

BROADCASTING AND CATV: THE BEAUTY AND THE BANE OF MAJOR COLLEGE FOOTBALL

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INTRODUCTION

Amateur sports, particularly major college football, are an object of nationwide interest. With the cooperation of individual colleges, the National Collegiate Athletic Association (NCAA) and the government, television networks and sponsors have been able to exploit this interest to create a business the economic importance and implications of which are not inconsiderable. Indeed, in 1972 broadcasters spent an estimated \$19 million for television and radio rights to regular-season telecast dates; corporate giants such as Chevrolet, Continental Insurance, Goodyear, Holiday Inns, Miles Laboratories, Miller Brewing, Motorola, Texaco, Traveler's Insurance, and U.S. Tobacco spent \$52,000 to send a minute commercial message to an average of over eight million TV homes; and the more familiar football-playing colleges, from Big Ten doormats to Big Eight powerhouses, each received in the neighborhood of \$215,000 in regular-season broadcast fees.

To the average fan anxiously awaiting the Oklahoma-Nebraska telecast, and trying to explain ABC's bypassing of the traditionally-classic Notre Dame-Purdue game in favor of Washington-Illinois, these facts are only of passing interest. But they are not unrelated to the limited and selective choice of games, nor are their implications unimportant in a supposedly free market economy. When almost 300 colleges collude through a single cartel,¹ the NCAA, to sell TV rights to collegiate football to a single buyer, a number of effects are evident: (1) fewer than fifty of the almost 3,000 college football games played in 1972 were available for home viewing, (2) no more than nineteen games were telecast in the overwhelming majority of viewing areas, and (3) the viewers' choice was restricted to games *chosen for them*, rather than games *they might choose* to view. Thus, the competitive system may be said to have been bypassed in favor of the monetary rewards for a favored few. Similarly, competition is thwarted when an independent station or an affiliate of a rival network or a cable television operation is prevented from telecasting a game of local interest because one of the three major networks has secured *exclusive* broadcast rights to college football and has dictated that if fans in one section of the country are to see televised football on a particular Saturday afternoon, it *must* be a

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¹ While the National Football League can pool its rights *only* pursuant to the Telecasting of Professional Sports Contests Act, 15 U.S.C. §§ 1291-95 (1970), the NCAA pools without benefit of any statutory antitrust exemption. Nevertheless, the Justice Department has never attacked the pooled effort.

game played between two colleges located perhaps 3,000 miles away whose fortunes may be only of casual interest locally. Finally, competition in the business world is being inhibited when, for example, the nation's largest manufacturer of rubber products can advertise to an important segment of the buying public at what is a relatively small cost to itself, but at what would be a prohibitively large cost to any potential competitors, and the potential competition cannot avail itself of a comparable rival medium.

The purpose of this paper is two-fold. First, we discuss (1) the existing broadcast arrangements for major college football, (2) the historical forces that have culminated in the current pattern of major college football programming, and (3) the economic implications of the broadcasting of those games. Second, we explore the potential impact of cable television (CATV) on major college football telecasting and existing broadcast arrangements. Cable offers the dual prospects of intense TV competition between rival sporting events, and competition for the potential audience between a live sporting event and the televised version of that event. CATV is a specter that has rapidly moved from the horizon to the present, becoming an ever-deepening concern to broadcasters, the NCAA, and the colleges.²

I

BACKGROUND

A well-known bit of sports trivia is that on May 17, 1939, the second game of the baseball double-header between Columbia and Brown became the first televised athletic event in the United States. Less well-known is the fact that some four months later, on September 30, 1939, NBC's TV camera—the one set up on the 40-yard line next to the Fordham bench—brought the 34-17 Fordham trouncing of hitherto unheralded Waynesburg of Pennsylvania to some 2,000 viewers watching on fewer than 1,000 television sets. A decade after these meager beginnings, TV was being blamed for declining college football attendance on the East and West coasts, and the threat posed by televised football to gate receipts became real indeed.

It did not escape notice that the 2.71 per cent rise in college football attendance between 1948 and 1949 was attributable to increased attendance within the two coasts, where TV had yet to spread.³ Similarly, in 1950 total attendance actually fell by 3.51 per cent, although turnouts in the South and Southwest jumped sharply. At the

² Our focus has been on football broadcasts, because these dwarf those of the other major—from the revenue standpoint—college sport, basketball. Indeed, the approximately \$10,000 that the major schools average from radio and local TV probably equals their entire basketball broadcast revenues. Revenues from baseball, hockey, track and field, and swimming are negligible. In basketball, however, many conferences have regional networks for Saturday afternoon telecasts, and these might earn a conference member \$10,000 to \$20,000 above local revenues. Most independents, however, have only local radio contracts, although some do have TV contracts. In any event, there are a huge number of college basketball radio and TV broadcasts, quite frequently covering competing games. The result of this competition and vast exposure is reduced fees.

³ Many citations herein are matters quoted by the *New York Times* or *Broadcasting* in various issues. Where considered essential, citations are provided.

time, several colleges, particularly those in the East, locally televised virtually all of their games, including those played at home. TV was blamed for declining attendance, notwithstanding the fact that the hardest-hit schools—Pennsylvania, Columbia, and Yale—all had poor years on the field, which may have accounted for their troubles at the gate.

