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Sports Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?

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Sports Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?

As cable television began expanding in the late 1960's, there was growing concern that pay cable television would outbid conventional broadcast television for rights to popular programs, and that these programs would be diverted or "siphoned" from broadcast television and no longer available without charge. To guard against this possibility, the Federal Communications Commission (FCC) adopted anti-siphoning regulations, limiting pay cable access to movies and sports programming. In 1977 in *Home Box Office v. FCC*, the U.S. Court of Appeals, D.C. Circuit, vacated the anti-siphoning rules leaving no pay cable rules in effect.

Most studies conclude that pay cable should be deregulated and that anti-siphoning restrictions should be lifted from all programs except pay presentations of sports events. It is claimed that sports programs need special

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1 Pay cable television provides programming to viewers via cable at a per program or per channel charge. This charge is in addition to the monthly fee for basic cable service.


   Programming restrictions on motion pictures and series programs should be phased out gradually and selectively. The Federal Communications Commission should authorize and carefully monitor experiments designed to evaluate the impact of such deregulation on free over-the-air television service. . . . Antisiphoning restrictions on major sports events should be maintained, but pay-cable regulations should be modified to allow the presentation of games that are not regularly televised.

5 *Cabinet Comm. on Cable Communications, Cable: Report to the President* 54 (1974) [hereinafter cited as *Report to the President*]:

   We recommend that the FCC have the authority to adapt reasonable anti-siphoning provisions to the changing conditions in the broadcast, cable and programming industries, selectively lessening the restrictiveness of the rules.

   At the end of the transition period [when the nationwide percentage of households connected to cable systems reaches about 50 percent], there should be no siphoning restrictions except those applying to the "pay" presentation of professional sports events.

6 *Sloan Comm'n on Cable Communications, On the Cable* 174-75 (1971) [hereinafter cited as *Sloan Comm'n*]:

   The Commission believes that competition between the local broadcasting station and the cable system should be managed on the basis of equal opportunity of access to program and to audience.

   [However], [the Commission recommends legislation that would reserve specified playoff and championship sporting events for conventional, sponsor-supported televi-
protection because they are unique in three respects. First, they have great entertainment value only at the time of their occurrence. If siphoned, viewers without cable service would be entirely deprived since a delayed broadcast presumably would have little appeal. Dramatic programs, on the other hand, could be aired over conventional television at a later time with little loss in entertainment value. Second, the supply of sports events is, in theory at least, inelastic. If siphoned, there would be no similar substitute. In the case of dramatic fare, however, additional movies or series could easily be produced to meet the increased demand. Third, the percentage of sports events to be televised is controlled by the sports leagues through a government sanctioned cartel. So long as the leagues can constrict the supply through their

sion, and would free other sporting events for competitive bidding between pay television, and conventional television.

STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th Cong., 2d Sess., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE 70 (Subcomm. Print 1976) [hereinafter cited as HOUSE REPORT]. The Subcommittee on Communications went the furthest concluding that all restrictions on pay cable should be removed until the actual threat of siphoning becomes significant:

[W]e recommend that no regulations are needed at this time, that rather the FCC should monitor the situation so that if and when any significant threat of siphoning occurs (e.g., a proposal to take some sporting event off conventional television for pay), the agency (or the Congress if the FCC fails to act) can take prompt action to prevent such siphoning and maintain the status quo.

Film producers assert that they have no intention of withholding movies from broadcast television. Rather they see sales to pay cable as merely an additional step in the release pattern. HOUSE REPORT, supra note 4, at 68. As a general rule, program suppliers claim they would license feature films in sequence to theatres, pay television, networks and finally local stations. First Report and Order, 52 F.C.C.2d 1, 26 (1975) [hereinafter cited as First Report and Order], reconsideration granted in part, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975). FCC Commissioner Robinson contends that without siphoning restrictions, some films would undoubtedly go to pay television before reaching the networks, but that the time lag would be an insignificantly loss to the public. Id. at 75 (Robinson, Comm'r, dissenting in part, concurring in part).

Major studios can restrict the supply of feature films by their oligopolistic control of distribution. However, this problem can be eliminated by dealing directly with producers. Expanding supply in this way should not increase program prices because there is easy entry into the programming supply industry and all factors of production can be rented. Besen, Mitchell, Noll, Owen, Park & Rosse, Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation, in Deregulation of Cable Television 86-87 (P. MacAvoy ed. 1977). Program suppliers contend that the introduction of the new cable television market will in fact decrease the cost of films to theatres and television by causing an increase in supply. First Report and Order, supra note 5, at 25.

In 1961 Congress specifically exempted from anti-trust laws member teams of professional football, baseball, basketball and hockey leagues. The exemption allowed the leagues to pool their television rights and sell an entire package to one network. 15 U.S.C. §§ 1291-1295 (1970).

PAY CABLE TELEVISION

monopoly position, some commentators believe regulation should be retained.8

The purpose of this note is to determine whether anti-siphoning restrictions should be applied to any programs on pay cable television. The focus will be on the validity of sports program restrictions since the justifications for regulating that type of programming are the strongest. This note will consider the limitations on FCC regulation of pay cable television and first amendment limitations on the regulation of pay cable program content. In order to determine whether the government has a substantial interest in such regulation, the consequences of deregulating sports programming will be analyzed to determine whether a siphoning threat actually exists, and the social costs of withholding certain programs from competition will be examined and weighed against the benefits derived.

THE SIPHONING EFFECT

The technical ability of cable television to make special interest programming available comes from its multi-channel capacity.9 However, it is pay cable's potential market power that creates the possibility of program siphoning. Potentially it will be able to outbid conventional television because advertisers on broadcast television are not willing to pay as much per viewer attracted to a certain program as the viewers might pay themselves to watch the program on pay cable.10

Under the present broadcast television system, the advertiser pays for the programs broadcast by purchasing viewers. To an advertiser the value of each viewer is measured in cents or fractions of a cent.11 This is because the

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8The view taken by former FCC Chairman Richard E. Wiley is that by requiring the sports leagues to sell largely to conventional broadcast television, the "FCC would be doing little more than holding the leagues to bargains struck in return for various exemptions from the anti-trust laws obtained or contemplated over the years." Rose, Pay Cable Options Paper, in Deregulation of Cable Television app. 149, 158 (P. MacAvoy ed. 1977).

