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Alternative Broadcasting Arrangements after *NCAA*†

BYRON L. GREGORY*
J. CRAIG BUSEY**

INTRODUCTION

On June 27, 1984, the United States Supreme Court issued its opinion in *NCAA v. Board of Regents of the University of Oklahoma,*[1] (*NCAA*), and thereby threw the world of college football into virtual chaos. In ruling against the NCAA and its program of controlling the rights to present live telecasts of the college football games of all of its members, the Court sent nearly all the colleges in Division I-A[2] scurrying about to find ways to market the rights to televise their football games for the 1984 season. As will be described below, the result of the ensuing activity was the formation of various organizations and coalitions[3] which have, like the NCAA, subsequently been challenged under the antitrust laws.[4] There have as yet been no final judicial determinations as to the legality of these challenged arrangements,[5] and the questions left unanswered by the *NCAA* decision as to what arrangements for marketing college football television rights, to replace the NCAA, are legally acceptable have yet to be resolved. This article considers what arrangements may now be proper and what standards are likely to be used to evaluate the legality of those arrangements.

I. THE *NCAA* DECISION

The issue before the Supreme Court in *NCAA* was whether the NCAA's television plan, which governed all televising of all college football games

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1. 104 S. Ct. 2948 (1984).
2. The NCAA's membership is classified into separate divisions to reflect differences in size and scope of the respective athletic programs. Division I includes 276 colleges with major athletic programs, of which 187 play intercollegiate football, and has been subdivided into Divisions I-A and I-AA for football. Division I-A contains the stronger football schools. *See, e.g.,* 104 S. Ct. at 2970 n.63.
3. *See infra* text at II. *A.,* THE WAKE OF THE *NCAA* DECISION—*The Broadcasting Arrangements.*
4. *See infra* text accompanying notes 23-56.
5. There was, however, a preliminary injunction granted by the District Court for the Central District of California, and affirmed by the Ninth Circuit, prohibiting members of the Col-

played by NCAA member schools during the 1982-1985 seasons, violated the antitrust laws. Under that program, the NCAA had entered into contracts with the ABC and CBS television networks which provided for a minimum aggregate payment by each network for the rights to televise a specified number of games on a national or regional basis. Each network was required to schedule television appearances for at least 82 different member institutions during each two-year period. Moreover, the plan provided that each member institution was eligible to appear on television no more than a total of six times or more than four times nationally, with appearances to be divided equally between the two networks. Also, there was an absolute limitation on the number of games which could be broadcast.

Although the plan set the minimum aggregate compensation for the television package, it also allowed individual networks and member schools to bargain over the specific terms of the agreement. In practice, an NCAA representative would recommend a fee for the different types of telecasts, such as national, regional, or Division II or III. The aggregate amounts of the fees then negotiated and paid for individual telecasts would, the Court noted,[6] presumably equal the total minimum aggregate compensation set forth in the basic agreement. In any case, each member institution was expressly precluded from selling its television rights except in accordance with the plan. The Court found that the essential features of the plan were to limit the total amount of televised intercollegiate football and the number of games that any one team could televise.[7]

The Court concluded that "the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise price and reduce output."[8] It also noted that the restraint at issue was "a horizontal restraint—an agreement among competitors on the way in which they will compete with one another."[9] Although the Court pointed out that such a restraint has often been held unreasonable as a matter of law,[10] it refused to hold that the plan constituted a per se violation of the antitrust laws because the case "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[11] The Court thus analyzed the NCAA plan under the Rule of Reason[12] and addressed the justifications which the NCAA offered to offset the plan's anticompetitive effects.

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lege Football Association ("CFA") from refusing to appear on networks other than ABC, the network with which the CFA has entered into a broadcasting contract. Regents of Univ. of Cal. v. American Broadcasting Cos., Civ. No. 84-6093 (C.D. Cal.), *aff'd*, 747 F.2d 511 (9th Cir. 1984). For discussion see *infra* text accompanying notes 23-49.

6. *See* 104 S. Ct. at 2956.
7. *Id.* at 2967.
8. *Id.*
9. *Id.* at 2959.
10. *Id.*
11. *Id.* at 2961.
12. "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement

The Court analyzed the NCAA plan and concluded that the "hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market."[13] After examining each of the NCAA's proffered justifications, the Court concluded that this burden had not been met.[14] The NCAA argued that the joint selling arrangement established by its plan, much like the arrangement at issue in *Broadcast Music, Inc. v. Columbia Broadcasting System,*[15] actually assisted in marketing broadcasting rights and was thus procompetitive. The Court, however, rejected that argument and found that, unlike the blanket licensing arrangement in *Broadcast Music,* the NCAA plan tended to limit rather than enhance production.[16] Whereas the arrangement in *Broadcast Music* had enabled the composers of tens of thousands of musical works, who could not have marketed their works effectively on an individual basis, to establish a market for their works, there was nothing inherent in the circumstances of the NCAA case to prohibit individual games from being marketed individually.[17] Moreover, "[s]ince broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors."[18]

The NCAA also argued that two of the plan's legitimate purposes were to protect live gate attendance and to preserve a competitive balance among member teams. With respect to the former argument, the Court found that the actual implementation of the plan, which permitted the televising of as much as nine hours of football on some Saturdays, was not consistent with the stated goal and that, in any event, the underlying premise of the justification was the anticompetitive and monopolistic objective of protecting ticket sales by limiting output.[19] The latter argument failed because the Court, while recognizing the legitimacy of the objective, found that the specific regulations under attack in the litigation did not in reality appear either to seek or to achieve the purposes of preserving the competitive balance between various teams.[20] Moreover, the Court was particularly swayed by "the District

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is one that promotes competition or one that suppresses competition. 'The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.' " National Soc. of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978) (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). *See also* Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

13. 104 S. Ct. at 2967.
14. *Id.* at 2971.
15. 441 U.S. 1 (1979).
16. 104 S. Ct. at 2968.
17. *Id.* at 2967-68.
18. *Id.* at 2968.
19. *Id.* at 2968-69.
20. *Id.* at 2969-70.

