

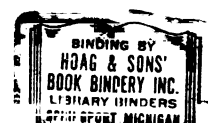
CABLE TELEVISION AND SPORTS

Thesis for the Degree of M. A.
MICHIGAN STATE UNIVERSITY
LAWRENCE WALTER LYNN
1975



3 1293 10170 5394

THESIS



81 12127
~~12127~~
E156

MAY 17 1999

OCT 25 2002

G-91002

ABSTRACT

CABLE TELEVISION AND SPORTS

By

Lawrence Walter Lynn

This thesis examines the history and current problems affecting cable television and organized sports. Since 1953, when the first hybrid pay cable sports programming occurred, broadcasting, motion picture theater owners and sometimes even organized sports have sought to impede cable television's dependence on sports programming for subscriber entertainment.

Television feared pay TV's wholesale purchase of prestigious sports events would leave network schedules without one type of blue chip programming unless Congress or the Federal Communications Commission imposed rigid anti-siphoning restrictions on pay TV and cable television. Theater owners feared that pay television's dependence on motion pictures and sports for the bulk of its programming would threaten box office receipts at theaters and drive-ins across the country. Organized sports feared cable television's ability to import the signals of distant stations carrying a game into an area where it was blacked out locally. Sports felt the blackout protection afforded it by the courts and Congress was completely disregarded by cable television.

Often Congress and the FCC acted on behalf of these vested interests and cable television faced a prolonged embryonic period until the 1970's when the FCC's third report on cable television loosened previously imposed restrictions. Coincidentally, organized sports' interest in pay cable as a source of supplemental income in the face of rising operational costs gave cable television another ally.

Primary research data was obtained from transcripts of congressional hearings, congressional reports, FCC documents and court decisions related to pay television, cable television, aspects of antitrust laws concerning the blackout of televised sports and the question of copyright liability for cable.

Secondary research data was compiled from books and law review articles by respected authorities in the fields of cable television and sports economics. Also, the broadcast trade publications Broadcasting, Variety, TV & Communications and the New York Times and Boston Globe newspapers were examined for supplemental information.

The major finding of this thesis is that cable television and sports are interdependent upon each other for their future prosperity. The futuristic services unique to cable depend on obtaining enough subscribers to warrant the institution of police and fire protection, at-home shopping and classroom instruction, etc. The appeal of additional sports programming either by importation of distant signals or pay cable, is an important subscriber inducement.

Organized sports needs cable television as a supplemental income to the already remunerative network contracts. Player salaries, pension

plans, ticket prices and operating expenses have risen at an astronomical rate since 1960. Gate receipts and commercial broadcasting alone can no longer pay the sports promoter's bill. Pay cable is a means of relieving the financial strain on sports' economics.

Broadcasting's fear that pay cable is conspiring to siphon away all sports from commercial television is unfounded. Cable television is still in its infancy. There are no potential purchasers of pay TV rights who are able or willing to offer substantial amounts of money for those rights. Such purchasers will not suddenly materialize because cable television markets develop slowly, subscriber by subscriber. Also, organized sports will not even consider a mass defection from commercial to subscription television. There are legal uncertainties about cable legislation by Congress or further regulations concerning copyright liability or the existing anti-siphoning rules. There are practical uncertainties such as potential fan resentment over paying for games they previously saw commercially.

CABLE TELEVISION AND SPORTS

By

Lawrence Walter Lynn

A THESIS

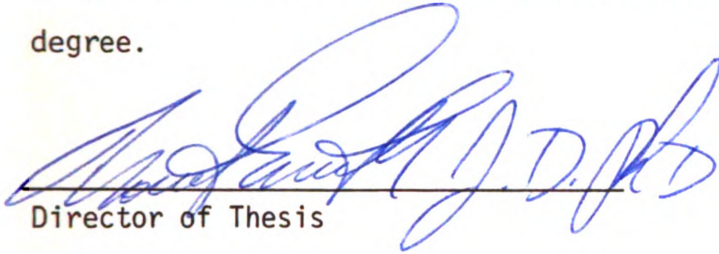
**Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of**

MASTER OF ARTS

Department of Television and Radio

1975

Accepted by the faculty of the Department of Television and
Radio, College of Communication Arts, Michigan State University,
in partial fulfillment of the requirements for the Master of Arts
degree.

A handwritten signature in blue ink, appearing to read "Andrew J. D. Ph", is written over a horizontal line.

Director of Thesis

Copyright by
LAWRENCE WALTER LYNN

1975

To Mom and Dad

ACKNOWLEDGMENTS

A special thanks to Thomas Muth and
Thomas Baldwin, School of Television
and Radio, Michigan State University.

TABLE OF CONTENTS

Page

INTRODUCTION 1

PART ONE. THE HISTORY OF SPORTS ON STV AND CATV

Chapter

I.	GENESIS	6
	The First Hybrid STV-CATV Experiment	6
	Raised Eyebrows in Washington	14
	The First California Pay TV Operation	27
II.	AUTHORIZATION OF STV TRIAL TESTS AND INITIAL PAY TV OPERATIONS	38
	The Authorization of Pay TV Experimentation	38
	The Hartford Pay TV Experiment	46
	The Etobicoke Pay TV Experiment	54
	The Second California Pay TV Operation	58
	Authorization of a Permanent STV Service	77
III.	CABLE TELEVISION	119
	Cable Television--The Early Years	119
	Initial Pay Cable Sports Hookups	134
	Cable Television--The Recent Years	137

PART TWO. CURRENT PROBLEMS FOR CABLE TELEVISION AND SPORTS

IV. THE IMPORTATION OF DISTANT SIGNALS	156
V. COPYRIGHT LIABILITY	180
VI. PAY CABLE	217

Chapter	Page
PART THREE. OUTLOOK FOR THE FUTURE	
VII. SUMMARY	246
APPENDIX	
A. GEOGRAPHICAL/DEMOGRAPHICAL DISTRIBUTION OF MAJOR PROFESSIONAL SPORTS FRANCHISES	249
B. PUBLIC LAW 87-331	250
C. PRO TEAMS OF THE UNITED STATES AND CANADA IN THE FOUR MAJOR SPORTS	252
D. PAY CABLE SYSTEMS IN THE UNITED STATES	255
E. CABLE TELEVISION GROWTH 1952-1954	257
SELECTED BIBLIOGRAPHY	258

INTRODUCTION

Sports first appeared on television in 1939. A collegiate baseball game between Columbia and Princeton originating from Baker Field in upper Manhattan was beamed by NBC's W2XBS tower atop the Empire State Building to three hundred receivers situated within 50 miles and to the New York World's Fair.

Though the picture was blurred and only one camera was used, there was optimism for the future of sports events on television. NBC's program manager predicted the baseball game would "signal the beginning of an important development in the art of pictures through the air, for outdoor sports will furnish much of the most interesting material we could televise."¹

Orrin E. Dunlap of the New York Times compared the Columbia-Princeton telecast with Jack Dempsey's boxing match with Georges Carpentier in 1921. That fight increased the sale of radio receivers and Dunlap projected that sports would do the same with television receivers and would be seen from coast-to-coast within two decades.²

Heavyweight boxing, major league baseball and college football made their initial video appearances later in 1939.

Sports was a key element in the nineteen-forties in launching the television industry. A Pulse survey of New York City found that local stations devoted 16 percent of their air time to sports in January 1949.³

Twenty years later only 2 percent of all programming was sports.⁴ Nevertheless, sports gained the status of prestige programming and the networks became highly competitive in acquiring events of mass audience appeal.

Sports is a ready-made answer for programming supply. Many people are extremely interested in watching games that are automatically different and new. Newspaper coverage is built-in publicity. The "show" is inexpensively produced by a team or league promoter, who gets most of his money from gate receipts. The "stage" is a stadium or arena already constructed and equipped with lighting.

While the April 4, 1939 Columbia-Princeton telecast drew wide attention, and remained an indelible mark in broadcasting's annals, comparatively little notice was given to the first hybrid pay cable television experiment with sports on November 28, 1953.

Broadcasting devoted less and less programming time to sports as the years passed. However, cable television relied more and more on athletic events as it moved out of the hinterlands and into the cities during the next 20 years.

Cable television became an additional video service which could also be a vehicle for pay TV, something sports promoters had long envisioned as a supplemental income source while providing them with blackout protection to maintain healthy attendance figures.

However, neither sports nor broadcasting appreciated the inroads cable TV made on their economic standing for differing reasons. Sports interests had a love-hate relationship with the new communications medium.

Sports sought pay cable contracts at exactly the same time it attempted to blackout cable's unique ability to provide additional sports events for subscribers via the importation of distant signals. Broadcasting and theater interests tried to oppress the new video competition. Sports became an important bargaining chip in the program stakes between broadcasting and cable.

This thesis measures the development of sports programming on cable television against a backlash of vested interests which used the Federal Communications Commission and the Congress to impede cable's growth.

Part I is a history of pay TV, also known as subscription television and STV, and cable television regarding sports programming. These chapters show the roots of the problems encountered by cable TV and sports in the succeeding years.

Part II explains the three major current problems confronting cable TV and sports. Importation of distant signals and potential copyright liability for events are still unresolved in a maze of FCC and congressional investigations. The third current problem, pay cable, is hampered by FCC programming restrictions. It is these three problems that block cable's growth.

Part III predicts where cable television and sports are headed. Why cable TV and sports should be allowed to grow without restrictions as artificial and unfounded as have been placed on it is explained. Also, suggested solutions for the importation, copyright and pay cable problems are outlined.

Footnotes--INTRODUCTION

¹New York Times, April 17, 1939, p. 19.

²Ibid., June 6, 1939, ix, p. 10.

³Ibid., March 27, 1949, vi, p. 17.

⁴Ibid., January 7, 1971, iii, p. 13.

PART ONE

THE HISTORY OF SPORTS ON STV AND CATV

CHAPTER I

GENESIS

The First Hybrid STV-CATV Experiment

In 1953, the first hybrid pay cable television experiment occurred in Palm Springs, California.¹ Seventy subscribers paid \$1.00 each to watch the University of Southern California-Notre Dame football game from the Los Angeles Coliseum on November 28.

Earlier that year, company representatives of Zenith's Phone-vision, Paramount Pictures' International Telemeter and Skiatron's Subscriber-Vision appeared before the National Collegiate Athletic Association's Television Committee.² The NCAA needed a solution for their television programming policy. Attendance had declined noticeably as more and more fans bought their first television receivers and individual member colleges were free to televise as many games as they wished.

In 1950, the NCAA commissioned the National Opinion Research Center to determine the underlying factors of a college football fan's behavior. Based on the NORC's recommendations over the next seven years, the NCAA's TV Committee instituted a controlled, restrictive, experimental, or blackout policy (depending on one's point of view) for its televised games. This policy was the forerunner of the NCAA Football television schedule seen on ABC each fall. Basically, the member

colleges unite to sell the television rights for a few big college games and then split the revenue.

The NCAA TV Committee viewed a live demonstration of Zenith's Phonevision pay system.³ Robert Hall, Yale University's athletic director and member of the NCAA's TV steering committee, predicted that televising college football games had to be eventually done on a pay-as-you-see basis. He said the Phonevision and closed-circuit theater television were the best means.⁴

The International Telemeter Corporation received authorization from the FCC and built a coaxial cable hookup to an antenna 10 miles northwest of Palm Springs. The antenna received the Los Angeles VHF stations from their Mount Wilson transmitting site via microwave. The signals were relayed into Palm Springs by wire. Subscribers were able to see Los Angeles programming from over 90 miles away in February 1953.⁵

Paramount-owned KTLA-TV in Hollywood microwaved the USC-Notre Dame game to its Telemeter subsidiary, the Palm Springs Community Television Corporation on November 28, 1953.⁶ Reception of the game and Tom Harmon's play by play were excellent. One advantage of pay TV subscribers was quickly realized. Many fans could watch for the price of a single subscription. One hundred thirty-one saw the game at the plush Racquet Club.⁷ A professional football game was offered eight days later on the subscription system. For twenty-five cents subscribers saw the Baltimore Colts-Los Angeles Rams game from the Coliseum.⁸

Both the subscribers and the NCAA TV Committee were happy with the Palm Springs experiment. Though the subscribers' affluence wasn't typical of most other areas, promoters felt that technical advances in pay TV equipment would lower subscriber fees, and give subscription television a wider appeal. Uncertainty about whether the FCC would authorize pay TV prevailed and the TV Committee urged the NCAA ". . . to keep an unrelaxing watch on the situation, since it recognizes as a certainty the fact that subscription television will be of immense importance to intercollegiate athletics in the future."⁹

The 1953 NCAA TV Committee gave its 1954 successors the authority to include in the 1954 television plan a provision for theater and pay TV as it was necessary to prevent adverse effects upon college football.¹⁰ The 1954 committee heeded the advice and formulated a policy permitting member colleges to arrange for any number of pay TV appearances subject to the Television Committee's approval. In effect, pay TV was exempted from the NCAA's rigid telecast policy of blackouts or controlled appearances.

The results of the Palm Springs experiment elated Paul MacNamara, Telemeter's vice president. MacNamara called the USC-Notre Dame game a 100 percent sell-out. Actually, it was a 97 percent rating.¹¹ Seventy-one television sets were equipped with coinboxes and seventy subscribers watched the game. MacNamara conceded the novelty factor of the first game in a January telegram sent to the 1954 NCAA Annual Convention. However, Telemeter still felt pay TV was the solution to collegiate economic woes.¹²

Carl Lesserman, Telemeter's executive vice-president, said in an official statement, "The near sell out of the Notre Dame-USC game via Telemeter in Palm Springs indicates conservatively that such a game on a national basis could easily gross \$10,000,000 on a Saturday afternoon." ¹³

Aside from football games, motion pictures comprised the other entertainment available to Telemeter's subscribers. Telemeter closed its Palm Springs operation for the summer of 1954, the season when most of its subscribers escaped the desert heat for cooler climates.¹⁴ Telemeter attempted to restart its pay cable service in the fall but didn't due to a lack of programming.

Other pay systems weren't dormant in the interim. Skiatron Corporation's Subscriber-Vision had its first public demonstration at a New York City hotel in June 1953.¹⁵ Zenith Radio Corporation's Phone-vision system had already shown ninety motion pictures into the homes of three hundred Chicago area families in 1951.¹⁶ Zenith published and circulated a twelve-page booklet entitled Phonevision--What It Means To Television and You in 1953 claiming its system was perfected and ready for FCC approval.¹⁷

As holder of the patent for the encoding process, Zenith filed a petition with the FCC in 1952 for authorization of its system. A revised petition was filed by Zenith and Teco, the Television Entertainment Company and Zenith's patent licensee in North America, on November 29, 1954. On February 10, 1955, the FCC invited comments on proposed rules for what the FCC called STV, or subscription television.¹⁸

The action of Telemeter, Zenith and Skiatron began a struggle that continues to this day. The first pay TV opposition came from the theater owners and motion picture exhibitors. Pay TV's primary programming need was a threat to the theater's staple, the feature film.¹⁹ In later years, pay TV presented an additional economic challenge to sports events shown on closed-circuit theater television. Over the years, the theater interests impeded pay TV under such guises as the Citizens Committee For Free TV and the Joint Committee Against Toll TV. Wherever the pay TV entrepreneurs went, the National Association of Theater Owners and the Theater Owners of America followed.

Pay TV was a convenience for the sports fan compared to venturing to a local theater, paying a parking fee and not having the convenience of viewing a championship boxing match or other blacked out event in one's own living room.

The idea of extending a sports event beyond its location via closed-circuit television was conceived in 1951.²⁰ Boxing managers for Joe Louis and Lee Savold rejected a \$62,500 offer for radio and television rights to the match in favor of a \$100,000 minimum in exclusive rights for eight theaters in six cities. Four theaters were in New York City where the bout occurred. Twenty-two thousand attended the theater showings and thousands more were turned away.²¹

James D. Norris, president of the International Boxing Club, said that theater TV could solve the problem of how to gain added revenue without adversely affecting the gate receipts.²² Only one major boxing match was on home television in the summer of 1951 as the sport took notice of the bigger dividends offered by closed-circuit.²³

Theaters in the East and Midwest began televising NCAA football games in 1951. The closed-circuit games were part of the NCAA's experimental TV project. None of the games was shown on home television.²⁴

The potential for inroads on theater TV sports by pay TV entrepreneurs existed and theater interests defended sports almost as vigorously as their feature film product. Broadcasting reported the rivalry in 1954. Basically, the theater interests claimed they wanted to preserve so-called "free TV" for America. The pay TV companies called the theater owners' intentions misleading. Skiatron, Telemeter and Zenith explained they only wanted to supplement programming on commercial television, not to supplant it.²⁵

The FCC announced it would invite comments on the authorization of pay television near the end of 1954.²⁶ Interests both pro and con to subscription television were taking sides, or taking to the sidelines. Two groups, the National Association of Radio and Television Broadcasters (now the National Association of Broadcasters) and the National Community Antenna Association (now the National Cable Television Association) stated no formal position on the question.²⁷ They wished to study the issue more thoroughly. Although neither sensed it, sports programming became a major bargaining chip that would put the NARTB and NCTA at opposite ends of the pay TV spectrum.

Comments poured into the FCC and spokesmen for the various interests sought support among organized sports. Arthur Levey, president of Skiatron Electronic and Television Corporation, told sports broadcasters that pay TV was the solution to the problem of presenting sports on

commercial television. Specifically, a championship boxing match could be presented on subscription television much more cheaply than over closed-circuit theater TV. Home fees would be lower than the several dollars one paid for theater admission, argued Levey. When more and more sports events left commercial television for theater telecasts the public would protest. Pay TV was the only logical answer for preserving major sports events at a cost a family could afford while still allowing organized sports to flourish.²⁸ Instead of the \$3.00-\$4.00 per person for a heavyweight championship fight at the theater box office, a whole family could watch for only \$1.00. Levey predicted that pay TV would gross ten times as much as the theater receipts.²⁹

Walter O'Malley, president and owner of the Brooklyn Dodgers, appeared on Edward R. Murrow's "See It Now" and spoke not just in pro pay TV terms, but also in favor of commercials on the new medium.³⁰ O'Malley rationalized that if a customer took a subway ride, bought a magazine or went to a ball park, the customer saw advertising even though he still paid. Sponsored pay TV would decrease the viewer's fee, O'Malley thought, and fifty cents was a fair price for a National League baseball game over such a medium.³¹

The FCC received favorable comments on subscription television from various sports interests. One letter came from Tom Hamilton, the University of Pittsburgh athletic director and head of the 1951 NCAA TV Committee. Art Rooney, president of the National Football League's Pittsburgh Steelers, also concurred.³² The NFL restricted a team's home games within a seventy-five mile radius of the home city. This was in

compliance with a 1953 U.S. District Court decision where the league was permitted to protect its gate receipts with home television black-outs. Rooney undoubtedly foresaw the financial potential of placing his team's blacked out home games on a Pittsburgh pay TV system.

Some minor league baseball clubs even filed with the FCC hoping to alleviate their shrinking attendance problem resulting from unrestricted telecasts of major league baseball into their territories.³³ The president of the National Association of Professional Baseball Leagues (the minor leagues), George Trautman, believed pay TV would probably strengthen minor league franchises whose income was cut by invading major league telecasts. Subscription television was the cure-all since rule 1 (d) was eliminated from the Baseball Constitution.³⁴

Not everyone was so enthused about STV's potential. NBC's David Sarnoff feared a secret deal between Skiatron and any of New York's three major league baseball teams.³⁵

Two nationally known sportswriters, Dan Parker of Hearst and Shirley Povich of the Washington Post and Times Herald editorialized against pay TV in their columns. Parker called STV in the New York Mirror ". . . a brazen attempt to put over the biggest air grab." Povich worried about integrity. "How to keep the pay promoters honest after they have your dough might be a problem."³⁶

Baseball Commissioner Ford Frick told the sixteen major league club owners that efforts to negotiate an understanding with the Justice Department on rule 1 (d) were fruitless. Frick announced the results of a national survey revealing that 50 percent of the respondents

avored a home game blackout if baseball was threatened by television. Nationally, 37 percent said they would pay twenty-five to fifty cents to see games over STV. In major league areas, over one-half of the fans said they would pay from twenty-five cents to one dollar to see their local team.³⁷

The FCC wasn't hurrying on pay TV. VHF, UHF and de-intermixture problems were more important.³⁸ Commission Chairman George McConnaughey told the Sports Broadcasters Association that pay TV wasn't on the agency's immediate agenda.³⁹ McConnaughey stretched his candidness too far. It wasn't until 1968 that the FCC finally approved a subscription television service.

Raised Eyebrows in Washington

In 1957, the Supreme Court subjected professional football to the antitrust laws in Radovich v. National Football League.⁴⁰ The court knew it had created an antitrust irregularity by its refusal to reevaluate the total exemption for baseball in Toolson v. New York Yankees in 1953 while placing boxing and football under the antitrust statutes.⁴¹ Cognizant of this fact, the Radovich court reiterated its Toolson opinion that the appropriate means of eliminating the sports antitrust inconsistency was through legislation. The court said:

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But Federal Baseball held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that

the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision.⁴²

Following the Radovich decision, Congress began examining the relation of the antitrust laws to organize professional team sports. Bills referred to the House Judiciary Committee suggested three solutions. The first school of thought was that baseball, like other team sports, should not have the antitrust exemption the courts had granted it. The courts would then decide on the facts of each case whether any particular baseball agreement or practice constituted an unreasonable restraint of trade. The second solution was to give a blanket antitrust exemption for all professional sports. The third method was to place all sports under the antitrust laws and that certain practices, i.e., the reserve clause, player draft, radio and TV agreements, etc., be specifically exempted from those laws.

Legislation was introduced in favor of all three solutions. In the summer of 1957 approximately 50 witnesses testified in 15 days of hearings before Emanuel Celler's (D-N.Y.) House Antitrust Subcommittee of the Judiciary.

Two weeks before the hearings began in mid-June, reports circulated that the Brooklyn Dodgers and New York Giants were going to California on the heels of a 10 year twenty million dollar contract for paid, closed-circuit TV. Walter O'Malley denied the Dodgers were going West. Rumors also abounded that baseball's Milwaukee Braves had been approached about subscription television. The Braves offered no comments, but ever since the Braves left Boston in 1953, they had not permitted any telecasts of their games.⁴³

When the president of Pacific Telephone and Telegraph said that his company was negotiating with Matthew Fox of Skiatron to feed Dodger and Giant games over phone lines for pay TV, Chairman Celler wasted no time trying to discover if baseball's, or more specifically, the Dodgers and Giants, intentions were honorable.

Explanations were rampant on why two successful franchises that had always been in New York were suddenly leaving the entire city to the Yankees and the rival American League. Three theories predominated: first, the Dodgers in Ebbets Field and the Giants in the Polo Grounds played in outmoded parks. The city fathers had not guaranteed any new stadia with adequate parking facilities in the immediate future. Los Angeles and San Francisco had promised both clubs new municipally or county-built stadiums on favorable rental terms.⁴⁴ Secondly, the Dodgers and Giants move to the West Coast meant they would become the only major league team in their respective markets. They could demand and get higher fees for their telecast rights.⁴⁵ Thirdly, and probably the most influential while also the most denied, was the opportunity for Walter O'Malley's Dodgers and Horace Stoneham's Giants to get into pay television.

