatre Owners (NATO) \textit{v. FCC}, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970). The court in \textit{Home Box Office}, noting the differences between STV (over which the FCC has a much clearer jurisdictional mandate) and cable, did not purport to overrule the NATO decision. Moreover, the court in \textit{Home Box Office} conditionally upheld the revised STV rules insofar as they differed from those considered in NATO. The case, however, was remanded to consider the nature and effect of \textit{ex parte} contacts in the formulation of the STV rules.
\item[\textsuperscript{123}] Report and Order in Docket No. 21489, 42 R.R.2d 1207, 1208 (1978).
\end{itemize}
\end{footnotesize}
could be imposed by the Commission if it could develop the proper record support.\textsuperscript{124} Also, there is always the spectre of congressional action.\textsuperscript{125}

There has been considerable activity, as of late, involving sports programming distributed by pay cable and STV. Current estimates are that, by the end of 1984, pay sports networks will be available to some 10 million cable subscribers; even if only ten percent of these subscribers actually opt for the sports service, rights holders can expect to receive some $50-$60 million annually from pay cable.\textsuperscript{126} In many cases, the sports clubs have utilized pay services as a supplement to their conventional over-the-air television packages—that is, there has been no diminution of the number of conventional telecasts because pay receives only games not previously scheduled for telecast. In some cases, however, there has been diminution of over-the-air telecasts as clubs have established pay packages which probably would not have been permitted under the former anti-siphoning rules.\textsuperscript{127}

\textbf{G. The Sports Broadcast Act of 1961}

Another important piece of legislation affecting sports broadcasting is the Sports Broadcast Act of 1961.\textsuperscript{128} The Act immunizes from antitrust liability the pooled sale of telecasting rights by certain of the professional sports leagues. Thus, it has allowed the leagues to negotiate such lucrative network television packages as Sunday afternoon football and the Saturday Baseball Game of the Week without fear of antitrust prosecution. The Act, however, does have at least one significant limiting feature. It restricts the ability of the leagues to define the geographical areas into which the pooled telecasts may be broadcast.\textsuperscript{129}

\begin{itemize}
  \item \textsuperscript{124} See, e.g., \textit{Home Box Office}, 567 F.2d at 31.
  \item \textsuperscript{125} Anti-siphoning bills have, in fact, been introduced but none has been enacted. See, e.g., H.R. 15620, 92d Cong., 2d Sess. (1972); H.R. 2239, 93d Cong., 1st Sess. (1973). \textit{But see S.C. Code Ann.} § 58-12-110 (Law. Co-op. Supp. 1983) (precluding sale of athletic events by state-supported colleges to cable where there is the "exclusion of free television.").
  \item \textsuperscript{127} It should be noted that these packages involve what the FCC termed "non-specific" events. One major advantage of placing non-specific events on pay is that the clubs retain control—a control which they lack in dealing with conventional over-the-air telecasters. As noted above, cable systems have a compulsory license to carry whatever conventional telecasts are permitted by FCC rules; they have no such compulsory license with respect to pay telecasts. Thus a club may license rights to a television station in its home market only to find a cable system on the other end of the state importing those very telecasts for a minimal copyright payment and without the club's consent. If the club places this same package on pay, the cable system may not present the telecasts unless it negotiates with the club or its agent. Congressional and administrative failure to deal with the cable distant signal controversy is itself partially responsible for the inevitable movement toward pay—a result which cable surely welcomes.
  \item \textsuperscript{128} 15 U.S.C. §§ 1291-95 (1982).
  \item \textsuperscript{129} The Act also is significant in that it protects college and high school football from the competition that would be posed by NFL telecasts. Section 3 of the Act, as amended, 15 U.S.C. § 1293 (1982), excludes from the exemptions any agreement which permits the telecasting of a professional football game, on any Friday after six o'clock post-meridian or on any Saturday during the period
\end{itemize}
1. Pooling

For many years the member clubs of the NFL individually sold the television rights to their games. Eventually, however, the clubs decided to pool their rights and to authorize the NFL to market this package—in part as a response to a league-wide contract signed by the rival American Football League in 1960. In 1961, the NFL and CBS entered into a two-year contract granting CBS the exclusive right to televise league games. In United States v. National Football League, Judge Alan K. Grim held that this contract violated the antitrust laws.