Court's unambiguous and well supported finding that many more games would be televised in a free market than under the NCAA plan."[21] The Court noted that this finding clearly demonstrated the fallaciousness of NCAA's basic premise that equal competition, as allegedly maintained under the plan, would maximize consumer demand for the product.[22]

II. The Wake of the *NCAA* Decision

A. The Broadcasting Arrangements

The *NCAA* decision ended more than three decades of total control by the NCAA of the television rights to its members' games and dependence by the NCAA members upon the NCAA to negotiate the basic contract for the televising of their games. In the period immediately after the decision, it was not clear how those arrangements would or could be handled for future seasons.

Shortly after the issuance of the *NCAA* opinion, a Football Television Planning Committee, composed of representatives of various conferences and universities, was formed to formulate a new television plan to replace the NCAA plan. One organization represented in this Committee was the College Football Association ("CFA"), an association formed in 1979 and consisting of essentially all colleges and universities with major football programs other than those in the Big Ten Conference (the "Big Ten") and the Pacific-10 Conference (the "PAC-10"). Although various proposals were made within the Committee, the CFA, the Big Ten, and the PAC-10 could not agree on any particular plan. When no agreement could be reached, these parties went their separate ways.

The CFA entered into a contract with the ABC Television Network and ESPN, a sports and entertainment network owned primarily by ABC. That contract granted ABC the rights to televise a specified number of games involving CFA members and precluded CFA teams from appearing on any network other than ABC or ESPN. The contract also defined time periods during which games involving CFA members could not be televised even by any station, syndicator, or regional broadcasting entity.

At approximately the same time, the PAC-10 and Big Ten entered into an agreement with the CBS Television Network. Like the ABC/CFA agreement, this contract granted the network the rights to televise a specified number of games involving Big Ten or PAC-10 schools. Unlike the ABC/CFA agreement, however, the CBS/Big Ten/PAC-10 agreement recognized the principle that only the team hosting a football game has the right to negotiate and grant the rights to televise that game and, therefore, placed

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21. *Id.* at 2970.
22. *Id.*

no prohibition upon the teams as to television appearances for which they were the visiting teams. Moreover, the exclusivity of the rights granted to CBS extended only to those time periods during which a game within the package was being televised by CBS.

Both of those agreements were consummated in time to govern the television rights and broadcasting arrangements for the 1984 college football season. In addition, both were destined to result in litigation involving some of the issues addressed in this article.

B. The Litigation

Because the ABC/CFA Agreement prohibited CFA teams from appearing on networks other than ABC and ESPN, and because the CBS/PAC-10/ Big Ten Agreement gave CBS the rights to televise PAC-10 or Big Ten home games, the two agreements were headed on a collision course. The actual collision occurred when CBS sought to televise the Nebraska (CFA) at UCLA (PAC-10) game and the Notre Dame (CFA) at USC (PAC-10) game as part of its selected television package. When UCLA and USC requested the consent[23] of Nebraska and Notre Dame, respectively, to the broadcast arrangements, both CFA schools refused to give their consent because of their agreement with ABC and threatened not to participate in the games if they were televised on CBS.

The Big Ten and PAC-10 brought suit against ABC and the CFA (as well as the universities of Nebraska and Notre Dame)[24] to obtain an injunction precluding Nebraska and Notre Dame from withholding their consent to the broadcast of these "crossover games"[25] on the basis of the ABC/CFA contract. The Big Ten and PAC-10 alleged that the provision of the ABC/ CFA contract which effectively prohibited the broadcast of crossover games at non-CFA schools by a network other than ABC violated the antitrust laws. They contended that the crossover restriction was a control output restriction of the type condemned by the Supreme Court in the *NCAA* case,[26] as well as a per se unlawful boycott.

The district court granted a preliminary injunction prohibiting Nebraska and Notre Dame from withholding their consent to the CBS broadcast of

23. Although the Big Ten and PAC-10 recognize and advocate the right of the home team to negotiate and grant the license to broadcast a game, it is axiomatic that the visiting team must give its consent to the arrangements agreed to by the home team. If a visiting team refuses to acquiesce, the home team and its licensee will run the risk that the visiting team may simply refuse to participate in the game.

24. Regents of Univ. of Cal. v. American Broadcasting Cos., Civ. No. 84-6093 (C.D. Cal. 1984).

25. A "crossover game" is one in which a team whose games are subject to one network television agreement plays against a team whose games are subject to a different network agreement. In the cited case, UCLA and USC are PAC-10 teams, while Nebraska and Notre Dame belong to the CFA.