The hearings were concerned with the antitrust aspects of professional team sports. They dealt with player contracts, the reserve clause, the player draft and territorial rights. Included under the subject of territorial rights was radio and television contracts. Chairman Celler, whose home district was Brooklyn and who had authored a bill forbidding payment for telecasts viewed in the home, wasn't

hesitant about asking those involved with the imminent Dodger and Giant transition about their pay TV sentiments.

The president of Skiatron, Matthew Fox, told Celler that his company was prepared to serve any team in any United States market.⁴⁶ He acknowledged negotiating with the Dodgers and Giants and said that the Skiatron system was not under FCC jurisdiction since it would remain intrastate.⁴⁷ A tentative rate schedule was set with O'Malley and the Dodgers for fifty cents to one dollar per game per subscriber, said Fox.⁴⁸ The Giants would receive one-third of the pay TV gross in their city for their home games with 25 percent of that going to the visiting team. The other two-thirds would be equally split by Fox's Skiatron Television and its licensee, Skiatron Electronics.⁴⁹

The subcommittee confronted the principals in the San Francisco deal, Fox and Horace Stoneham of the Giants, with an Associated Press story about a news conference called by San Francisco Mayor George Christopher. Mayor Christopher said that Pacific Telephone and Telegraph told him the Skiatron system would cost \$30 to \$40 million and take three to four years to build. The telephone company said that it hadn't received any money from Skiatron. The subcommittee was obviously trying to learn if a limited number of subscribing fans would have to bare the financial burden of an entire city during the initial years, or if there was a possibility of higher subscription rates because of a cost overrun in wiring the city.⁵⁰

Fox told Celler that the Mayor and Pacific Telephone were referring to a conventional coaxial system which was more expensive

than Skiatron's.⁵¹ Whatever the problem was, said Fox, Mayor Christopher could go to Los Angeles, meet with Skiatron engineers and see that the telephone company's figure was exorbitant.⁵²

The Giant's owner Horace Stoneham hinted of his unfamiliarity with pay TV's pitfalls. There was a big difference between the \$30 million and \$60 million wiring cost for the city, he acknowledged. The Giants would begin modestly and not try to wire all of San Francisco immediately. Celler was looking for such a pie-in-the-sky attitude. If only a small number of subscribers were wired when baseball began, and if the city wiring costs were blatantly underestimated, then Skiatron would find itself having to raise the subscription rates for baseball. This would mean fewer and fewer fans would be willing to pay more and more to bale out a system that would be exploiting the Giants, San Francisco, the fans and baseball in general. Celler wasn't attempting to alienate organized sports with his questioning. He just wanted to protect athletics from pay TV which he believed would ruin the sports when controlled by self-satisfying owners.

Stoneham negotiated with Skiatron from late April until mid-May, 1957. Although the parties had reached an agreement pending approval of the National League club owners⁵³ and the Giants' board of directors, Stoneham avoided discussing terms of the pact. He conceded, though, that the Skiatron deal involved substantially more money. Stoneham revealed his team would get twenty-five to fifty cents a game.⁵⁴ The Skiatron-Giant agreement was predicated on New York unless the club moved to San Francisco. Engineering and mechanical difficulties, a

hostile city council and the present television contract with WPIX made the chances of any pay system in New York City quite slim.⁵⁵

Stoneham's testimony was totally noncommittal. He admitted he owned a thousand shares of Skiatron stock, however. To some subcommittee members that represented a conflict of interest. However, Stoneham would not be the last sportsman to have an interest in pay TV.

Walter O'Malley faced the irony of telling Emanuel Celler, who represented the Dodgers' home territory, of his club's plans to leave Brooklyn. Skiatron had approached O'Malley in February 1957 while the Dodgers were at their Vero Beach, Florida spring training site. Fox and O'Malley formulated a contract similar to the Skiatron-Stoneham deal.

The agreed-to document became an escrow agreement to have either New York or Los Angeles wired depending on where the Dodgers played.⁵⁶ The contract wasn't operative yet, O'Malley said. It was a pilot agreement subject to the scrutiny of the other National League clubs.⁵⁷ O'Malley withdrew from the pact when his appearance before the Celler subcommittee was imminent. The Dodger president wished to avoid conducting his negotiations "in a goldfish bowl."⁵⁸ Once he finished testifying, O'Malley planned to resume negotiations with Skiatron.⁵⁹ This arrogance shocked Celler.

O'Malley felt fifty cents per game was a reasonable price for a subscriber.⁶⁰ As the Giants, the Dodgers would receive one-third of the pay TV gross in their city for their home games with 25 percent of that figure going to the visiting ball clubs. The other two-thirds would be split equally between Skiatron Television and Skiatron Electronics.⁶¹

O'Malley denied owning any stock or having any options in Skiatron Television. If the company reached its potential, he would invest.⁶²

New York City Council President Abe Stark left no doubt in the minds of the Celler subcommittee that pay TV wasn't welcomed in the city. Calling it a "Frankenstein monster" that offered the public nothing new except a bill at the end of the month, Stark asked the subcommittee to prevent pay TV from trying to force its way in the back door via the Dodgers and Giants. Stark warned of the consequences in his prepared statement for the hearing.

Tomorrow other major league cities will be affected. Ultimately every sport, as well as other forms of entertainment and culture, will be blacked out across the Nation in order to satisfy the monopolistic interests of a profit-hungry television syndicate. . . . In my opinion, the unholy alliance between the baseball barons and the pay television forces is a proper subject for this committee to investigate. Unless Congress uses its power for the protection of the public, we may all wake up one morning to find that the American people will be paying for the privilege of watching their own television sets.⁶³

Private sponsors spent \$32 million on baseball in 1957, said Stark. If pay TV took over, many industries that sold their goods directly to the consumer might suffer. The national economy would fall since 12 percent of the \$10 billion expended for all forms of advertising was spent on commercial television.⁶⁴

Commissioner Bert Bell of the National Football League said he was not in favor of pay TV personally, that he hadn't discussed the issue with any club owners and hadn't any knowledge of any individual club negotiating with pay TV entrepreneurs. Bell disclosed that closed-circuit television was prohibited in most NFL TV contracts.

No further action resulted on any of the bills discussed during these hearings. On January 30, 1958, Celler introduced H.R. 10378. The bill placed professional baseball, basketball, football and hockey under the antitrust laws. However, the legislation also provided exemptions from antitrust action where sports activities were "reasonably necessary" to insure: (1) the equality of competitive playing strengths, (2) the right to operate within specified geographical areas, and (3) the preservation of public confidence in the honesty of sports contests.

The words "reasonably necessary" gave organized sports a legal chance to defend any policy they pursued. For example, the minor leagues had already asked for a ban against major league telecasts into their areas. The minor leagues were unsuccessful since such a TV restriction allegedly violated the antitrust laws. However, Celler justified such a practice under the antitrust laws by defining it as "reasonably necessary" to preserve the sport.

Organized sports opposed usage of the term "reasonably necessary." Those words invited an onslaught of litigation against practices which sports thought it shouldn't have to prove as reasonable.

H.R. 10378 was referred to the Judiciary Committee and was reported favorably without hearings on May 13, 1958. Four identical bills were introduced in the House which were offered as substitutes for the Celler legislation. H.R. 10378 passed overwhelmingly on June 24, but without the words "reasonably necessary."

Two other amendments were added to the three specific exemptions listed in H.R. 10378. One was an exemption regarding the employment,

selection of eligibility of players, or the reservation, selection or assignment of player contracts. The other exempted the regulation of rights to broadcast and telecast reports and pictures of sports contests. The unrestricted exemptions allowed a small group of professional sports owners the right to name, exclude or boycott radio and television broadcasters. In effect, the House had granted an unlimited exemption for sports.

On June 27, 1958, Senator Thomas Hennings (D-Mo.) of the Judiciary's Antitrust Subcommittee introduced S. 4070, a bill identical to H.R. 10378. Senator Estes Kefauver's Antitrust Subcommittee began hearings in July 1958.

Emanuel Celler appeared to fight for the restoration of his "reasonably necessary" clause. Without those words serving as a check on owners, Celler believed organized sports would take any action it desired. Celler didn't specifically mention rule 1 (d), but if baseball revived it knowing it had a blanket antitrust exemption, two-thirds of the United States and 90 percent of the population could be blacked out.⁶⁵ The major leagues could use the blackout strategy to put their games on pay TV. Celler recommended that the Kefauver subcommittee review the testimony of Walter O'Malley before the House Antitrust Subcommittee in 1957. All the owners weren't like O'Malley, Celler believed, but they couldn't be given such an antitrust exemption.⁶⁶

Celler's concern with the sports lobbying attempt to force an antitrust bill through Congress permitting uncontrolled blackouts helped sway his Senate colleagues into inaction. Senator William Langer of

North Dakota heeded Celler's warning. Langer contended that millions of people outside the area of a closed-circuit operation would be unable to watch their teams play, even if they decided to pay for the privilege. Langer amended S. 4070 to protect the public's privilege of viewing sports on TV without payment of a toll, fee or subscription.⁶⁷

S. 4070 was tabled because it was too broad and no acceptable substitute was drafted before Eighty-Fifth Congress adjourned.⁶⁸

Celler's influence lasted into the Eighty-Sixth Congress when it convened in 1959. Senator Hennings introduced a bill identical to the defunct S. 4070 except in its application of the telecasting and broadcasting provisions. It went one step further and allowed the reinstitution of rule 1 (d).

Estes Kefauver introduced S. 886 in February 1959. His bill left exemptions for television and radio to the FCC's judgment as to whether the arrangements were "reasonably necessary." The bill was to be effective for four years to enable Congress to reexamine the situation.

Senator Kefauver introduced S. 2545 shortly afterwards. There was a two-part TV exemption. The first part restored rule 1 (d). It allowed for the limitation of television within 75 miles of the home community of another club on the day when the home club was scheduled to play a league game in the same sport. The bill also permitted as an alternative mutual distribution of any portion of the television revenues among clubs in the same or different leagues received from telecasts in the same sport. The revenue sharing was allowed only when no club

televised its contests from within 75 miles of the home community of another club in a different league or sport on a day when the televised club was scheduled to play a regularly scheduled game, unless consent was obtained from the other club.⁶⁹

Senator Kenneth Keating (R-N.Y.) appeared before the Kefauver subcommittee to promote the reinstitution of rule 1 (d) in his bill, S. 616, and to expose the shortcomings of Kefauver's S. 886. Keating's bill afforded protection to the minor leagues without beleaguering the FCC with what was "reasonable and necessary." Furthermore, Kefauver's bill presented the problem to the FCC but mentioned no standards to follow.⁷⁰

Keating found allies in professional sports. NFL Commissioner Bert Bell felt Keating's bill wouldn't interfere with his league's radio and TV arrangements. Baseball Commissioner Ford Frick naturally supported Keating's bill with its 1 (d) provision. There was no "reasonably necessary" clause nor another federal branch--the FCC--to face.⁷¹

The FCC favored neither the Kefauver nor the Keating legislation. Chairman John Doerfer wrote Kefauver and said that S. 886 didn't amend the Communications Act of 1934 in the manner Kefauver anticipated. The FCC declined to involve itself with public interest considerations of antitrust matters which were really Congressional policy questions. The agency had no day-to-day working familiarity of appraising competitive and economic factors against a framework of antitrust doctrines said Doerfer. Hearings would become a prerequisite to determine what was "reasonably necessary." Unless the FCC was dropped in favor of some

other administrative or legislative body in determining what was "reasonably necessary," the FCC would not support the bill.

The FCC also felt Keating's S. 616 didn't amend the Communications Act. The FCC felt it had no authority to either prevent a particular program from being shown or to require a station to carry it. Section 326 of the Act prohibited the FCC from exercising censorship power over radio communications transmitted by any radio station. The FCC excused itself from the antitrust mess.⁷²

S. 616, S. 886 and S. 2545 were reported to the parent Judiciary Committee on June 13, 1960. They were indefinitely postponed for action the same day.

In May 1960, Kefauver introduced S. 3483, a bill similar to his S. 886. Title I of the bill placed baseball, football, hockey, and basketball under the antitrust laws. Title II contained an exemption for baseball's right to limit telecasts within 75 miles of the home community of another club on the day when the club was playing a regularly scheduled league game. The clubs were also allowed to mutually distribute all or part of their TV revenues among themselves. The revenue sharing was limited by the requirement that no club could televise its games from cities within 75 miles of another club's home territory in a different league on a day when that club, namely the minor league franchise, played a regularly scheduled home game.⁷³

At the time of S. 3483 there was considerable activity relating to the proposed Continental League, a third major baseball league. The new league was the center of attraction in the hearing room with representatives of organized baseball presenting their testimony.

The Judiciary Committee received the bill from its Antitrust Subcommittee and reported it to the Senate with amendments and without recommendation on June 29, 1960.⁷⁴ S. 3483 went to the floor eight days later and was amended by striking Title II. The bill was recommitted without instructions to the Judiciary Committee where it languished and eventually died.

The House dealt with seven bills during the 86th Congress. Six of the bills were identical to H.R. 10378 except for provisions relating to radio and television. Hearings on these proposals were held by the Antitrust Subcommittee in September 1959. No further action on these bills was taken.⁷⁵

The antitrust era did not end in the 1960's. Sports attracted an increased amount of congressional attention when television began providing more and more revenues to athletics. Whether it was a business or sport under the changes the professional leagues had undergone since the 1922 Federal Baseball case was never specifically determined by Congress. To this day there exists no all-encompassing antitrust legislation for the four major professional sports.

The pay TV mortality rate was high. Skiatron was shut down in California in 1959 and Zenith was only in its infancy in Hartford during the 1960's. Congress focused more and more on league and network broadcast agreements and less on pay television. It wasn't until the FCC's 1968 order establishing nationwide subscription television on a permanent basis that the pay TV question needed new solutions.

The First California Pay TV Operation

The Dodgers and Giants announced their intention of moving West by world series time in 1957. There was no more National League baseball played in New York.⁷⁶ However, it was a rough financial trip for both clubs.

Horace Stoneham and the Giants' board of directors approved a Skiatron contract for \$2 million. The club received \$1 million when it signed for pay TV and the other \$1 million at a later date.⁷⁷ Despite the promise of a big pay TV payoff, the Giants put themselves \$3.6 million in debt when they moved. The club had to pay \$1 million in damages to the Pacific Coast League for invasion of its territory. The Giants also paid a \$125,000 indemnity to the San Francisco Seals, \$525,000 for rental and property taxes for the Polo Grounds on a lease that had four years to run and \$2 million for rent of Seal's Stadium until Candlestick Park was completed. Profits for the club in the preceding five years were only around \$250,000.⁷⁸

The Dodgers had similar problems but their five year profit picture was almost \$1.9 million.⁷⁹

Skiastron intended to wire Los Angeles and San Francisco with parax, a copper-coated steel wire costing about four cents per foot. The company estimated the Los Angeles cost at \$12 million which was twice the San Francisco estimate.⁸⁰ What wasn't anticipated was Pacific Telephone and Telegraph's refusal to allow the parax installations on the basis that it would be a monopoly.⁸¹ Skiastron was forced to use coaxial cable which was several times more expensive.⁸²

Skiatron's construction troubles were compounded when a Citizens Committee Against Pay-TV formed in January 1958 and collected enough signatures in Los Angeles to place subscription television up for a June referendum vote.⁸³ The Citizens Committee succeeded in stalling Skiatron from wiring Los Angeles and in March 1958 the company asked the city council to withdraw their franchise.

The Dodgers and Giants opened their 1958 season with a home and home series before huge turnouts at their respective ball parks. Interest was high but Skiatron's subscriber penetration rate was zero. Less than three weeks after the season began, Walter O'Malley surprised everyone when he announced that eight Dodger road games--all from San Francisco--would be seen on commercial TV in 1958.⁸⁴ The Dodger owner said he hadn't heard from Skiatron in months and that his change of heart was caused by 400 letters from shut-ins asking for a chance to watch baseball on TV.⁸⁵ He told newsmen he was doing it as a public service, but O'Malley did it as much for charity as for his love of the dollar.

Horace Stoneham was angrier with Skiatron. He even refused an offer from a San Francisco commercial station to carry his team's road games.⁸⁶

Skiatron maintained a low profile until near the end of the baseball season when it cited technological problems as the reason for the company's lackluster start. Skiatron had been forced to develop a new metering system for coaxial cable and the old decoder system was obsolete.⁸⁷

Skiatron's announcement appeased Stoneham and the Giants' owner forecasted that his club would be on pay television in 1959 at a stockholders meeting.⁸⁸ O'Malley differed on his prognostication and harbored animosity toward pay TV. His Dodgers would remain on commercial television in 1959 with 11 road games, all from San Francisco, shown.⁸⁹

In December 1959, the Securities and Exchange Commission suspended trade of Skiatron Electronics and Television Corporation stock on the American and Over The Counter exchanges. Allegedly, Skiatron's registration statement was so misleading that investors couldn't properly evaluate the stock's worth.⁹⁰ Skiatron pledged not to abandon its California system and said a \$50 million subsidy from a major motion picture company was forthcoming.⁹¹ No aid ever came and the SEC disclosed that Matthew Fox was \$4 million in debt. Horace Stoneham had only received \$750,000 of the \$2 million Fox had promised the Giants for 1958.⁹²

Pay TV's demise in California resulted from theater interests disguised as a Los Angeles citizens group, a veto of parax wire construction by Pacific Telephone and Wall Street troubles. Walter O'Malley, Horace Stoneham and Matthew Fox had not found gold in California but the triumverate would try again in 1963.

Pay TV was a viable alternative for sports promoters worried about overexposing their events on commercial television. The National Opinion Research Center's findings for the National Collegiate Athletic Association and the elimination of rule 1 (d) brought pay TV into the limelight.

The activities of Telemeter, Zenith and Skiatron generated fear in other entertainment interests which stood to lose their audience appeal to a new communications medium. Commercial television and motion picture theater owners sought successfully to prolong STV's embryonic age through legislative and administrative lobbying.

Two pay TV questions arose during this era. One was whether the Communications Act of 1934 permitted subscription television, and if so, was it the Congress or the FCC that should authorize it. The second was whether one man--a sports promoter--could remove his team's games from commercial television and enter pay TV at his personal whim.

The first query was eventually solved, but the current antitrust complications involving pay cable were only beginning to emerge in the mid-1950's.

The 1950's was a time when pay TV was harassed by broadcast and theater interests while the federal hierarchy postponed STV experimentation to protect the vested interests.

Footnotes--CHAPTER I

¹Broadcasting, April 4, 1953.

²Ibid., January 5, 1953.

³New York Times, March 2, 1951, p. 29.

⁴Ibid., June 4, 1951, p. 34.

⁵Broadcasting, May 3, 1954, p. 67. Subscribers paid an installation fee of \$162.00. There was also an annual wire cost of \$64.80. Telemeter utilized several hundred coin-operated boxed receiver sets produced by various manufacturers to determine the public's acceptance of pay television. The coinbox installation charge was \$21.75 and the subscriber had to guarantee \$3.00 per month in program acceptances. Broadcasting, April 6, 1954, p. 46.

⁶Ibid., December 7, 1953, p. 56.

⁷Ibid., January 18, 1954, p. 32.

⁸Ibid.

⁹Year End Report of the NCAA Television Committee to the Forty-Eighth Annual Convention of the National Collegiate Athletic Association, 1954, p. 32.

¹⁰Broadcasting, January 11, 1954, p. 28.

¹¹Ibid., May 3, 1954, p. 67.

¹²Ibid., January 18, 1954, p. 82.

¹³Ibid., May 3, 1954, p. 67.

¹⁴Ibid., November 15, 1954, p. 32.

¹⁵Ibid., June 15, 1953, p. 76.

¹⁶Ibid., January 1, 1951, p. 60.

¹⁷Ibid., July 16, 1953, p. 93.

¹⁸First Report and Order, 23 FCC 532 (1957).

¹⁹During Telemeter's Palm Springs service, a local drive-in theater operator charged Telemeter with antitrust violations saying that movies were seen on pay TV before they were released to the theaters. The operator said Paramount made pictures and distributed them to its

Telemeter subsidiary which was really acting as an exhibitor.
Broadcasting, January 11, 1954, p. 56.

²⁰ New York Times, May 16, 1951, p. 10.

²¹ Ibid., June 5, 1951, v, p. 1.

²² Ibid.

²³ Ibid., Only Ezzard Charles and Jersey Joe Walcott were on home TV.

²⁴ Ibid., August 8, 1951, p. 32.

²⁵ Broadcasting, October 25, 1954, p. 80.

²⁶ Ibid., November 15, 1954, p. 31.

²⁷ Ibid., February 28, 1955, p. 60.

²⁸ Ibid., May 9, 1955, p. 58.

²⁹ Broadcasting, May 23, 1955, p. 27.

³⁰ O'Malley was not a new advocate of pay TV. In an FCC petition for pay TV hearings filed by four UHF grantees in the New York City-Philadelphia area in 1953, a supportive statement by the Dodger owner was enclosed. Broadcasting, August 10, 1953, p. 31.

³¹ Ibid., June 20, 1955, p. 87.

³² Ibid., May 16, 1955, p. 114.

³³ Ibid., May 9, 1955, p. 72.

³⁴ This rule was adopted by the major leagues in 1946 and provided every minor league club with the right of protection within a fifty mile radius of its ball park. Radio and television coverage of a major league game in a minor league market was not allowed without the club's consent. The antitrust division of the Justice Department successfully challenged the rule's legality in 1949 based on alleged restraints of competition. Rule 1 (d) was amended by limiting its effect to the hours during when a minor league team was playing a home game and to the hours when a minor league team was telecasting a road game back to its home territory. In 1951, the Justice Department advised baseball it was reopening its investigation of the rule. The government pressure forced an elimination of the rule under any circumstances. Since that date, each major league club had an unlimited right to broadcast any of its games into minor league markets even if the minor league teams opposed it on the basis of economic injury. Senator Edwin Johnson (D-Colo.), who was the

president of a minor league, blamed television and the Justice Department for destroying one-third of the minor leagues. In 1953, he introduced a bill to readopt Rule 1 (d) hoping to save major league baseball's source of talent--the minor leagues. The bill died after an Interstate Commerce Committee hearing in May 1953. Statement of William Shea, "History of Sports Antitrust Legislation," U.S., Congress, Senate, Committee on the Judiciary, Organized Professional Team Sports-1960, Hearings, before the Subcommittee on Antitrust and Monopoly on S. 3483, 86th Congress, 2nd sess., 1960, p. 163.

³⁵ Broadcasting, June 6, 1955, p. 48.

³⁶ New York Times, May 23, 1955, p. 27.

³⁷ Ibid., December 6, 1955, p. 48.

³⁸ Broadcasting, September 19, 1955, p. 201.

³⁹ Ibid., February 6, 1956, p. 47.

⁴⁰ Radovich v. National Football League, 352 U.S. 445, (1957).

Radovich, an all-pro guard with the Detroit Lions contended the NFL conspired to monopolize and control pro football in the United States. Radovich had jumped to the rival All-American Conference, a competitive professional football league, after breaking his contract with Detroit.