Before the ink had even dried on Judge Grim's decision, Congress enacted the Sports Broadcast Act. A principal purpose of the legislation was to overrule the decision and thereby enable the member clubs of a professional football, baseball, basketball, or hockey league, to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws. Pooling was considered necessary to "assure the weaker clubs of the league continuing television income and television coverage on a basis of substantial equality with the stronger clubs." Congress was concerned that absent pool-
ing, the networks would abandon their policy of televising the games of the “weaker” clubs.\(^{133}\) “[S]hould these weaker teams be allowed to flounder, there is danger that the structure of the league would become impaired and its continued operation imperiled.”\(^{134}\)

It should be noted that the Act sanctions only arrangements of professional football, baseball, basketball, and hockey leagues—not soccer nor, more importantly, the colleges.\(^{135}\) The significance of this fact can best be seen in \textit{Board of Regents v. National Collegiate Athletic Association (NCAA)},\(^{136}\) where the courts struck down as violative of the antitrust laws the NCAA’s Football Television Plan and television contracts with ABC, CBS and WTBS (worth more than $280 million).\(^{137}\)

The NCAA litigation was brought by the Universities of Oklahoma and


\(^{136}\) One court has relied upon the Sports Broadcast Act to conclude that a baseball club’s decision to terminate affiliation with a radio station is not within Baseball’s antitrust immunity. \textit{See} Henderson Broadcasting Corp. v. Houston Sports Ass’n, Inc. 541 F. Supp. 263, 269-70 (S.D. Tex. 1982). \textit{But see} Hale v. Brooklyn Baseball Club, Inc., Civ. Action No. 1294 (N.D. Tex. 1958), noted in \textit{id.} at 268 n.7 (holding that the Baseball antitrust exemption would cover such conduct).

\(^{137}\) It appears difficult to reconcile the \textit{Henderson} rationale with section 4 of the 1961 Act, 15 U.S.C. § 1294 (Supp. V 1982), which the \textit{Henderson} court does not mention. Section 4 provides that the Act shall not be “deemed” to affect the “applicability or nonapplicability” of the antitrust laws to any act. \textit{See} \textit{Hearing on H.R. 8757 Before the Antitrust Subcomm. of the House Judiciary Comm., 87th Cong., 1st Sess.} 65-66 (1961) (testimony of Ford Frick, Commissioner of Baseball) (“We believe that this provision is essential to make it crystal clear that the enactment of this bill will in no way affect adversely or unfavorably baseball’s existing exemption from the antitrust laws under the \textit{Toolson} decision.”).

\(^{135}\) The Act has no applicability to pooling arrangements of clubs in different sports. \textit{See} Midwest Communications, Inc. v. Minnesota Twins, Inc., 1983-2 Trade Cas. (CCH) ¶ 65,719 (D. Minn. 1983) (discussed in Kagan, \textit{Pay TV Sports}, Sept. 23, 1983, at 4-6). There the Minnesota Twins baseball franchise and Minnesota North Stars hockey franchise were enjoined under the antitrust laws from marketing the “telecast rights for the games of one team on the condition that the telecast rights for the other team be acquired in whole or in part.” In a Memorandum and Order entered March 30, 1984, the district court effectively dissolved the injunction, concluding that the plaintiff did not have standing to sue under the antitrust laws.


\(^{137}\) This was not the first lawsuit challenging the NCAA football telecasting patterns. In Warner-Amex Cable Communications, Inc. v. American Broadcasting Cos., Inc., 499 F. Supp. 537 (S.D. Ohio 1980), plaintiffs sought to enjoin ABC and the NCAA from denying Ohio State games to a cable system serving Columbus, Ohio. Plaintiffs claimed that the NCAA contract with ABC limiting pay-cable distribution violated the antitrust laws. The court refused to grant a preliminary injunction since the plaintiffs had failed to show that they were without alternative means of gaining access to college football games for pay-cable distribution. Plaintiff could—and did—purchase all tickets to other local college games, giving itself the opportunity to cablecast OSU games under the NCAA regulations. \textit{See} Hochberg & Horowitz, \textit{Broadcasting and CATV: The Beauty and the Bane of Major College Football}, \textit{38 Law & Contemp. Probs.} 112 (1973) (the NCAA was “pooling at its peril”).
Georgia in substantial part because the NCAA had prohibited the schools and other member institutions from selling games on their own to the networks or to the new media. The College Football Association (CFA)—of which Oklahoma and Georgia are members—had sought to negotiate a television package outside the NCAA contracts, believing that the property rights belonged to individual institutions unless specifically relinquished by those institutions. In response, the NCAA adopted the following “Official Interpretation” of an NCAA by-law:

The Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season . . . . Any commitment by a member institution with respect to the televising or cablecasting of its football games in future seasons necessarily would be subject to the terms of the NCAA Football Television Plan applicable to such season.138

According to the district court, this was the NCAA’s “first clear statement” that mere membership in the NCAA was a grant by the member to the NCAA of the right to act as the school’s agent for televising football. As the district court also found, it was “NCAA’s first specific statement that it controlled ‘cablecasting’ as well as broadcasting.”139 The district court concluded that while the NCAA “has a valid role to play in the regulation of college athletics, it has gone far beyond the pale of this legitimate purpose in commandeering the rights of its members to sell their games for television broadcast.”140 The district court, after a non-jury trial, held that the NCAA’s Television Plan and contracts were unlawful per se as price fixing and a group boycott, and unlawful under a rule of reason analysis. The court further held that the NCAA had violated section 2 of the Sherman Act by monopolizing the intercollegiate football market.

On appeal, a divided panel of the United States Court of Appeals for the Tenth Circuit upheld the district court’s per se price fixing and rule of reason findings.141 The decision was predicated upon a number of factors. One important consideration, however, was that the NCAA restrictions are all-

139. Id. at 1286.
140. Id. at 1309. The district court further characterized the NCAA actions as a “presumptuous seizure,” id. at 1326, a “commandeering” of property rights, id. at 1307, 1309, 1317, 1326, and, potentially, a “lust for power” or “rank greed.” Id. at 1328.
141. The court of appeals did not agree with the lower court’s group boycott analysis. The district court held that the NCAA members had illegally boycotted all broadcasters and cable networks other than ABC, CBS and WTBS. The court of appeals, on the other hand, concluded: The exclusivity features were used by the NCAA to extract the highest possible prices from the networks. The opportunity to purchase the rights to the NCAA football package was offered to all broadcasters. That certain networks were unsuccessful bidders, or did not bid at all, does not turn the contracts into boycotts. 707 F.2d at 1160-61 (footnote omitted).

The court of appeals did not consider the monopolization ruling because the NCAA did not urge a reversal of this ruling. Id. at 1159 n.16.
embracing—that is, member institutions are not free to televise any of their games other than through the NCAA. This, of course, distinguishes the NCAA arrangements from those of most of the professional sports leagues, whose members enter into individual as well as league deals.

For purposes of the 1983 season, at least, the NCAA plan was allowed to continue when Justice White issued a stay pending the Supreme Court's decision on granting certiorari. Justice White did raise some doubts as to the correctness of the decisions below, and the Supreme Court subsequently agreed to hear the case. The Tenth Circuit itself indicated that the antitrust laws may not proscribe all NCAA regulations of its members institutions' television rights. Thus, the extent to which there may be collegiate pooling of rights consistent with the antitrust laws—by the NCAA or, for that matter, individual conferences—is not entirely clear at this time.

Whatever the ultimate outcome of the NCAA litigation, the case illustrates the substantial importance of the Sports Broadcast Act to the professional sports leagues. The law spares the leagues of the uncertainty and expense of litigating over whether their particular pooling arrangements are or can be made consistent with the antitrust laws.

142. See id. at 1157. The court of appeals did note the NCAA “exception telecast” policy, where schools could license telecasts that (1) are sold out or are being played more than 400 miles from an area in which the game is to be telecast and (2) will not be telecast within a certain distance of other football games unless those games are sold out. But the court of appeals concluded: "These telecasts occur infrequently and do not affect our analysis of the television plan and network contracts." Id. at 1150 n.2.


144. Commenting on the breadth of the district court's injunction, the court of appeals noted: [Paragraphs one and four [of the injunction] appear to vest exclusive control of television rights in the individual schools. While we hold that the NCAA cannot lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case. 707 F.2d at 1162. The court of appeals, in fact, remanded the case to the district court to "consider" the injunction in light of these views. Id. Query, however, whether it is that the NCAA cannot maintain exclusive control or that the NCAA cannot maintain exclusive control.