In March, 1951, a very anxious NCAA convention approved a one-year moratorium on live football telecasts, although permission was given to televise certain "special" games, such as the Army-Navy contest. Whether the rumored threat of a possible antitrust inquiry⁴ helped influence matters is uncertain, but the NCAA Television Steering Committee subsequently recommended an experimental program of regional telecasts and regional blackouts. Under the plan, seven dates were designated in which regional games would be telecast outside of the originating area, so that a Big Ten game, for example, might be seen in the East and an Ivy League game might be seen in the West. In addition, there would be no televised football at all on three Saturdays. Finally, one game—Army-Navy—would be televised nationally.

This plan, under which the NCAA's TV fund would get sixty per cent of the receipts and the competing institutions forty per cent, was not universally applauded. In June, for example, the University of Pennsylvania, then a perennial Eastern power, announced its intention to televise eight games, but reneged in July when several of its opponents indicated that they would not play the recalcitrant school. An equally-disconcerted opponent of the plan was Notre Dame, which had previously sold its TV rights for in excess of \$300,000, a figure which was impressive, particularly when placed in the perspective of the \$1 million that NBC paid for the entire college package and the \$0.7 million that all eleven NFL teams received in broadcast revenues. Indeed, Notre Dame's Moose Krause subsequently claimed that NCAA control of televised football cost the school "\$600,000 in 1951 and as much as a million dollars" in 1952.⁵

The purpose of the NCAA experiment was to determine the effects of TV and various programming options on gate receipts, while not losing the potentially favorable impact that this advertising of its product might have on college athletics and, more tenuously perhaps, on educational programs in general. Nonetheless, in 1951 total attendance again declined, and this time by 7.81 per cent, and in 1952 the TV Steering Committee voted to continue the previous year's experiment, again over the vigorous objections of Pennsylvania and Notre Dame. The television package was sold to NBC for \$1.2 million. These revenues were to be distributed among 300 NCAA members according to a predetermined formula favoring schools whose games were broadcast. Allocations reflected the extent of coverage which a particular game achieved. Thus, Army and Navy were the principal beneficiaries because the Army-Navy game was carried on the most stations.

⁴N.Y. Times, Apr. 3, 1951, at 35, col. 1.

⁵N.Y. Times, Jan. 4, 1953, § 5, at 5, col. 4.

Most persuasive to the NCAA were the results of a National Opinion Research Center (NORC) poll indicating that in the individual years between 1948 and 1951 the number of TV sets increased from one to three to nine to fourteen million, while total attendance went from 19.1 to 19.7 to 19.0 to 17.5 million. Attendance further declined by 1.1 per cent in 1952 (although the per-team average increased from 27,528 to 27,661). Again in April, 1953, NORC produced a study alleging that even where controlled, as in the NCAA plans, TV reduced attendance by 26.7 per cent.⁶ The NCAA decided to continue its experiment, but sought to become more responsive to regional interest and the possibility of televised double-headers. It also permitted special telecasts solely in the viewing areas of competing teams if the games were sell-outs.⁷ As a result of this policy, a lone station in Oklahoma carried the Oklahoma-Notre Dame game; the rest of Oklahoma saw Holy Cross play Dartmouth. This particular bit of sadism brought threats of legal action from the Oklahoma legislature,⁸ and the NCAA's policy in general came under study by the Anti-trust Division of the United States Justice Department.

Despite the NCAA controls, total (as well as average per-team) attendance again fell, now by 3.51 per cent to 16.7 million people, and in 1954 the previous year's program was again adopted, with the telecasts moving to ABC. Now, however, a more serious objection was being raised, as the Big Ten threatened to bolt, and requested permission for at least two regional appearances by its members. Moreover, Harvard's objections were so adamant that it refused to permit the Harvard-Yale game to be included as part of the ABC-NCAA program and gave up a \$30,000 share of revenue.

College football attendance increased to 17.0 million in 1954, the first increase since 1949, and it has increased every year thereafter, reaching its high-water mark of 30.5 million in 1971. Similarly, average per-team attendance has increased steadily to almost 50,000. While it was not until 1960 that total attendance finally surpassed the 1949 level of 19.7 million, the NCAA's attitude towards TV, and its approach to the regulation of televised football, had by that time firmed up, and opposition to its policies lessened.

The opponents' last gasp was yet another threat by the Big Ten, now joined by the Pacific Coast clubs, to bolt. But the rebellion was defused with the 1955 plan, which called for eight national telecasts and four regional telecasts on five dates and allowed any team one national and one regional appearance with the participating schools negotiating separate regional contracts. The TV Steering Committee's proposals have subsequently never been seriously challenged. Indeed, except for a change to a program of nine national and four regional games in 1957, the TV policy

⁶ N.Y. Times, Apr. 23, 1953, at 41, col. 5.

⁷ This continues even today as the sell-out exception provided for by the NCAA.

⁸ This sort of brouhaha seems to arise phoenix-like every two decades. There was a similar controversy surrounding the sell-out exception telecast of the October 9, 1971, Oklahoma-Texas game. N.Y. Times, Oct. 12, 1971, at 41, col. 5.

remained unchanged, and by 1959 "[t]he subject of controlled football television . . . did not create a ripple."⁹

The current policy of two-year contracts with television networks was adopted in 1960. ABC's bid of \$6,251,114 for the rights to the 1960-61 games topped NBC's bid of \$5.2 million. After a fifth regional date was added in 1961, both ABC and NBC increased their bids for the 1962-63 games to \$8.6 million and \$8.8 million, respectively, but this was easily topped by a CBS bid of \$10.2 million. Thus, with ABC owning the rights to all AFL games as a result of a five-year pact signed with the fledgling league in 1960, and with CBS having acquired the 1962-63 rights to all NFL games, there was no football on NBC in 1962-63. To a network desiring to offer its stations a well-rounded programming package, this situation was intolerable. To correct it, NBC successfully bid \$13,044,000 for the 1964-65 rights, topping three competitive bids: ABC's \$12.4 million bid, CBS's \$12.3 million bid, and a bid of \$10.6 million from the Sports Network.