26. *See supra* text accompanying notes 1-22.

their crossover games with PAC-10 schools based solely on the ABC/CFA contract. The district court also enjoined the CFA from imposing or threatening to impose any sanctions on either Nebraska or Notre Dame to inhibit the schools from agreeing to a CBS telecast of the games at issue. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision by a two-to-one vote.[27]

The Ninth Circuit majority characterized the Big Ten and PAC-10 allegations as charges that the ABC/CFA contract amounted to price-fixing[28] and a group boycott[29] in violation of Section 1 of the Sherman Act.[30] In assessing the strength of the Big Ten's and PAC-10's case to determine whether a preliminary injunction should have been issued, the Ninth Circuit did not reach the question whether the rule of reason or the per se rule would apply; rather the court held that the district court's finding that the plaintiffs had raised serious questions indicating a fair chance of success on the merits was supported under either rule.[31]

Not surprisingly, the Ninth Circuit majority used the Supreme Court's *NCAA* decision as the touchstone for its analysis. The majority noted that the Supreme Court had declined to apply the per se rule to the restrictions involved in the *NCAA* case[32] because some "horizontal restraints on competition are essential if the product is to be available at all."[33] The Ninth Circuit concluded that the Court was referring to restraints such as the uniform rules collectively adopted and enforced by the NCAA, both before and after the *NCAA* decision, to preserve the integrity of the college football "industry."[34] It also found that, since the NCAA had already occupied the field of college football, the CFA could not claim to occupy the same role occupied by the NCAA, a role which had led the Supreme Court to avoid applying the per se rule to NCAA restrictions.[35] The Court thus characterized the CFA and the ABC/CFA agreement as "classical horizontal restraints unadorned by any organic relationship to the 'character and quality of the "product".' "[36] Accordingly, the majority opined, without deciding, that the *NCAA* decision suggested that the per se rule should apply to the allegations against the CFA.[37]

In the context of affirming the preliminary injunction, the majority viewed the CFA as a cartel of commercial competitors which sought to sell broadcasting rights to their games and which toward that end adopted restrictions

27. Regents of Univ. of Cal. v. American Broadcasting Cos., 747 F.2d 511 (9th Cir. 1984).
28. 747 F.2d at 516.
29. *Id.*
30. 15 U.S.C. § 1 (1982).
31. 747 F.2d at 516.
32. *Id.* at 516-17.
33. *See NCAA,* 104 S. Ct. at 2961.
34. 747 F.2d at 517.
35. *Id.*
36. *Id.* (citation omitted).
37. *Id.*

to limit output and raise prices.[38] The majority found that the ABC/CFA agreement would undoubtedly limit the output of televised football and that the crossover restriction was on its face in furtherance of a concerted refusal to deal.[39]

Having all but decided the case on the merits under a rule of per se illegality, the majority also indicated that the same result would be reached under a rule of reason analysis.[40] The court rejected the argument by the CFA and ABC that their contract amounted to a joint selling arrangement creating a "new and different product, an ABC 'CFA Football' program."[41] The majority, noting that the Supreme Court had rejected a similar argument in the *NCAA* case, distinguished *Broadcast Music*[42] on the grounds that the blanket licensing agreement in that case had allowed for "the possibility of individual competition, with the concomitant increase in output . . . ," which was not present here.[43] The majority concluded that the ABC/CFA arrangement, like the NCAA plan, suffered from the "dual infirmities" of an intentional reduction in output and sharp restraints on individual school competition.[44] The majority, in a statement of potential considerable significance beyond the narrow issues in the case, also indicated that its conclusion applied as much to the entire ABC/CFA contract as to the component restraints found in the crossover restriction.[45] Thus, it appears the Ninth Circuit suggested that the entire concept of a contract between the CFA and ABC, apart from the crossover restriction, might be invalid because of its restraints on the CFA members as well.

The Ninth Circuit also rejected the argument by the CFA and ABC that the contract should be viewed as a vertical arrangement[46] affecting the distribution of televised college football. Pointing out that the Supreme Court had found the NCAA television plan to be "a horizontal restraint—an agreement among competitors on the way in which they will compete with one another,"[47] the court stated:

> It is unclear how the CFA, which does not even purport to perform the supervisory functions undertaken by the NCAA, occupies a different posture with respect to its member institutions.[48]

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38. *Id.* at 516-18.
39. *Id.* at 517.
40. *Id.* at 517-18.
41. *Id.* at 518.
42. 441 U.S. 1 (1979). *See supra* note 15 and accompanying text.
43. 747 F.2d at 518.
44. *Id.*
45. *Id.*
46. A "vertical" arrangement, or restraint, is one undertaken between parties which are at different levels of the distribution process. Vertical restraints, unlike horizontal restriants between competitors at the same level, are usually analyzed under the rule of reason when not involving price. *See* Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
47. *See* 104 S. Ct. at 2959.
48. 747 F.2d at 518.

Finally, the majority indicated that even if the ABC/CFA contract were viewed as a vertical agreement, the defendant's chances of prevailing under the rule of reason were diminished because of the "concentrated conditions of the college football television market and the CFA's position therein."[49]

The suit between the CFA and the Big Ten and PAC-10 was not the only litigation spawned by the *NCAA* decision. On September 13, 1984, just three months after the Supreme Court handed down its opinion, the Association of Independent Television Stations ("INTV") instituted lawsuits in federal court against the Big Ten, the PAC-10, and CBS in the one instance[50] and the CFA, the Big Eight, ESPN, and ABC, in the other.[51] These lawsuits, which are presently still pending, were commenced shortly after the CFA had entered into its agreement with ABC and after the Big Ten and the PAC-10 had entered into their agreement with CBS. The complaint in each action by INTV challenges as anticompetitive the respective agreements with the networks.