In 1948, the San Francisco Clippers, a member of the Pacific Coast League which was affiliated with but not a competitor of the NFL, offered to employ Radovich as a player-coach. The NFL advised the Clippers and all other affiliated clubs that Radovich was blacklisted and any club signing him would suffer severe penalties. This blacklisting effectively prevented Radovich's employment in organized professional football.

Radovich sued the NFL for treble damages and injunctive relief. He alleged, inter alia, that radio and TV incomes were derived from nearly every state in the Union, that player contracts prohibited athletes from signing with another club without the consent of his contract-holder and there was a conspiracy to destroy a competitive league, the All-American Conference, by boycotting it and its players.

⁴¹ United States v. International Boxing Club of New York, Inc., 348 U.S. 236, (1955). The IBC promoted professional championship boxing matches. The court found the IBC guilty of restraining trade and commerce in the interstate promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship matches in the United States. IBC's receipts from television, radio and film sometimes exceeded the revenue derived from the sale of admission tickets.

⁴² Radovich v. National Football League, 352 U.S. 445, (1957).

⁴³ New York Times, June 10, 1957, p. 92.

⁴⁴ Neither the Dodgers or Giants owned the land they played on. They had to pay the City of New York a property tax under the terms of their leases. New York Times, June 5, 1957, p. 28. In 1954, San Franciscans voted to provide a \$5 million bond issue for a new stadium. Los Angeles voters approved a \$39 million bond issue for park and recreation facilities. A \$1.5 million portion could be diverted for a stadium. New York Times, June 2, 1957, pp. 42, 44.

⁴⁵ The Yankees, Dodgers and Giants televised all their home games in 1957. Fans saw a total of 231 home games that year. New York Times, May 29, 1957, p. 19. The Dodgers and Giants felt overexposed on New York television. The Dodgers received \$450,000 for their TV rights from WOR-TV. The Giants received \$730,750 in 1957 but this figure includes both radio and TV rights. U.S., Congress, House, Committee of the Judiciary, Organized Professional Team Sports, Hearings, before the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, on HR. 5307 and other bills, 85th Cong., 1st sess., 1957, pp. 1974, 1954.

⁴⁶ Hearings before the House Judiciary Committee on Organized Professional Team Sports, 85th Cong., 1st sess., 1957, p. 212. Skiatron Electronics and Television Corporation was incorporated in New York in May 1954. Shortly afterwards, Skiatron Television Inc. and Matthew Fox, who had become prosperous distributing feature films to television, acquired the American rights to Subscriber-Vision under a royalty arrangement with Skiatron Electronics which had a 99 year license to manufacture the necessary coding and decoding equipment. Ibid., pp. 2110, 2115.

⁴⁷ Subscriber-Vision was a wired pay TV system. Subscribers had three channels to choose. One channel had hi-fi music 24 hours a day for free of charge. The other two carried pay programming which required the deposit of coins in a box associated with the decoder. The picture appeared scrambled on all sets whether they belonged to subscribers or not. A decoder had to be attached to the set to unscramble the video and the decoder could only be activated by coins. New York Times, June 6, 1957, p. 25. The minimum monthly charge would be \$3.00. Ibid., July 22, 1957, p. 32; and the installation fee was \$20.00. Broadcasting, August 26, 1957, p. 28. Further changes were made in Subscriber-Vision's ownership and technical system in the 1960's.

⁴⁸ Hearings before the House Judiciary Committee on Organized Professional Team Sports, 85th Cong., 1st sess., 1957, p. 2120.

⁴⁹ Ibid., p. 1953.

⁵⁰ Fox had estimated wiring San Francisco would cost \$6 million. New York Times, July 22, 1957, p. 68.

⁵¹ Ibid., p. 2121.

⁵² Ibid., p. 2122.

⁵³ The other club owners had to amend the league's TV contract to provide for pay TV.

⁵⁴ Hearings before the House Judiciary Committee on Organized Professional Team Sports, 85th Cong., 1st sess., 1957, pp. 1953, 1955.

⁵⁵ Ibid., p. 1952.

⁵⁶ Ibid., p. 1868.

⁵⁷ Ibid., p. 1877.

⁵⁸ Ibid., p. 1869.

⁵⁹ Ibid., p. 1881.

⁶⁰ Ibid., p. 1875.

⁶¹ Ibid., p. 1876.

⁶² Ibid., p. 1877.

⁶³ Ibid., p. 1823.

⁶⁴ Ibid.

⁶⁵ The two-thirds and 90 percent figures were supplied by the Justice Department when it appeared before the Kefauver subcommittee. The government maintained H.R. 10378 as written would let sports have the unchallenged right to deprive the public of games on TV. Major league baseball would be blacked out in minor league areas even if the major league game was played during the day and the minors weren't playing until night. Therefore, with so many minor league franchises within 75 miles of a major league city, no one would see a game on television. Celler thought this not to be a "reasonably necessary" exemption. Broadcasting, July 16, 1958, p. 33.

⁶⁶ U.S., Congress, Senate, Committee on the Judiciary, Organized Professional Team Sports, Hearings, before the Subcommittee of Antitrust and Monopoly of the Committee on the Judiciary, Senate, on S. 4070, 85th Cong., 2nd sess., 1958, p. 383.

⁶⁷The Langer amendment read, "No person conducting or engaging in any such organized professional team sport, shall enter into or become a party to any contract, agreement or other arrangement resulting directly or indirectly in the imposition upon the public by any person or any requirement for the payment of any toll, fee, or subscription or other charge for the privilege of viewing on television receiving sets in private residences any organized professional team contest of any such sport."

⁶⁸New York Times, August 2, 1958, p. 12.

⁶⁹U.S., Congress, Senate, Committee on the Judiciary, Organized Professional Team Sports, Hearings, before the Subcommittee of Antitrust and Monopoly of the Committee on the Judiciary, Senate, on S. 3483, 86th Cong., 2nd sess., 1960, p. 165.

⁷⁰U.S., Congress, Senate, Committee on the Judiciary, Organized Professional Team Sports, Hearings, before the Subcommittee of Antitrust and Monopoly of the Committee on the Judiciary, Senate, on S. 616, 86th Cong., 1st sess., 1959, p. 10.

⁷¹Ibid., pp. 31, 84. The minor leagues received \$10 million in subsidies from major league baseball in 1958. New York Times, July 30, 1959, p. 32.

⁷²Ibid., p. 187.

⁷³Hearings before the Senate Antitrust Subcommittee on Organized Professional Team Sports, 86th Cong., 2nd sess., 1960, p. 169.

⁷⁴S. Rept. No. 1620, 86th Cong., 2nd sess., 1960, p. 3.

⁷⁵S. Rept. No. 462, 89th Cong., 1st sess., 1965, p. 10.

⁷⁶Both teams made the shift together to offset traveling expenses for teams going West for their road trips. New York City Mayor Robert Wagner immediately sought a citizens committee to bring National League baseball back to the City. New York Times, October 9, 1957, p. 1. The citizens committee succeeded and in 1962 a new franchise, the New York Mets, began play.

⁷⁷New York Times, September 6, 1957, p. 23.

⁷⁸Ibid., August 20, 1957, p. 30.

⁷⁹Ibid., June 21, 1957, p. 14.

⁸⁰Ibid., July 22, 1957, p. 32.

⁸¹Broadcasting, October 5, 1957, p. 5.

⁸² Ibid.

⁸³ Skiatron charged the Southern California Theater Owners Association with using money and fear tactics to kill pay TV. Allegedly, the theater interests paid thirty cents for each name that hired solicitors acquired for petitions. The solicitors were instructed to tell potential voters that they would lose free TV if they did not sign. Broadcasting, February 17, 1958, p. 99.

⁸⁴ Ibid., November 4, 1957, p. 68.

⁸⁵ Ibid., May 5, 1958, p. 68.

⁸⁶ New York Times, April 30, 1958, p. 37.

⁸⁷ Broadcasting, September 19, 1958, p. 78.

⁸⁸ Ibid., September 15, 1958, p. 78.

⁸⁹ Ibid., April 6, 1959, p. 66.

⁹⁰ The SEC lifted its ban in October 1960, but the Amex imposed a ban of its own which lasted until Skiatron clarified its financial status. Broadcasting, October 24, 1960, p. 81.

⁹¹ Ibid., January 18, 1960, p. 88.

⁹² Ibid., May 2, 1960, p. 74.

CHAPTER II

AUTHORIZATION OF STV TRIAL TESTS AND INITIAL PAY TV OPERATIONS

The Authorization of Pay TV Experimentation

The FCC issued its first thoughts on pay television in 1955. Petitions in favor of STV came before the FCC as early as 1952 when Zenith filed.

Harold Fellows, president of the NARTB, wrote the FCC about the Zenith petition. Fellows did not comment on pay television, but he urged the FCC to give consideration in full rulemaking proceedings.

The Joint Committee on Toll TV filed in opposition to the Zenith request and urged a full public hearing.¹

The pay TV proponents said they would open new horizons of entertainment and information by making entertainment available previously unseen due to economics or program restrictions. The UHF problem could be solved by filling it with STV stations. This would lead to a quicker conversion rate to all channel receivers.

Zenith asked the FCC for authorization of a case-to-case basis. However, feeling there should be a full rulemaking proceeding, the FCC asked for comments. It wanted thoughts on its authority to authorize and regulate pay television, data and information on its technology,

cost estimates for transmitting and subscriber equipment and opinions on how the public interest would be affected.²

An avalanche of mail poured into Washington. Letters from segments of the television industry, motion picture distributors and backers of the three pay systems were among the 25,000 informal pieces of correspondence from the public and numerous organizations.³

In a Notice of Further Proceedings on May 23, 1957, the FCC concluded it had the statutory authority to authorize subscription television if it was in the public interest. The FCC felt the comments received were useful but they weren't a sufficient basis for approving an STV service. Trial demonstrations were necessary.⁴

Later in 1957, the FCC announced its first report on STV. Conditions were listed for trial operation applications. The FCC needed answers to three STV questions: public acceptance of the new medium, STV's competitive impact on commercial television and whether the various pay TV systems were technically feasible.⁵ The FCC chose this course based on briefs supplied by interested parties. Zenith, Telemeter and Skiatron naturally favored STV. Opposition came from the three major networks, the NARTB and the Joint Committee on Toll Television.

Whether it should be the Congress or the FCC that was to authorize pay TV was the dilemma that faced the lawmakers for several years. While FCC administrators were grappling with the new video system, Senate and House leaders were doing likewise.

The Senate Interstate Commerce Committee focused on STV in 1956 in its television inquiry. Paul MacNamara of Telemeter told

Chairman Warren Magnuson (D-Wash.) of a hypothetical plan his company had for saving minor league baseball. MacNamara used Sandusky, Ohio as an example of a minor league area able to see major league games (the Cleveland Indians) when the Sandusky club played at home. MacNamara explained to the committee that a fan would not see Sandusky when he could watch Mickey Mantle on home television. Pay TV was the answer. Some of the money received by the Indians for switching to pay television could be allocated to the Sandusky franchise owners.⁶ Pay TV was insurance against the loss of sports to theater television.⁷

Governor Edwin Johnson of Colorado, a former committee member, appeared before his old colleagues as the nonsalaried president of the Western Baseball League, a minor league. Eager to see television advance the sport instead of destroying it, Johnson spoke in favor of pay TV. Advertisers were not paying enough to offset attendance declines, said Johnson. Also championship heavyweight boxing had virtually disappeared from home television since 1951. Johnson deplored the National Collegiate Athletic Association's football television policy and named three major league baseball clubs that blacked out all their games in their cities.⁸

Then Johnson crusaded for the cause most personal to himself--the survival of baseball with a healthy minor league system as its foundation. There were 58 minor leagues in 1950. Five years later there were 33. Attendance had dropped in that period from 35 million to 18 million. Like Telemeter, Johnson hypothesized that the minor leagues might share in the major league's subscription TV revenue.

Not only that, but the minor league games should also be on pay TV. There was no doubt in Johnson's mind that the FCC had the authority to authorize pay TV.⁹

Marcus Cohn, counsel to the Committee Against Pay-To-See-TV, worried about STV's raiding of commercial television entertainment.

Sports are but an illustration. Every program that has a proven audience appeal is in danger of being subverted to the coinbox. Sports programs merely illustrate the fact that any program which is now a success on television is suited for and must inevitably--by the very law of economics--be used by pay-as-you-see television.¹⁰

Evidence of this was the support of baseball and other organized sports for pay TV. Cohn asked why baseball should be content with Gillette for the World Series sponsorship if they could get 30 million fans to pay \$1.00 per game. Pay TV and commercial television were unequal competition, said Cohn, the two couldn't survive side by side.¹¹

Richard Salant, vice-president of CBS, maintained that the extensive sports coverage of commercial television left little for pay TV to add. Salant listed the numerous attractions on the three networks. He thought that Telemeter's and Governor Johnson's plan for pay TV to act as an economic support for sports promoters was a fallacy. CBS called it a tax on the nation's viewers to subsidize sports.¹²

Sports and pay interests had already made up their minds, said Salant. He cited the Dodgers' plan to move West and the comments filed by the Madison Square Garden Corporation in the FCC's STV proceeding.¹³ The pay industry was candid about what it wanted, claimed Salant. Referring to the Saturday Evening Post, Matthew Fox of Skiatron had said, "The only thing we want that's now on free television are the top

20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

sports events--and the sports promoters agree with us on this." Eugene McDonald of Zenith told Variety that Phonevision was pursuing the Rose Bowl and Army-Navy games.¹⁴

ABC called for Congress to assert its jurisdiction over subscription television. The network believed the FCC didn't have the statutory authority to authorize a system that was only a price tag intent on destroying commercial television. ABC believed that sports activity was widespread enough without the need of a pay system and that improved coverage of athletic events by commercial TV was occurring.¹⁵

The Commerce Committee recommended that the FCC authorize trial demonstrations of STV. Among the types of programming that were to be tested were those withheld from commercial television because of their adverse effect on the box office which couldn't be made up adequately by commercial television.

Representative Oren Harris (D-Ark.), Chairman of the House Interstate Commerce Committee, shared ABC's opinion about who had the statutory authority to authorize pay television. In April 1957, a month before the FCC's notice that trial pay demonstrations were necessary, Chairman Harris asked the FCC to come before Congress before authorizing STV.¹⁶ The FCC refused, saying that nothing in the Communications Act of 1934 or the Radio Act of 1912 forbade a charge for receiving broadcast signals.¹⁷ Though the seven-member panel was split on the pay question, Chairman Doerfer promised a prompt decision in September 1957.¹⁸ A week later, Harris said his committee would hold hearings after the Congress reconvened in January 1958. The FCC's first report

on STV released in October 1957 announced conditions under which applications for trial operations would be accepted.¹⁹

Congressional mail was heavy and running against pay TV.²⁰ Oren Harris himself admitted he was against the new system and indicated that his committee would analyze the FCC's first report when the second session of the 85th Congress began in 1958. Special scrutiny would be directed at the terms and conditions of trial operations and applicant information.²¹

John Doerfer, accompanied by the other six commissioners, opened the Harris hearings with an explanation of their STV philosophy.

Our [FCC] concern is not to abort any idea. . . . We do not know whether the subscription television is an idea about to be born; or whether it is just one of these things that will disappear under the test of experience and trial. But I would say this . . . I think the Commissioners who voted for the test believe this, is that we do not have the omniscience, we do not know.

The American people are most resourceful. They should be given the opportunity to accept or reject. If they reject, there is no problem whatsoever. If the test indicates that they will accept, there will be time enough for Congress to consider the full implications of it, and to legislate accordingly.²²

W. Theodore Pierson, who appeared as counsel and on behalf of Zenith's Phonevision, cited a trend over the past few years to restrict sports on home television. This was due to closed-circuit theater TV. The amount sponsors paid for advertising on sports events did not suffice for the drop in gate attendance. Pierson listed four examples:

1. Heavyweight Boxing. Since 1951 the majority of championship fights were not televised and other weight divisions also refused home television at times.

2. Major League Baseball. During the past few years the Kansas City Athletics and Milwaukee Braves permitted no television coverage whatsoever of their games. The Dodgers and Giants had announced they would not allow their games on commercial TV when they reached Los Angeles and San Francisco.
3. College Football. The NCAA permitted national telecasts of 11 college games in 1957 and limited regional telecasts to 12 other games. Only 23 games were available from the entire collegiate schedule.
4. Pro Football. TV coverage of home games was prohibited within a 75 mile radius of the home city to protect gate attendance.²³

Commercial television was undermining the entire financial structure of organized sports, said Pierson. He blamed commercial TV for the near disappearance of local boxing clubs and the decreasing number of minor baseball leagues operating each season.²⁴ STV was a new source of income. The combination of televising home games on pay TV and road games under advertising sponsorship on commercial television would produce more income for a team than an attempt to televise all its games entirely by STV or commercially. Pierson predicted pay TV was a supplement, not a supplanter.

CBS and NBC disagreed sharply. CBS' Frank Stanton said the number of championship boxing matches not seen--either because they were withheld from home TV or blacked out locally--only amounted to a fraction of 1 percent of all the network and local sports programming seen each year. Authorizing pay TV simply wasn't worth the price of one or two additional boxing matches annually.²⁵

NBC President Robert Sarnoff added that the more time pay TV had to fill, the more it would take existing attractions from commercial television. Sarnoff cited the Dodgers and Giants as perfect examples.

The economics of pay TV--like those of free television--compel it to develop the largest possible subscription audiences. Many of its supporters are candid enough to admit it.²⁶

The networks predicted families would have to pay for, or do without, all the other sports they were accustomed to seeing on home TV once STV used dollar signs to lure sports interests away from commercial television.

The House committee ended its hearings January 23, 1958. There wasn't enough time to pass legislation before the FCC's March 1 date for acceptance of applications for three-year pay experiments. Oren Harris told the FCC to stay their action until Congress decided whether the agency had or should have the statutory power to allow trial tests.²⁷

In the Senate, Strom Thurmond (D-S.C.) and six other colleagues introduced a resolution against STV. They asked the FCC to wait for congressional guidance.²⁸ Nineteen anti-pay TV bills were introduced in the House within a month and pressure from the Senate and House Commerce Committees forced the FCC to postpone its processing of STV test applications just three days before its March 1 target date.²⁹

When the 86th Congress convened in January 1959, Oren Harris introduced a resolution banning pay TV and delegating authority to the FCC to authorize technical tests for limited periods. One motive for the resolution was Harris' fear "that baseball, and possibly football, would enter into a closed-circuit operation where the general public might be deprived of viewing these outstanding sports events."³⁰ He knew of no existing contracts between sports and pay TV. However, one baseball club which Harris refused to name, had agreed to a wired operation if and when such facilities became available.

Harris wanted the Commission to permit STV technical tests so his committee could have additional information from actual field experience.³¹

The FCC again buckled under the Congressional pressure. A third report, issued in March 1959, stated that the FCC was ready to seriously consider STV applications for three-year trial operations.³² The move received marginal backing in Congress. Harris introduced legislation subjecting wired systems such as Skiatron's to the same limitations the FCC imposed on over-the-air STV in its third report.³³

On June 22, 1960, the Hartford Phonevision Company, a protege of Zenith and RKO General, filed the first STV application under conditions of the third report to operate a subscription television station in Hartford, Connecticut.³⁴ The great pay TV adventure began and Hartford eventually proved the sole experimental basis for the ultimate authorization of nationwide STV.

The Hartford Pay TV Experiment

The FCC's third report on Docket 11279 in 1959 welcomed any possibilities for increasing usage of UHF channels. STV was a high hope to provide fresh impetus to an almost empty bandwidth. Yet the FCC seemed to work against itself by authorizing trial subscription tests only in markets with substantial amounts of commercial programming service. This permitted the continued availability of commercial programs and insured maximum opportunities for competition between the STV and commercial stations.

The FCC had thrown pay TV into the major leagues of television-- the top twenty markets where there was more commercial competition to act as a buffer to the new medium. Years later, the FCC reversed its strategy with another competing medium, CATV, and ostracized it to the hinterlands.

The FCC no doubt felt the heavy influence of commercial broadcasters. STV's economics wasn't feasible for small markets so the FCC encouraged it to enter the largest markets where small- and medium-sized broadcasters were unaffected and large markets offered enough "free programming" to offset any STV inroads.

Nevertheless, on June 22, 1960, Zenith allied itself with RKO general and the Television Entertainment Company (Teco) in endorsing an application filed by the Hartford Phonevision Company for an STV trial test over a UHF station in that city.³⁵

Zenith agreed to manufacture equipment for the system. Teco was established by Zenith to develop and market Phonevision in North America. Teco assigned the Hartford franchise to RKO General, which owned the Hartford Phonevision Company. Hartford Phonevision was the licensee of WHCT, channel 18.³⁶

WHCT proposed to operate as a regular station 30 hours a week. STV programming would be telecast approximately 40 hours weekly, but because of repeated shows (movies), only 17 of the 40 hours would be unduplicated. Motion pictures were the bulk of WHCT's pay programming with sports, legitimate theater, opera, ballet, educational features and childrens's shows all a part of its pay operation. The majority of programming would cost between \$0.75 and \$1.50.³⁷

To determine if the application met the requirements of the third report, the FCC scheduled five days of hearings in October 1960. RKO General/Hartford Phonevision President Tom O'Neil spent three days alone on the witness stand vowing among other things that WHCT wouldn't negotiate for any sports event generally seen on commercial television.³⁸

The Hartford application was approved February 23, 1961 to become the first over-the-air pay system in the United States. One month later Broadcasting reported that the Connecticut Committee Against Pay TV, a group consisting mainly of theater owners, intended to use the courts to overrule the FCC's decision. The theater owners contended that public airwaves couldn't be used by private interests for private profit.³⁹ The anti-pay group questioned the FCC's authority to authorize the STV system, believed that the FCC had erred in so doing without knowing specifically what WHCT's programming plans were and that the FCC had mistakingly concluded that STV served the public interest.⁴⁰ The FCC maintained that the Communications Act permitted it to deal with technical developments and to encourage or foster their expansion as long as they were in the public interest.⁴¹

The District of Columbia Court of Appeals did not find the FCC guilty of its statutory authority.⁴² The court ruled on March 8, 1962 that the Congress had indeed commanded the Commission under Section 303 (g) of the Communications Act to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

Secondly, the court felt the Hartford experiment wouldn't undermine the public interest, convenience and necessity during the term of the license. Other licenses granted by regulatory agencies were for the future and much about the future was unpredictable. The court sought to placate the Citizens Committee when it emphasized that the FCC had the power to terminate the license upon notice and hearing prior to the end of the three year term. Also, the FCC could refuse to renew it after three years.

Surely its (FCC) power to see that this area of the public domain is used in the public interest is not less for "paid" television than for the existing system of so-called "free television." It wasn't reasonable to require the licensee to commit himself now to definite named programs until the wishes of subscribers had been heard and the potential sources of programming material had been explored.⁴³

The anti-pay forces weren't satisfied, however. They filed a writ of certiorari with the Supreme Court but it was denied October 8, 1962.⁴⁴ Pay opponents had lost two battles with the FCC and the judiciary, but the war was far from over.

WHCT began its three year test June 29, 1962 with a showing of a feature film to 188 subscribers.⁴⁵ The movie fee was \$1.00.⁴⁶ That same week Thomas O'Neil announced that the Floyd Patterson-Sonny Liston heavyweight championship fight would be shown on a pay basis in September.⁴⁷

Hartford had 1,729 subscribers after six months.⁴⁸ Installations averaged 50 per week. Nonsubscribers believed STV was too costly or that it didn't offer enough programming for their tastes.⁴⁹ Depending on one's viewpoint, pay TV was or was not succeeding.