9According to the Sloan Commission, cable now has the capacity for conveying over 40 channels of programming, and current technology could increase capacity to over 80 channels through one cable. Sloan Commn. supra note 4, at 37. However, in January, 1976 only 382 systems had over a 20 channel capacity out of a total 3405 systems. This is slightly over 11 percent. House Report, supra note 4, at 17.

10For a discussion of the technology of cable television, see Sloan Commn. supra note 4, at 11-22; W. Baer, Cable Television: A Handbook for Decisionmaking 11-38 (1973); W. Baer et al., Cable Television: Franchising Considerations 1-67 (1974). For a description of existing pay cable systems in terms of technology and services offered, see I. Kamen, Questions and Answers about Pay TV 89-149 (1973).

11Rose, supra note 8, at 150-51; see House Report, supra note 4, at 62.

12Notwithstanding demographics and other variables, "networks . . . charge basically at the rate $2.50 per thousand households per 30-second commercial (prime time). . . . There are 12 minutes of commercials allowed under the NAB Code per prime-time hour; at other times, 14 minutes or more of commercials are aired." Rose, supra note 8, at 161 n.24. In 1976 the amount spent by advertisers per television home in the twenty highest markets ranged from $71.71 per household in Anchorage to $48.74 per household in Cincinnati. Broadcasting, Aug. 29, 1977, at 26.
amount the advertiser is willing to pay reflects the net revenue from an additional sale of his product diminished by the probability that the viewer will not purchase it. If the advertiser is selling an inexpensive product, the worth of an additional sale is slight, and if he is selling an expensive item, the likelihood of inducing a viewer to purchase it is small. Either way, the audience will not be worth more to the advertiser than a few cents per viewer.

Pay cable, on the other hand, sells programs directly to viewers, each of whom will pay more than a few cents per program. Therefore, pay cable will be able to outbid broadcast television having a much smaller audience. For instance, if an advertiser pays three cents per viewer per hour, and pay cable subscribers agree to pay thirty cents per program hour, pay cable would be able to outbid broadcast television when its audience becomes greater than ten percent of the size of the broadcast television audience. Broadcasters are certain that when pay cable audiences attain that level of market power, pay cable will inevitably purchase much of the best programming now on broadcast television, leaving only unwanted leftovers.

In light of the siphoning possibility, the FCC and Congress have expressed a need to protect two groups of pay cable nonsubscribers who would be deprived of siphoned programming—the poor who cannot afford pay cable and the residents of sparsely populated areas that cannot be economically served by cable—contending that the public's interest in viewing the programming it wants to see over free television should be safeguarded. The question remains whether this is a proper concern for government regulation.

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12See Note, Regulation of Pay-Cable and Closed Circuit Movies: No Room in the Wasteland, 40 U. Chi. L. Rev. 600, 610 (1973).
13The low price per viewer forces the networks to seek the largest possible audience in order to cover production costs and results in programming geared toward the lowest common denominator of viewers' interest.
14See First Report and Order, supra note 5, at 9-10 for a formula developed by the American Broadcast Company for estimating the pay cable dollars available for the purchase of any particular program.
15See Rose, supra note 8, at 155 for the broadcasters' explanation of how siphoning will occur:

[Broadcasters say that] free television currently pays about $800,000 for a network showing of a movie. They reason that 1.5 million pay-cable homes paying one dollar can outbid free television. If there are 30 million homes wired for cable and pay-cable services, as some cable industry analysts have projected, 5 percent of those homes paying one dollar, or 10 percent paying fifty cents, or 20 percent paying twenty-five cents can generate the funds necessary to outbid free television.

16First Report and Order, supra note 5, at 10. Broadcasters assert that once pay interests obtain a foothold, the industry will grow rapidly. The number of new subscribers will increase dramatically as good programs are siphoned away from conventional broadcast television.
17HOUSE REPORT, supra note 4, at 62.
18Id. First Report and Order, supra note 5, at 72 (Robinson, Comm'r, dissenting in part, concurring in part).
FCC POWER TO REGULATE PAY CABLE: Home Box Office v. FCC

The FCC began to regulate cable television in 1965 out of fear that importation of distant signals would have an adverse effect on local broadcasters.19 This extension of jurisdiction over cable was upheld by the Supreme Court in United States v. Southwestern Cable Co.20 as being "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."21 The Southwestern Cable decision prompted the FCC to regulate cable comprehensively,22 and in 1972, FCC regulations requiring cable systems to originate certain kinds of programming were affirmed by the Supreme Court in United States v. Midwest Video Corp.,23 again under the doctrine of ancillary jurisdiction.24

19 Cable television, also known as CATV and community antenna television, originated around 1950, and for the first decade was primarily used as a means to import broadcast signals to communities where reception was poor or nonexistent. For general background on the regulatory history and development of cable television, see R. BERNER, CONSTRAINTS ON THE REGULATORY PROCESS (1976); Smith, Primer on the Regulatory Development of CATV (1959-72). 18 HOWARD L. J. 729 (1975); Pearson, Cable: The Thread by Which Television Competition Hangs, 27 RUTGERS L. REV. 800 (1974); D. LE DUC, CABLE TELEVISION AND THE FCC (1973); Note, Cablecasting: A Myth or Reality, 26 RUTGERS L. REV. 804 (1973). At first cable television was welcomed by broadcasters, and in 1959 the FCC concluded it had no basis for asserting jurisdiction over it. Inquiry into the Impact of Community Antenna Systems, Report and Order, 26 F.C.C. 403, 427-31 (1959). However, as CATV began to move into larger, more lucrative markets, the FCC decided some regulation was necessary to protect local broadcasters from cable competition. For a chronology of FCC cable regulation and case history, see D. Le Duc, CABLE TELEVISION AND THE FCC app. 219-22 (1973); HOUSE REPORT, supra note 4, at 12.

20 392 U.S. 157 (1968), rev'g Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967). Southwestern Cable upheld the 1966 FCC rules which restricted the entry of CATV into the top 100 markets by requiring cable companies to prove that carriage of distant signals would not adversely affect UHF development in those markets.

21 Id. at 178. It was held that FCC cable regulation has to be "reasonably ancillary" to the powers granted the FCC by the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. (1970), specifically by § 152(a) which states that the Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio" and by § 151 which states that the Commission must endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide . . . radio communication service. . . ."

22 In 1972, the Commission incorporated a consensus agreement reached by the broadcast industry, the cable industry and the copyright owners into its cable rules governing service in the 100 largest markets. 36 F.C.C.2d 143, 284-86 (1972). For an analysis of the agreement, see Besen, The Economics of the Cable Television "Consensus", 17 J. LAW & ECON. 39 (1974). The main elements of the plan are a limitation of distant signal importation, non-duplication protection for local stations, minimum channel capacity and a public access requirement.