INTV is an incorporated association having among its members 108 independent television stations. Independent stations are those which do not have an affiliation with any of the major networks. The claims made by INTV are that each of the agreements contains exclusivity provisions which deprive the independent stations of the opportunity to televise any of the games involving CFA teams on the one hand, or Big Ten or PAC-10 teams on the other, during the Saturday afternoon and evening periods.[52]

The two complaints filed by INTV differ as a result of the differences between the two agreements. Both agreements are alleged to preclude any participating college football team from permitting its games to be televised at the same time that the contracting network is televising one of the games in the package ("head-to-head competition"),[53] and this provision is claimed in both actions to have the anticompetitive effect of precluding independent stations from obtaining rights to any games being played during that time period.[54] In addition, however, the INTV has challenged other restrictions in the CFA/ABC agreement which are not contained in the Big Ten/PAC-10/CBS agreement. These other restrictions are alleged to include a limitation on the number of appearances on the network by any CFA member and a requirement that CFA members must withhold consent to televise any game between a CFA member and a non-CFA member by anyone other than ABC

49. *Id.* (citation omitted).

50. Association of Independent Television Stations v. Columbia Broadcasting System, No. 84-6917 (C.D. Cal. filed Sept. 13, 1984).

51. Association of Independent Television Stations v. College Football Ass'n, No. 84-2283 (W.D. Okla. filed Sept. 13, 1984).

52. Plaintiff's Complaint at ¶ 24, *INTV v. CBS*, No. 84-6917 (C.D. Cal. filed Sept. 13, 1984); Plaintiff's Complaint at ¶ 31, *INTV v. CFA*, No. 84-2283 (W.D. Okla. filed Sept. 13, 1984).

53. Plaintiff's Complaint at ¶ 24, *INTV v. CBS;* Plaintiff's Complaint at ¶ 27, *INTV v. CFA*.

54. Plaintiff's Complaint at ¶ 25, *INTV v. CBS;* Plaintiff's Complaint at ¶ 29, *INTV v. CFA*.

or ESPN. It is this latter restriction which was the subject of the suit by the PAC-10 and Big Ten against the CFA and ABC.

There is at least one other distinction between the two INTV lawsuits. In its Complaint against the CFA and ABC, INTV alleges:

> Unlike NCAA, CFA has no legitimate role in organizing or regulating college football as an intercollegiate athletic venture. CFA came into existence in order to fashion a joint agreement to market television rights to its members' football games and to generate monopoly profits for its members. Absent CFA, college football would continue as a vital and distinct product under NCAA's administration, and individual schools could readily market television rights to their games. CFA is not and never has been necessary for college football to exist.[55]

INTV makes no such claim against the PAC-10 and the Big Ten. Instead, INTV asserts that the "rules of the PAC-10 and Big Ten regulating academic and other eligibility requirements for their members' student athletes [like those of NCAA], have no logical relationship to, and do not justify, horizontal agreements to restrict output and head-to-head competition."[56]

The defendants in both lawsuits have taken the position that their agreements and arrangements to market the television rights of the particular schools are neither anticompetitive nor illegal. The defendants in *INTV v. CBS* filed motions to dismiss on the grounds that neither INTV nor its members have standing to bring the action. These motions were denied, and all the defendants have now filed responsive pleadings denying INTV's claims. Defendants in *INTV v. CFA* have filed similar motions to dismiss, but those motions have yet to be decided. Consequently, neither of these cases has yet reached the substantive issues underlying the claims by INTV.

III. Analysis: What Alternative Broadcasting Arrangements May Legally Be Adopted?

More than a year after the *NCAA* decision, the question still remains as to what broadcasting arrangements may legitimately be employed by schools, or groups of schools, which wish to market and sell the rights to televise their games. Because some arrangements formulated in the wake of *NCAA* have already been challenged in the courts, some guidance may be forthcoming in the near future. Nevertheless, it will be beneficial to attempt an analysis of what types of arrangements and provisions are likely to be permited under *NCAA*.

It is noteworthy that, in the time following *NCAA*, no individual schools have undertaken to market their television rights nationally without participation in some collective coalition. This is true even of such football powers as the University of Oklahoma and the University of Georgia, the named

55. Plaintiff's Complaint at ¶ 22, *INTV v. CFA*.
56. Plaintiff's Complaint at ¶ 20, *INTV v. CBS*.

plaintiffs in *NCAA* who argued that the NCAA plan restricted the ability of the individual schools to sell and reap the benefits of the telecasts of their football programs. Both Georgia and Oklahoma, along with sixty-one other schools, marketed their television rights through the CFA package. The only other major football schools, the twenty members of the Big Ten and PAC-10 conferences, elected to market their television rights through a coalition made up of their two conferences.[57]

The fact that schools placed in a free competitive market tend to take collective rather than individual action suggests that it may not be feasible or desirable for individual schools to market their television rights individually. The prospect of each school having to engage in bidding procedures or negotiations with the networks or regional broadcasters for each individual game appears to be an administrative nightmare. Each school, having as its stock in trade only five or six home games,[58] some of which have no real widespread appeal to viewers, would have limited leverage to command its best deal. Moreover, the networks, which would be compelled to strike deals for individual games with individual schools, often far in advance of knowing whether the teams involved would be of sufficent strength on the date of the game to provide a game of real viewer appeal, would be placed at a severe disadvantage under such a system.

Certainly, these concerns are no real surprise. The Supreme Court in *NCAA* acknowledged that college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[59] Schools with football programs joined together in athletic conferences, for example, long before football games were broadcast or telecast, and for reasons totally unrelated to television rights. Joint action has been taken in numerous ways which are not even remotely anticompetitive or illegal.[60] Moreover, the Supreme Court's refusal to accord per se illegality to the joint marketing and sale of television rights clearly suggests that such collective action may in some form be reasonable and legal. The only remaining question—admittedly a broad one—is what types or forms of collective action will be legally acceptable and which will not.

The only collective form which conclusively will not survive scrutiny is the NCAA plan which was condemned by the Supreme Court. The aspects of this plan which appear to have been repugnant to the Court are:

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57. *See Regents of Univ. of Cal.*, 747 F.2d 511, 513-14.