Subscribers heavily favored feature films which had already played in local theaters but had not yet been shown on commercial television. Sports was second in popularity. Football, basketball and hockey games played in Boston and New York were available. So also was a rebate system for the sports addict. Subscribers spending more than \$8.00 per month on a per program basis, received a \$2.00 rebate on their next month's bill. Fans spending \$10.00 received a \$3.00 remittance.⁵⁰

Zenith and RKO General had previously agreed to assess their system after one year to decide whether or not to continue the test. On its first birthday the service had 2,743 subscribers, a little less than management had anticipated.⁵¹ RKO General's investment was \$3.5 to \$4 million to date while Zenith had committed \$1.25 million. The station telecast the Liston-Patterson rematch July 22, 1963 and RKO and Zenith decided to operate for the full term or for whatever amount of time it took to reach a decision on STV's feasibility. Neither party knew how many subscribers were needed for Hartford Phonevision to get into the black.⁵²

WHCT retained the home games of the New York Knicks and Rangers and the Boston Celtics and Bruins for a second year starting in October 1963. Its 3,400 customers averaged three hours of pay programming weekly, a rate where the annual gross was \$75 per subscriber.⁵³

RKO General filed an antitrust suit charging the theater owners with conspiracy against Hartford Phonevision in March 1964.⁵⁴ There was a deliberate and organized campaign to abort pay TV on a national basis,

or even on a trial basis against Hartford according to RKO. The theater interests had withheld films from WHCT. RKO argued the public and the FCC's decision on STV was hampered when a sizable portion of the programming, movies, wasn't available to gather data on public acceptance of pay TV.⁵⁵ An out-of-court settlement was reached with Twentieth Century Fox and Universal four months later.⁵⁶ RKO was pacified and the FCC later used this instance to renew WHCT's trial license over the objections of the Connecticut Committee Against Pay TV.

On its second birthday, WHCT had 4,784 subscribers, but it still wasn't even close to the break-even point.⁵⁷ Company officials estimated that 18,000-20,000 subscribers were needed for solvency. That was 10 percent of the homes within WHCT's range. The relatively high cost of sales required to enlist subscribers wasn't helping the profit picture. Also disturbing was the high rate of customer turnover.⁵⁸

Hartford Phonevision reported high ratings for their sports events. Heavyweight championship fights, which consisted of about .3 percent of the total STV programming during the first two years, were the most popular attractions. Audience ratings averaged 63 percent of all subscribers.⁵⁹ There was an average of nine persons per tuned-in subscribing set at a cost of \$3.00 for the two Liston-Patterson matches as compared to a cost of \$5.00 per person at several local theaters carrying the fights on closed-circuit.⁶⁰

Charges for sports events during the first two years averaged \$1.37. Attractions were scaled between \$1.00 and \$3.00.⁶¹ A scale of sports programming for the first two years of WHCT is shown below.⁶²

<u>Sport</u>	<u>% of Subscribers Expenditures for All STV Programming</u>	<u>Number of Events</u>
Boxing	7.31	6
College Basketball	0.17	2
High School Basketball	0.03	1
Professional Basketball	1.22	21
College Football	0.30	5
Professional Hockey	2.34	44

WHCT presented 1,500 hours of STV programming annually which consisted of 300 separate programs. Movies, which were 86.5 percent of the STV programming hours, and sports, which was 4.5 percent of the STV programming time, were the prime box office attractions totaling 91 percent of the scheduled STV air time.⁶³

In March 1965, Zenith asked the FCC for a license renewal for Hartford. WHCT had 5,000 subscribers and Zenith felt it unwise to make a commitment to increase the penetration rate without assurance of a pay test extension.⁶⁴

Naturally, the Connecticut Committee Against Pay TV objected. The Committee requested a hearing fearing WHCT might become too popular and hurt theater owners.⁶⁵

Again, the STV opponents lost when the FCC granted Zenith a three year extension of authorization. The FCC said that information obtained from further experimentation would help it reach a decision on pay TV's feasibility. The FCC recommended further that the Hartford test was obstructed for its initial two years by the refusal of two movie producers to provide films for subscription viewing.⁶⁶

WHCT expanded its sports programming in 1965 with the addition of two Hartford Charter Oaks' football games.⁶⁷ Two blacked out title

defenses by Muhammed Ali against Cleveland Williams and Ernie Terrell were available for subscribers in November 1966 and February 1967.⁶⁸

The number of subscribers increased but vice president John Pinto of RKO General Phonevision said the operation was still losing money. It was what his company had anticipated, though.⁶⁹ An organized advertising and public relations campaign began in August 1965 to clarify public misunderstanding about STV. The penetration rate increased 10 percent to 5,500 by the end of the year.⁷⁰ The operation peaked at 7,000 in 1967, but then things began to sour.⁷¹

Late in 1967, the House Commerce Committee had asked the Commission to postpone, for at least a year, any authorization of nationwide STV with reference to the 1965 Zenith-Teco petition. The FCC acquiesced to the committee's wish and RKO General began thinking of closing down its Hartford operation.⁷²

The FCC did grant another three-year license extension to WHCT when its renewal expired in June 1968. STV programming was seen only 12 hours per week in November 1968. The number of subscribers had fallen to 4,500.⁷³

When the FCC approved nationwide STV with its fourth report in December 1968,⁷⁴ Zenith decided to shut down Hartford on January 31, 1969.

The new FCC rules required conversion of WHCT's black and white system into color. Zenith felt it wasn't practical to produce advanced solid state decoders until the FCC issued the technical standards that were absent from the fourth report. Manufacturing took many months and Zenith wanted to await a fifth report on technical standards.

Joseph Wright, Chairman of Zenith Radio, said the principal objective of the trial was realized. Hartford was a proven supplement to commercial television.

STV in America went to black in January 31, 1969. WHCT became a commercial station.⁷⁵

The Hartford experiment was a financial failure but a regulatory success. It alone hastened the FCC's authorization of STV. Zenith and Teco confronted the FCC with the pay TV question in 1965 when the companies petitioned for nationwide subscription television. When it was finally authorized in 1968, it was 16 years after Zenith's first petition. Hartford was almost the sole basis of information cited in the fourth report on Docket 11279. Telemeter's Etobicoke system and California's Subscription Television also fell by the wayside during the decade, but it was Hartford that put pay television beyond a trial basis.⁷⁶

The Etobicoke Pay TV Experiment

Even though Telemeter's 1953 Palm Springs operation was short-lived, the company was not about to cease its experimentation with subscription television. Telemeter chose Etobicoke, Ontario, a western Toronto suburb for a test of its wired system in 1960.

Telemeter wished to test its system's technical capability, the economic feasibility of an operation supported solely by pay programming and to measure the degree of public acceptance. Etobicoke was deliberately chosen because it was a handicap. The community was less than

10 miles from Toronto and that city's competing attractions. There was only a moderate density of homes within the town and reception of six television stations from both sides of the U.S.-Canadian border was already available. Telemeter likened its challenge to entering a New York City or Los Angeles-size market. Viewers chose from the three major American networks from Buffalo stations and the CBC and a Canadian independent station from Toronto and Hamilton.⁷⁷ The odds against success were higher than average.

Trans Canada Telemeter Limited, a division of Famous Players Canadian Corporation, operated the Etobicoke system.⁷⁸ A minimum of 500 subscribers was sought for the start of programming on February 26, 1960. The company expected to increase its subscribers by tenfold after one year. There were two channels. Movies, sports and live musical programming were available for a fee. A subscriber could listen to hi-fi music or news, weather, or sports obtained from a Toronto newspaper for free. The coinbox installation fee was \$4.00. The only other subscriber cost was the amount paid for each program.⁷⁹

Telemeter reached a five year agreement with the National Hockey League's Toronto Maple Leafs for presentation of the team's 35 regular season road games on the pay system. The Maple Leafs, whose games were not previously available in Etobicoke and whose home games were sold out since the end of World War II, were a definite programming asset.⁸⁰ Their February 28, 1960 game with the Rangers in Madison Square Garden was available for \$1.00 to over 2,000 subscribers.⁸¹

Hockey's popularity helped the system expand. The Sunday nite games were the biggest box office attraction and ratings of 20 percent were not uncommon. Using the Maple Leafs as a drawing card undoubtedly helped Telemeter reach the 6,000 subscriber mark by March 1961.⁸²

Some championship boxing matches not carried on American or Canadian home television and the Canadian Football League's Toronto Argonauts were soon on the system.⁸³

Despite the popularity of sports programming, Telemeter still lost money. The company lost \$481,000 in 1960 and was \$225,000 in the red for the first half of 1961. There was widespread speculation on just how bad things in Etobicoke were. Company officials varied on the true monetary losses, but agreed that a shakeup was necessary.⁸⁴ Unfortunately, their decisions only compounded their losses.

The novelty and curiosity about the new system had given way to casualness and the number of subscribers declined. Telemeter wired Mimico, an adjacent suburb to bring the subscriber number to 6,000, in 1962.⁸⁵

Company belt-tightening was the next order. Sports telecasts from the Buffalo, Toronto, and Hamilton stations had hurt Etobicoke's closed-circuit attractions. High income homes hadn't proved as lucrative a customer as thought. Management reacted by cancelling the Maple Leafs' games for the 1962-63 season. It was a bad decision. The Leafs were perennial Stanley Cup Playoff competitors and won the league championship in 1962, 1963 and 1964.⁸⁶ There was no move to negotiate a home game package for the system if indeed, tie line charges forced abandonment of the Leaf's road games.

When the Mimico service began, a \$5.00 installation fee was initiated plus a commitment of another \$15.00 as an annual service charge. The \$15 assessment fee was appended to the Etobicoke contract with a 90 day notice of change.⁸⁷ Mass disconnections resulted and Telemeter's customers dwindled to 3,200 by September 1963. Telecasts of Maple Leafs' hockey were resumed at \$1.50 each, but it was too late to save the system.⁸⁸

Telemeter shut down April 30, 1965 with only 2,500 subscribers remaining. Though technically successful, Etobicoke never reached the black. Some Telemeter executive openly second-guessed the choice of the community for a pay operation.

The company didn't abandon its pay system. It began negotiating with some Montreal businessmen who planned to use the system on Cable TV, Limited, the largest CATV system in North America.⁸⁹

Telemeter found that sports was the second most popular programming after movies. The company's statement in support of the 1965 Zenith-Teco petition said "sports with high topical interests attained exceptional penetrations among home viewers." The Maple Leafs' audience rating average 27 percent despite price increases from \$1.00 to \$1.25 to \$1.50. The hockey ratings never went below 17 percent and reached a high of 51 percent.⁹⁰

The Second California Pay TV Operation

In July 1963, an Associated Press story reported that Matthew Fox was attempting to resurrect his bankrupt Skiatron system. Allegedly, Fox had financial backing from one manufacturing company for his project. His rebuilding plan called for substantial monetary support in order to get baseball reinterested in subscription television. Once these immediate goals were accomplished, a public offering of stock would be made.⁹¹

Within a week the public learned that the Reuben H. Donnelley Corporation of Chicago, the giant printing-direct mail combine, Lear Siegler Incorporated of Santa Monica, California, a manufacturer of electronic equipment, and Matthew Fox had committed \$6 million into a business named Subscription Television.⁹²

The Reuben H. Donnelley Corporation would handle sales and billings of the pay system. Lear Siegler would handle equipment installations and maintenance. Each firm owned 7.1 percent of the new company. The public was offered 1.9 million shares of Subscription Television. This would raise \$23 million and give the public a 46 percent ownership of Subscription Television.

Arthur Patterson, the assistant general manager of the Los Angeles Dodgers, reacted.

The Dodgers have always admitted their interest in closed-circuit television. A qualified group now appears to be serious in obtaining the necessary permission to start in the business of subscription television. This undertaking has our full support and we are willing to cooperate to offer our baseball games to this new medium in addition to our present broadcasting programs. There is nothing further we can add until and unless this latest development becomes real.⁹³

The public offering of Subscription Television stock was sold in one day, October 30, 1963. The California public utilities commission was expected to approve Subscription Television's contracts with Pacific Telephone and Telegraph and the General Telephone Company in November.

Fox had secured solid financial assistance from a stock sale and technical know how from two corporations. Subscription Television wasn't short on assets and technical talent. Managerial talent was also sought.

Sylvester L. (Pat) Weaver was lured from the chairmanship of the McCann-Erickson Corporation to become the President and a board member of Subscription Television. Tom Gallery, a former NBC sports director, assumed a similar position for Matthew Fox.⁹⁴

Everything was falling into place for Fox's new venture. The California state legislature smoothed the way by reducing a municipality's power to set exorbitant rates for cables and wires within their jurisdiction. The legislature and the governor amended the state's revenue and taxation code to limit pay TV fees to 2 percent of its gross, with 1 percent going to the state government and the other 1 percent to the local government.⁹⁵

There was complete optimism in the pay TV camp. It seemed like the mistakes made in 1958 would not be repeated. Fox had a new company, enough capital to build the system, wasn't under SEC scrutiny, had assistance from the state PUC and possessed talented technical and managerial help. Everyone's hindsight was twenty-twenty but

Subscription Television was myopic in recognizing the potential power of the theater owners.

Subscription Television promised the Dodgers and Giants 20,000 subscribers in both Los Angeles and San Francisco by July 1, 1964, the scheduled date for California's pay TV premiere. The contract stipulated penalty payments if Subscription Television didn't honor these terms.

The Dodgers were given 2.3 percent of the Subscription Television common stock and were to receive a \$200,000 flat fee plus one-third of the gross receipts from paycasting their games. The Giants acquired 1.8 percent ownership in Subscription Television and were to receive 20 percent of the gross receipts up to \$1.5 million. Thereafter, the Giants would get one-third of the gross receipts.⁹⁶ The figures were higher for the Dodgers because Los Angeles was a more lucrative market. Subscription Television's contract to deliver games to its six subscribers was limited to a 50-mile radius from Dodger Stadium in Los Angeles and Candlestick Park in San Francisco. Game prices were fixed at \$1.50 each.⁹⁷

The agreement also pledged the Giants 500,000 subscribers in five years. The Dodgers were promised 700,000 subscribers in the same period. If this promise was realized, Walter O'Malley would receive \$2.8 million for a 162 game season if only 5 percent of the 700,000 subscribers watched the Dodger game. This was almost like having another one million fans pass through the turnstiles at Dodger Stadium annually.⁹⁸

To have said Subscription Television's plan was ambitious was an understatement. The agreement with the ball clubs amounted to swinging for the fences, but that was not necessarily prudent from a business standpoint. Subscription Television had committed itself without accounting for the variable of an intense anti-pay TV campaign aided by the state PUC's procrastination. Because of its lack of foresight, Subscription Television never got beyond first base.

Subscription Television made such an outlandish commitment because it needed baseball as much as the technical, managerial, and public support. Pay TV was bush league to O'Malley and Stoneham after the 1958 experience. This time Subscription Television did not want the image of a fly-by-nite operation entering California through the back door. If it was to rid itself of that image, Subscription Television had to prove itself as a permanent fixture with a credible public appearance. Signing long terms agreements with the Dodgers and Giants was one way of achieving this. Also, the company needed baseball more than the sport needed them. Subscription Television wasn't viable without the Dodgers and Giants, but the clubs were already quite happy with their new stadia, higher attendance and less television exposure. Subscription Television decided to take the risk.

It wasn't long before the theater owners became insensed about Subscription Television. In October, 1963, the Southern California Theater Owners of America placed an advertisement in the Wall Street Journal which told of an initiative being drafted intended to leave the question of "charging the public for the privilege of viewing television

in the home to a popular vote." The ad exhorted, "It's your TV--Keep it free."⁹⁹

As the Citizens Committee Against Pay TV had done in 1958, the theater owners sought to repeat again in 1963. They banded together in what was called the Crusade For Free TV. Two hundred-fifty exhibitors representing 800 California motion picture theaters circulated petitions to make pay TV a referendum question. The Theater Owners of California announced they intended to raise a \$500,000 war chest to defeat Subscription Television.¹⁰⁰

Pat Weaver tried to expose the theater owners' selfishness in a most rational way. "[They] . . . opposed talking pictures, color, wide screen, drive-ins, radio and commercial television, so naturally we expect them to oppose us."¹⁰¹ Theater owners had traditionally sought protection for their box office receipts when confronted with any new technical progress in entertainment.

Subscription Television filed a \$117 million antitrust suit against the California Crusade for Free TV in December, 1963. There was a conspiracy to restrict competition in violation of state and federal laws said Subscription Television. The company charged the defendants with conspiring to prevent Subscription Television from selling stock and securing feature films for programming material.¹⁰²

The Crusade labeled the suit as just an attempt to discourage the voter's right to make up his own mind at the ballot box.¹⁰³ This was the first time a pay TV organization challenged an opponent in court.

As if the trouble with the theater owners wasn't enough, Subscription Television soon found its problems compounded when the state PUC delayed its approval of the system's contract with Pacific Telephone. The pay TV opponents asked the PUC to defer its decision until after the November election.¹⁰⁴ When the PUC finally authorized the pact it was June 3.¹⁰⁵ Subscription Television was left with only 27 days to find the 20,000 subscribers it had promised the Dodgers and Giants in their contracts by July 1, 1964. The first installations were made on Los Angeles' west side on June 11.¹⁰⁶ The San Franciscan installations were delayed until later that month when the PUC okayed an agreement for Pacific Telephone to provide transmission facilities to San Francisco's Richmond and Sunset districts.¹⁰⁷

Subscription Television delayed its start of the Los Angeles operation until July 17 and the company postponed its San Franciscan premiere until August 14. A delay of the development and shipment of subscriber equipment, concern with pay opponents and the failure of the PUC to approve the contract with Pacific Telephone in Los Angeles until after the June primary were blamed.

Forty-seven hundred subscribers in Los Angeles and 1,700 in San Francisco were already waiting for pay TV according to Subscription Television. The company had yet to submit a telephone service contract in the Bay City.¹⁰⁸

In the interim the theater owners sought signatures for their petitions and allies for their cause. They were successful on both counts and the influence of the California Crusade For Free TV grew.

Subscription Television sought its own allies. It hired one advertising agency and a public relations firm.¹⁰⁹ Pat Weaver began making public statements about the merits of pay TV. He predicted Subscription Television's full color coverage would stimulate set sales thereby making commercial TV a more effective medium. Weaver argued, as so many preceding pay TV promoters had, that Subscription Television supplemented, not supplanted, commercial television. Most of his subscribers would come from sets not in use, he said, as he used this analogy. "We are a book store selling everything; the networks try to sell only best sellers."¹¹⁰

Weaver also briefed the FCC on his company's programming plans. The FCC had previously decided it had only limited jurisdiction over the wired system proposed in California, but Weaver was looking for friends in high places in the event of interstate expansion.¹¹¹

The theater owners found widespread support. The NAB's TV Board of Directors announced their opposition to any form of home pay TV. It was generally accepted that pay TV would be the number one topic at the NAB's 1964 convention. It was, and the Future of Television in America Committee announced its formal opposition to Subscription Television. However, the committee refused to fight actively with the theater owners.¹¹²

Groups representing restaurant and parking lot owners, some television station operators and organizations such as the California Federation of Women's Clubs joined the Crusade For Free TV.¹¹³

Subscription Television countered with a hard-sell campaign offering potential subscribers discount installation rates. Help came

from some Hollywood labor unions which accused the theater owners of attempting to prevent competition with theater closed-circuit TV.¹¹⁴ The American Federation of Radio and Television Artists (AFTRA) and the Screen Actors Guild (SAG) supported Weaver because a new programming source would produce jobs for their membership.¹¹⁵

Animosity escalated between the pro and con pay TV forces and the battle became an open war. To the victor belonged the acknowledged prize--public opinion. The theater owners began running filmed advertisements throughout the state to save what they called free TV. When the theaters charged \$10-\$20 for the first Clay-Liston heavyweight championship fight, Subscription Television placed newspaper ads saying, "Next time \$2.00 at home. . . . Subscription Television's price for future world championship fights will be just \$2.00 per family in your own living room. . . . No driving or parking problems."¹¹⁶ Though it was doubtful that Weaver's company could charge less than Hartford's price for a heavyweight championship match, the advertisement was a caustic comment about how theaters foreclosed the bout on home TV by bidding a higher price for the rights and then passing the cost on to the fan via the admission fee.

The theater owners didn't stop the anti-pay petitions once they reached their quota for putting Subscription Television on the November ballot. Over one million Californians signed the petitions according to their figures. That was one of every six registered voters in the state. From southern California came 717,000 signatures, easily surpassing the 468,000 statewide quota. Los Angeles County alone was responsible for

450,000 names. In the northern part of the state, 340,000 signatures were secured.¹¹⁷

Subscription Television attempted to keep pay TV off the November ballot through the judicial process. When appeals to the courts were unsuccessful, Weaver vowed to contest the November vote with litigation if it was against Subscription Television.¹¹⁸

The Los Angeles operation began on Friday, July 17, 1964. Over 2,500 subscribers in an upper middle west Los Angeles neighborhood saw Subscription Television's Pat Weaver appear to inaugurate the service. The inaugural program was free as Weaver previewed upcoming shows over the three channels. At 8:00 PM, channel A presented a Broadway drama, channel B covered the Dodgers' home game with the Chicago Cubs at 7:45 and channel C showed a 90 minute surfing film at 8:00 PM, followed by an hour-long educational feature at 9:30. At 10:30, channels A and C presented a satirical revue taped at a New York nightclub. On each channel a six to twelve minute free sample was given before the subscriber was billed for the program.

The following day, the Dodgers and Cubs were available for \$1.50 and there was a Carol Channing Broadway revue for \$2.00 that nite.

On Sunday, sports fans received two games for the price of one. The Dodger doubleheader with Chicago was \$1.50. There was also a program starring Dodger shortstop Maury Wills with the Los Angeles Community Choir for fifty cents.¹¹⁹

Programming was seen daily between 7:00 and 11:00 PM. There was no daytime service except for baseball or special events. Subscription

Television designated one channel for mass appeal programming like baseball or feature films. The other two channels were reserved for special interest programming.¹²⁰ However, one staple of the mass appeal channel, movies, was not forthcoming. Subscription Television was unable to negotiate a purchase of recent vintage Hollywood films.¹²¹ The motion picture industry had decided to dwindle Weaver's programming supply.

The Dodger games brought the most favorable comments during the premier week. Of the 2,500 subscribers who purchased one show, 61 percent chose baseball.¹²² The Los Angeles service was at least underway even though Subscription Television knew it lacked enough subscribers to reach the breakeven point. No matter how badly the Los Angeles operation went, the system had worse luck in San Francisco.