It is important to consider NCAA broadcast right fees in the wider context of network football programming as a whole, since any contract that the NCAA secures will be influenced by network needs and dealings on the professional front. In 1960 and 1961, NBC had a Colts-Steelers package, CBS had a package with all remaining NFL clubs save the Browns (Cleveland had its own network), and ABC had the new AFL—at the time the least attractive football offering. The annual \$3.1 million fee that ABC paid for NCAA rights exceeded the total paid to the NFL clubs by NBC and CBS in 1960 or 1961 and was almost twice the fee it paid the AFL. In 1962-63, following the passage of the Telecasting of Professional Sports Contests Act, 15 U.S.C. §§ 1291-95 (1970), which legalized the pooled sale of a professional sports league's broadcast rights, CBS paid the NFL \$4.6 million per year, with ABC paying the AFL \$1.9 million. In each instance there was a total of sixteen national and regional telecast dates. Thus, the NCAA contract of \$5.1 million per year for fourteen national and regional telecasts exceeded that of either league.

In 1964, however, NBC acquired five-year AFL rights at a fee of \$900,000 per club to each of the then eight clubs. CBS was paying the NFL \$14.1 million per year in 1964-65, and despite some disagreements between the league and the network, it was likely that this relationship would be maintained. The \$14.1 million purchased twenty-two telecast dates (including Sunday double-headers, Saturdays, and Thanksgiving) as compared to the fourteen telecast dates purchased by the \$6.5 million NBC payment to the NCAA. The NCAA fee per-telecast was 72 per cent of the NFL fee; the average size of the NCAA TV audience was 78 per cent of the average NFL audience. The NCAA per-telecast fee from NBC exceeded NBC's payment to the AFL by 16 per cent; but, the average size of the NCAA TV audience exceeded that of the AFL by 50 per cent. Nonetheless, NBC had a policy commitment to assure the AFL's survival. The high fee paid to the AFL, a fee in excess of the worth of its games at the time, reflected this policy.

⁹ N.Y. Times, Jan. 9, 1959, at 20, cols. 1, 2.

In 1965, then, ABC faced the prospect of being without any football coverage in the near future, a competitive situation that it viewed with extreme disfavor, and which it rectified through a \$15.5 million two-year contract with the NCAA. This left CBS without a firm football contract, and enabled the NFL and Pete Rozelle to exact a two-year \$39.0 million contract from the network. Thus, division of the TV-football pie was now set: CBS had the NFL, NBC had the AFL, and ABC had the NCAA. It took just four years after the legalization of pooled TV rights to professional games, and one year after the expiration of the original ABC-NFL contract, for the networks and the three major football organizations to orderly allocate televised football in a pattern that persists to this day.¹⁰

The NCAA's contribution to the allocation scheme is especially interesting, because its original 1966-67 contract with ABC was greeted by NBC's violent objections. In particular, NBC suggested that the contract was the result of NCAA-ABC negotiations, as opposed to inter-network competitive bidding.¹¹ There seems to be some justification for this belief. In its August 16, 1965 issue, *Broadcasting* magazine speculated that the winning bid for NCAA football would be in the range of \$7.5 to \$8.0 million per year. The winning ABC "bid" was \$7.75 million per year for 1966-67. Given *Broadcasting's* accurate speculations and NBC's interests in televising college football along with the AFL games, which still suffered by comparison with CBS's NFL games, it would seem that NBC could have indeed outbid ABC had it been given the opportunity to do so. But the NCAA was concerned that NBC would devote its corporate attentions to the AFL—or at least divide them as they had in 1965—while ABC would give college football considerable attention and publicity. Thus, 1966 marked the beginning of a new era in televised football, with negotiations replacing bidding. From then on, only the price and the details would have to be worked out between ABC and the NCAA. At this time, for example, teams appearing in nationally-televised games received \$82,500 apiece, while those appearing in regional telecasts received \$52,500 apiece. ABC was permitted eighteen one-minute commercial spots—during time outs, after a score, and so on—but teams and referees were encouraged to "look busy" on the field so as to keep the crowd entertained while the TV audience was viewing commercials.

In 1968-69 the price was \$10.2 million per year for about eighteen dates, including a couple of double-headers, six regional dates, and an end-of-year "wild card" game of the network's choice, installed to assure that the telecasting of a game such as the 1966 Notre Dame-Michigan State tie would not require special last-minute NCAA dispensation. Again, given the 1968-69 annual fee of \$20 million paid by CBS to the NFL for about thirty telecast dates, and the fact that in 1969 NFL TV audiences exceeded average NCAA TV audiences by about ten per cent, the NCAA and NFL broadcast rights were quite in line with one another.

The 1970-71 contract raised ABC's annual payment to \$12 million but gave ABC

¹⁰ The single alteration is the addition of ABC's Monday evening telecast of an NFL game.