In addition to federal controls, local authorities may regulate such items as selection of franchisee, subscriber rates and operation of municipal channels. For municipal regulation of cable in Ohio, see OHIO LEGISLATIVE SERVICE COMM., ALTERNATIVE STATE ROLES IN THE REGULATION OF CABLE TELEVISION 50-67 (1974). Additionally, a third tier of regulation is developing at the state level. For a comprehensive overview of state involvement in cable, see NEW YORK STATE SENATE, CABLE COMMUNICATIONS AND THE STATES (1975). See also Practising Law Inst. CURRENT DEVELOPMENTS IN CATV AND PAY TELEVISION (G. Christensen, chairman 1977) for current operation practices and state and federal regulations.

23 Id. at 649 (1972), rev'g Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971). Midwest Video upheld FCC rules which required that cable systems with more than 3,500 subscribers cablecast or originate programs not carried as broadcast signals and have facilities available for local production.

24 Id. at 670. The Court in Midwest Video held that FCC regulation of cable television was
The FCC adopted its pay cable anti-siphoning rules in 1970. After certain changes in 1975, the anti-siphoning rules provided that sports and feature film programming combined could not exceed ninety percent of the total cablecasting hours, and that the following would be prohibited from pay cable exhibition: 1) feature films between three to ten years from general release; 2) commercial advertising except when shown between programs for the purpose of promoting other pay cable selections; 3) specific sports events, such as the World Series, if broadcast live over conventional television during the preceding five seasons in the same market; and 4) more than a certain amount of non-specific (regular season) sports events depending on the amount broadcast over conventional television during the preceding five seasons.

The amount of non-specific sports events available to pay cable was determined in the following way. If less than twenty-five percent of non-specific events in a certain category were broadcast live over conventional television in a market during the highwater mark season, the number of events available to pay cable would be the number of games remaining during that highwater mark season. If, however, twenty-five percent or more of the events were broadcast live over conventional television in a market during the highwater mark season, the number of events available to pay cable would be fifty percent of the remaining games during that highwater mark season.

The anti-siphoning rules were attacked on jurisdictional, procedural, competitive and first amendment grounds. It was argued that the doctrine of ancillary jurisdiction had no application to pay cable because unlike CATV, pay cable is a self-contained form of communication which is not auxiliary to broadcast television and which does not at any time rely on transmission via radio waves. The FCC jurisdiction upheld in *Southwestern Cable* and

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reasonably ancillary if it furthered "the achievement of long-established regulatory goals in the field of television broadcasting. . . ." *Id.* at 667-68, quoting First Report and Order, 20 F.C.C. 2d 201, 202 (1969).

The rules were adopted in Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970), and codified in 47 C.F.R. § 76.225 (1976). They were reviewed by the Commission in 1975 along with the anti-siphoning rules for subscription broadcast television (pay television broadcast over the airwaves rather than transmitted through cable). Although some details were changed, jurisdiction was reaffirmed. First Report and Order, *supra* note 5. The series rule prohibiting the cablecasting of any serial program was deleted in Second Report and Order, ____ F.C.C.2d ____, 35 RAD. REG. 2d (P&F) 767 (1975).

The highwater mark season is that season out of the preceding five seasons during which the largest number of events in the relevant category was broadcast over conventional television. *House Report, supra* note 4, at 67 n.17.

There was an additional requirement imposed in the latter situation. If the number of games broadcast over conventional television in the current season was to be less than the number broadcast in the highwater mark season, then pay cable use had to be reduced proportionally. 47 C.F.R. § 76.225(b)(3)(i)(1976).

See Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DENVER L. J. 477, 482-89 (1976), for an elaboration of this view. Hof-
Midwest Video was over CATV, a medium which amplifies and distributes broadcast signals, which should arguably be within the Commission's control. Pay cable, however, offers an entirely separate entertainment channel from broadcast television, and should be allowed to compete for audiences and ideas as do stage shows, live sports events or theatrical film showings.

Pay cable entrepreneurs asserted that the rules were overbroad in that they prohibited pay cable exhibition of feature films and sports events even when there was no danger of siphoning. In the sports area, the rules could withhold many events from pay cable which broadcast television might not intend to te leakcast. For instance, if broadcast television had carried a specific sports event during the preceding five seasons and decided not to te leakcast it in the current season because of the availability of more attractive programming, the event would still be barred from pay cable, and the public would be deprived of the program altogether. Similarly, if broadcast television decided to reduce its coverage of non-specific sports events in the current year because of high transmission costs of away games, pay cable would still be limited to the amount of remainder games set by the highwater mark season. It was further argued that the twenty-five percent criterion applied to non-specific sports events was arbitrary on its face. The step between the twenty-four percent and the twenty-five percent mark was of no special significance to broadcast television, yet its consequences for pay cable were severe. By increasing the number of events broadcast over conventional
television by one or two games, pay cable would have access to only half of the events available before, with the result that the public might not be able to see the remaining half on either medium.\footnote{For example, if 24 games out of 100 were broadcast over conventional television during the highwater mark season, pay cable would have access to 76 games. If, however, the games broadcast during the highwater mark season were increased to 26, pay cable would have access to only 37 games, 50 percent of the remainder. Thus, in the 25 percent situation, if conventional television did not broadcast more games than it did during its highwater mark season, i.e. 26, the public would be denied the opportunity to see the remaining 37 games on either medium.}

The validity of the anti-siphoning rules was challenged in a consolidated appeal by the cable television industry, the Justice Department and other parties in \textit{Home Box Office}\footnote{The court stated that “the Commission has in no way justified its position that cable television must be a supplement to, rather than an equal of, broadcast television. Such an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal.” \textit{Id.} at 36.} v. \textit{FCC.}\footnote{Id. at 50.} The Court of Appeals, in a highly critical opinion, held that the pay cable rules exceeded the FCC's jurisdiction over cable television, which at best remained ancillary. The court stated that cable television should not be viewed as a supplemental or secondary service to broadcast television,\footnote{Id. at 51.} and that at a minimum, the objectives to be achieved by regulating cable must also be objectives for which the FCC could legitimately regulate the broadcast media.\footnote{Id. at 51 where the court stated: \textit{“Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible. . . . [W]e conclude by reminding the Commission that prior restraints on speech are heavily disfavored and can be sustained only where the proponent of the restraint can convincingly demonstrate a need.” \textit{Id.} at 44-46.} The appeal also concerned the validity of the subscription broadcast television (STV) anti-siphoning rules, 47 C.F.R. § 73.643 (1976), and the propriety of FCC ex parte...
Although the *Home Box Office* decision invalidated all pay cable rules in effect, the court suggested that FCC anti-siphoning regulation of pay cable may be permissible where siphoning would in fact lead to the financial demise of broadcast television\(^4\) or cause the disappearance of a sufficiently unique and popular broadcast format.\(^5\) However, it is highly unlikely that the first situation would ever occur, and regulation under the second would be valid only if the Commission would require that the format in question be broadcast over conventional television, something the Commission has said it will not do in the entertainment area.