145. One illustration of this point can be seen in an investigation of the NFL by the Federal Trade Commission (FTC). The FTC was concerned about the manner in which the eight first-round 1982-83 NFL playoff games had been scheduled for network broadcast. During the regular season, NBC and CBS typically ran NFL broadcasts at the same time, and therefore, in direct competition with each other. The scheduling, however, was changed for the January 8 and 9 playoff games. The four NFC playoff games were broadcast by CBS at 12:30—two on Saturday and two on Sunday. The four AFC playoff games were broadcast by NBC at 4:00—two on Saturday and two on Sunday. As a result, there was no head-to-head competition between the networks—which meant, more significantly from the standpoint of sports fans (including those at the FTC), that viewers could not switch between NFL games on different networks.

The FTC thought that the arrangement might be anticompetitive in that it diminished competition between the networks for the advertising dollars. However, at the conclusion of two days of interviewing league and network officials, the FTC decided not to take any action. Apparently the decisive factor was that the NFL alone had made the scheduling decision. The FTC found no evidence that the networks had pressured the NFL into this decision. The FTC thus considered the decision to be immune from challenge under the Sports Broadcast Act of 1961. See Wash. Post, Jan. 8, 1983, at D8.
2. Blackouts

Section 2 of the Sports Broadcast Act\textsuperscript{146} excludes from the Act's immunity any agreement which "prohibits any person to whom such [pooled] rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home." This provision was added at the recommendation of the Justice Department, which sought to codify Judge Grim's 1953 United States v. NFL decision limiting blackouts.\textsuperscript{147} In that case, Judge Grim upheld an NFL rule which prohibited each club from televising its games into the home territories of other league members when those members were playing at home. Judge Grim, however, held violative of the antitrust laws those NFL rules which prohibited (1) the televising of a game into another team's home territory when that team was televising its away game;\textsuperscript{148} and (2) the radio broadcasting of a game into another team's home territory.\textsuperscript{149}

Section 2 of the Act has been the subject of litigation, as well as the source of further congressional action. In Blaich v. NFL\textsuperscript{150} a number of New York Giants' fans sought a preliminary injunction against the blacking out of the 1962 NFL Championship game between the Giants and the Chicago Bears. They argued that section 2 applies only to regular season games.\textsuperscript{151} The court rejected this argument and denied the injunction, stating that section 2 expressly permits local area blackouts. It does not specify a pre-season game, a season game, a post-season game or a championship game. It

\textsuperscript{147} United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953). See H.R. Rep. No. 1178, supra note 131, at 5. This report also notes that: "The term 'home territory' is not susceptible of a single definition that will be suitable for all professional football, baseball, basketball and hockey leagues. By 'home territory' the committee means such home territory as is recognized by a particular league's bylaws or custom and usage." \textit{Id.}
\textsuperscript{148} Frequently overlooked is the fact that Congress in effect overruled this aspect of Judge Grim's decision and of the 1961 Act. Allowing the NFL to pool its broadcast rights for sale to a single network had the practical effect of allowing the very blackouts which Judge Grim had prohibited—a point which was made clear to Congress. As Commissioner Rozelle explained: "If the purchasing network is required to carry Green Bay's away games back to Green Bay, it cannot very well put in a New York Giants' game at the same time." \textit{Hearings on H.R. 8757 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 87th Cong., 1st Sess. 31} (1961). Further, as stated by counsel for the NFL: "If you sell the television rights of the National Football League to a single network, and you obligate that single network to carry the games of each away team back to its home territory, it is quite obvious that the network cannot carry any other game." \textit{Id. at 30.}
\textsuperscript{149} It is important to note that Judge Grim's decision, which employs a rule-of-reason analysis, was based upon the particular facts before the court. Thus, the 1953 decision leaves open the possibility that a league could present adequate factual justification of any particular restraint on broadcasting.
\textsuperscript{150} 212 F. Supp. 319 (S.D.N.Y. 1962).
\textsuperscript{151} In a manner that only a true sports fan (with limited knowledge of constitutional law) can fully understand, plaintiffs also argued that the "deprivation of their right to observe [the telecast] in common with the millions of Americans to whom it is being televised is a violation of a basic human right, guaranteed by the Constitution and the law of the land." 212 F. Supp. at 322. The district court had little sympathy for this argument, noting only that it is of "doubtful validity." \textit{Id.}
uses the all-embracing term "game." In the face of such clear and unequivocal language there is no basis upon which this Court can reasonably exclude from its authorization the area restriction of a league championship game.152