¹¹ N.Y. Times, Oct. 11, 1965, at 79, col. 4.

a nineteenth commercial minute. The NFC and AFC still get \$20 million and \$15 million from CBS and NBC, respectively, as well as \$8.5 million from ABC. The NCAA's improved rights position relative to the NFL is due to relaxed NCAA restrictions. In particular, there are now as many as thirteen national and six regional telecasts. But only the first six games of the season are chosen well in advance. The remaining games need not be scheduled until the Monday preceding the game. Thus, ABC and the TV audience are assured of attractive games for the majority of telecasts. Adjustments such as these have resulted in a highly saleable network package. An idea of the size of that \$13.5 million package is shown by comparison to the total of all non-network broadcast rights—about \$1.5 million, up only about \$400,000 in a decade.¹²

II

THE ECONOMIC IMPLICATIONS OF AMATEUR-SPORTS TELECASTS

In football, there is virtually no direct TV competition between televised events. As between professional and college games, the effect of 15 U.S.C. §§ 1291-95 is to preclude the telecasting of a professional game in competition with a live college event. This not only helps to shield gate receipts from professional football competition, but it also assures a TV football monopoly to the network owning the NCAA's broadcast rights and makes the NCAA a monopsonistic seller of Saturday's football.¹³ As a result: (1) a major college belonging to a conference earns, say, \$200,000 per year in regular-season broadcast rights; (2) a strong and attractive independent college team, such as Penn State or Georgia Tech, which does not share revenues with conference brethren, could glean close to \$0.5 million a year from regular-season games alone; and (3) Notre Dame, which has a habit of turning out excellent football teams and turning up twice a year in nationally televised games, which has closed-circuit telecasts, and which earns in excess of \$200,000 from its 400-station Mutual Radio network and delayed-telecast network, could receive as much as \$1 million in regular-season football TV rights. In effect, and without intending to draw any nefarious inferences, Notre Dame simply cannot afford to have anything less than a first-rate football team. Major independents and conferences have a similar incentive for excellence. In particular, if a college plays five home games in a 60,000 seat stadium and averages \$6 per seat, its total gate receipts will be \$1.8 million. Assuming its payment to the visiting teams equals its receipts as a visitor, broadcast revenues of \$200,000 are by no means relatively insignificant, espe-

¹² Delayed telecasts are both permitted and prevalent. Indeed, Notre Dame and Grambling have delayed telecast networks and the Irish receive upwards of \$150,000 for their rights.

¹³ The NCAA has vigorously fought any encroachment of its Friday night-Saturday television monopoly. See, e.g., *Hearings on H.R. 1206, H.R. 2305, H.R. 1085, and H.R. 11033 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 38, at 274, 275, 288-96, & 38 (1972); *Hearings on S. 2373 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Cong., 1st and 2d Sess., at 436-39, 1063, 1088, & 1098 (1971-72). See also Hochberg, *Second and Goal to Go: The Legislative Attack in the 92nd Congress on Sports Broadcasting Practices*, — N.Y.L.F. — (1973).

cially when one considers that collegiate athletic programs in general are rarely lucrative ventures.

Additionally, in 1972 NBC spent over \$2 million to telecast the Rose and Orange Bowl games in a TV double-header. The Cotton and Sun Bowls on CBS, and Liberty, Sugar and Gator Bowls on ABC cost those networks about \$1.5 million. Again, participating teams and conferences share in these receipts, thus adding \$3.5 million to total TV revenues. A decade ago, with the Bluebonnet Bowl replacing the Sun Bowl, the rights sold for \$365,000. Now, however, New Year's Day classics are not necessarily played on New Year's Day, and *none* compete for the TV audience. In 1972-73, for example, the Liberty Bowl game was on December 18; the Gator and Sun Bowls were on December 30, but at different times; the Sugar Bowl game was on December 31; and starting times of the Cotton, Rose and Orange Bowl games were staggered a couple of hours apart on January 1.

With the enthusiastic cooperation of the NCAA, the networks have thus been able to eliminate completely competition between televised college football games, both regular-season and bowl games. The advantage of this arrangement to the networks is that they can offer a TV football monopoly to sponsors, and sponsors are willingly anxious to pay to get this. A one-minute spot during the 1972 Rose Bowl was priced at \$135,000, the Orange Bowl price was \$80,000, and the regular-season rate was \$52,000. But ninety-six per cent of U.S. households are now TV homes, and the average nationally-televised game is seen in over eight million homes during the *average* minute. Thus, in 1971, it cost a sponsor about \$0.0065 per home to send a one-minute message to an audience composed mostly of those people that the sponsor wants to reach—males between the ages of 21 and 50. This accounts for perennial sponsor Gillette's position:

The exact relationship of programming to sales is difficult to determine, . . . but we feel that sports broadcasts are an ideal medium for our advertising messages. Network sports attract the large male audience we want and some of them . . . also attract a good share of women viewers for our women's and family products.¹⁴

In effect, Gillette believes that a football broadcast monopoly gives an exploitable competitive advantage, as do the previously mentioned NCAA TV-football sponsors, all of whom already enjoy premier positions in what are basically oligopolistic consumer-oriented U.S. industries—automobiles, tires, petroleum, brewing, tobacco, and the like. A similar situation exists with respect to the local radio broadcasts, where petroleum companies are particularly active as sponsors. The view of these companies, as noted by *Broadcasting*, is that "regional distribution patterns . . . are conducive to the establishment of state and regional radio networks covering the games of outstanding teams in these areas. For a comparatively modest investment, oil sponsors attract substantial and loyal audiences."¹⁵

¹⁴ BROADCASTING, June 7, 1965, at 45, 48.

¹⁵ BROADCASTING, Aug. 10, 1964, at 39.