The City of San Francisco threatened court action to prevent the paycasting of Giant home games less than a month before the start of the Bay City operation. The Finance Committee of the Board of Supervisors was concerned that Subscription Television's coverage of the Giants would reduce the gate receipts used to amortize the \$5.5 million revenue bonds circulated by the city to build Candlestick Park.¹²³ Thus, the taxpayers would face the burden of debt. The Giants paid San Francisco approximately \$400,000 annually for the stadium rental, scoreboard advertisements and parking fees. However, the city attorney nullified any suit saying the Giants had every right to paycast their home games if the team so desired. Eventually the city was pacified by Pat Weaver's promise that Subscription Television was worth \$180,000

annually to San Francisco based on the 1 percent franchise tax the city could levy.¹²⁴

Only 150 homes were wired in the middle class, Sunset district when the northern California service began August 14.¹²⁵ San Franciscans viewed five movies and nine Giants' games during the first ten days of service.¹²⁶

Subscription Television needed more subscribers desperately to become solvent, replace the money rerouted to the fight against the theater interests and to increase the public's knowledge of pay TV. Sports programming figured heavily in Pat Weaver's strategy to accomplish this.

Subscription Television's attempts to acquire either the NFL's Los Angeles Rams or San Francisco Forty-Niners would be unsuccessful. Neither team was certain of sellouts and an overflow subscription audience did not exist. Professional football was not a good investment.¹²⁷

Collegiate sports was an alternative. The NCAA's TV Committee had traditionally recommended that pay telecasting of football should be allowed to the annual NCAA convention. Weaver decided to take advantage of such a clause in the \$13 million NBC-NCAA contract. The NCAA approved and Subscription Television began negotiations with four of the member schools of the Athletic Association of Western Universities (now known as the Pacific 8) to show their 1964 home games in Los Angeles and San Francisco. UCLA, USC, the University of California at Berkeley and Stanford were under consideration due to their proximity to the two Weaver operations.

Subscription Television intended to charge the same price as a stadium ticket for each game. The potential for box office success was imminent. Only USC and UCLA were on commercial TV and just their road games were shown, and then only on a one-day delayed basis. Only the approval of the other four league schools, Oregon, Oregon State, Washington and Washington State, who appeared in some games was needed.¹²⁸

Subscription Television also sought professional basketball contracts. The Los Angeles Lakers of the National Basketball Association agreed to a 77 game, two year pact for their home contests on August 4, 1964. The Lakers' road games were already seen commercially and the New York Times reported that Weaver's company had previously signed a similar agreement with the NBA's San Francisco Warriors (now known as the Golden State Warriors).¹²⁹

The effects of Pat Weaver to find new subscribers and Tom Gallery, his sports director, to find new athletic events for coverage went for nought. Election Day, 1964 was drawing closer and Subscription Television had to shift attention to its chances of survival. The two systems had minimal success, and the company had little chance of solvency if it was banned from California in November. Weaver knew Subscription Television's battle with the theater owners had escalated into a full-scale political war. The anti-pay strategy was simple. Make Subscription Television divert time and money fighting pay opponents so if Subscription Television was not defeated in the voting booth, the drain on the company's assets would make it impossible to continue operation.

Subscription Television asked the State Supreme Court July 3 to remove the pay TV proposition from the ballot but wasn't successful.¹³⁰ After that date, a snowballing of events occurred that buried the company four months later.

In early September Weaver learned that the college football for which he had hoped was unobtainable. The Athletic Association of Western Universities decided to defer any pay TV experiments until they gave it further study.¹³¹

Subscription Television's advertisements urging defeat of Proposition 15, the pay TV question, were blacked out on the three San Francisco network affiliate stations. The NBC and CBS stations in Los Angeles didn't censor Weaver but the ABC affiliate did. Weaver counter-attacked explaining that ABC-TV was owned by American Broadcasting and Paramount Pictures which was headed by Leonard Goldenson, a former theater operator. Weaver definitely suspected that some broadcast licensees were in collusion with the theater owners and he sent a letter to the FCC seeking protection.

Weaver blamed some of his company's meager subscriber number on the state PUC. He charged the agency with excessive delays in granting approval for service contracts from the telephone companies. Coincidentally, Weaver laid off 143 employees, most of whom were engaged in selling subscriptions to homeowners.¹³² Belts were tightened and money rerouted to a last ditch pro pay TV campaign.

If Subscription Television survived the election result, more capital was needed. The company stock had lost half of its value and

Weaver scheduled a stockholder's meeting on issuance of another six million shares for three days after the election. The company already had four million outstanding shares at the time.

The theater owner-backed Citizens Committee For Free TV carried most of the workload until a fortnight before the election. The Citizens Committee openly urged broadcasters from around the country to contribute money to defeat Subscription Television. The pay TV opponents mentioned the \$1 million media blitz scheduled by Subscription Television two weeks before the election.¹³³ Why Subscription Television waited so long to win votes was unknown.

The tempo of the anti-pay forces quickened. Outdoor posters reading "Keep TV free--vote YES on 15" appeared.¹³⁴ In northern California forty radio stations were each broadcasting an average of 25 anti-pay TV spots weekly. Newspaper ads warned "This could be the last World Series on free TV."¹³⁵ Some drive-in theaters even offered free passes to motorists who allowed "Vote YES on 15" bumper stickers to be attached to their cars.¹³⁶ The Citizens Committee strategy was simple. Use a media blitz to convince a majority of the voters that they would eventually pay to watch the same programming that they saw for free. It was effective because it scared and confused the voters.

Subscription Television wasn't totally without support from other media despite its public relations dormancy. KNX-TV, the Los Angeles CBS affiliate, televised an editorial urging the defeat of Proposition 15. The San Francisco Chronicle, which was critical of pay TV earlier, reversed its stand and recommended a no vote on the

referendum.¹³⁷ The board of directors for the Hollywood Chamber of Commerce also recommended a no vote and two motion picture theater chains resigned from the organization.¹³⁸ This was bonafide support that Weaver needed, but it hardly compared with the grass roots movement the theater owners had begun.

Subscription Television tried to turn its support into votes on November 1, just two days before the election. A two and one-half hour "Phonathon" on a Los Angeles television station was sponsored by the Citizens Committee Against Proposition 15. Actors Dana Andrews and Ralph Bellamy, co-chairman of the organization, headed a list of celebrities who favored pay TV as a new source of employment. Viewers were able to talk with the celebrities who manned the telephones on camera about the reasons for defeating the referendum. Pat Weaver also appeared.¹³⁹

The following day six major city newspapers in California carried pro-pay TV advertisements. The Los Angeles Better Business Bureau strengthened Subscription Television's position when it asked the Citizens Committee For Free TV to delete from future advertisements inferring that 1964 was the last year that the World Series would be on commercial television and claims that Subscription Television charged as much as \$7.50 per program.¹⁴⁰

Both theater owners and Pat Weaver knew the election was only a formality. If Subscription Television lost, it intended to continue operations while utilizing the judicial process to have Proposition 15 declared unconstitutional. The Citizens Committee conceded the courts

would grant Weaver an injunction to operate while the law's constitutionality was tested. However, any Subscription Television plans for expansion would have to wait until the conclusion of litigation.¹⁴¹

A substantial amount of legal opinion said the referendum was unconstitutional and Weaver did not fear losing a vote in California as much as losing all of his company's assets in a needless public relations campaign and subsequent court battle.

Subscription Television could begin again in another state with a more favorable climate until its California setback was reversed. Electronic gear, program selectors and subscriber boxes were salvageable. But the loss of miles of cable and drop lines would be total.¹⁴²

Pay TV was defeated by better than a 2-1 margin.¹⁴³ The disarray of Subscription Television's strategy before the election and the wording of Proposition 15 did nothing to allay the false fears implanted by the theater interests into the minds of the average voter.¹⁴⁴ Polls had shown a large amount of the electorate was undecided about the issue. It was easy for the average reader to misconstrue the Proposition's language. Some voters undoubtedly suspected that pay TV was contrary to public policy. Even though the electorate was exposed to the wording when a sample ballot was sent to all prior to the election, there was still confusion about what a yes and no vote meant. In actuality, a vote for the proposition was a vote against pay TV.

TELEVISION PROGRAM INITIATIVE. Declares it contrary to public policy to permit development of subscription television business. Provides no charge shall be made to the public for television programs transmitted to home television sets.

Contracts inconsistent with free transmission made after effective date of Act or still executory are void. Act does not apply to community, hotel, or apartment antenna systems. Injured persons may seek damages or injunction for violation of Act. Repeals Section 35001-35003, Revenue and Taxation Code, relating to subscription television.¹⁴⁵

After the election, Subscription Television suspended its California operations on November 10, 1964. Studios were dismantled, equipment sold and the staff reduced. The Dodgers and Giants waived the penalty payments due when the company failed to wire 20,000 homes in each market.¹⁴⁶ Weaver announced a challenge of the referendum's constitutionality as he moved to New York City to begin the hunt for new groups outside California interested in pay TV.

It was the death knell for pay TV in California and there was plenty of sympathy for Subscription Television. A Los Angeles Times editorial a week after the election said the voters were duped into eliminating a legitimate private enterprise. The following day an advertising agency purchased space on the Times' financial page to explain its feeling of obligation to criticize the inferences, innuendoes and mal-practices of advertising by anti-pay groups.

Some subscribers told Subscription Television to keep the \$5.00 installation fee the company had announced as a rebate and to use it to defray court costs.¹⁴⁷ A Broadcasting poll of 25 former subscribers found that 80 percent of them would resubscribe if Subscription Television resumed operation. All the respondents agreed the passage of Proposition 15 was a mistake.¹⁴⁸

Subscription Television's court battle began unsuccessfully with a move to prohibit Secretary of State Frank Jordan from certifying

the vote into law.¹⁴⁹ Next Pat Weaver and some other company officials sought declaratory relief contending Proposition 15 violated the United States and California state constitutions. They filed articles of incorporation for Advanced Telecommunications Incorporated, a new pay TV firm, with Secretary of State Jordan. Jordan, of course, refused to accept the papers and Weaver turned to the state superior court in Sacramento County on December 11, 1964.¹⁵⁰

The superior court held Proposition 15 an unconstitutional abridgement of free speech as guaranteed by the federal and state constitutions.¹⁵¹ The Secretary of State, California attorney general and Weaver joined in a request for the state Supreme Court to hear the case without delay. The chief justice agreed and Weaver foresaw resumption of the Los Angeles and San Francisco operations without months of lengthy appeals at the appellate level.¹⁵²

Subscription Television, meanwhile, was breathing its last financial gasps and Weaver needed a quick and final resolution to the conflict. When the Subscription Television contract with the Los Angeles Lakers wasn't honored, the pro basketball team filed a \$250,000 breach of contract suit in December 1964. The Lakers claimed they had only received \$50,000 of the \$300,000 the company had guaranteed for home games over two seasons.¹⁵³ Subscription Television filed for bankruptcy five months later in May 1965.¹⁵⁴

The state Supreme Court gave Subscription Television a judicial reprieve in March 1966.¹⁵⁵ The 6-1 decision reiterated the superior court's opinion that Proposition 15 was invalid and was an abridgement

of the free speech guarantees of the state and federal Constitution. The court declared the referendum did not forbid a charge for entertainment when the viewing was done by audiences in a theater.

Thus the Act is entirely clear that no one may speak or disseminate ideas to the home through the medium of pay television, and, likewise, that no one in the home may listen to a pay television transmission or receive transmitted ideas or images conveying such ideas over the outlawed medium. The suppression of the proscribed medium as a vehicle of transmission to the home purports to be absolute; it amounts to total censorship, in advance, so far as home viewers are concerned.¹⁵⁶

If pay TV had adversely affected existing television stations, it was hardly the clear and present danger warranting the suppression of the First Amendment. The only difference between the two systems was their method of collecting revenues. One collected from subscribers, the other from commercial advertisers. The court recommended that

Monopoly in the field of communication can best be avoided by permitting the growth of that field of endeavor in directions and through media which will provide the widest possible range and choice of ideas and of expression.¹⁵⁷

The verdict was bittersweet. Subscription Television had hardly anything to celebrate. It had no resources, no staff nor had it made any progress in the \$117 million damage suit against the theater owners.¹⁵⁸ In October 1966, the company was \$16 million in debt and the California pay TV gold rush was permanently over.

Authorization of a Permanent STV Service

Zenith Radio Corporation was encouraged by its Hartford experiment. The problem with the motion picture distributors was alleviated, subscriber equipment was improved and installations became less costly.

On March 10, 1965, Zenith and Teco filed a joint petition with the FCC for further rulemaking to authorize STV. The petition also contained specific proposed rules to govern such a service. Support for the petitioners came from the Teleglobe Pay TV System and Telemeter which reviewed its five year Canadian experience for the FCC.¹⁵⁹

Zenith wanted STV's fate decided in the market place which it defined as the top 100 UHF markets. Twenty thousand subscribers were needed to break even and 91 of the top 100 markets had at least 200,000 television homes. Therefore, STV only had to reach a 10 percent penetration for solvency. Such a percentage didn't supplant commercial television in each market, and acted only as a programming supplement, argued Zenith. UHF stations would be the chief beneficiaries of any STV authorization.

The Phonevision system promised no commercial advertising. Programs would remain box office materials. Zenith and Teco emphasized that the definition of box office was programming not seen regularly on conventional TV for which the public would ordinarily pay an admission charge.¹⁶⁰

Telemeter's petition supporting Zenith and Teco included a report on its Etobicoke operation. The company claimed it left

Etobicoke when it felt it had obtained all the information possible, and not for financial reasons. Even the financially beleaguered Subscription Television filed in support of the joint petition. Subscription Television told the FCC that its short-lived 1964 California experience proved the people with "minority but intense interests" can profit from pay TV.¹⁶¹

The expected opposing comments from the Joint Committee Against Toll TV predicted that viewers would eventually pay for what they saw for free if the Zenith-Teco petition was authorized. Free TV would die. Commercial stations would convert at least part of their operations into pay to survive, thus making attractions now seen free available only for a fee.¹⁶²

In February 1966, the FCC discussed the petition in a closed meeting. On March 21, the FCC issued a further notice of rule making and inquiry.¹⁶³ Comments were invited on (1) whether a permanent nationwide STV service was in the public interest, (2) what rules, if any, were necessary to prevent siphoning (STV's taking programs or talent from a commercial station by outbidding sponsors for the attractions), (3) if STV operations needed a requirement to telecast a minimum amount of conventional (commercial) programming, (4) if a limitation was necessary on the types of programming a STV station carried and did such a limitation fall within the scope of the Communications Act, (5) if STV should be confined to the UHF band or to just one station per market, (6) how many STV technical systems should be authorized, (7) whether charges and terms for subscribers should be

regulated by the FCC and (8) whether a common carrier designation requiring a STV station to furnish service was necessary.¹⁶⁴ The FCC concurred with the Zenith-Teco petition concerning commercial advertisements. It wasn't included in the eight points because the FCC believed there was no doubt as to the answer.

While disclaiming any final decision about a nationwide STV authorization, the FCC admitted that on the basis of the submitted Hartford information, such permanent operations were likely to fall under the public interest.¹⁶⁵

There was one conspicuous part of the notice, however. It announced at the outset of the document that the proceeding was enlarged to include an inquiry into STV transmitted by wire or cable. The FCC referred to Docket 15871 of its second report on CATV.¹⁶⁶ If CATV was destined to become a vehicle for STV, a policy was needed urgently.¹⁶⁷

Part of the FCC's hesitancy to authorize STV stemmed from Congress' reluctance to grant the FCC an unconditional endorsement to okay the new medium. The statutory authority question was only part of the FCC's foot-dragging. An intense lobbying effort by theater interests forced procrastination in Washington.

The deadline for comments on the Zenith-Teco petition was October 10, 1966.¹⁶⁸ The three major networks, the NAB, theater owners and the Association of Maximum Service Telecasters took STV to task. They claimed the Hartford test was too limited to provide conclusions representative of a larger market. There was also a fear of siphoning which the pay opponents reacted to more emotionally than rationally.

Zenith and Teco were endorsed by Telemeter, Subscription Television, pay equipment manufacturers, the Screen Actors Guild and the ACLU. SAG felt STV was needed as an alternative to the advertiser-supported system which restricted the quality, variety, scope and diversity of programming. The ACLU believed the First Amendment right of free speech was abridged if STV wasn't authorized.¹⁶⁹

In July 1967, the FCC's three-member STV Committee submitted a 108-page report favoring a nationwide service. Included was a draft of a potential fourth report for Docket 11279 which the committee recommended for adoption by the full FCC plus a notice of proposed rulemaking.¹⁷⁰

Commissioners Wadsworth, Cox and Lee found:

1. STV could provide a "beneficial supplement" to conventional TV programming when STV consisted of current films and sports not generally available.
2. Audience impact would be minimal in large enough markets.
3. "Absolute proof of viability need not precede the establishment of a new service . . . there is enough of a basis on which to found the new service."¹⁷¹

The STV Committee also suggested that licenses only be granted to applicants in markets already saturated with commercial stations and then only one STV station could operate in that market. The STV station would have a minimum free programming requirement and pay programming would have to consist of attractions not normally seen commercially. No commercial advertisements were permitted during pay programming and a two-year antisiphoning rule was suggested for sports.¹⁷²

The backlash against the committee's controversial report was quick. Rep. John Dingell (D-Mich.) of the Commerce Committee introduced

H.R. 12435. The bill removed the FCC's jurisdiction under Section 303 of the Communications Act to authorize any STV licenses. Dingell felt pay TV limited a viewer's choice because of the siphoning threat and this, in turn, undermined commercial television.¹⁷³

Eighteen participants took two ten-hour days to explain their STV positions before an en banc FCC hearing on October 2 and 3, 1967. Emanuel Celler labeled pay TV as a regressive tax and a second vast wasteland. He threatened to rally the anti-pay forces on the House floor if the FCC adopted its proposed fourth report.¹⁷⁴

Chairman Torbert MacDonald (D-Mass.) of the House Communications Subcommittee began hearings on the Dingell bill in mid-October. The anti-pay forces were more organized and they criticized the FCC's fourth report lustily while MacDonald assumed a neutral position. In his opening remarks, MacDonald hoped the hearings were convened to answer whether Congress or the FCC should deal with STV and to decide whether pay TV was in the public interest.¹⁷⁵ MacDonald's worst fears were realized as anti-pay interests made the hearings a forum on the proposed fourth report.

The pay opponents saw imminent defeat at the hands of the FCC and chose the subcommittee's hearings to convince Congress and the public to nullify any FCC action. They attacked the proposed fourth report on three points. One, pay TV was not a beneficial supplement to the present commercial system. Two, the Hartford experiment proved too inconclusive to yield sufficient findings for the authorization of a nationwide system. Three, the antisiphoning rule was circumventable.

NBC questioned if a public demand did indeed exist for STV. President Julian Goodman predicted the authorization of STV would paralyze low income groups, UHF expansion and the growth of the Public Broadcasting System.¹⁷⁶ Goodman felt the proposed order's 90 percent ceiling for air time devoted to the combination of feature films and sports meant the FCC had contradicted its "beneficial supplement" policy for STV. Program diversification supposedly STV's beacon light, wasn't realized with the proposed fourth report. Goodman predicted a 90 percent diet of movies and sports meant far lower diversity than the choice already available from commercial television. Hence, STV was not the beneficial supplement for commercial TV that the FCC intended when one considered its philosophy of diversified programming.¹⁷⁷

Vincent Wasilewski, President of the NAB, concurred.

The argument that pay TV would provide a beneficial supplement to free TV is a sham. All evidence available and the imperative of logic leads to the conclusion that pay TV would seek to appeal to the greatest number of viewers to reap the maximum number of subscriptions and this it could do largely with sports and motion pictures.¹⁷⁸

The STV Committee called sports events not available for home television part of Hartford's "beneficial supplement" programming. The AMST disagreed with the committee's examples of professional baseball and ice hockey. STV was needed only when the NBA and NHL were not on commercial television.¹⁷⁹ The broadcasters claimed their medium had consistently demonstrated its capacity to expand its sports programming.¹⁸⁰

Martin Gaynes, counsel for NATO and the Joint Committee Against Toll TV, echoed AMST's position calling the STV benefit minimal at best.

. . . it is well known that sports events on free television have been proliferating at a rapid rate. Virtually every sports event known has been presented on free television, and, indeed, many critics have chided the networks for over-emphasis on sports programming. To contend that the airing of the occasional blacked out heavyweight championship fight or other sports programs is a "beneficial supplement" sufficient to authorize the institution of a pay television system, is to deprive these words of any realistic meaning.¹⁸¹

Moreover, the average age of feature films on commercial TV was less during the past five years due to the keen competition among the networks to fill their prime time movie schedules. NATO and the Joint Committee couldn't accept the FCC's "beneficial supplement" rationale. Besides, every STV film presentation lessened the use of that film commercially. Often STV reran films and that accounted for its heavy saturation of air time. Commercial television faced purchasing reruns instead of premier feature film packages. The Joint Committee proposed a 50 percent ceiling for film use during any one week of subscription air time to protect commercial TV. It was the theater interests' method of protecting their income while they layed a benchmark to make STV a "beneficial supplement."

The Joint Committee doubted the STV committee's ability to make any intelligent decision on nationwide subscription television when its only basis was the Hartford test. Nationwide STV, with more money, would eventually siphon off programming from commercial television. The Joint Committee asked the FCC to remember what happened with the Dodgers and Giants in California.¹⁸² They were more convinced that STV would destroy the commercial system when they dissected the two-year siphoning rule with microscopic alacrity.¹⁸³ The phrase "in the community during

the two years preceding (the event)" permitted STV to siphon events that had been seen on commercial TV within 24 months, according to the AMST's Lester Lindow.

If a specific event like the World Series was on commercial television in 1965 and 1966, but not in both years, it was deemed a specific event not regularly televised in a community and an STV station could show it in 1967. Lindow reached his conclusion on the basis of three paragraphs of the STV Committee's report. The word "during" (the two preceding years) did not denote both years preceding their proposed subscription broadcast. The AMST also had reservations about the language of the time length of the siphoning rule's protection.¹⁸⁴ The Joint Committee suggested a five-year siphoning period. Another three years was a better deterrent against siphoning and afforded commercial television a chance to adjust to the loss of an attraction.¹⁸⁵

NBC thought the siphoning rule was ineffective because sports promoters might be willing to take a financial bath with the loss of commercial television revenue in favor of an STV pot of gold after two years.¹⁸⁶

The NAB feared sports deserting commercial TV and cited pro football--the biggest STV bargaining chip--as the prime example. Theoretically, the NFL could substitute home game telecasts on STV for the coverage of road games on commercial TV.¹⁸⁷ For two years, the only NFL football available for home viewing would be via STV. Road games would be blacked out. After two years, road games satisfied the anti-siphoning rule by not having been televised on a regular basis

during the past two years preceding their STV broadcast. Consequently, after two seasons, a total transition of pro football to pay television was possible without the NFL violating the FCC rule.

The AMST thought authorization of STV signaled a pickoff play of commercially televised baseball. If ten home games were carried by a local station, the remaining 71 home games were available to STV after one year. The ten games previously seen could be withdrawn from commercial television and shown on pay TV the following season.¹⁸⁸ The AMST commented:

The fact that the Commission might expect that the hue and cry that would arise if popular specific sports events were siphoned from free television would move the Congress to prevent this from happening is no reason for the Commission to abdicate its responsibility to protect the public interest.¹⁸⁹

Martin Gaynes, counsel for NATO and the Joint Committee Against Toll TV, spoke of sports' peculiar economics which led the Dodgers and Giants to keep their games off television for years while admittedly looking for pay TV to supplement their gate receipts.¹⁹⁰ He believed authorization of a nationwide STV system was risky.