58. There is a significant question as to who has the right to sell the television rights to a particular game. Traditionally, the home team has negotiated and sold those rights and shared the revenues with the visiting team. In *Regents of Univ. of Cal.*, 747 F.2d 511, the CFA has contended that the visiting team has an absolute right to consent, or refuse to consent, to any grant of television rights. In addition, a regulation passed by the NCAA on July 10, 1984 provides that both teams must consent to any telecast of a game. Nevertheless, it still appears undisputed that the home team should have the right to negotiate the arrangement, even if it is subject to consent by the visiting team.

59. *NCAA*, 104 S. Ct. at 2961.

60. *See id.* at 2969.

(1) that it gave the NCAA control of the entire market for the live televising of college football games;[61]

(2) that it precluded individual members of the NCAA from selling television rights to their games except pursuant to the plan;[62]

(3) that it thus artificially limited the total amount of televised intercollegiate football;[63]

(4) that it limited the number of games that any one team may televise;[64]

(5) that it precluded price negotiation between broadcasters and institutions, thereby constituting horizontal price-fixing and creating a price structure "unresponsive to the viewer demand and unrelated to the prices that would prevail in a competitive market";[65]

(6) that the members of the NCAA had no real choice but to adhere to the NCAA's television controls;[66]

(7) that the plan eliminated competitors from the market because only those broadcasters able to bid on the entire NCAA package could compete;[67]

(8) that there was no "competitive justification" for the plan and its restriction;[68] and

(9) that the justifications offered by the NCAA were not reasonably related to or consistent with the restrictions in the NCAA plan.[69]

Although it may be impossible to designate any single aspect of the NCAA plan which resulted in its condemnation, this list of undesirable aspects may be helpful in evaluating the legality of other alternative arrangements. Certainly, an arrangement which closely resembles the NCAA plan and fails to avoid some or all of the listed problem areas is unlikely to be adjudged acceptable. On the other hand, an arrangement which does avoid a significant number of these aspects will clearly be less susceptible to being condemned than the NCAA plan was.

The fact that the NCAA plan controlled the entire market for televised live college football games was of particular concern to the Supreme Court. As pointed out above, the Court noted the fact that such control enabled the NCAA to limit not only a portion of televised intercollegiate football, but the total amount as well.[70] The Court was unable to ascertain any procompetitive justifications for the plan, such as enabling the NCAA to

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61. *Id.* at 2958.
62. *Id.* at 2957, 2968.
63. *Id.* at 2959-60.
64. *Id.* at 2957.
65. *Id.* at 2963.
66. *Id.*
67. *Id.* at 2964.
68. *Id.* at 2967-68.
69. *Id.* at 2968-69.
70. *See also id.* at 2966-67. The Court concluded that televised live college football games are uniquely attractive to fans and consequently, constitute a market separate from that for other live sporting events. Given that the NCAA controlled this market and that there were no substitutes available, it possessed absolute monopoly power.

penetrate the market, becuase there were no ready substitutes or competitors against whom the NCAA needed to compete.[71] Further, any restriction or limitation imposed by the NCAA became a restriction both upon the entire market and upon *all* of the ouput of the "product" within the market.

Although the Court stated that a finding of market power was not essential to holding that the NCAA plan was violative of the antitrust laws,[72] its perception of the NCAA's market power was implicit in its discussion. The import of the Court's discussion is that a *finding* of market power is not required where the anticompetitive effects of the challenged conduct are manifestations of the existence of that very market power. By viewing the nature of the effects of the conduct, the Court is well able to perceive[73] the market power which makes those effects substantial.[74] Even while disclaiming the need for a finding, the Court has implicitly arrived at that finding.[75]

The need for at least an implicit finding of market power, of course, is consistent with well-established antitrust theory.[76] Without market power, a competitor or group of competitors could not affect the marketplace with the impact necessary to reap the benefits of their anticompetitive conduct. If the NCAA had not had market power, it could hardly have been found to have required the payment by broadcasters of artificially high prices unresponsive to consumer preference. Similarly, while a joint arrangement or coalition with market power may engage in conduct which is legitimate and not anticompetitive, such a coalition without true market power should in most circumstances be considerably less vulnerable to attack. Consequently, a marketing group which does not number among its members a large percentage either of the total number of universities in the market for major college football or at least of those schools which are of greatest competitive strength in terms of their ability to market their games is likely to be unable to command artificially high prices or to significantly restrict output.

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71. *Id.* at 2968.

72. *Id.* at 2965.

73. The Court relies in part for its reasoning on a quotation by Professor Areeda to the effect that a joint selling agreement between General Motors and Ford would not require extensive market analysis to determine that it should be condemned: "The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." 104 S. Ct. at 2965 n.39 (quoting P. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 38 (Federal Judicial Center June, 1981)). The fact that a market analysis is not required, however, does not mean that market power is not a consideration in concluding that the restraint is unreasonable or illegal.

74. The Court notes that "the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference." 104 S. Ct. at 2965. This fact itself is indicative of market power. *Cf.* 104 S. Ct. at 2965 n.38 ("Market power is the ability to raise prices above those that would be charged in a competitive market." (citation omitted)).

75. "And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." 104 S. Ct. at 2966 n.42.

76. *See, e.g.,* Valley Liquors Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982); Muenster Butane Inc. v. Stewart Co., 651 F.2d 292 (5th Cir. 1981).