Broadcasting is viewed as a competitive industry,\(^6\) and the Commission may not regulate cable merely because it constitutes unfair competition.\(^7\) However, the court stated that the *Southwestern Cable* decision, approving FCC cable regulation, presented a different situation in that the harm to be avoided was fragmentation of audiences leading to the demise of UHF and educational broadcasting.\(^8\) Thus, it can be inferred that if siphoning were to actually threaten the existence of broadcasting itself, the FCC would be able to protect it through pay cable regulation. Present broadcast industry profits, however, are the highest in its history,\(^9\) and it is unlikely that pay cable will present a real threat to the industry's financial soundness.\(^10\)

contacts made during the rulemaking proceedings. The STV rules, which were essentially identical to the pay cable rules, were affirmed substantively in all respects in reliance on the public record and *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 997 U.S. 922 (1970), which foreclosed general antitrust and first amendment objections in the STV area. *Home Box Office v. FCC*, 567 F.2d 9, 59-60 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). As to the *ex parte* contacts, the court was strongly critical stating, "Even the possibility that there is . . . one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable." *Id.* at 54.

\(^{11}\) *Id.* at 41. The court, however, noted that the issue of economic harm was not presented in this case.

\(^{12}\) *Id.* at 29-32.

\(^{13}\) It was established by *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473 (1940), that economic injury to an existing station is not a ground for denying a new application. However, *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958), held that where competitive effects produce detriment to the public interest, the public interest controls. The court stated, "The public interest is not disturbed if A is destroyed by B, so long as B renders the required service." *Id.* at 444. The *Carroll* doctrine has since been upheld in *WLVA, Inc. v. FCC*, 459 F.2d 1286 (D.C. Cir. 1972).


\(^{16}\) *Income in 1976 for the television industry was 60.5 percent higher than in 1975, itself a record year. Broadcasting*, Aug. 29, 1977, at 24. CBS, Inc. set new sales and earnings records for both the third quarter and first nine months of 1977, and RCA, the parent corporation of NBC, said the 1977 period was the best in the company's 58 year history with a third record quarter in a row and the ninth consecutive period of improved year-to-year earnings. *Broadcasting*, Oct. 17, 1977, at 55-56.

\(^{17}\) It was estimated in 1973 that if 20 percent of cable homes subscribed to pay cable at $10 monthly, and viewed it half the time, network audiences and advertising revenues would decline by only 5 percent. R. NOLL, M. PECK & J. McCOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 149 (1975). According to a study prepared by the Stanford Research Institute for the Office of Telecommunications Policy, any negative impact of pay cable and pay television on conventional broadcast television would be offset by an increase in population. Assuming 20 percent of
Regarding the FCC's power to protect selected programs, the court said the Commission could not exert greater control over pay cable than it could over broadcasting, and it considered the Commission's authority to regulate broadcast format changes relevant. In *Citizens Committee to Save WEFM v. FCC*, involving a proposed radio format change, the court held that the Commission must regulate entertainment programming whenever a significant segment of the public is threatened with the loss of a preferred broadcast format. This would lend support for anti-siphoning regulation. But the FCC has not acquiesced in the decision and has maintained its traditional view that while it can require broadcast licensees to present a certain amount of non-entertainment programs such as news, public affairs or informational services, it should leave entertainment programming to the discretion of the licensee. The Commission has also stated that the first amendment and Section 326 of the Communications Act prohibit it from requiring or preventing the broadcast of any specific material.

U.S. households will subscribe to a pay service by 1985, that the pay service price will decline to 25 percent of its current level and that all pay viewing will be at the expense of prime-time television, the study projected that the audience lost by conventional television would be less than 11.9 percent of current levels by 1985, which should be nearly offset by population growth. *Broadcasting*, May 10, 1976, at 58.

*5* 506 F.2d 246 (D.C. Cir. 1974).

*6* The court in *WEFM* stated:

There is a public interest in a diversity of broadcast entertainment formats. The disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio. . . . When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. *Id.* at 262.

*1* The FCC has concluded it has no statutory authority to dictate entertainment formats. Notice of Inquiry, 57 F.C.C.2d 580 (1976); Memorandum Opinion and Order, 60 F.C.C.2d 858 (1976).


[If entertainment formats were regulated,] a station which was permitted to continue a successful format would benefit considerably from what would be, in effect, a government-managed cartel. . . . Unless we have abandoned all faith in a free economy, we must assume that the public will benefit from a competitive struggle and even from the potential competition made possible by a policy of open entry. Notice of Inquiry, 57 F.C.C.2d 580, 587 (1976).

*3* Section 326 of the Communications Act of 1934 states in relevant part:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.


*4* See, e.g., Ad Hoc Comm. on the Sugar Bowl, 29 RAD. REG. 2d (P&F) 70 (1973) (not restraining broadcast of Sugar Bowl despite racial discrimination by network); Letter to Honorable Ronald Reagan, 38 F.C.C.2d 378 (1972) (not postponing broadcast of election predictions in Pacific Time Zone); Washington Women's Strike for Peace, 6 RAD. REG. 2d (P&F) 307 (1965) (approving station refusal to sell time for spot announcement where station had complied with fairness doctrine).
Applying the FCC's own standards, the Commission would have authority to require the broadcast of sports programs only if the programs were considered non-entertainment, if actual viewer preference indicated they were sufficiently unique and popular, and if the entire format would otherwise disappear. However, no claims have been made that pay cable will siphon all sports programs, only the most popular ones. Therefore, the sports format itself is not threatened. Even if it were, Section 326 of the Communications Act would prevent the Commission from requiring the broadcast of specific sports events or individual non-specific sports programs. Thus, if the Commission were to prevent the cablecast of such programs, it would exceed the control it can legitimately exert over broadcasting.