The minute you get a pay television station in every home city, at that point the team I think would be more willing (to get into STV) because it is again a question of creating demand. They are creating a demand by their refusal to give it to the free television station.

I think from their point of view they are quite right. They are not charitable organizations, either. They have to maximize their profits. I think the longrun benefits to them would be enough to do it.¹⁹¹

Even though STV interests had minimal representation before the subcommittee, pay proponents were not unheard. Robert Hall, a former

NCAA TV Committee chairman, thought subscription television could rejuvenate college football. He proposed that games seen commercially on a regional basis be made available to STV stations outside the region provided that the game did not violate the siphoning rule.¹⁹²

The Americans For Democratic Action found the FCC's proposal repressive. The ADA's submitted statement expressed an interest in the development of STV as a precursor of many new communication services.¹⁹³ It called the rules "pre-emptive and premature" which conceded to private interests "unmeasured and massive potentials for social usefulness and economic yield."¹⁹⁴ Some ADA concerns were:

1. Throughout the STV report, there was an assumption that communication licenses, as a matter of right, are entitled to protection of their profitability from STV. This sanction was not legal in a free market place.
2. An STV station was only allowed in a market where there were at least four full-time commercial stations. The imposition of further FCC controls over STV programming for the purpose of controlling competition between public-payment systems violated basic American principles of free press and free competition.
3. The requirement that an STV station must program a minimum amount of free shows was irrelevant, uneconomic and an unworkable intermixture of two incompatible forms of broadcasting. There were already four full-time commercial stations in every market where STV was free to enter. More commercial stations weren't needed.
4. Authorizing STV on a one per market basis in a four, five, or six commercial station market created an STV monopoly. STV service should have been authorized on any number of active or inactive channels per market provided STV did not reduce the number of commercial TV stations below four, or exceed the total number of commercial stations.¹⁹⁵

The subcommittee ended its hearings October 17, 1967. Now STV became a game of wait and see. The Dingell bill languished while other political actors ran with the ball. The FCC retired to consider the

transcripts and written comments of its proposed fourth report. The Communications Subcommittee hearings were sure to definitely influence the FCC's final decision.

The House Commerce Committee passed a resolution a month after the MacDonald hearings asking the FCC to refrain from further STV action for one year or until the Communications Act was amended to authorize pay TV. In September 1968, Chairman Rosel Hyde wrote Commerce Committee Chairman Harley Staggers (D-W.Va.). Hyde maintained the FCC was responsible to the public and the delay in resolving the problem of Docket 11279 was some thirteen years old. If the FCC adopted a fourth report on STV, there was still the opportunity for judicial and congressional review.¹⁹⁶

A week later, the Commerce Committee adopted another, less adamant, resolution. It asked the FCC to postpone action on STV until the end of the current session of Congress or until pay TV legislation was passed. Staggers promised to schedule STV hearings by the end of May 1969.¹⁹⁷

On September 12, nine Commerce Committee members wrote the FCC explaining that the full committee vote on the resolution represented the barest majority of those present at the September 11 meeting.¹⁹⁸ The resolution was far from a mandate and the cosigners felt any further delay on Docket 11279 was inconsistent with the FCC's responsibilities imposed by the Administrative Procedure Act.¹⁹⁹

The FCC took the initiative and adopted its proposed fourth report by a 5-1 vote on December 12, 1968.²⁰⁰ A large part of the

document remained unchanged from the STV's Committee's original recommendations. The notice of inquiry about CATV's mandatory carriage of scrambled STV signals was also adopted coincidentally despite opposition from the NCTA.²⁰¹ The rules were effective June 12, 1969. The six-month delay served a dual purpose. First, it provided an opportunity for judicial and congressional review. Secondly, the FCC's report did not include any technical standards for STV operations. The six-month lapse was a chance to formulate them.

The anti-pay forces had struck out with the FCC. Their contention that STV sports was duplicative of commercially televised events was rejected as unrealistic by the FCC.

It is elementary that if a man wished to view a heavyweight championship fight he will not be satisfied with viewing a tennis match, a football game, or a motorcycle race instead. Such fights were generally not carried on free TV for many years. To let him see the fight on STV is clearly to supplement present sports events programming on free TV. The same is true with respect to blacked out home games of amateur and professional teams. If one wishes to view on TV the local teams in which he has a strong interest, it is at best a poor substitute to let him view other teams playing in other parts of the country.²⁰²

Critics who mentioned ways of circumventing the siphoning rule were pacified. The FCC trusted that STV and sports interests would not try such a maneuver which would result in a public backlash against sports. It was conceivable that an illegal restraint of trade might occur if STV operators and owners of sports teams colluded to keep events off commercial TV for the two-year waiting period. It wasn't the FCC's intent to create any new market for owners of television rights to sports events. The FCC promised if it detected any

circumventions of the rule, appropriate action such as increasing the standard to five years would result.²⁰³

NATO and the Joint Committee Against Toll TV saw the handwriting on the wall. The FCC had made a Solomon-like judgment in their eyes which eliminated any potential for an alliance with the FCC. The House Commerce Committee's previously promised STV hearing did not begin until November 1969. There was nowhere for the theater owners to turn except to the judicial process. Remembering how the District of Columbia Court of Appeals had struck down their argument against Hartford in 1962, the theater owners reluctantly went to court in 1969 to have the FCC's fourth report rescinded.

NATO asked the FCC to stay the June 12, 1969 effective date until all the avenues of judicial review were exhausted.²⁰⁴ The FCC agreed and promised to delay any STV authorization for 60 days after the circuit court's decision.²⁰⁵ In the interim, NATO began a last ditch national campaign against pay TV seeking 25 million signatures for petitions in 10,000 theaters. The petitions were addressed to Congress and the state legislatures.²⁰⁶ NATO's strategy was simple. It was to delay, delay, delay the FCC's fourth report, but it may have also backfired when the circuit court suspected it was buttonholed with a petition campaign instead of an amicus curiae brief.

The case was argued June 9. The rationale presented by Marcus Cohn and Martin Gaynes for NATO and the Joint Committee, respectively, had either been advanced previously or bordered on the ludicrous. Circuit Judge Edward Tamm affirmed the fourth report without dissent from his fellow jurists on September 30, 1969.²⁰⁷

The anti-pay forces utilized their perennial challenge of the FCC's power to authorize STV. The petitioners contended (1) the Communications Act contained no explicit grant empowering the FCC to allow direct charges to the public for broadcast services, (2) that the FCC lacked authority to regulate the rates charged for the broadcast services and that the absence of such authority was persuasive evidence of Congress' intent to preclude establishment of a direct charge operation and (3) that even if the FCC acted within its authority, its failure to regulate rates or to decide whether it possessed rate-making power constituted an arbitrary and capricious exercise of its authority.²⁰⁸

Judge Tamm disposed of the petitioners first contention by citing the Communications Act, the 1962 Connecticut Committee Against Pay TV decision and the Radio Act of 1927.

The FCC had no power to establish tariffs over broadcasting, said Tamm. Because STV wasn't a common carrier, it wasn't a natural monopoly. "Congress apparently believed that once clear dangers of combinations in restraint of trade were removed, competition among those providing broadcasting services in a given area would best protect the public interest."²⁰⁹ The principal method that Congress provided for combatting anti-competitive practices was regulation through a licensing process. The FCC asserted this method was sufficient to prevent any STV abuses of economic power in the fourth report. Tamm thought the need for rate regulation rested in markets where STV was granted a monopolistic or quasi-monopolistic position in competition with ordinary television. The subscriber charges in Hartford demonstrated there was no likelihood of rate abuse.

Since NATO and the Joint Committee had mistakingly questioned the FCC's rate regulating authority, the petitioners argument that the FCC acted capriciously was dismissed. Tamm thought courts should be reluctant "to declare that free market forces must be supplanted by rate regulation when neither Congress nor the agency administering the area has found that such regulation is essential."²¹⁰

The anti-pay interests also called the FCC actions discriminatory against indigent persons who weren't able to afford STV equipment and fees. The petitioners explained that the fourth report showed that less than 2 percent of the Hartford subscribers had incomes below \$3,999. Thirty percent of the national population had incomes of less than \$4,000 in 1964. STV was a "systematic discrimination" against 30 percent of the populace.

Marcus Cohn alluded to the 1968 Kerner Commission Report stating there were two societies, separated and unequal, one white and one black. STV violated the rights of the poor to equal protection of the law.

Harold Cohen, Zenith's counsel, countered with statistics showing that STV wasn't anti-civil libertarian. Pay TV lowered the barriers between the rich and poor, he said. Cohen acknowledged that families with less than a \$3,000 income cannot afford subscription television. However, 43 percent of the Hartford subscribers had annual incomes from \$4,000 to \$7,000 while 85 percent earned less than \$10,000.

The court agreed that STV presented a problem for the less wealthy, but that the poor had monetary setbacks daily when they couldn't afford a long-distance phone call or a taxi.²¹¹

Tamm did not find any factors that distinguished broadcasting from other endeavors subject to federal regulation. A decision couldn't be rendered which moved toward the establishment of a rule that every service provided by a regulated industry was required to be made available to all citizens on the basis of their ability to pay. The court was more convinced that broadcasting had a uniqueness separating it from comparable regulated industries. Bowing to the petitioners' plea was a constitutional innovation the court was unwilling to make.

The public's access to the broadcast media has never been wholly free; at minimum, it has been necessary to procure and maintain the necessary apparatus for receiving broadcasts, and this burden necessarily weighs heaviest on those with the least resources.²¹²

The court thought any deprivation of access to broadcast frequencies resulting from the fourth report was slight. At the most, there would be only one STV station per community and it would carry at least 28 hours of "free" programming weekly. In some cities, approval of an STV operation meant the opening of a new facility rather than the conversion of an existing commercial station. The siphoning rule was an adequate deterrent to keep the more popular attractions from migrating to STV. There was hope also that pay competition would spur commercial networks and stations to upgrade their programming. Summarily, Tamm dismissed the petitioners' claim of the poor's constitutional right to receive programming as insubstantial. There was no relationship to their arguments and the fifth and fourteenth amendments.

The height of folly occurred when NATO and the Joint Committee felt that the programming restrictions (siphoning and 90 percent ceiling

rules) constituted "an impermissible restraint on free speech" in violation of the First Amendment. The court quashed that claim and reminded the Joint Committee of its proposal to lengthen the siphoning period to five years during the FCC proceedings. Tamm also recalled that organizations vitally interested in free speech supported STV as a means of promoting diversity of expression.

Tamm said the FCC had found STV to be a beneficial supplement to the present system and instituted restrictions to preserve this balance and insure against duplication.

In seeking to provide the broadcasting media with the diversity demanded by the first amendment, however, the Commission must avoid the perils of both inaction and overzealousness of abdication which would allow those possessing the most economic power to dictate what may be heard, and of censorship which would allow the government to control the ideas communicated to the public.²¹³

Tamm quoted from Banzhaf v. FCC reiterating that "even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss."²¹⁴

NATO and the Citizens Committee fared no better with the Supreme Court. Their writ of certiorari was denied February 24, 1970.

Even as the court's decision was rendered on September 30, no interested parties chose to leave the playing field for the sidelines to sit and wait for the Supreme Court. Twenty odd bills against pay TV were on the House Commerce Committee's agenda and chairman Harley Staggers eagerly scheduled a Communications Subcommittee hearing for November 1969. NCTA President Frederick Ford headed his industry for legislative shelter. Ford briefed Staggers on why CATV was not STV,

explaining that CATV was essentially a monthly charge for reception service and STV was a per program charge. Ford hoped to avoid any congressional wrath which might easily spill over from its obvious intent-banning pay programming.²¹⁵

When Chairman MacDonald convened his subcommittee for nine days of hearings in November and December, he was concerned with the potential of a Howard Hughes-type sports network capable of circumventing the siphoning rule by paying a sports promoter enough money to remove his games from commercial television for two years. MacDonald asked Commissioner Kenneth Cox how the FCC would react if an individual or interest bought up too much sports. Cox replied that the doubts raised by such action meant renewal problems for an STV licensee or the lengthening of the antisiphoning period.²¹⁶

Vincent Wasilewski told the subcommittee he was relieved by Cox's statement but more STV controls were desirable. The NAB President cited the Washington Redskins pro football team as an example close to home. Wasilewski wondered if the language of the antisiphoning rule prevented piracy of commercially televised sports. He recommended the words "during two years" as written, be revised to read, "for two years." If the revision was made, the rule would be stronger. STV would have to wait a full two years before even approaching a sports interest. However, under the present situation the Redskins could forego local coverage of their road games for one year while presenting their home games for pay only and then switching their road games the following season to STV also. The road games would not be subjected to the

antisiphoning rule because they had not been on commercial television "during [the] two [previous] years."

Wasilewski wanted Congress to impose its own siphoning restrictions with a statute to give it more permanency. The FCC rules were "impermanent and fragile" because regulatory agencies tended to bend by granting waivers.²¹⁷

STV had more friends at these hearings than the one held by MacDonald's subcommittee in 1967. The hearings were also broader in scope as they were expanded to include the testimony of various sports interests.

Luther Evans of the ACLU felt the FCC description of STV as a "beneficial supplement" was inaccurate. STV was an independent system of public communications needing judgment on its own capabilities, potentials and regulated requirements according to the ACLU. Evans explained that the First Amendment insured a broad-base diversity of opinion available for public inspection. A diverse and heterogeneous climate of opinion in competition for public approval insured that the best ideas prevailed. However, the true worth of public opinion wasn't determined in the market place under the FCC's fourth report. The ACLU maintained the FCC could not exercise control of STV's programming content except for section 315 of the Communications Act. Yet the FCC shackled pay television with a minimum commercial programming requirement and an antisiphoning rule. These restrictive policies minimized instead of broadened the diversity of available programming.²¹⁸

Robert Hall, the former Yale athletic director and NCAA TV Committee chairman, was enthusiastic about the fourth report. Hall reiterated his support of STV in a manner almost identical to his 1967 appearance before MacDonald. Most of the public's knowledge about the NCAA came from football and Hall predicted the enhancement of the organization's image if STV added to the number of games available from commercial television. The FCC actually allowed a college team overlooked by ABC for a regional telecast to be seen by fans who had no opportunity to see it in person or commercially. Hall used the University of Houston as an example. Its game with a particular opponent was available to STV if (1) the game was not on commercial television during the past two years or (2) if it was televised regionally during the past two years, it was still available for STV outside the region. Hall felt the new rules allowed the public to see more football without siphoning away the ABC game audience.²¹⁹ The NCAA would never permit full conversion to pay TV according to Hall because the NCAA had too much goodwill at stake with the public and youth of America not to present games commercially.²²⁰

There was also an intrinsic economic control on STV, said Hall. Pay television couldn't pay fantastic sums for an event or it would price itself out of the market.²²¹

All the speculation by anti-pay interests about how organized sports intended to circumvent the siphoning rule made the subcommittee anxious to hear from athletic interests. The two most popular sports, and coincidentally the sports with the largest amounts of a readily

available product for STV, pro football and major league baseball, said pay TV was not on their horizons.²²²

NFL Commissioner Pete Rozelle tried to guarantee the subcommittee that pro football was definitely uninterested in pay TV. Rozelle claimed that the sport hadn't appeared before the subcommittee's 1967 hearings because they were not related to the NFL's interests.²²³

The new three-year contracts with the three major networks all had provisions for a renewal clause and no STV, said Rozelle.²²⁴ He guaranteed MacDonald there had been no leaguewide discussion of STV nor had a pay TV committee been appointed. Even though the NFL had no plans for subscription television, Rozelle was unsure whether he could make that commitment into perpetuity.²²⁵ Rozelle went out of his way to proclaim his apathy to anti-pay legislation. He said he only appeared to answer the subcommittee's questions. He had no interest in shortening or lengthening the siphoning rule nor had he talked with the president of Hughes Sports Network about using it as a vehicle for a switch to pay TV.²²⁶

As much as Rozelle tried to allay the subcommittee's suspicions about a NFL defection from commercial television, he was unsuccessful. The subcommittee's apprehension about pro football's past closed-circuit theater TV arrangements, the necessity of home game blackouts and a pay TV stipulation in the current CBS contract all signaled illegal procedure.²²⁷

Rozelle's reputation as a powerful commissioner compared to his baseball, basketball and hockey counterparts aroused the subcommittee's

skepticism when it appeared he would not unequivocally oppose STV. Representative William Springer (R-Ill.) suggested that Rozelle be more committal. Springer requested the commissioner to consider an anti-pay resolution with the club owners at their annual meeting in March 1970. Springer felt Rozelle's "guarantees" were not sufficient and he wanted a written resolution effective forever. After some evasion, Rozelle agreed to the request.²²⁸

The subcommittee found baseball commissioner Bowie Kuhn even less candid. It was the Major League Television Committee which consisted of club presidents that handled the NBC telecasts since before he assumed the office, Kuhn said.²²⁹ Kuhn didn't have knowledge of any owners who were remaining off commercial television waiting for STV. He admitted he didn't fully comprehend the siphoning rule, but guaranteed siphoning wouldn't occur.²³⁰ Kuhn simply tossed the ball into the Major League Television Committee's lap saying he didn't have the authority to place an injunction on any club owners to keep them out of pay TV. That authority rested with the Major League Television Committee.²³¹

The hearings ended December 12, 1969. In February 1970, the subcommittee went into executive session to consider the anti-pay TV bills before it. Its primary concern was the effectiveness of the siphoning rule. Speculation mounted that the time period would be extended to five years because there was concern that membership changes at the FCC might result in a waiver or modification in the rule without Congress having a chance to express its view. The subcommittee

recommended amending the rule to provide that no amendment, modification or waiver be made or granted by the FCC without giving the House Commerce Committee six months notice.²³² The MacDonald committee emerged rejecting anti-pay legislation, endorsing the fourth report and urging the FCC to adopt even stricter protection for commercially televised sports.²³³

The subcommittee's resolution plus the Supreme Court's February decision not to review the 1969 Tamm decision appeared to place the future of STV in the hands of the entrepreneur and the public. However, the anti-pay forces still refused to concede their final defeat. Some surprising moves ensued in the subsequent months that sharply split the House Commerce Committee in the final phase of the STV struggle.

The Communications subcommittee's resolution was killed March 11, 1970 by a parent Commerce Committee vote. There would either be proposed legislation on STV or no action at all. That same day Representative John Dingell introduced H.R. 16418 which was identical to the bill tabled by the MacDonald subcommittee except for a few minor and inconsequential word changes. The Dingell substitute was narrowly adopted by a 15-13 vote by the full committee April 29. The Commerce Committee felt STV required new legislation to insure the public interest was adequately protected and wanted the pay TV and siphoning guidelines to have the force of law.²³⁴ Torbert MacDonald was conspicuously absent for the crucial vote because nothing was on that day's agenda about such a vote.²³⁵

H.R. 16418 amended the Communications Act to prohibit STV unless it was authorized by the FCC.²³⁶ However, it was really a scheme to make pay TV economically unworkable. Among its stipulations (hindrances) were a five year siphoning rule, a 45 percent ceiling on daily STV programming hours devoted to sports and feature films (60 percent ceiling during prime time), no commercial advertisements during free programming periods and a ban against present commercial licensees who wanted to engage in STV.²³⁷

The report on H.R. 16418 was submitted by Harley Staggers and set the stage for the first STV floor debate ever. But the report was accompanied by a wringing dissent led by MacDonald and nine other Commerce Committee members.

The minority view badly split the full committee. It claimed the majority had "made a mockery of the Committee function in the legislative process." It was a fact that due process was lacking. The Dingell bill hadn't received any formal hearings nor was it referred to the MacDonald subcommittee. The dissent accused the majority of being steamrolled by broadcast and theater interests. The 20 odd anti-STV bills pending in the 90th Congress were evidence of this.²³⁸

The minority chastised the broadcast and theater interests for their high pressure tactics. There was already advertiser-sponsored and public broadcasting, and America should have subscription television if its citizens chose it. STV wasn't a government project. Any expenditures lost were borne by the entrepreneurs, not the taxpayers.²³⁹ Even the All Channel Television Society, representing UHF licensees and permittees nationwide, wanted a pay system.²⁴⁰

H.R. 16418 was never considered by the full House. The bill was the last substantial threat to the FCC's fourth report on Docket 11279. Congressional anti-pay sentiment has been aroused since 1970, most noticeably in reaction to the Muhammed Ali-Joe Frazier heavyweight championship in 1971, but no measure has even reached the hearing stage.²⁴¹

The FCC wasn't shaken by the bitter debate over H.R. 16418. During the following months, it authorized Zenith's Phonevision as the first technical system for pay TV and considered an application from Vue-Metrics to use a Philadelphia UHF educational station for STV.²⁴²

Over-the-air STV wasn't feasible during the subsequent years. In markets where it was permitted, all the VHF air space was already used and for the most part, profitable enough not to risk a change to a new system. Potential operators knew from hindsight that the theater interests were dormant but not extinct. An alliance was needed with them because motion pictures were invaluable for a box office attraction. Moreover, in 1970, the American economy was in a recession. Television was facing its darkest economic days. The tight money situation meant cutbacks instead of expansion. No one dared venture into an over-the-air STV operation when staying in the black was the *raison d'etre*.

But there was a potential in wired STV via cable television. The technical standards for two-way capability were mandated by the FCC's third report on CATV in 1972. Overnight, pay cable became a reality.

The new technology of wired and over-the-air pay TV changed swiftly in the 1960's while social change was slow, for two reasons. One was the inherent conservatism by theater and broadcast interests which had enormous entertainment investments. Secondly, the quandary enveloping the FCC was history repeating itself. The problem with radio frequency allocation in the 1920's and the TV freeze on construction permits due to station interference were two examples of technical change outdistancing governmental regulation and planning.

Pay TV entrepreneurs learned three things from Hartford, Etobicoke and California. One, the courts were the best allies for STV. Two, sports programming was a necessity for expanded penetration. Three, enormous venture capital was needed for any system's start-up and subsequent inevitable battle with theater and broadcast interests.

A vehicle for pay TV, community antenna television, developed in the interim. Pay proponents envisioned a hybrid service with cable. Eventually, pay TV and cable TV would become interdependent. They would face the same challenge--the economic clout of the theaters and broadcasting.

Footnotes--CHAPTER II

¹First Report, 23 FCC 532, 535 (1957), The Joint Committee was an organization composed of theater owners' associations. It was said to represent 75 percent of the motion picture exhibitors in the United States.

²U.S., Federal Communications Commission, Notice of Proposed Rulemaking, "Radio Broadcast Services, Subscription Television Service," Federal Register, XX, No. 33 (February 16, 1955), 988.

³U.S., Federal Communications Commission, Notice of Proposed Rulemaking, "Radio Broadcast Services, Subscription Television Service," Federal Register, XXII, No. 104 (May 23, 1957), 3758.

⁴Ibid.

⁵First Report, 23 FCC 532, 1957.

⁶U.S., Congress, Senate, Committee on Interstate and Foreign Commerce, Television Inquiry, Hearings, before the Committee on Interstate and Foreign Commerce, Senate, on S. Res. 13, 84th Cong., 2nd sess., 1956, p. 1087.

⁷Ibid., p. 1101.

⁸Ibid., p. 1174, Milwaukee, Pittsburgh and Kansas City.