The Supreme Court was able to disavow the need for a finding of market power because the anticompetitive results of the implementation of the NCAA plan were also earmarks of market power. The ability to impose restrictions upon its members to market the right to televise their games, to impose sanctions for the members' failure to abide by the plan, and to exact artificially high prices is indicative of market power, and no separate finding of market power need be required. Where the restrictions present in the NCAA plan are not found in an alternative broadcasting arrangement, the implication of market power does not arise. In other words, when market power is present, absolute control and anticompetitive restrictions may follow, and market power may be presumed from those anticompetitive results. Where the anticompetitive effects are not present, the existence of market power is likely to be irrelevant since it will have no anticompeititve consequences.

If a collective arrangement or coalition of individual schools is to be acceptable from an antitrust standpoint, it should ideally be one which does not have or exercise market power in the antitrust sense. The absence of market power will eliminate virtually all of the negative aspects alluded to in the Supreme Court's analysis in *NCAA*. An arrangement without market power could not control the entire market for the televising of football games;[77] it could not artificially limit the total amount of televised games;[78] it could not create a price structure unresponsive to viewer demand and unrelated to the competitive price level;[79] it would have no leverage to compel its members to adhere to its television program;[80] and it would not preclude other broadcasters from bidding on or broadcasting games other than those in its package.[81] Whether such an arrangement might legitimately preclude its members from selling rights to their games outside its plan[82] or to limit the number of games any one team could televise[83] would be dependent upon the demands and competitive conditions of the market. Even if the plan were found to have anticompetitive aspects, it would still be analyzed subject to any justifications which might be offered. Certainly, a collective arrangement or coalition, existing in a competitive market, without the market power of the NCAA, is much more likely to be able to show competitive justifications for such restrictions, and perhaps even justifications of the type which the NCAA attempted to assert.

The most logical and natural organizations of schools for the joint marketing of their broadcasting rights are the athletic conferences which have long been in existence for the common promotion of the members' football

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77. *See supra* text accompanying note 61.
78. *See supra* text accompanying note 63.
79. *See supra* text accompanying note 65.
80. *See supra* text accompanying note 66.
81. *See supra* text accompanying note 67.
82. *See supra* text accompanying note 62.
83. *See supra* text accompanying note 64.

programs. A number of the Court's statements in *NCAA* seem specifically to authorize a conference to engage in some of the same activities which were held to be illegal when engaged in by the NCAA. For example, in addressing and rejecting NCAA's defense that its plan was intended to maintain a competitive balance among amateur athletic teams, the Court's reasoning was premised on the facts that the plan was nationwide in scope, was not directed to any particular league or tournament, and was in fact unrelated to any readily identifiable group of competitors.[84] In the case of a conference, of course, the attempt is to equalize the athletic competition within one league and for one identifiable group of competitors and to share in the management decisions and revenues generated by the televising of the league's sports. The Supreme Court appears to be inviting conferences to replace the NCAA in this role.

Similarly, the Court's conclusion that the NCAA was unable to justify its plan on the basis of procompetitive benefits is also couched in terms encouraging to schools wishing to market their games through a conference. The Court found that the uniqueness of broadcasting rights to college football as a product for which there was no ready substitute meant that there was no need for collective action in order to enable the NCAA to penetrate the market or to compete against nonexistent competitors.[85] Where the competitors are not nonexistent, however, and where a conference is marketing its members' games in a market which includes other conferences and organizations like the CFA, the story is a different one. As the Court pointed out, "[i]f the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete."[86] Now, in the aftermath of *NCAA*, the market for college football games has become more fragmented and diverse, and interbrand competition has arisen.[87]

These justifications, which the Court has denied to the NCAA but has impliedly permitted to conferences or similar organizations, are not merely theoretical when applied to conference broadcasting arrangements. As the Court recognized, "a certain degree of cooperation is necessary if the type of competition that petitioner [NCAA] and its member institutions seek to market is to be preserved."[88] This is because "[w]hat the NCAA and its

84. 104 S. Ct. at 2969-70.

85. *Id.* at 2968.

86. *Id.* at 2968 n.55

87. With the demise of the NCAA's football plan, "products" such as Big Ten football games and PAC-10 football games have arisen as specific competitive brands. The CFA has also contended that it markets "CFA brand football," but there may be some question as to whether CFA football, as opposed to Big Eight or Southwest Conference football, is a distinct, identifiable product. If General Motors, Ford and American Motors formed a joint selling arrangement, for example, it is unlikely that they could persuade anyone that the products which they offered under the arrangement were a new and distinct brand. "Substance, not form, will determine whether the CFA is a single economic entity, engaged in distributing a product to its distributors." 747 F.2d at 518.

88. 104 S. Ct. at 2969.

member institutions market in this case is competition itself—contests between competing institutions."[89] It must be remembered that the institutions within a conference, while competitors for fans, athletes, students, and financial support, are "competitors" only in a very different, noneconomic sense when it comes to the staging, scheduling, marketing, and promotion of athletic events. The "product" which is being marketed and sold is created only by combining the efforts of no fewer than two "competitors," and the interests of these competitors and the other members of their conference in promoting that product are identical.[90] Moreover, because there is an identifiable common interest, and common product, each conference also has an interest in maintaining the quality of the product, which also translates to the quality of the football programs of all of the members of the conference.

This, essentially, is why the maintenance of competitive balance alluded to in the *NCAA* decision[91] is more significant and justifiable in the context of conference broadcasting programs than it would be in the context of a dominant or monopolistic market force. By acting on behalf of a small, discrete number of "competitors," rather than the entire universe of college football institutions, a conference can directly adjudge and affect the competitive balance among its members. Presumably, a conference can be more responsive to the needs and interests of its members than an organization of the size of the NCAA, which has the responsibility of representing numerous and diverse interests, including even those of member institutions which have no football program at all.