NCAA policy and its results have been made possible by the government's permissiveness in allowing the colleges to cartelize for the sale of TV rights, even prior to both 15 U.S.C. §§ 1291-95, which does not apply to the colleges in any case, and the restrictive practices of the NCAA. For the NCAA and the overwhelming majority of its membership, the pooled sale of rights means that there is a greater total amount to be divided among the members. While a college such as Notre Dame might not do as well as it could on its own (a decade ago its *radio* rights sold for \$150,000), Notre Dame has only one vote; its annual opponents have eleven votes.

The NCAA argues that its TV policy is designed only to promote college football and college programs and to protect gate receipts. But it does not take TV restrictions and pooled rights to accomplish the former, and the latter argument is at best debatable. Surely each college can determine its own blackout policy for home games, since at *some* price a home game is worth televising, even if gate receipts are adversely affected. The only issue is whether the TV revenues outweigh gate losses. The NCAA cannot be concerned totally about the effects of others' games; otherwise, they would not countenance telecasts of what the network judges to be the game of greatest national interest on a particular date. The Association has managed to rise above principle and adopt the profit-maximizing monopsonistic-seller position. To appreciate the advantage of this position, one need only contrast the \$0.4 million increase in annual local broadcast revenues. In the case of the professional leagues, the need for pooling was justified through the argument that this would equalize revenues, assure small-city teams TV coverage, and in the process help to equalize on-the-field competition. The NCAA has no such justification for its pooling policy and, to its credit, it has not had the temerity to suggest this.¹⁶

There is, however, an imponderable factor giving the NCAA, the networks, and the sponsors considerable pause—CATV. CATV makes feasible widespread telecasting of any game televised any place, without the cooperation or approval of individual stations. It thus presents the interested parties with a potentially formidable problem, and one to which we devote the remainder of our discussion.

III

THE FUTURE OF CABLE TELEVISION AND COLLEGE FOOTBALL

In the present state of collegiate football, CATV seems to be akin to Sesame Street's Oscar, "the nice grouch who brings negativism to the block . . . and yells at people for daring to forget that an 'R' has two legs and a 'P' only one."¹⁷ Cable, too, always seems to be hovering nearby, reminding the NCAA that CATV also

¹⁶ That there has been no NCAA pooling of basketball TV rights is easily explained: there is a spate of locally-televised basketball during the week, the Nielson ratings of Saturday college basketball series indicate an audience slightly more than half that of college football, and so the networks simply would not pay enough to get a Saturday afternoon TV-basketball monopoly to make it worthwhile for the colleges to participate.

¹⁷ M. MAYER, *ABOUT TELEVISION* 134 (1972).

can be nice to work with, but at the same time posing a threat to established broadcasting patterns, while still telling potential viewers of the pleasures of televised football. The problems and potentialities of cable relate to its two principal present day aspects: carriage of distant signals and origination of programming.

A. Present NCAA Telecasting Policies

To understand fully the impact of CATV on major college football games, one must first recognize the scope of the NCAA's telecasting policies. On six Saturdays out of the season, anywhere from three to five regional telecasts are aired.¹⁸ On the remaining nine calendar dates, nationwide telecasts of either a single game or double-header are scheduled. In contrast to the universal practice in the NFL, the NCAA does not blackout the area in which the game is being played. On any date, however, special exceptions allow an additional telecast generally limited to a small area. In 1971, the four exceptions—the sell-out exception, the 400-mile exception, the home college educational TV exception, and the “special” exception—totalled twenty games on twelve of the fourteen different dates encompassed by the contract.¹⁹ These involved some of the major powers in collegiate football—Notre Dame, Oklahoma, Colorado, Arizona State, Texas, Ohio State, and Nebraska.²⁰ A total of twenty-three different schools participated in an exception telecast, with the Irish being televised seven times by WNDU-TV, South Bend, and the Buckeyes televised four times by WOSU-TV, the educational station in Columbus. Nonetheless, this apparent wealth of exception telecasts is misleading, since the NCAA rigidly controls the stations broadcasting and precludes “appreciable damage” to other games:

“Appreciable damage” . . . shall be considered to be created by . . . the *existence* of another concurrently-conducted and non-televised game (unless it is a sellout . . .) within a 120-mile radius of the VHF transmitter which is to carry such a telecast These protection areas shall be reduced to a 45-mile radius where a UHF station is involved²¹

For the network telecasts, the NCAA has various rules concerning minimum and maximum televised appearances by individual colleges, as well as conferences as a whole. Until 1972, for example, in a conference with eight or more members, members of that conference had to appear at least three times during a two-year contract period but were allowed no more than fourteen appearances in any one year. Moreover, no college could appear more than three times in two years. The liberalized 1972-73 contract permits five appearances in two years. Teams receive

¹⁸ THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1972-1973 NCAA TELEVISION PLAN, arts. 5 & 6, at 7-8 [hereinafter cited as 1972-73 TELEVISION PLAN]. Subsequent remarks are based on the provisions of this Plan.

¹⁹ The NCAA also has provisions for College Division Exception telecasts and for closed circuit, but any discussion thereon is beyond the scope of this paper.

²⁰ The lone Nebraska exception telecast was of the Nebraska-Hawaii game in Honolulu, as broadcast by KHVH-TV, Honolulu—not exactly the easiest station to import to mainland cable systems.

²¹ 1972-73 TELEVISION PLAN 14, n. 4 (emphasis added).

approximately \$215,000 each for a national appearance, and up to \$155,000 for a regional appearance. In the case of conference members, these revenues are normally turned over to the conference and redistributed to *all* members, often with the TV participants receiving an extra share.