⁹Ibid., p. 1175.

¹⁰Ibid., p. 1237.

¹¹Two months after Cohn's testimony, NBC bought the radio and television rights to baseball's All Star Game and the World Series for five years. Pay TV interests weren't overjoyed about the network's lock on a top box office attraction. New York Times, July 3, 1956, p. 51.

¹²Hearings before the Senate Interstate Commerce Committee on its Television Inquiry, 84th Cong., 2nd sess., p. 1323, 1956.

¹³Ibid., p. 1291. Madison Square Garden believed that boxing matches, the World Series, hockey, basketball, the Westminster Kennel Club Show, track meets, the Army-Navy game, pro football, tennis and horseraces were natural events for pay TV.

¹⁴Ibid., p. 1315.

¹⁵Ibid., p. 1381.

¹⁶ Broadcasting, April 29, 1957, p. 64.

¹⁷ Ibid., July 8, 1957, p. 9.

¹⁸ Ibid., September 16, 1957, p. 70.

¹⁹ First Report, 23 FCC 532, 1957.

²⁰ Broadcasting, January 6, 1958, pp. 50, 114.

²¹ U.S., Congress, House, Interstate and Foreign Commerce Committee, Subscription Television, Hearings, before the Interstate and Foreign Commerce Committee, House of Representatives, 85th Cong., 2nd sess., 1958, p. 29.

²² Ibid., p. 91.

²³ Ibid., p. 210.

²⁴ In pretelevision days, there were nearly 150 local professional boxing arenas in the United States. The 1,500 to 2,000 boxers used to stage weekly bouts were an important talent source and the local arenas were their training grounds. In 1957, there were less than 20 such arenas left. The number of baseball minor leagues dropped from 59 to 28 in five years. Ibid.

²⁵ Ibid., p. 394.

²⁶ Ibid., p. 327.

²⁷ Broadcasting, February 10, 1958, p. 31.

²⁸ Ibid., February 17, 1958, p. 9. The resolution exempted pay TV via wire and CATV.

²⁹ Ibid., March 3, 1958, p. 62. Acceptance of applications still continued though.

³⁰ Ibid., January 19, 1959, p. 72.

³¹ Ibid.

³² Third Report, 26 FCC 265, 1959.

³³ Broadcasting, April 13, 1959, p. 62.

³⁴ Report and Decision, 30 FCC 301, 302, 1961.

³⁵ Hartford, the capital and largest city in Connecticut, received six Grade A station signals. Approximately 93 percent of the households had television receivers and 95 percent were UHF converted. Ibid., p. 306.

³⁶ Ibid., p. 302.

³⁷ Ibid., pp. 307-308.

³⁸ Broadcasting, October 31, 1960, p. 70.

³⁹ Ibid., March 27, 1961, p. 62.

⁴⁰ Connecticut Committee Against Pay TV v. Federal Communications Commission, 301 F 2d 835 (1962).

⁴¹ Broadcasting, October 16, 1961, p. 60.

⁴² Connecticut Committee Against Pay TV v. Federal Communications Commission, 301 F 2d 835 (1962).

⁴³ Connecticut Committee Against Pay TV v. Federal Communications Commission, 301 F 2d 835 (1962).

⁴⁴ Connecticut Committee Against Pay TV v. Federal Communications Commission, 371 U.S. 816 (1962).

⁴⁵ The 188 subscribers included 48 "test" subscribers and 12 "complimentary" subscribers, i.e., veterans hospitals, a children's home, etc. Joint Comments of Zenith and Teco in Support of Their Petition to Authorize a Nationwide STV Service, cited in U.S., Congress, House, Subcommittee on Communications and Power, Subscription Television, Hearings, before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 12435, 90th Cong., 1st sess., 1967, p. 247.

⁴⁶ The audio and video signals were transmitted over the air in a scrambled form. Phonevision consisted of four essential elements: (1) the television transmitter, (2) an encoder, (3) the television receiver, and (4) the decoder. The encoder scrambled the TV signal and also generated an "air code" signal containing instructions by which a TV receiver, assisted by the decoder, unscrambled the video and audio signals. The air code signal was utilized to restrict the use of the system to subscribers only.

To view subscription programming, the subscriber first turned the channel selector on his set to the desired station. A door on the decoder opened to permit positioning of a code setting knob to an index number (program identification number). A switch on the decoder then automatically shifted from TV to Phonevision. If the correct number

was dialed and the operation properly completed, an unscrambled picture appeared. Otherwise, a correlator light flashed. During a particular pay program, the subscriber could switch from any Phonevision position back to TV to view conventional programming. He could switch back to Phonevision without charge.

The program identification number consisted of three digits to designate the program and a letter to designate its price. Zenith planned to furnish subscribers with the code number via daily newspapers and a periodic distribution of program booklets.

Billing was based on a paper billing tape, on which subscription program usage was recorded, concealed in a small compartment behind the decoder door. The subscriber was expected to examine the tape monthly, add up the charges, and send the tape and payment to Teco.

Subscribers also paid a "rental charge," a separate monthly sum to cover repairs and the maintenance service. This charge allowed for decoding equipment depreciation based on an estimated five-year life. The rental charge was estimated to be \$28.77 annually. Report and Decision, 30 FCC 301, 302-304, 1961.

⁴⁷ WHCT carried the blacked out middleweight championship between Gene Fullmer and Dick Tiger on October 16, 1962 for \$2.50 per subscriber. The telecast was arranged with another company which possessed the closed-circuit theater TV rights. Broadcasting, September 10, 1962, p. 9.

⁴⁸ U.S., Congress, House, Subcommittee on Communications and Power, Subscription Television, Hearings, before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 12435, 90th Cong., 1st sess., 1967, p. 247.

⁴⁹ Broadcasting, January 21, 1963, p. 68.

⁵⁰ Ibid.

⁵¹ Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 247.

⁵² Broadcasting, July 9, 1962, p. 23.

⁵³ Ibid., July 16, 1963, p. 50; and October 7, 1963, p. 83.

⁵⁴ This was the second suit of this nature. Three months earlier Subscription Television filed a similar suit in California against the theater owner-backed Crusade for Free TV.

⁵⁵ Broadcasting, March 23, 1964, p. 54.

⁵⁶ Ibid., July 20, 1964, p. 23.

⁵⁷ Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 247.

⁵⁸ Broadcasting, July 20, 1964, p. 23.

⁵⁹ The two Liston-Patterson championships drew 84 percent and 68 percent of the subscribers, respectively. When Cassius Clay (now Muhammed Ali) took away Sonny Liston's crown on February 25, 1964, 86 percent of all the subscribers watched. Broadcasting, July 20, 1964, p. 23.

⁶⁰ Fourth Report and Order, 15 FCC 2d 466, 1968, p. 478.

⁶¹ Joint Comments of Zenith and Teco in Support of Their Petition to Authorize a Nationwide STV Service, cited in U.S., Congress, House, Subcommittee on Communications and Power, Subscription Television, Hearings, before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 12435, 90th Cong., 1st sess., p. 262.

⁶² Ibid., p. 263.

⁶³ Fourth Report and Order, 15 FCC 2d 466, p. 474. A Special Entertainment category with 5.5 percent of the STV air time included plays, opera, ballet, concerts and recitals, variety and nightclub programming. The Educational category (3.5 percent) was mainly medical programming for doctors.

⁶⁴ Broadcasting, March 15, 1965, p. 33.

⁶⁵ Ibid., May 17, 1965, p. 76.

⁶⁶ Order, 45 FCC 2441, 1965.

⁶⁷ Hartford was a member of the Continental Football League, a minor football league which had no network TV contract. Some individual teams televised locally. Broadcasting, August 29, 1965, p. 70.

⁶⁸ Broadcasting, November 7, 1966, p. 46; and February 6, 1967, p. 69.

⁶⁹ Ibid., January 3, 1966, p. 5.

⁷⁰ Ibid., August 16, 1965, p. 80.

⁷¹ Ibid., January 6, 1969, p. 23.

⁷² Ibid., December 4, 1967, p. 5.

⁷³ Ibid., January 6, 1969, p. 23.

⁷⁴Fourth Report and Order, 15 FCC 2d 466, 1968.

⁷⁵Broadcasting, January 6, 1969, p. 23.

⁷⁶Zenith's Phonevision wasn't the only STV test authorized by the FCC. On October 3, 1962, station KCTO (then KTVR) in Denver received permission to become the second over-the-air STV experiment. It proposed to use the Teleglobe system which sent an unscrambled picture without audio into subscriber's homes via phone lines. A subscriber was billed only when he used his audio. Evidently, someone behind the Teleglobe system lacked the foresight to see how sports fans could subscribe to as many games as they wished for free as long as they picked up the game on their home radios. The operation never commenced due to a lack of subscribers and the difficulty encountered operating a pay system over a full-time VHF station. Authorization was relinquished on May 1, 1964.

In 1963, an application from Sacramento, California's KVUE, which hadn't been on the air since 1960, was denied because it did not meet the requirements of the third report. 3 FCC 2d 1, 2, Broadcasting, May 11, 1964, p. 78; and June 3, 1963, p. 60.

⁷⁷Excerpts from Statement of International Telemeter Corporation in Support of Rulemaking Petition for Authorization of Nationwide Subscription Television, Filed with the FCC in Docket No. 11279, May 25, 1965, Setting Forth Facts Concerning the Etobicoke (Canada) Experiment, as cited in Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 367.

⁷⁸Famous Players was Canada's largest theater chain and a subsidiary, as was International Telemeter, of Paramount Pictures. Broadcasting, February 29, 1960, p. 29.

⁷⁹Broadcasting, September 19, 1960, p. 58. The heart of Telemeter's system was its decoder which unscrambled the video portion of the signal transmitted by wire to the subscriber.

The fully transistorized decoder contained both all channel VHF and UHF tuners. If a subscriber's set did not have a UHF tuner, the decoder on free programs served as a UHF converter.

The decoder was connected between the lead wires from the subscriber's antenna and the antenna terminals on the back of his set. No modifications were required on any set to install, repair or remove a decoder. The back of a subscriber's set was never removed. If a subscriber wished to discontinue service, only the reconnection of the antenna to the antenna terminals of the set was necessary.

All television viewers, regardless of whether or not they were Telemeter subscribers, were provided with a message about pay programming when they turned to a pay channel. Included in the message was information about the identity of the program, its price, and for the benefit of subscribers only, its code number. At the same time, all viewers saw a scrambled picture on their TV screen.

To purchase a program, a cash subscriber deposited money into the decoder. Telemeter also developed a credit system in Etobicoke. A

credit subscriber "dialed" the code number from code card received each month from Telemeter by moving four levers on the decoder. Four numbers of a code appeared in the window of the unit. Then the subscriber pushed a purchase button to receive the program.

In both the cash and credit cases, a printed record was made automatically within the decoder, consisting of the code number and the price of the program just purchased. One copy of this record was delivered to the credit customer by the unit monthly, and another copy was retained within the decoder.

Billing was done by a collector who visited the home periodically to remove a cash drawer within the decoder. A new drawer was substituted for it.

The special code card necessary for purchasing programming was replaced monthly. This allowed Telemeter to withhold mailing code cards to delinquent subscribers. Excerpts from Statement of International Telemeter Corporation in Support of Rulemaking Petition for Authorization of Nationwide Subscription Television, Filed with the FCC in Docket No. 11279, May 25, 1965, Setting Forth Facts Concerning the Etobicoke (Canada) Experiment, as cited in Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, pp. 692-694.

⁸⁰ Fourth Report and Order, 15 FCC 2d 466, 1968, p. 471.

⁸¹ Broadcasting, February 15; and February 29, 1960.

⁸² Ibid., March 13, 1961, p. 84.

⁸³ Subscribers saw the Argonauts in their second of two preseason games in August 1961 for \$1.50. All the blacked out regular season home games were available for \$2.00 each in 1961. The games averaged a 23 percent rating. Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 371.

⁸⁴ Broadcasting, October 16, 1961, p. 81; and October 23, 1961, p. 76.

⁸⁵ Ibid., May 7, 1962, p. 88.

⁸⁶ The reason for cancelling such a premier attraction may have been caused by costly telephone line charges used to feed games from Montreal, Boston, New York, Detroit, and Chicago back to Etobicoke.

⁸⁷ Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 369.

⁸⁸ Broadcasting, September 23, 1963, p. 78.

⁸⁹ Ibid., March 29, 1965, p. 100.

⁹⁰Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 370.

⁹¹Broadcasting, July 22, 1963, p. 60.

⁹²Ibid., July 29, 1963, p. 5; and August 19, 1963, p. 70.

⁹³Ibid., August 26, 1963, p. 34.

⁹⁴Ibid., September 16, 1963, p. 44, 48.

⁹⁵Ibid., August 26, 1963, p. 34.

⁹⁶Ibid., August 8, 1963, p. 32.

⁹⁷Ibid., September 16, 1963, p. 44.

⁹⁸New York Times, March 8, 1963, v, p. 3.

⁹⁹Broadcasting, October 14, 1963, p. 74.

¹⁰⁰Ibid., October 21, 1963, p. 69.

¹⁰¹Ibid., November 25, 1963, p. 68.

¹⁰²Subscription Television cited the Crusade For Free TV's newspaper ads on the Los Angeles Times and Wall Street Journal against pay TV. Subscription Television said it couldn't publicly react to the ads because any rebuttal would have been construed as a promotion for its impending stock sale. The SEC hadn't approved Subscription Television's public offering when the ads appeared and the company remained silent to avoid accusations of any bad business practices.

¹⁰³Broadcasting, December 23, 1963, p. 52.

¹⁰⁴Ibid., April 6, 1963, p. 102.

¹⁰⁵Ibid., June 8, 1964, p. 62.

¹⁰⁶Ibid., June 15, 1964, p. 80.

¹⁰⁷Ibid., June 29, 1964, p. 10.

¹⁰⁸Ibid., June 8, 1964, p. 9.

¹⁰⁹Ibid., February 10, 1964, p. 7.

¹¹⁰Ibid., p. 52.

¹¹¹The FCC was only concerned with over-the-air pay TV systems prior to the Zenith-Teco petition in 1965. Also, Subscription Television's cables did not cross state lines thereby avoiding federal regulation. Broadcasting, March 9, 1964, p. 9.

¹¹²Broadcasting, April 13, 1964, p. 55; and April 20, 1964, p. 5.

¹¹³Ibid., March 23, 1964, p. 55; and New York Times, November 5, 1964, p. 91.

¹¹⁴Broadcasting, March 23, 1964, p. 55.

¹¹⁵Ibid.

¹¹⁶New York Times, March 8, 1964, v, p. 3.

¹¹⁷Broadcasting, April 27, 1964, p. 60.

¹¹⁸Ibid., May 18, 1964, p. 33.

¹¹⁹Ibid., July 20, 1964, p. 26.

¹²⁰Ibid., May 18, 1964, p. 33.

¹²¹New York Times, July 16, 1964, p. 63.

¹²²Broadcasting, August 3, 1964, p. 64.

¹²³Ibid., July 27, 1964, p. 65.

¹²⁴Ibid., August 10, 1964, p. 46.

¹²⁵New York Times, August 15, 1964, p. 47.

¹²⁶Broadcasting, August 10, 1964, p. 46.

¹²⁷Broadcasting, June 23, 1964, p. 5. Little known primary research on Subscription Television's collapse between June and November 1964 is available. Only Broadcasting provided somewhat sufficient source material for the demise of pay TV in California.

¹²⁸Ibid., p. 61.

¹²⁹Ibid., August 11, 1964, p. 64; and August 18, 1964, p. 64.

¹³⁰The question of pay TV was known as Proposition 15.

¹³¹Broadcasting, September 7, 1964, p. 9.

¹³²Ibid., September 21, 1964, p. 48.

¹³³Broadcasting, October 5, 1964, p. 60.

¹³⁴Ibid., October 12, 1964, p. 60.

¹³⁵Ibid., October 26, 1964, p. 60.

¹³⁶Ibid., p. 9.

¹³⁷Ibid., October 5, 1964, p. 60.

¹³⁸Ibid., November 2, 1964, p. 52.

¹³⁹Ibid., October 26, 1964, p. 87.

¹⁴⁰Ibid., November 2, 1966, p. 52. NBC had a World Series contract with Major League Baseball effective until 1966. Pay TV of the series was prohibited by the pact.

¹⁴¹Broadcasting, August 31, 1964, p. 40.

¹⁴²Ibid., September 28, 1964, p. 23.

¹⁴³Theodore B. Olson and Norman S. Oberstein, "Aspects of Pay Television: Regulation, Constitutional Law, Antitrust," California Law Review, LIII, No. 5 (1965), p. 1378. The Proposition was passed by a vote of 4,515,013 yes to 2,286,775 no.

¹⁴⁴Subscription Television only allocated \$100,000 on pre-referendum publicity because of a cash shortage. New York Times, November 5, 1964, p. 91.

¹⁴⁵Broadcasting, September 28, 1964, p. 24.

¹⁴⁶There were 4,000 subscribers in Los Angeles and 2,000 in San Francisco when the operation ceased. Weaver estimated the breakeven point was between 75,000-80,000 subscribers spending \$10-\$15 monthly. Broadcasting, November 9, 1964, p. 21.

¹⁴⁷Broadcasting, November 16, 1964, p. 20.

¹⁴⁸Ibid., January 11, 1964, p. 74.

¹⁴⁹Ibid., November 9, 1964, p. 9.

¹⁵⁰Ibid., December 21, 1964, p. 42. International Telemeter joined Weaver in his court battle in February 1965. Telemeter filed to have Proposition 15 declared unconstitutional by the superior court. Broadcasting, February 15, 1965, p. 49.

¹⁵¹Broadcasting, May 24, 1965, p. 46.

¹⁵²Ibid., August 23, 1965, p. 10.

¹⁵³New York Times, December 24, 1965, p. 24.

¹⁵⁴Broadcasting, May 24, 1965, p. 46.

¹⁵⁵Sylvester L. Weaver & D. E. O'Neil & T. F. Greenhow v. Frank M. Jordan, 411 P 2d 289 (1966).

¹⁵⁶Ibid., p. 294.

¹⁵⁷Ibid., p. 299.

¹⁵⁸Broadcasting, March 7, 1966, p. 56.

¹⁵⁹Further Notice of Proposed Rulemaking and Notice of Inquiry, 3 FCC 2d 1, 1966.

¹⁶⁰Joint Comments of Zenith Radio Corporation and Teco, Incorporated in Support of Petition for Nationwide Authorization of Subscription Television, March 10, 1965, as cited in Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, pp. 280-292.

¹⁶¹Broadcasting, August 9, 1965, p. 10.

¹⁶²Comments Submitted by the Joint Committee Against Toll TV, October 10, 1966, as cited in Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 448.

¹⁶³Further Notice of Proposed Rulemaking and Notice of Inquiry, 3 FCC 2d 1, 1966.

¹⁶⁴Ibid.

¹⁶⁵Notice of Inquiry and Notice of Proposed Rulemaking, 1 FCC 2d 453, 1965.

¹⁶⁶Ibid.

¹⁶⁷Ibid.

¹⁶⁸Broadcasting, August 15, 1966, p. 9.

¹⁶⁹Ibid., October 17, 1966, p. 62.

¹⁷⁰Two commissioners, Kenneth Cox and Robert E. Lee, recommended adoption. James Wadsworth agreed it should be presented for FCC consideration but stated that this did not imply that he endorsed its

adoption. Report to the Federal Communications Commission by Its Subscription Television Committee, July 3, 1966, as cited in Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 14.

¹⁷¹Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 10.

¹⁷²Broadcasting, July 17, 1967, p. 32.

¹⁷³Ibid., August 21, 1967, p. 50.

¹⁷⁴Ibid., October 9, 1967, p. 30.

¹⁷⁵Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 1.

¹⁷⁶Ibid., p. 188.

¹⁷⁷Ibid., p. 187.

¹⁷⁸Ibid., p. 409.

¹⁷⁹The NBA arranged for a game of the week package with ABC in 1965. The NHL disappeared from network television in 1960 and reappeared with CBS six years later.

¹⁸⁰Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 567.

¹⁸¹Ibid., pp. 419-420.

¹⁸²Ibid., p. 484.

¹⁸³The proposed rule stated "Sports events shall not be broadcast which have been televised on a non-subscription, regular basis in the community during two years preceding their proposed subscription broadcast: Provided, however, that if the last regular occurrence of a specific event (e.g., summer Olympic games) was more than two years before proposed showing on subscription television in a community, and the event was at that time televised on conventional television in that community, it shall not be broadcast on a subscription basis." Programming was divided into specific and nonspecific events. The World Series, college football bowl games, the Kentucky Derby, Masters Golf Tournament and the Olympics were specific events. Nonspecific events included contests which were part of a regular series such as regular season football or baseball games. This category prevented the siphoning of games of the week and any game packages under contract with a local television station. Preseason games were also included in the nonspecific category. NHL and NBA playoff games were nonspecific since they were deemed a

regular part of the season. Report to the Federal Communications Commission by Its Subscription Television Committee, July 3, 1966, as cited in Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 140.

¹⁸⁴Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 381.

¹⁸⁵Ibid., p. 485.

¹⁸⁶Ibid., p. 188.

¹⁸⁷Home games were unaffected by the siphoning rule because they hadn't been on commercial TV because of the NFL's antitrust exemption to blackout home games under Public Law 87-331.

¹⁸⁸Hearings before the House Communications Subcommittee on Subscription Television, 90th Cong., 1st sess., 1967, p. 578.

¹⁸⁹Ibid., p. 577.

¹⁹⁰Ibid., p. 550.

¹⁹¹Ibid., p. 557.

¹⁹²Ibid., p. 629.

¹⁹³Ibid., p. 643.

¹⁹⁴Ibid., p. 646.

¹⁹⁵Ibid., p. 645.

¹⁹⁶Fourth Report and Order, 15 FCC 2d 466, 1968, pp. 470-471.

¹⁹⁷Ibid., p. 471.

¹⁹⁸The letter was signed by four Communications Subcommittee members including Chairman MacDonald. The motion to recommit the resolution to the Communications Subcommittee failed by a tie vote of 14-14. The resolution passed 16-13. Fourth Report and Order, 15 FCC 2d 466, 1968, p. 471.

¹⁹⁹Fourth Report and Order, 15 FCC 2d 466, 1968, pp. 471-472.

²⁰⁰Ibid., Commissioner Robert Barley dissented saying that he believed valuable spectrum air space should not be used for over-the-air pay TV.

²⁰¹Third Notice of Proposed Rulemaking, 15 FCC 2d 601, 1968.

²⁰²Fourth Report and Order, 15 FCC 2d 466, 1968, p. 484.

²⁰³Ibid., pp. 571-572.

²⁰⁴Broadcasting, May 5, 1969, p. 63.

²⁰⁵Ibid., May 26, 1969, p. 48.

²⁰⁶Ibid., May 5, 1969, p. 5.

²⁰⁷National Association of Theater Owners v. Federal Communications Commission, 420 F 2d 194 (1969).

²⁰⁸Ibid., p. 198.

²⁰⁹Ibid., p. 203.

²¹⁰Ibid., p. 204.

²¹¹Broadcasting, June 16, 1969, p. 61.

²¹²National Association of Theater Owners v. Federal Communications Commission, 420 F 2d 194 (1969), p. 206.