As has been noted, a conference will also have a greater ability to show competitive justification for its programs than would the NCAA or the CFA. Since the college football market may now be evaluated in terms of interbrand competition, restrictions on *intra*brand competition, or the ability of member institutions to televise their games in head-to-head competition with other games played by members of the same conference pursuant to the conference's broadcasting plan, may well be a reasonable method to enhance *inter*brand competition against televised games of other conferences or collective groups.[92] Similarly, granting exclusive rights to a network or other broadcaster to televise conference games for a particular time period, so that no other games hosted by members of that conference could be televised at that same time, could be justifiable as a legitimate restriction to ensure the quality of representation and services to be rendered by the network and its affiliates.[93]

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89. *Id.* at 2961.

90. Both Ohio State University and Northwestern University, for example, have an interest in maintaining a high level of athletic competition among the schools in the Big Ten Conference. If Northwestern's program falters, as it has from time to time, each game it plays against conference foes will attract less consumer and advertiser preference. Moreover, the reputation of the conference may be adversely affected.

91. *See* 104 S. Ct. at 2969.

92. *See, e.g.,* Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-55 (1977).

93. The CFA argued in *Regents of Univ. of Cal.* that its restrictions prohibiting CFA

This type of analysis should also apply to the issue of whether particular arrangements or restrictions are justified because they enable particular groups or institutions to enter or penetrate the market. Since the NCAA dominated the market, the Court in *NCAA* found that no such justification was available.[94] However, in a fragmented and competitive market, a particular conference or other collective group may be justified in imposing or agreeing to restrictions which will assist it in competing against larger, more powerful competitors. The existence of competitors which control large or desirable segments of the college football market, for example, may require less advantaged institutions or conferences to adopt various kinds of collective programs or marketing arrangements in order to compete for television revenues and audiences with the stronger competitors.

This is not meant to suggest that any organization or conference with less market power than the NCAA or the CFA can engage in unlimited restraints or anticompetitive practices. The particular limitations or restrictions of any arrangement must still be measured in terms of their effect on competition and the justifications available in light of *NCAA*.[95] While it is impossible to anticipate all of the restrictions which may be utilized in future television arrangements, there are at least four types of restrictions which have arisen either in the context of *NCAA* or in the situations subsequent to the decision:

(1) Restricting the member institutions from selling the television rights to their games except pursuant to the package;[96]

(2) Limiting the number of television appearances by a member institution either on a network telecast or on telecasts by any broadcaster;[97]

(3) Restricting the member institutions from appearing on any network other than the one to which rights are granted by the principal contract;[98] and

(4) Restricting the member institutions from permitting their games to be televised at the same time as the telecast of the games included in the package.[99]

It is possible at least to assess the manner in which each of these types of restraints should be viewed.

An absolute prohibition against member institutions selling the rights to

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members from appearing on other networks than ABC were vertical in nature, but the Ninth Circuit rejected this argument. *See* 747 F.2d at 518.

94. *Cf. Continental T.V.*, 433 U.S. at 54-55; 104 S. Ct. at 2968.

95. It should be clear, however, that restrictions imposed by an organization with significant market power will by their very nature tend to have greater effects on competition than where no real market power exists.

96. *See* 104 S. Ct. at 2957.

97. *See, e.g., id.;* Plaintiff's Complaint at ¶ 27(h), Association of Independent Television Stations v. College Football Ass'n, No. 84-2283 (W.D. Okla. filed Sept. 13, 1984).

98. *See* 747 F.2d at 513.

99. *See, e.g.,* Plaintiff's Complaint at ¶ 27(e), *College Football Ass'n*, No. 84-2283; 747 F.2d at 513; Plaintiff's Complaint at ¶ 24, Association of Independent Television Stations v. Columbia Broadcasting System, No. 84-6917 (C.D. Cal. filed Sept. 13, 1984).

their games outside the package will undoubtedly be viewed with great skepticism. This is one of the restraints which the Supreme Court in *NCAA* expressly addressed and condemned when implemented by the NCAA.[100] It is remotely possible that a party with minimal market power might succeed in justifying this restriction as procompetitive, otherwise beneficial, or having no real anticompetitive effect, but doing so requires a stretch of the imagination. Since this arrangement is a classic horizontal restraint on output, the burden on a party attempting to justify it will be heavy. Moreover, it is likely that any claimed procompetitive goal could be achieved by a less restrictive means.[101] It should be axiomatic that arrangements leaving greater measures of freedom to the member institutions to compete will be proportionately less vulnerable to attack than was the NCAA plan.

Limiting the number of television appearances by member institutions will also cause a plan to be vulnerable. Certainly, a restriction imposed by a conference as to the number of appearances on telecasts, generally, could have the same effect as the first discussed restraint and would require skillful justification. A self-imposed restriction as to the number of appearances by a member on telecasts by the contracting network might arguably be reasonable, since arguments can be made that over-exposure of any member will be detrimental to the conference and its marketability and that a balance of appearances among the conference members should be attained. Nevertheless, the answer to this argument is that the appropriate number of appearances should be determined and limited only by consumer preference, which will also dictate when over-exposure is approached. If a limitation is necessary in order to avoid over-exposure, the prudent course will be to permit each university to make its own determination as to the maximum number of television appearances it will make.

A restriction prohibiting a member institution from appearing[102] on any network other than the one with which the conference has contracted will also be a difficult one to justify.[103] The net effect of such a restriction is not only to prohibit a conference's member institutions from taking steps to broadcast their games on another network, but also to bar nonmember institutions from broadcasting games played at their own home sites against conference schools. In other words, if the restriction were upheld, a conference could control the television rights of all games in which a member school were participating, even though that member might have no right to

100. *See* 104 S. Ct. at 2968.