When contrasted with the schools participating in the network series, the exception telecasts do not take on an entirely different hue, since the same schools again appear. Of the twenty exception telecasts, nineteen included one or both teams which were also participating in the 1971 national or regional TV showings.²² Only the October 16, 1972, exception telecast between New Mexico and San Jose did not involve teams appearing on ABC during the 1971 season. The import is, of course, that TV exposure invariably goes to the top teams, a result which may very well enhance their positions as the top teams due in part to the very exposure that goes along with being on television. In and of themselves, the exception telecasts, being highly controlled in numbers of stations, would not be expected to cause many problems because the exposure is limited. It is only when control is lost that the problems become acute.

B. Cable Carriage of Distant Signals

For CATV, the beginning was in the late 1940's in Pennsylvania and Oregon communities where TV reception was poor because of the terrain. Enterprising businessmen set up antennas in high places in the towns to get better reception of TV signals, then ran a cable from the antenna to the subscriber's home. While these CATV operators originally just wanted to sell TV sets, they soon realized that a business potential existed in improving reception and, perhaps, in bringing in stations from distant cities. The distant signal potential has been the lure in signing subscribers. The desire for the distant signals is heightened by the uncertain nature of copyright liability being attached to signal carriage.²³ While cable systems generally have sought signals carrying pro sports, they have done so only because there is a general lack of college sports on the air.

The ability and the desire of cable systems to import those distant signals has been opposed in a specific sports rule-making at the Federal Communications Commission by representatives of all sports, including the NCAA.²⁴ Not being as highly visible as, say, the NFL, protection for collegiate athletics was not even included in the rule proposed by the Commission, which would have had a protected

²² Between its seven exception telecast appearances and two network appearances, only one 1971 Notre Dame game—the Purdue game on September 25, 1971—was not televised.

²³ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *but see* *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir. 1973). It is recognized, of course, that the telecasts of college football games are not copyrighted and therefore are not strictly covered under the above cases. Furthermore, the protections offered to professional team sports against CATV in the proposed revision to the Copyright Law do not run to nonprofessional sports. *See* S. 1361, § 111(c)(4) (C), 93d Cong., 1st Sess. (1973).

²⁴ *See* Docket No. 19417, Notice of Proposed Rule Making, 37 Fed. Reg. 3190, 36 F.C.C. 2d 641 (1972).

area of about sixty miles around the site of the game.²⁵ The protection would have precluded another pro game of the same sport from being imported via a distant signal on a day when a team was at home.

Quite naturally, cable interests fought this proposed rule vigorously. They needed those distant sporting events, they said, because of other distant programming they were not getting. In point of fact, it is generally conceded within the cable industry that the effect of the FCC's Cable Television Report and Order²⁶ is to deprive cable systems—especially those in the larger markets—of much choice programming, such as movies and syndicated shows. The need, therefore, is to attain non-copyrighted—that is, sports—programming.²⁷ By the same token, the sports interests claimed they needed protection for the TV package of away games, as well as for the home gate.

The Commission's rules would have allowed the sports signal importation without a requirement of notice to affected interests (that is, the stations and the teams). For instance, the Commission's rules are often interpreted as allowing vast importation of only independent (non-network) stations. There are, nevertheless, two sections of the rules which work to the benefit of a major-market cable system desiring to import a major college football game:²⁸ (1) 47 C.F.R. section 76.61(b)(2) (ii) allows major-market cable systems to substitute unprotected (that is, non-copyrighted) programs on network stations when protecting independent station syndicated programming, pursuant to the program exclusivity rules; and (2) 47 C.F.R. section 76.61 allows unlimited importation of programs telecast by educational stations.²⁹

The concern of the NCAA was understandable. The rules would upset the balance which had been secured to protect the attendance at local college football games. This fear had been articulated by the NCAA in a caveat to its article authorizing exception telecasts:

The Television Committee shall have the right to withhold or withdraw authorization for a special telecast . . . if wired systems (including CATV) operations threaten enlargement of the permissible area of telecast release.³⁰

²⁵ *Id.* at 3191, 36 F.C.C. 2d at 643. The Commission did, however, seek comment on whether protection should be afforded to collegiate sports. *Id.* at 3192, 36 F.C.C. 2d at 645.

²⁶ 37 Fed. Reg. 3252, 36 F.C.C. 2d 141 (1972).

²⁷ *See, e.g.*, Statement of David Foster, President, National Cable Television Association, July 20, 1972, in Oral Argument in Docket No. 19417, at 98-102.

²⁸ On December 15, 1972, the Commission closed a loophole in section 76.61(e)(2) which would have allowed a system to import "a network program . . . not . . . carried by a station normally . . . on the system." In other words, a regional telecast *not* offered to a local station could have been imported. The Commission noted that the decision not to carry the program had to be made voluntarily by the station, rather than not being offered to the station. Letter to Harry J. Ockershausen, Esq. (representing Scripps-Howard Broadcasting Co., Station WPTV, West Palm Beach, Fla.), 39 F.C.C. 2d 502 (1972).

²⁹ Primary emphasis is on major-market cable systems herein, but much of the same analysis pertains to systems in minor markets and outside any market.

³⁰ 1972-73 TELEVISION PLAN, art. 17, at 16. This proviso first appeared in the 1966 Television Plan.

Having predated the Cable Television Report and Order which allowed much wider signal latitude, it is likely that the provision was designed in fact to protect home gate attendance (that is, the appreciable damage concept), rather than any network package.