In addition, it has been charged that FCC pay cable regulation is primarily a device to protect the broadcasters' monopoly profits, and in fact the sincerity of the Commission's concern for the viewing public without access to pay cable can be questioned on the basis of its past television regulation. When television appeared on the market, it siphoned many programs from radio, but the FCC did not issue anti-siphoning regulations even though residents without television service and the poor without means to buy television receivers and antennas were denied access to these programs.

Because of these difficulties with FCC regulation, it has been suggested that steps to regulate pay cable should be taken legislatively. Presently, plans to rewrite the Communications Act of 1934 are being considered by Congress, and sports anti-siphoning regulations are foreseen. If congressional action is taken, the question of jurisdiction will no longer be a concern. The major obstacle to pay cable anti-siphoning legislation will be the first amendment.

**FIRST AMENDMENT LIMITATIONS**

Although the protections of freedom of speech and the press in the first amendment extend to radio and television, the Supreme Court has permit-

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57 Even if the FCC would require that a minimum number of hours of a particular sport be broadcast, this would hardly be different from requiring the broadcast of a particular program, and would amount to program censorship in violation of § 326 of the Communications Act of 1954.

58 See 2 E. BARNOW, A HISTORY OF BROADCASTING IN THE UNITED STATES 284-90 (1968).

59 The powers of the FCC were already questioned twice by the drafting of the Cable Communications Act of 1975 by the Office of Telecommunications Policy and the drafting of the Comprehensive Cable Communications Act of 1976 by the Department of Justice. See DEREGULATION OF CABLE TELEVISION apps. B & C 113-48 (P. MacAvoy ed. 1977).

59 House Communications Subcommittee Chairman Lionel Van Deerlin said pay television anti-siphoning regulation of live sports events is something "we should damn well write into law." BROADCASTING, April 4, 1977, at 41. Van Deerlin promised not to permit siphoning of "classical sports events" apparently meaning not only the Super Bowl, World Series and major horse races, but also college and professional football games now broadcast on conventional television. BROADCASTING, May 30, 1977, at 29.

ted certain regulatory constraints on broadcast program content because of the special nature of the broadcast medium.62

The airspace used by radio and television is considered a scarce resource since those desiring to use channels far exceed the number of frequencies available.63 Because of this scarcity, allocation of airspace to broadcasters has been held to warrant regulation in the public interest.64 Furthermore, since the first amendment protects the expression and dissemination of diverse views as well as the rights of individual speakers,65 access to a full range of opinions by the audience has been held to be in the public interest and is used to justify limitations on the broadcasters' right to speak. Thus, in Red Lion Broadcasting Co. v. FCC,66 the Supreme Court upheld the FCC fairness doctrine requirement that opposing views must be presented on significant public issues,67 stating: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."68

Cable television, on the other hand, has a multiplicity of channel space available,69 and even though it is a capital intensive industry and a true natural monopoly, there is no physical barrier to the operation of several


63The VHF portion of the electromagnetic spectrum that has been allocated to television allows for 12 clear channels, but no one locality has more than 6 in use. The FCC added 70 UHF channels in 1952, but UHF television never grew as expected. For a description of the electromagnetic spectrum and its allocation, see M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 536-54 (1977). According to FCC tabulations, only 369 UHF television stations were on the air in the United States as of December 31, 1977. BROADCASTING, Jan. 16, 1978, at 66.

64See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943): "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio is inherently not available to all. That is its unique characteristic, and that is why . . . it is subject to governmental regulation." The public interest held to be served by regulation is "the interest of the listening public in 'the larger and more effective use of radio.'" Id. at 216, quoting Communications Act of 1934, § 303(g) (emphasis supplied). See also T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 663 (1970); 2 Z. CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 688 (1947).

65"[T]he First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." Associated Press v. United States, 326 U.S. 1, 20 (1945).


67The fairness doctrine imposes two duties on a broadcaster: (1) to broadcast all sides of significant public issues, 47 U.S.C. § 315(a) (1970), and (2) to provide a right of reply when individuals or groups have been attacked on the broadcaster's station, 47 C.F.R. § 73.123 (1976).


The Supreme Court modified its position somewhat in Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), holding that broadcasters may refuse to sell time to public groups for editorial comment on public issues. The court said that broadcasters are allowed discretion in deciding what issues are to be discussed by whom, and when, in fulfilling their fairness doctrine obligations.

For a consideration of other justifications of broadcast content regulation (e.g., public ownership of the air waves, the unique impact of broadcasting, and broadcasting as a government granted privilege) and their applicability to pay cable, see Hoffer, supra note 28, at 490-98.

69See note 9, supra.
cable systems in the same locality. Because of this difference in technology, the court in *Home Box Office* stated that for first amendment purposes, cable television should stand toward the government as a newspaper and not as a broadcast licensee.\(^7\)

The government’s power to control the content of newspapers is quite limited.\(^7\) However, the court in *Home Box Office* indicated that the content of pay cable television may be regulated if 1) the government’s regulatory purpose is neutral and “unrelated to the suppression of free speech,” 2) the government interest is “important or substantial” and 3) the incidental restriction on first amendment freedoms “is no greater than is essential to the furtherance of that interest.”\(^7\)

The court held that the anti-siphoning regulations met the first requirement because the government purpose in regulating pay cable—protecting viewing rights of those without cable—is not intended to curtail expression and is neutral in character.\(^7\) Siphoning by pay cable would prevent transmis-

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\(^7\) Home Box Office v. FCC, 567 F.2d 9, 44-46 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977):

The First Amendment theory espoused in National Broadcasting Co. and reaffirmed in Red Lion Broadcasting Co. cannot be directly applied to cable television since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent. . . . [S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, . . . and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point. (citations omitted)


\(^5\) Home Box Office v. FCC, 567 F.2d 9, 48 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977), quoting the standard enunciated in *United States v. O’Brien* 391 U.S. 367, 377 (1968). Even though O’Brien involved a case of draft card burning, the *Home Box Office* court noted that the O’Brien holding has not been limited to that kind of symbolic speech situation. 567 F.2d 48 n.92.

The *Home Box Office* court also noted that *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), possibly left open an additional argument for permitting pay cable regulation. 567 F.2d 9, 46 n.82. The Miami Herald Court found that the Florida right-of-reply statute for newspapers which it invalidated would have a chilling effect on political and election coverage, 418 U.S. 241, 256-58 (1974), indicating that the Court was concerned with general diminution of diversity. Thus, if it could be shown that regulation of pay cable would increase diversity, it might be argued that the regulation would not violate but would further first amendment principles.