101. *See, e.g., id.* at 2958, 2969.

102. Precluding a school from appearing on another network is very different from precluding the school from selling its television rights to other broadcasters. A restriction as to *appearances* will preclude a school even from consenting to the broadcast of a game which the team's opponent wishes to have broadcast and has the right to broadcast.

103. The implementation of such a restriction by the CFA has already been the subject of a preliminary injunction in *Regents of Univ. of Cal.*, 747 F.2d 511, as a concerted refusal to deal.

telecast the game itself. The impact would therefore be a restriction not only on *intra*brand competition, but *inter*brand competition as well.[104]

It is very unlikely that such a restriction could be held to be reasonable. Besides being an obvious restraint on output, the restriction does not appear to serve any legitimate objective for the conference or its members, which produce the "product" which they sell to the network. When a restriction originates with the producer of the product, such as one imposed by a manufacturer upon a distributor, it may be presumed that the restriction has procompetitive aspects in terms of interbrand competition, since the interests of a producer without market power are likely to be consistent with the interests of the consumer.[105] Where, however, the restriction emanates from the distributor of the product, there will be a real question as to whether the restriction serves the interests of the producer, and thus of the consumer, in arriving at the most competitive marketing of its product. For example, the Ninth Circuit found in *Regents of University of California* that "[f]rom the individual college's perspective . . . the 'quality' of the college football program is affected by national exposure regardless of which network performs the task."[106] In other words, the best interests of the conference and of the consumers are served if the crossover games are *televised,* without reference to which network does the telecasting. It is thus difficult to say that the proposed restriction, serving as it does only the interests of the distributor-network, is procompetitive or reasonable.

On the other hand, the final restriction to be considered, that prohibiting member institutions from permitting their games to be televised at the same time as the telecast of the games included in the package agreed to between the conference and the network, should fare better under close scrutiny. This restraint is closely analogous to a narrow exclusive distributorship granted by a manufacturer to a distributor of its product, thereby freeing the distributor from competition by others in the same product. The classic justification for such an arrangement is that, absent market power by the manufacturer, the exclusivity will enable the distributor to engage more strongly in interbrand competition and will encourage him to provide a fuller range of distributorship services than he would without the restraint.[107]

In the context of telecasts of college football, this same analysis holds true. If a network is assured by a conference that the conference will not sell rights to games in head-to-head competition with those being telecast

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104. Certainly, a game played by a conference member away from home against a nonmember school cannot, for purposes of defining competitive products, be called a product of the conference. Consequently, an attempt by the conference to restrict the telecasting of that game cannot merely be a restraint on intrabrand competition.

105. *See, e.g.,* Valley Liquors Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982).

106. 747 F.2d at 521.

107. *See Continental T.V.,* 433 U.S. at 54-56.

by the network, the network will find it profitable, and thus desirable, to devote its resources fully to promoting and producing the conference game being telecast. If, however, the conference permits other games to be telecast in head-to-head competition by other broadcasters, the network will be faced with the potential dilution of its audience share and will find less advantage in expending time and money to provide its product. Moreover, since a network relies heavily upon being able to sell its programs to local affiliated stations throughout the country, the telecast of head-to-head games of the same conference by other broadcasters will detract from the network's ability to sell its program to those affiliates. What this means is that a network may be unable to formulate a *national* television package and to attract prime advertisers who wish to advertise in a national market. The conference, as a result, would lose the opportunity to have its games televised on a national basis, which is of optimum benefit to the conference and its schools in attracting donations, grants, fans, students, and athletes. Consequently, the circumstances of this market are perfectly suited to this narrow kind of restriction, and this is exactly the type of situation for which a vertical restraint is appropriate.[108]

Conclusion

In the wake of the *NCAA* decision, notwithstanding the many uncertainties created by that decision, there thus appear to be a number of conclusions which may be helpful in structuring future broadcasting conditions and arrangements. Some of those conclusions are more obvious or more certain than others, but they all appear to be well-founded in light of *NCAA* and its analysis. These conclusions may be stated in the form of the following general guidelines:

1. Some form of joint arrangements among football universities in broadcasting their college football games should be acceptable. At the very least, an athletic conference is peculiarly suited to this task and should be a legitimate mechanism for marketing rights to games. Any organization encompassing more than one conference or differing substantially in form from that of a conference will be evaluated in terms of the market power it wields and the competitive circumstances of the marketplace.

2. Any broadcasting arrangement should minimize the restrictions imposed upon the ability of the individual schools to market the television rights to their own games. An absolute prohibition against the schools' selling the rights to their games will probably be condemned. If there are less restrictive means of accomplishing the same purposes, those means should be considered. A conference or other organization should be able to agree to some restrictions on its members' sales of the television rights to their football

108. *Cf. id.*

games. As long as the contracting organization may legitimately be viewed as producing an identifiable common product, such restrictions should be analyzed as being vertical in nature. The restrictions will thus be evaluated in terms of:

(a) the market power of the organization;

(b) the anticompetitive effects of the restriction and the amount of competition which it forecloses;

(c) the procompetitive benefits of the restrictions in terms of the extent to which they enable the organization to compete more effectively for television revenues against other conferences or producers of college football games than they otherwise could; and

(d) other justifications for the restrictions, such as balancing the competitive strength of the football programs within the conference or other organization.

These guidelines should provide some assistance in determining the appropriate means by which groups of schools may market the television rights to their games. Additional guidance will undoubtedly be forthcoming from the various courts called upon to adjudicate the legality of specific plans and restrictions. In the meantime, however, each university and conference can only measure its conduct by the signposts suggested by the cases which have already been decided.