Under the Commission's new CATV rules, however, cable systems all over the country could carry vast numbers of games, paying only the cost of transmission. Using the Notre Dame 1971 experience as an example, an extensive network of Irish fans could be put together across the country under a package featuring nine of the ten games played.

Above and beyond that, however, importation of either a regional telecast or an exception telecast would tend to fragment the audience for the network game carried in the particular market. On the one hand, to the extent the additional game increases the total number of viewers, such a fragmentation of football exclusivity may not be undesirable. On the other hand, however, to the extent that an advertiser may purchase commercial time in part because of exclusivity of the sole college telecast, the value of his contract is diminished. So, for example, a West Coast savings and loan association might buy time in the West Coast regional game; the game is then imported into the Midwest, in competition with the Midwest regional game having a Midwest savings and loan sponsor. The West Coast institution would get unpaid-for and virtually useless exposure, while the Midwest savings and loan would obtain a smaller viewing audience than it had bargained for.

Absent FCC action, three courses of action appear to be open to the NCAA. First, it could attempt to broaden the scope of the pending Copyright Bill³¹ so as to include intercollegiate athletics in those events precluded from unauthorized "secondary transmission" on cable systems. Second (pursuant to the same legislation), it might seek the payment of the compulsory license fee, which would tend to soften the impact of importation, for this fee could either be divided among those schools showing gate losses or used to offset any fragmentation. Third, there is the option of limiting telecasts. The NCAA could eliminate any regional telecasts, a threat which has been made by the NCAA.³² (Interestingly enough, the same threat—to go into a single national game of the week—has been made by pro football.³³) The more effective initial limitation has been the elimination of the exception telecasts. On September 29, 1972, the Commission was informed that Ohio State would no longer be allowed its exception for telecasting over WOSU-TV, since "cable systems were spreading the signal into areas where other college games were to be played

³¹ See note 23 *supra*.

³² Interview by Philip R. Hochberg with Thomas C. Hansen, Assistant Executive Director, NCAA, Kansas City, Mo., Oct. 26, 1972. See also Comments of the National Collegiate Athletic Association in Docket No. 19417, at 15.

³³ See Letter from John Vanderstar, Esq., to Dean Burch, Aug. 14, 1972, in Docket No. 19417, at 5. See also comments of NFL Commissioner Pete Rozelle in *Hearings on H.R. 9553 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. (Sept. 6, 1973).

concurrently."³⁴ This, said the NCAA, was a "perfect example of cable activities resulting in less availability of sports programming rather than more."³⁵ One primary source of major college football for distant signal importation—WOSU-TV—was thus denied the games because of that importation, which WOSU-TV could neither prevent nor, under existing law, get paid for!³⁶ The exception telecasts of the Notre Dame games were continued during the 1972 season, ostensibly because cable systems outside the WNDU-TV service area "had agreed not to carry the signal."³⁷ This, of course, is puzzling for two reasons: (1) why would a cable system, with its own subscribers to satisfy, agree not to carry the games and (2) how can new cable systems that might try to use the Notre Dame games as a subscriber inducement and who are not parties to the agreement be policed, especially when there is no notice requirement even to the FCC?

An ancillary issue, but one to which the NCAA devoted a considerable amount of its pleading in Docket No. 19417, dealt with CATV's potential impact on protection from pro football telecasts. The NCAA was fearful that cable would undermine the protection of 15 U.S.C. § 1293 (1970), which effectively ensures that there will be no telecasts of an NFL game within seventy-five miles of a high school or college game on Friday nights or Saturdays between the second Friday in September and the second Saturday in December. Whatever precautions might have been taken by the NFL to avoid such telecasts might be obviated by a system's importation of a distant signal. For instance, on October 23, 1971, the San Diego Chargers hosted the Buffalo Bills in a Saturday night game starting at the unusually late hour of 9 p.m., P.C.T.; the telecast back East began at midnight Sunday, therefore not violating the intent of section 1293. Suppose cable systems in the West had brought the game back from the East, thereby competing with local college games played that night? The NFL would have complied with the law, but the clear intent of Congress would have been frustrated.³⁸

C. Purchase of Rights by Cable Systems

The other side of the cable coin is the prospect of CATV's entrance into the market for the purchase of the exclusive rights to originate major college football. While not endorsing the prospect, the plan of the Television Committee has not rejected it either:

³⁴ See Letter from Walter Byers, Executive Director, NCAA, to Chairman Dean Burch, Sept. 29, 1972, in Docket No. 19417.

³⁵ *Id.*

³⁶ As of April, 1972, twenty-seven cable systems in Ohio alone with more than 111,000 subscribers were carrying WOSU-TV outside its regular service area. As of June 1, 1973, an additional twenty-two Ohio cable systems had sought FCC authority to carry WOSU-TV outside its service area.

³⁷ Interview with Thomas C. Hansen, *supra* note 32. There is no way of calculating which systems "plug-in" the Notre Dame games pursuant to the provision of section 76.61(b)(2)(ii) of the Commission's Rules. 47 C.F.R. § 76.61(b)(2)(ii).

³⁸ It is not an altogether isolated problem, since a total of thirty-two NFL games were played on Friday nights or Saturdays during the 1970 and 1971 protected periods. See Comments of NCAA in Docket No. 19417, at 10.