\(^3\) Home Box Office v. FCC, 567 F.2d 9, 48 (D.C. Cir. 1977), cert. denied 434 U.S. 829 (1977). Examples of non-neutral purpose would be the favoring of particular groups of speakers over others or the banning of speech not within the doctrinal categories of obscenity, “fighting words,” or “clear and present danger” because of a harm it was thought to produce. *Id.* at 48.
sion of certain messages to a segment of the potential audience,\textsuperscript{7} and anti-siphoning regulation would make those messages available to that audience segment without denying the material to the pay cable audience which has access to broadcast television through basic cable services. Similarly, sports and movie producers would not be affected if the regulations were narrowly drawn, because they could still present any material to one or both audiences. Hence, the purpose of anti-siphoning regulations is to promote freedom of speech rather than to abridge it.\textsuperscript{75}

Nevertheless, the FCC pay cable rules were held to violate the first amendment because they failed to meet the second and third requirements. The court held that the government interest was not demonstrated to be important or substantial because the problem of siphoning was not convincingly shown to exist. Furthermore, the court found the regulations to be overbroad much in agreement with the pay cable entrepreneurs' assertions, and stated that for overbreadth purposes, restricted programs not broadcast must be readily available to cablecasters.\textsuperscript{76}

Any new sports anti-siphoning legislation adopted by Congress will have to meet the same criteria, although only the substantial or important government interest requirement should present a problem. Neutrality with respect to the first amendment can be illustrated by use of the same arguments presented in \textit{Home Box Office}, and new legislation can be drafted narrowly enough in accord with that court's instructions to prevent overbreadth problems. However, it remains to be demonstrated that the threat of siphoning is sufficiently real to be considered substantial and that the interest endangered by siphoning is sufficiently important to warrant first amendment infringement.

\textbf{CONSEQUENCES OF DEREGULATION}

Cable television and pay cable growth has not been as explosive as broadcasters had predicted it would be.\textsuperscript{77} Currently there are approximately one

\textsuperscript{7}In this respect, siphoning is not unlike heckling. Government may adopt reasonable regulations to prevent speakers from interfering with each other when competing for the same audience since “the right of free speech . . . does not embrace a right to snuff out the free speech of others.” Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969), quoted in \textit{Home Box Office} v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977), \textit{cert. denied}, 434 U.S. 829 (1977).

\textit{See also} A. Meiklejohn, \textit{Free Speech and its Relation to Self-Government} 22-27 (1948); A. Meiklejohn, \textit{Political Freedom} 24-48 (1960), cited in \textit{Home Box Office} v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977), \textit{cert. denied}, 434 U.S. 829 (1977). Meiklejohn uses a town meeting to illustrate that the first amendment is not a guardian of “unregulated talkativeness” and regulations which “transform cacophony into ordered presentation” can be consistent with the right to free speech.

\textsuperscript{7}But cf., Hagelin, \textit{supra} note 62, at 524 (contending that if restrictions drastically limit the commercial potential of cable television, they will violate the first amendment by depriving urban residents of access to new communications media technology).


\textsuperscript{7}For a chronology of cable growth from its inception in the 1950's to 1972, see D. Le Duc, \textit{supra} note 19, app. 219-22. In 1977 there were 11.9 million cable homes in the United States,
million pay cable subscribers in comparison to 71.5 million television homes in the United States. This is well below even the most pessimistic forecast by communications economists which estimated 1.7 million pay cable subscribers by the end of 1977, with three million pay subscribers by 1980. Thus, pay cable is still too small to pose an actual siphoning threat and predictions of rapid, spectacular growth are probably inflated.

Growth of pay cable has been retarded in part by the high cost of installing and maintaining cable systems in urban areas where most of the population resides. For instance, in 1975 the cost of laying cable ranged from $4,000 per mile in rural areas to $75,000 in large cities, and the cost of wiring urban households for cable was estimated in 1974 to be over $300 per home and over $600 per apartment.

Thus, even without siphoning restrictions, pay cable will not be able to grow rapidly. Instead, pay entrepreneurs are finding pay broadcast operations more feasible in cities through the use of UHF television channels since the capital investment is much smaller and since broadcasting can begin without delay. UHF use, in turn, presents no siphoning threat because the FCC pays with approximately 3,700 operating cable systems. STAFF OF SUBCOMM. ON COMMUNICATIONS OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95th Cong., 1st Sess., OPTIONS PAPERS 547, 555 (Comm. Print 1977) [hereinafter cited as OPTIONS PAPERS].

Home Box Office, Inc. controls 80 percent of the pay cable business with 800,000 subscribers in 46 states. BROADCASTING, Oct. 17, 1977, at 50. Showtime, a pay cable branch of Viacom International, has 90,000 subscribers in 10 states and hopes to have 300,000 by the end of 1978. BROADCASTING, Oct. 31, 1977, at 45.

See HOUSE REPORT, supra note 4, at 63, for a graph of high-low estimates of growth in cable and pay cable subscriber households by 1980.

The 800,000 subscribers of Home Box Office pay $8 to $10 monthly, of which Home Box Office receives $3.50 to $4. BROADCASTING, Oct. 17, 1977, at 50. Thus, from its monthly gross of $3.2 million, Home Box Office has an average of less than $107,000, minus operating expenses, to spend on a whole day's programming. In fact, after five years of operation, Home Box Office did not turn its first profit until the third quarter of 1977. Id.

Various predictions include a study by Stanford Research Institute made in 1974, which projected that pay cable subscribers will increase to 14.7 million by 1985. BROADCASTING, May 10, 1976, at 58. James Duffy, ABC TV Network president, predicted only incremental growth for pay cable during the next few years with no radical changes in television, although he estimated that by 1987 pay cable would be able to compete with the networks for super events with 15 million pay viewers and $2.5 billion in pay-TV ad revenues. BROADCASTING, Oct. 24, 1977, at 40.

Now that restrictions have been removed, however, it is difficult to predict the rate of pay cable growth without further studies. MacAvoy, Memorandum on Regulatory Reform in Broadcasting, in DEREGULATION OF CABLE TELEVISION 32 (P. MacAvoy ed. 1977).

The top-100 television markets, which contain 86 percent of all television homes in the United States, together take up 4 percent of the nation's geographic area. HOUSE REPORT, supra note 4, at 55.