Following Blaich, several lawsuits were filed in efforts to enjoin NFL Super Bowl blackouts, which presumably were made pursuant to section 2 of the 1961 Act. Although it won each of these cases,153 the NFL did lift the local blackout of the 1973 Super Bowl VII. The NFL's actions were taken largely in response to mounting pressure from Congress to eliminate blackouts, particularly of sold-out games.154

Congress, however, was not satisfied with simply the Super Bowl. In September 1973, it enacted legislation which required the leagues to lift the local blackout of any pooled telecast if all the tickets available for purchase five days before the game were sold seventy-two hours or more in advance.155 By its terms, the anti-blackout legislation expired on December 31, 1975. Nevertheless, the NFL voluntarily has continued to adhere to the terms of the legislation.156 In 1978 the FCC determined that the effect of such compliance is to reduce the NFL's revenues from lower gate revenues and concession revenues by as much as $4.7 million per year157—a result which the FCC found to be acceptable. The other professional sports leagues have relatively few games that could have been subject to the anti-blackout legislation; generally, however, these games have been televised.158

152. Id.
156. One piece of legislation introduced in the 98th Congress-H.R. 4104—would limit the geographic areas of blackouts, preventing a game blacked out in Los Angeles, for instance, from also being blacked out in San Diego.
One additional case arising under section 2 of the 1961 Act was *WTWV, Inc. v. NFL*,19 which involved the refusal of the NFL and Dolphins to permit a Fort Pierce, Florida television station to broadcast Dolphins' home games that had not been sold out. The station claimed that the refusal was not sanctioned by section 2 because the station's transmitter was located more than fifteen miles outside the Dolphins' seventy-five-mile home territory. According to the station, section 2 permitted the blackout of only those television stations whose transmitters were located within the seventy-five-mile zone.

The district court rejected this argument, concluding that the location of the transmitter was not decisive. The court held that the blackout of the station was permissible under section 2 because the station broadcast with sufficient power so that its telecasts were viewable well within the seventy-five-mile zone. The Court of Appeals for the Eleventh Circuit affirmed, concluding:

> [T]he purpose of the statute is clear. The broadcast exemption from the antitrust laws was intended to preserve the existence of the NFL by shielding its member clubs from a decline in game attendance due to televising games in the area from which spectators are drawn. . . . *Technological advances could undermine completely the purpose of § 1292 if the exemption is applied only to restrictions on stations physically located within the 75-mile radius that is designated home territory. Congressional purpose requires that the antitrust exemption focus on where the potential ticket buyers would receive the signal, not where it comes from.*

**CONCLUSION**

The Eleventh Circuit's recognition that interpretation of the 1961 Sports Broadcast Act must accommodate technological advances provides an appropriate point upon which to conclude. Clearly, the communications industry is undergoing a dramatic revolution—a revolution in which the sports interests have a substantial stake. As the stakes grow even higher, there will be increased pressure for litigation, legislation and regulation affecting sports broadcasting. In resolving the complex issues involved, it will be important to place in proper perspective those fundamental legal principles which have been developed during the more than four decades since a television camera was trained on that 1939 Princeton-Columbia baseball game.

---

158. See *id.* at 90-92.
159. 678 F.2d 142 (11th Cir. 1982).
160. *Id.* at 145-46 (emphasis added).

There is another aspect of the Dolphins' litigation which also is significant. The district court originally entered a preliminary injunction against the Dolphins, holding that the Sports Broadcast Act represents an unconstitutional delegation of legislative powers to private parties; the district court focused upon the portion of the statute which permits the leagues themselves to define their home territories. The Court of Appeals for the Eleventh Circuit, however, reversed. It concluded that a holding of unconstitutionality could not be made without further factual findings by the district court. The Fort Pierce television station ultimately abandoned its constitutional claim, and no further proceedings were held by the district court.