Article 20

Wired Systems

Telecasts by wired systems may be authorized by the Television Committee if deemed by it to be beneficial to intercollegiate football and calculated to assist in the achievement of this Plan's stated purposes. Approval for any such telecast must be obtained from the Television Committee

The following provisions have been developed by the Committee to govern applications for telecasts via wired systems:

- (a) No presentation may conflict in point of time with any Series game being telecast on a live basis by the carrying network in the area involved;
- (b) Any rights fee to be paid the participating institutions (or any other compensatory arrangements) should be specified and shall be subject to the assessment prescribed in Article 25;
- (c) An evaluation of the experiment must be made and the planned method of evaluation must be described in the application;
- (d) Application for approval of such a telecast shall be made by the host institution, regardless of the area(s) of release. The consent of the visiting institution to participate in the telecast must be obtained in advance of presentation of the application.³⁹

The NCAA concedes it has not looked deeply into the problem, but still has indicated an interest in experimenting.⁴⁰

A move by the NCAA to sign a pay-cable contract for football might, however, be fraught with danger from a political standpoint.⁴¹ Nevertheless, such a contract would represent a landmark, both for cable and for football. In certain parts of the country where CATV is highly saturated, the fervor for college football rivals, if not exceeds, that of pro football, and a vast potential audience exists. The showing of selected games could certainly generate a dollar flow sufficient to offset any harm incurred by the gates of other games.

An abyss of confusion is encountered, however, with the pay-cable rules of the Commission. Section 76.225(a)(2) precludes "siphoning" of programs from conventional television to pay-cable. It is clear under the rules that the Rose Bowl, for instance, could not be put on pay-cable without withholding it from conventional television for the required period.⁴² By the same token, the Commission has stated that the NCAA Game of the Week is also to be protected against siphoning from conventional television to pay.⁴³ But obviously while the Game of the Week as such

³⁹ 1972-73 TELEVISION PLAN 18-19.

⁴⁰ Interview with Thomas C. Hansen, *supra* note 32.

⁴¹ For an example of one Senator's reaction, see *Hearings on S. 4007 and S. 4010 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 2d Sess., ser. 92-78, at 145 (1972).

⁴² Although section 76.225(a)(2) was drafted to be a two-year rule, the rule would actually be satisfied by withholding the games from conventional television for one year. *But see* Docket No. 19554, 37 Fed. Reg. 15173, 35 F.C.C. 2d 893 (1972).

⁴³ Fourth Report and Order in Docket No. 11279, 33 Fed. Reg. 19104, 19139, 15 F.C.C. 2d 466, 560-61 (1968).

could not be shown on pay-cable, could other games not be shown on a weekly pay basis? What about showing other games of teams which have been or will be on the Game of the Week? Moreover, other problems would arise where a team's games have been shown continually as an exception telecast.⁴⁴

The prospect of pay TV has caused considerable network concern. Within a three-week period, top network officials had all attacked the pay-cable and sports possibility.⁴⁵ At the Commission, one anti-pay-cable entity proposed a ban on CATV origination of sporting events within one week of their occurrence if (1) the same school in the same sport was on conventional TV anytime in the prior three years, or (2) events of the same sport (not involving the same schools) were being carried during that season.⁴⁶

The prospects of pay-cable origination are significantly lessened and the costs significantly increased, however, by the cost of producing the telecast. Professional sports' practices must be contrasted. There the away team will generally be televising back, but the home team will not be putting the games on at all, or, alternatively, will be blacking-out. In any case, however, there is at least one TV production of the pro game going on. This is not true in the college ranks. Since the game is not blacked out, if it is not broadcast in the local community, it is simply not being televised. Hence, unlike the pro telecast, there is no existing "production" which can be borrowed for the pay audience. Nevertheless, the prospects of significant dollars—even on an experimental basis—may make the initial production of presently-untelevised college events worthwhile.

In the meantime, a number of cable systems are taking the first tentative steps into sponsored (that is, non-special charge) football cablecasts. All of these, however, come within the delayed telecast provisions of the Television Plan and are of limited dollar value.⁴⁷ The true test of the positive uses of cable—if they exist to the media, to the sport, and to the fan and viewer—is yet to come.

CONCLUSION

The NCAA pooling of college football broadcast rights has resulted in higher average broadcast revenues for the overwhelming majority of colleges and the elimination of competition between rival football telecasts. Cable, however, makes feasible both the widespread importation of a game televised anywhere, as well as the local cablecasting of any game not otherwise available for local viewing. It

⁴⁴ See, e.g., note 22 *supra*.

⁴⁵ Address by Julian Goodman, President, National Broadcasting Company, Inc., Meeting of NBC Affiliates in Los Angeles, Cal., May 7, 1973; Address by Arthur Taylor, President, Columbia Broadcasting System, Inc., Meeting of CBS Affiliates in Los Angeles, Cal., May 16, 1973; Address by Everett Erlick, Esq., Vice President and General Counsel, American Broadcasting Company, Inc., Meeting of ABC Affiliates in Los Angeles, Cal., May 24, 1973.

⁴⁶ An exception to the latter was proposed if the cable system was within ten miles of the institution. Comments of Association of Maximum Service Telecasters in Docket No. 19554, at 43.

⁴⁷ 1972-73 TELEVISION PLAN, art. 21, at 19-20.

thus offers the prospects of a plethora of football telecasts and an elimination of no local telecasts, with each college left to negotiate on its own in the absence of NCAA pooling. It is, however, a plethora for which the cable entrepreneurs and the cable's customers are going to have to reimburse either the colleges or the originating television stations. There is thus very little that is free in this segment of our free market economy.