BROADCASTING CABLE SOURCEBOOK 5 (1975).


Robinson, Recent Developments and Predictions About the Future, in DEREGULATION OF CABLE TELEVISION 94 (P. MacAvoy ed. 1977). However, it suggested that pay cable may eventually dislodge STV in the big cities because unlike STV, it will be able to offer programming on more than one channel as well as additional services. Krasnow & Quale, Legal and Regulatory Problems Facing Cable Television, in CATV TODAY: A DISCUSSION OF CURRENT ISSUES 21 (1975).
broadcast television anti-siphoning regulations were left intact by the Home Box Office decision.87

In addition, if one considers the pay cable network programming policies, the commitment of the sports leagues and the actual prices paid for sports programming by the broadcast industry, the threat of sports siphoning becomes even less realistic.

According to Home Box Office, Inc., sports programs have been deemphasized on their schedule because of their regional appeal, their abundance on broadcast television and because they cannot be used as reruns. In fact, their 1978 schedule was expected to include 75 percent films, 20 percent entertainment and only 5 percent sports.88 The 1977 Showtime schedule included no sports programming at all.89 Thus, because of their limited utility to pay cable networks, non-specific sports events do not appear to be endangered.90

Regarding specific sports events, the sports leagues have repeatedly stated that the leagues will not withhold from conventional television programs that have traditionally been broadcast for free.91 Although this commitment has never been put to a real test,92 public pressure on the leagues would make them hesitate before entering such a contract.

Also, broadcasters and advertisers are often willing to pay unusually high prices for rights to specific sports events because of their prestige value. Thus, these events will not be siphoned as easily as the usual three-cents-per-viewer-per-program-hour broadcast formula makes it seem. For instance, for ten days' coverage of the 1980 summer Olympics in Moscow, NBC contracted to pay the Soviet Union $85 million.93 Even with greatly increased subscribership, the pay cable industry could not afford to match such an offer.

89BROADCASTING, Oct. 31, 1977, at 45.
90It is not certain whether individual cablecasters would have the incentive and ability to outbid local broadcast stations for rights to local sports events. There is very little evidence on the willingness of viewers to pay for individual sports or seasons, but what evidence there is, does not suggest that the public would be willing to pay much for the run-of-the-mill events. First Report and Order, supra note 5, at 80 (Robinson, Comm'r, dissenting in part, concurring in part).
91See House Report, supra note 4, at 68; Rose, supra note 8, at 156. The commissioner of baseball has on many occasions assured the FCC that under no foreseeable circumstances will such traditionally free television events as the World Series, the league championships or the all-star games be sold to pay cable or STV. COMM. FOR ECONOMIC DEV., supra note 4, at 99.
92The National Football League (NFL) was recently offered $400 million by a promoter for rights to the Super Bowl and championship play-off games for five years. The NFL refused, even though the broadcast network bids were considerably lower, terming the offer as not serious. BROADCASTING, May 30, 1977, at 45-46.
93BROADCASTING, May 30, 1977, at 19-20. On the four year contract which expired at the end of the 1977 season, the NFL was paid approximately $57 million by the networks in yearly rights fees. Id. at 45. For amounts paid by the radio and television networks for 1977 football rights and season advertising costs, see BROADCASTING, Aug. 1, 1977, at 47-50. One minute of advertising during the 1977 Super Bowl cost $350,000. Id. at 48. For amounts spent on advertis-
Thus, it would appear that at present, pay cable poses no actual siphoning threat to sports programming. However, even if siphoning should occur sometime in the future, the consequences will not be as serious as contended.

Residents of areas not served by cable would not be denied access to siphoned programs because it would be to pay cable's advantage to sell broadcast viewing rights to conventional television stations in those regions of the country. In fact, the greater the area without cable, the more demand there would be for broadcast rights, and the more likely nation-wide coverage would be achieved through a combination of cable and broadcast television.9

Thus, the only valid concern would be for the poor who live in an area served by cable and cannot afford pay cable service. However, since pay cable would probably sell simultaneous broadcast rights to radio stations, the poor would not be denied access altogether. They would only be deprived of a live video account of the event.95 Nevertheless, this showing alone would still not be sufficient to satisfy the substantial or important government interest requirement. In addition to demonstrating the likelihood of actual harm, it must also be shown that the government interest—maintenance of the present sports programming level on free broadcast television—is sufficiently important to the public to warrant first amendment infringement. Weighing the positive and negative effects of sports anti-siphoning regulation, the intrusion seems unjustified.

A PUBLIC RIGHT TO FREE TV?

Sports anti-siphoning regulations are intended to give the poor and those not served by cable access to sports programming and to maintain for the general viewing public the present level of free sports programming. However, if sports are valued so highly by our society that access should be guaranteed,96 the primary concern should be in protecting the integrity of the sports industry itself.

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9 For example, in the 1977 World Series, see ADVERTISING AGE, Sept. 26, 1977, at 3. Four companies alone spent over $1 million each on the Series, and another four each spent over $350,000.


9It is also possible that other sports events would replace those siphoned. Besen et al. note that supply inelasticities of sports events are easily exaggerated, as illustrated by the expansion in several major league sports, the advent of new televised sports such as tennis and soccer and the growth of college football bowl games. They say even extraordinary events are not completely inelastic, pointing out that once there was no Super Bowl. Besen et al., supra note 6, at 87.

9The social value of sports has been judicially noticed. Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970);

Baseball's status in the life of the nation is so pervasive that it would not strain credibility to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession . . . were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations.
Many teams are in financial trouble today, and sports leagues have grown increasingly dependent on broadcast rights as a revenue source. Pay cable could offer the leagues a much broader market in which to sell their rights than conventional television, yet that market would be closed by anti-siphoning regulations which would prevent the leagues from accepting higher bids. Thus, anti-siphoning regulations work against the interests of professional sports.

Since the anti-trust exemption granted the sports leagues by Congress was intended to help professional sports, it should not be used as a justification or trade-off for regulations that would hurt sports interests. Rather, if it is feared that the leagues will abuse their monopoly bargaining position, they could be allowed to negotiate with both the broadcast and cable industries with the warning that their exemption will be repealed if they constrict the supply of sports programming unreasonably.

Furthermore, lack of access to free programming by the poor is not a proper justification for restricting a channel of communication. The 1974 Cable Report to the President argued that "especially in the constitutionally protected media, the problem of poverty should not be dealt with by governmental restrictions of the range of choices open to consumers." Restricting a medium on this basis would prevent its development and deny the public much material not otherwise obtainable. Thus, the inability to afford pay cable should be treated no differently than the inability to afford a book, magazine or admission to a closed circuit theatrical showing.

In addition, artificially maintaining the current level of free broadcast programming might seem desirable to the public on an individual basis, but would result in a cost to society through misallocation of resources. Unless the resources used by broadcast television are allowed to shift to their highest

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9 See notes 7 and 8 supra and accompanying text.

99Broadcast programming is not really free because related advertising costs are reflected in higher prices at the store. The higher prices resulting from television advertising are on goods bought by the poor, so the poor pay a significant part of the cost of free television. MacAvoy, *supra* note 82, at 44.

100 *REPORT TO THE PRESIDENT,* *supra* note 4, at 35.

101 It has been pointed out that the poor would also be benefited by pay cable. It would offer a cheaper source of entertainment now available only at a film theatre, sports arena or concert stage, enabling the poor to buy more of this sort of entertainment than they otherwise could afford. Also, broadcasters have little incentive to serve the poor since they cannot extract payment from them, while pay cable would have incentive to design and market programs of special appeal for them. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 257-58 (1972).
valued, and thus, most productive uses, they will not be used with maximum efficiency.\(^{103}\)

In terms of programming resources, pay cable is able to gauge the value of programs more accurately because its viewers can express the intensity of their preferences by the amount they are willing to pay. Thus, programming resources would be used more efficiently in meeting the public interest if programs were allowed to transfer to the pay system.

In terms of the electromagnetic spectrum, television could free much of the most valuable frequencies by switching from its use of broadcast frequencies to cable transmission. Broadcast television uses more than half of the VHF band, the most valuable spectrum space, with government exclusive or shared channels occupying another third. This leaves five percent of this frequency range for the increasing numbers of safety and special radio facilities such as aviation, fire and other emergency or industry services.\(^{104}\) These mobile services do not have a choice, but must use the electromagnetic spectrum. Thus, the switch by television to cable transmission should be encouraged. Restrictive programming regulations, however, no matter how slight, would tend to perpetuate the status quo and discourage such a development.

Finally, pay cable growth should be encouraged because of the program diversity and new non-pay services it could bring about in the future. Presently over 80 percent of all television programming is dominated by the networks,\(^{105}\) with the bulk aimed at the mass audience.\(^{106}\) Pay cable offers a different alternative. Because its programming can be directed toward specific, less popular tastes and desires, it could offer more diverse, innovative programming to the public, as well as finance educational programming and provide a much needed source of revenue for the performing arts.\(^{107}\)

Additionally, pay cable could stimulate the growth of cable television which promises to have revolutionary effects once it is fully developed.\(^{108}\) Such

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\(^{103}\)One who is willing to pay the most for a resource believes he knows how to get the greatest output from it by using it most efficiently. *Id.* at 10-11. Thus, resources should be transferred to the highest bidder to maximize efficient use.

\(^{104}\)See D. Le Duc, *supra* note 19, at 12. Such a large portion of the VHF band must be allocated to television because each television signal demands a range of frequencies almost six times the breadth of the entire commercial radio band. *Id.*

\(^{105}\)HOUSE REPORT, *supra* note 4, at 2.

\(^{106}\)See note 13, *supra*. The oligopolistic influences of the networks in the program market are also thought to be to blame for the homogeneity of programming. Network dominance of the selection, financing and production of programs restricts entry of truly independent producers and perpetuates the networks' perception of public taste. See L. Ross, *ECONOMIC AND LEGAL FOUNDATIONS OF CABLE TELEVISION* 8 (1974).


\(^{108}\)It is estimated that cable must penetrate 50 percent of all television homes in the United States in order to reach a "maturity" that will allow development of its potential. HOUSE REPORT, *supra* note 4, at 5.
systems could transform the television set into a multifunctional information and entertainment device which could provide homes with data information services, mail and newspaper facsimile reproductions and a "talk back" device for catalogue shopping or banking.\textsuperscript{109}

However, before pay cable can have these effects, it must develop an economically viable base on which special interest programming can piggyback at low marginal cost.\textsuperscript{110} At present, it needs widely popular programming in order to attract the large subscriber base necessary to insure its growth. Any program restrictions would have a negative effect on these attempts.

It is difficult to measure the benefits the viewing public would derive from sports anti-siphoning regulation.\textsuperscript{111} However, the social costs of such regulation would seem to far exceed the gain. The negative effects would, of course, not be as great if the restrictions were limited. Nevertheless, as a matter of public policy, no public right to the free broadcast of any sports or entertainment program should be recognized.

CONCLUSION

Since there is little chance at present that siphoning will actually occur, there is no justification for sports anti-siphoning legislation. However, even if the threat of siphoning becomes imminent, broadcast television should be made to compete with pay cable just as it competes with closed circuit theatrical showings. There is no reason to treat pay cable more restrictively. It is a self-contained form of communication which should be allowed to compete for audiences and ideas on an equal basis. Its growth should be encouraged, rather than restricted, to enable cable television to develop and fulfill its promise of program abundance and diversity.

M. AGNES SIEDLECKI

\textsuperscript{109}For a discussion of technological innovations that will be made possible by cable, see Barrow & Manelli, \textit{Communications Technology—A Forecast of Change (Part II)}, 34 L. & CONTEMP. PROB. 431, 431-33 (1969); R. Steiner, \textit{Visions of Cablevision} 22-27 (2nd ed. 1973).

\textsuperscript{110}It is generally agreed that special interest programming by itself will not provide a sufficient economic base for pay cable operations. L. Johnson, \textit{Expanding the Use of Commercial and Noncommercial Broadcast Programming on Cable Television Systems} 13 (1975).

\textsuperscript{111}Pay cable opponents claim that without restrictions 20 percent of Americans will be deprived of about 80 programs per year because of siphoning. They estimate that these programs will cost the average viewer $134 per year. Hoffer, \textit{supra} note 28, at 500, citing National Ass’n of Broadcasters, \textit{Fact Sheet on the Potential Impact of Pay Television upon Low Income Consumers} (1974). A study by Noll, Peck and McGowan has estimated the social value of free television at between $20 and $30 billion a year, with a proportionally large share going to lower income groups. MacAvoy, \textit{supra} note 82, at 44. However, a theoretical analysis by Owen, Beebe and Manning has found that under reasonable conditions consumers will generally be better off with pay television than with free television. \textit{Id.} at 43.