²¹³Ibid., p. 207.

²¹⁴John F. Banzhaf v. Federal Communications Commission, 405 F 2d 1082 (1968), pp. 1101-1103.

²¹⁵Broadcasting, September 29, 1969, p. 46. The NCTA had taken no formal position on STV except for its opposition to the FCC's compulsory carriage rule of scrambled STV signals. Third Further Notice of Proposed Rulemaking, 15 FCC 2d 601, 1968.

²¹⁶U.S., Congress, House, Committee on Interstate and Foreign Commerce, Subscription Television-1969, Hearings, before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 420, 91st Cong., 1st sess., 1969, p. 50.

²¹⁷Ibid., p. 60.

²¹⁸Ibid., p. 420.

²¹⁹Ibid., p. 407.

²²⁰Ibid., p. 408.

²²¹Ibid., p. 409.

²²²Pro football's readily available STV product was its home games which had been blacked out in their local communities long enough to fall outside the siphoning rule. Many home games were constant sellouts and there was a TV market for those who couldn't obtain tickets. Baseball's readily available product was all its games both home and road that were not under contract with local stations during the past two years. In short, home and road games not on the commercial TV schedule could be shown on STV.

²²³Hearings before the House Communications Subcommittee on Subscription Television, 91st Cong., 1st sess., 1969, p. 376.

²²⁴The contracts with CBS (National Conference), NBC (American Conference) and ABC (Monday Night Football) were effective for the 1970 season.

²²⁵Hearings before the House Communications Subcommittee on Subscription Television, 91st Cong., 1st sess., 1969, p. 369.

²²⁶Ibid., p. 376.

²²⁷In 1964, four NFL teams operated closed-circuit theater TV showings of their games. Each team was free to negotiate its own theater arrangements without consulting other clubs. Rental of the theater/arena was costly and some clubs lost money on the presentation themselves. There were no NFL games seen regularly on theater TV in 1965. A league spokesman commented that fans might support a losing team at the stadium but not in a theater. Broadcasting, August 30, 1965, p. 53. Rozelle told the subcommittee that theater TV wasn't in the public interest. Theater TV of regular season games wasn't permitted under the NFL-CBS contract from 1965-1969. Individual teams, however, were free to make their own theater arrangements with organizations that provided such service. Hearings Before the House Communications Subcommittee on Subscription Television, 91st Cong., 1st sess., 1969, p. 378.

The NFL-CBS contract gave the league the right to have its games on pay TV during the third and fourth years of the agreement. CBS had to be notified before January 15, 1968 if the NFL or any of its members had entered into an STV agreement for 1968, the third year of the pact. There was a January 15, 1969 deadline for notification for the fourth year of the contract. The NFL never utilized their pay option. Hearings Before the House Communications Subcommittee on Subscription Television, 91st Cong., 1st sess., 1969, p. 400.

²²⁸Hearings Before the House Communications Subcommittee on Subscription Television, 91st Cong., 1st sess., 1969, pp. 371-372.

²²⁹Ibid., p. 304.

²³⁰Ibid., p. 307.

²³¹Ibid., p. 308.

²³²H. Rept. No. 1110, 91st Cong., 1st sess., 1969, p. 14.

²³³Broadcasting, February 9, 1970, p. 47.

²³⁴H. Rept. No. 1110, 91st Cong., 1st sess., 1969, p. 6.

²³⁵Ibid., p. 15.

²³⁶The bill authorized the FCC to adopt rules and regulations consistent to the FCC's measure. Where there were inconsistencies, H.R. 16418 superseded the fourth report.

²³⁷H. Rept. No. 1110, 91st Cong., 1st sess., 1969, p. 17.

²³⁸Ibid., p. 12.

²³⁹Ibid., p. 25.

²⁴⁰Ibid., p. 14.

²⁴¹After the bout, Representative Charles Sandman (R-N.J.) introduced H.R. 6992 which proposed amending Communications Act to prohibit CATV and STV "from seeking, contracting for or exercising exclusive rights to present championship sports events." Broadcasting, March 29, 1971.

²⁴²Broadcasting, August 31, 1970, p. 32; and July 6, 1970, p. 27.

CHAPTER III

CABLE TELEVISION

Cable Television--The Early Years

Cable television's reliance on major live-action sports events as a subscriber inducement grew as the industry expanded. In fact, CATV's current problems with the rules and regulations concerning siphoning, copyright and the importation of distant signals are directly related to the evolution of sports on CATV.

Community antenna television began in the mountainous regions of the United States in the late 1940's as a method on improving reception of television signals in fringe areas and introducing television into locations without any TV service. Some of these localities were remote. Others were without television because of the FCC's television freeze from 1948 to 1952 on the construction of new VHF stations. Nothing was done to hinder CATV's growth because most of the licensed television broadcasters wanted their signals to be received via cable to insure a larger audience and more advertising revenues. The FCC refrained from any CATV action because it believed the new-found medium was a temporary phenomenon that would dissipate once the freeze was over and there was competition from new stations providing local service.¹

When the FCC lifted the TV freeze in 1952, CATV grew instead. There was a close parallel between the growth of television and the expansion of CATV systems.²

<u>Date</u>	<u>Number of TV Stations</u>	<u>TV Audience (millions)</u>	<u>Number of CATVs</u>	<u>CATV Subscribers (thousands)</u>
1952	108	15	70	14
1953	120	20	150	30
1954	356	26	300	65
1955	411	30	400	150
1956	461	34	450	300

The increase in the number of television stations meant a rise in receiver sales stimulated by the availability of more signals. This growth actually influenced CATV development because of the existing relationship between station contours and CATV systems. The optimum location for a CATV system was in an area just beyond the coverage of two or three television stations. This allowed an antenna to receive and retransmit signals without the expense of long-distance wire relays or complex amplification equipment. Hence, CATV sprung up in all fringe areas of existing stations. CATV expanded only when new stations created additional communities of this type.³

CATV fragmented some of the smaller market TV audiences with its importation of distant signals. In 1958, a small number of local station licensees complained that CATV had eroded their advertising revenues and brought their case to the Senate Communications Subcommittee of the Interstate Commerce Committee. The subcommittee asked the FCC to investigate but the FCC found it was impossible to conclude that any CATV system had a serious economic effect on any television station.

In 1959, the Senate Commerce Committee sent a bill to the floor amending the Communications Act to establish FCC jurisdiction over CATV located within the contours of a single station. The Commerce Committee feared a calamity if one CATV operator drove a lone TV station out of business in a rural community and deprived the population of television.⁴ The measure was defeated by one vote in 1960 and sent back to the Committee where it eventually died.

Since its birth in Pottsville, Pennsylvania in 1952, the National Community Television Association had fought against federal regulation. Operators were mostly mom and pop type and the business was lucrative enough without expansion. By 1963, restrictive state and local regulations caused the NCTA to reassess its position.⁵

Small station licensees kept up their adverse economic impact complaints and the FCC attempted to avoid a full-scale congressional investigation by assuring both houses that the controversy would be resolved through industry negotiations or private litigation.⁶

The FCC undermined CATV when it finally decided to act in April 1965. Its first report and order sought to regulate CARS, the licensed microwave relay companies, to require their customers, namely cable operators, to comply within the conditions of the first report.⁷ The new regulations imposed certain conditions upon authorizations issued by the FCC "to establish or operate fixed (radio) stations used to relay television signals to community antenna television systems."⁸ There were two general provisions:

1. Every licensee granted to such a cable relay had to carry all local TV stations within the contours of his system upon request of the station licensee.
2. A CATV operator had to refrain from duplicating a station's signal for thirty days, fifteen days prior and fifteen subsequent, to the telecast.⁹

CATV operators tolerated the mandatory local carriage but bitterly protested the thirty day nonduplication period. Coincidentally, the FCC issued a proposed rule with Docket 15971 which really enraged CATV interests.¹⁰ In Part I, the FCC announced for the first time its belief that the allegation of adverse economic impact upon television licensees had some merit. This alleged unfair element of CATV competition gave the FCC power to expand its jurisdiction over all CATV systems pending further hearings on the need to exercise that authority. Operators importing signals to comply with the first report's nonduplication requirement found that Part II of Docket 15971 nullified their primary source of sports programming, the importation of distant independent stations. Part II emphasized the alleged danger to UHF development posed by CATV entering the larger markets.

Comments on Docket 15971 were due in November 1965 and the rule making was expected to be finalized in early 1966. If distant signal importation was limited, one of the first staples CATV subscribers would miss was out of town sports events. CATV operators faced an uphill struggle to sell a service minus distant signals and sports limited to local events.

Not only did the FCC paralyze sports on cable but organized sports showed its formal animosity toward CATV when controversy developed between Notre Dame and the NCAA in October, 1965. WNDU, the

university television station, had customarily presented sold out home football games for over ten years to Fighting Irish fans.¹¹ When those signals were expropriated by four Indiana CATV systems, the NCAA withdrew its permission for WNDU to telecast the games because CATV relayed WNDU's signal beyond its Grade B contour.¹² The NCAA, in effect, had shortchanged 162,000 viewers in WNDU's coverage area for 7,000 CATV subscribers. Notre Dame appealed for relief to the FCC and NCAA. The CATV systems claimed they were only an antenna service and they did not have the right to alter or delete station broadcasts.¹³

Upon recommendation by the 1965 NCAA Television Committee, the NCAA banned all CATV importation unless prior consent was given by the originating station.¹⁴

Notre Dame President Reverend Edmund Joyce succeeded in changing the NCAA's mind though. Joyce acquired letter from athletic directors of neighboring schools vouching they weren't hurt at the turnstiles by WNDU telecasts. The NCAA agreed to decide future cases on their merits and vowed to cooperate with the FCC in determining those merits.¹⁵

Chairman Oren Harris of the House Commerce Committee was upset with the FCC's unilateral action. Within a week of the first report and order, Harris introduced H.R. 7715 to have Congress authorize the FCC to regulate CATV, convened his Communications Subcommittee and began hearings a month after the FCC's first report. Harris wanted a method whereby FCC rules regarding CATV would have to be reviewed by Congress to become effective. H.R. 7715 nullified the first report and the commissioners were summoned to explain their behavior.¹⁶

Broadcasting interests muddled the water by labeling CATV as a forerunner to pay TV during the four days of hearings in late May and early June. Such a claim strengthened broadcasting's argument that uninhibited CATV expansion caused an adverse economic impact. Viewers eventually would pay for programming they now saw for free, said the commercial broadcasters. There was nothing in H.R. 7715 to prevent CATV from using commercial programming as a base to support it in a gradual shift to pay TV. The Association of Maximum Service Telecasters, a group of 160 commercial and educational VHF and UHF stations serving various sized markets, believed the hearings were a policy for STV as much as they were concerned with CATV regulation.¹⁷

Broadcasters created a pay TV nightmare to avoid CATV competition, but they denied it vigorously. Lester Lindow of the AMST pointed to his organization's support of increased competition by the all channel receiver legislation. It was the perfect rationale for raising the subcommittee's doubts about CATV.

The issue is not whether there will be a choice of service but what kind of service. Should the choice largely be among distant stations brought to the people by CATV for a fee? Or should the choice be among the present and future local and area television stations serving the particular needs of the area for free? We submit that vigorous competition among a growing number of free and local area television stations is more beneficial to the broad public interest.¹⁸

One broadcaster adeptly summarized the prevailing viewpoint of his colleagues who believed the Harris bill did not deal with the CATV question as effectively as possible.

I see in unregulated CATV the basis upon which pay TV may be able to make substantial inroads into the free TV audiences, particularly in the larger cities. Pay TV is to me the most potentially dangerous development in the entire field of broadcasting. I am convinced that the American public, once pay TV is permitted a foothold, would soon be paying enormous sums to view the same programs which they now are able to see free. Just as the community antenna business is built upon the product of licensed commercial broadcasting, so unregulated CATV can be the means by which pay TV can be developed.¹⁹

The broadcaster's strategy was simple. Parade before the subcommittee and claim how CATV, with all its present adverse economic impact, would become pay TV and destroy so-called free television. It was a case of repeating it enough to the Communications Subcommittee and hoping they'd begin to believe it. It had already worked with the FCC. Now the NCTA had two fronts to defend.

Chairman E. William Henry of the FCC testified that unregulated CATV could form the basis of a pay system or separate pay stations in the larger cities.²⁰

The NCTA had filed comments with the FCC on the matter of false allegations of CATV's involvement with pay TV a year before the first report.²¹ CATV likened itself to a party line telephone system. The present state of the art did not allow CATV systems to operate as pay TV services because program distribution was impossible on a selective basis.²²

Robert L'Heureux, NCTA legal advisor, argued in TV & Communications in 1965 that the success of pay TV depended on its getting a foothold in the largest urban areas where CATV was nonexistent or quite scarce. Almost all the systems were too small compared to the

penetration level required by pay TV economics. Not more than 18 CATV systems with 500,000 subscribers or more existed among the almost 13,000 operations. L'Heureux explained there wasn't any substantive reason to believe that a STV entrepreneur would grant a franchise to any CATV operator. The CATV systems simply weren't large enough to support STV, nor did they have a two-way communications capability.²³

What the NCTA saw as an economic and technical impossibility, broadcasters used for propaganda. Weekly or monthly payments were interpreted as pay TV, not CATV. The AMST maintained STV was not limited to a per program charge during the hearings.²⁴

The broadcast interests used all their ammunition to scare the subcommittee members into thinking that CATV and STV were synonymous. In order to retain the argument of adverse economic impact more lobbying was needed. Importation of sports events was the perfect example of demonstrating this viewpoint.

WSAU-TV of Wausau, Wisconsin complained that blacked out Green Bay Packer home football games were seen in its market on CATV systems via microwave.²⁵ WSAU accepted the blackouts as a legitimate means of protecting the Packer's gate, but the station claimed CATV exploited the situation.²⁶

WNEP-TV of Scranton/Wilkes Barre, Pennsylvania, one of the few all UHF markets in the country, said CATV had turned from an ally to a foe. Previously, CATV was needed to reach people within WNEP's service area with poor reception and those without UHF tuners. Now the importation of three independent New York City stations placed all three Scranton/Wilkes Barre stations at a disadvantage.²⁷

Taft Broadcasting operated WNEP and Taft's President, Lawrence Rogers, presented an exhibit of the CATV program schedule found in the Williamsport Sun Gazette for a week in mid-April 1965.²⁸

Rogers called New York City a sports mecca because of its number of professional teams and local events like collegiate basketball and track meets. There were no tributes to CATV though. Rogers referred to the "demonstration week" schedule which he had inserted into the record. On Wednesday night, April 14, Yankee and Met baseball games were available on two of the cable channels. On Saturday, WNEP picked up its feed of ABC's baseball "Game of the Week," but so did another station on the cable system. WNEP's and another ABC affiliate audiences were fragmented. The WNEP game competed with two other major league games involving the Yankees and Mets. One game was televised in the afternoon on two cable channels and the other was shown on a third cable channel at night.

The Tuesday, April 13 and Friday, April 16 newspaper advertised the Cassius Clay-Sonny Liston championship fight to be seen on Williamsport CATV. Rogers interjected that the difference between CATV and STV was nonexistent.²⁹

Furthermore, the Williamsport CATV system cablecasted. That was justification enough to call the CATV system an unlicensed broadcaster without any obligation to serve the public interest. Presumably, Rogers' definition of public interest meant preventing a loss of advertising revenues due to CATV's "adverse economic impact" causing WNEP to go out of business.³⁰

The Williamsport example was a great test case for importation, leapfrogging, nonduplication and pay TV restrictions--all the things that broadcasters loathed. Rogers had strained the argument though. The week he chose was atypical. It was the beginning of the baseball season and the Yankees and Mets televised almost, if not all, their home games and over half their road games in 1965. Heavyweight championship boxing matches were a rarity, but Rogers pragmatically chose a week when promotions for an upcoming bout were scheduled to strengthen his case.

CATV gave a blanket defense against all accusations. Bruce Merrill, board chairman of the NCTA, chastised the public officials involved in the controversy.

There is one thing that proposed pay TV and CATV would have in common. If pay TV comes into existence, it will owe that existence to one thing, which is that to which CATV owes its existence, basically. It will be giving the public something that it does not now have, something the public wants, and something it is willing to pay for. That something is a greater variety of television entertainment that is generally available, and free of off-the-air reception problems. If pay TV does not have that something, it will not exist. If CATV loses that something, it will not exist. The only force that can deny this to the public so far as I can see will be made up only of public regulators who are misinformed concerning the demands of the public and the service of CATV.³¹

In the beginning, the hearings caused much tumult because of the FCC's unprecedented action. But the outrage subsided and the Harris bill eventually died in committee. The House knew it couldn't restrain the FCC without Senate help. Broadcasting reported that Warren Magnuson, the chairman of the Senate Commerce Committee, and John Pastore (D-R.I.), the chairman of the Communications Subcommittee, were on the record as feeling the FCC had sufficient authority to regulate CATV.³²

Eleven months after it enacted its first cable rules, the FCC issued its second report in March 1966.³³ The report's major provisions greatly expanded the FCC's jurisdiction. They were:

1. An assertion of authority over all CATV systems whether or not they used the microwave relay service.
2. CATV systems, upon request and within their channel capacity, had to carry all TV stations placing a Grade B signal over the system's community.
3. The nonduplication period was reduced to a same day period.
4. The FCC welcomed Congressional guidance on any policy or authority it wished to assert over CATV.
5. CATV systems located within the Grade A contour of a station in one of the top of a hundred markets could not import the signal of another station beyond its Grade B contour.

It was the lattermost rule that spelled doom for the CATV operators who had hoped to enter the large cities with out-of-town and blacked out sports programming as a subscriber inducement. The FCC decided that independent stations in the largest markets needed protection from potential audience fragmentation due to CATV importation. CATV's role as a supplemental service was exiled to the hinterlands.

The FCC waived the rule for two reasons--neither one substantially hurt broadcast interests. A cable system could extend a TV signal beyond its Grade B contour into a top 100 market ". . . upon showing made in an evidentiary hearing that such operations would be consistent with the public interest and particularly the establishment and healthy maintenance of UHF television broadcast service." Or CATV systems within the top 100 markets as of February 15, 1966 could be grandfathered to avoid disruption of subscriber viewing habits.

At the conclusion of its second report, the FCC concentrated on the possibility of a hybrid pay cable operation. Such a system based on the use of broadcast signals was considered inappropriate by the FCC. Pay TV needed full consideration at a separate FCC or congressional proceeding to avoid a "back door" entrance via CATV with profits based on the sale of the broadcast industry's product.³⁴

The FCC also considered the importance of sports programming anomalous to CATV and broadcasting. Broadcasters paid for exclusive rights to sports events which were sometimes subjected to blackout restrictions. The same programming was available to CATV which never brought exclusive rights and did not observe Public Law 87-331.³⁵ Therefore, the FCC sent Congress two legislative proposals for the problem:

1. Congress should prohibit program originations by CATV systems. A hybrid CATV-STV operation using the broadcast industry's signals was not in the public interest since viewers would have to pay for what they had previously received for free.
2. Congress should reconsider applying a statutory provision under Section 325 (a) to CATV.³⁶

Section 325 (a) prohibited broadcast stations from rebroadcasting the programming of another broadcast station without the expressed consent of the originating station.

The new House Commerce Committee chairman, Harley Staggers (D-W.Va.), supported the FCC's unilateral action unlike his predecessor.³⁷ Congressional opposition to the FCC's broad decision making in its second report still remained, though at a lower level. That level was at the Communications Subcommittee where its chairman, Walter Rogers

(D-Tex.), introduced a bill amending the Communications Act to prohibit the FCC from exercising jurisdiction over CATV. Two other bills were introduced, H.R. 13286 by Staggers which had the FCC's blessing, and the NCTA-backed H.R. 14201.

The Commerce Committee began another round of CATV regulation hearings in 1966. The FCC-sponsored legislation had smoother sailing under the full committee instead of Rogers' subcommittee. The FCC's proposal requiring a retransmission consent for CATV attracted the attention of organized professional sports.

National Football League Commissioner Pete Rozelle supported H.R. 13286, because CATV systems ignored the 75 mile blackout radius. Rozelle also asked Staggers to adopt legislation requiring CATV operators to obtain the consent of the professional leagues whose games the CATV system wished to carry.³⁸ Rozelle admitted the NFL had never acted against CATV regarding the unauthorized reproduction statement made during each game. An NFL consent restriction was difficult to enforce and had never been attempted legally.³⁹

Rozelle's preoccupation with his league's economic well-being led him to admit that he wouldn't have appeared before the Commerce Committee if the NFL had copyright law protection against CATV. The Staggers committee was chosen since they were more informed about the importation problem than any other congressional committee and because the copyright legislators regarded the NFL as a communications problem not applicable to books, records or photographs.⁴⁰

Rozelle was dubious of his chances of renegotiating another lucrative football contract in 1968 as long as CATV systems brought three or four games into a community. Unless importation was curbed, audiences would be fragmented and the value of the exclusive CBS contract to television rights would suffer.⁴¹

Walter Rogers, superseded by Harley Staggers, was hardly muzzled. Rogers said the NFL's wish invited federal regulation of business to solve competitive problems if followed to its logical conclusion.⁴² It was a fundamental problem that disturbed Rogers. The only problem about the importation of games was that it didn't have a fundamental solution.

Commissioner Joe Foss of the American Football League also supported H.R. 13286. The blackout protection afforded sports leagues by the courts and the Congress was in jeopardy because of CATV. Foss recommended that Staggers amend his bill to amend Section 325 (a) of the Communications Act as proposed by the FCC.⁴³

Major League Baseball also sought a prior retransmission consent. Paul Porter, representing Commissioner William Eckert, said unless the sport continued to control its live telecasts under contract, the network TV rights would suffer. Porter emphasized that a retransmission consent or the remuneration to the interests producing the events should also apply to local TV arrangements.⁴⁴

The National Association of Broadcasters widened its adverse economic impact argument to include sports. Broadcasting's attempt to protect its exclusivity to events caused its alliance with sports. Vincent Wasilewski said unrestricted importation meant an advertiser

would soon find wider coverage by buying a few stations in large markets.

Small market licensees would suffer as he cited a case from Television Age to Staggers.

The burgeoning CATV industry has caused the New York Mets to drop plans this year for the regional network that has carried their games to upstate New York and Connecticut. In the past, a half dozen local outlets were used in Plattsburgh, Binghamton and other small markets, but with several CATV systems now getting the games directly from New York, there appears to be little audience left for duplicate games on the regular channels.⁴⁵

WSAU-TV reappeared complaining of CATV importation. Blacked out Packer home games were on five CATV systems within WSAU's circulation area while the station had to obey the blackout restrictions. That was unfair to WSAU and those who were not wired for CATV. WASU didn't approve of the blackout rule and felt CATV should be placed under the same statute.⁴⁶

NCTA President Frederick Ford disagreed. Sports signals out over the air were in the public domain when received by community antennas.⁴⁷

In June 1966, the Commerce Committee, by a vote of 20-11, reported out a bill that agreed substantially with the FCC's philosophy. It did not include, however, the retransmission consent so avidly sought by the FCC and organized sports. But it did require CATV to honor the TV blackout provision. The measure eventually died in the House Rules Committee.⁴⁸ While Senator Pastore remained intent to let the House solve the CATV question first, the FCC was free to run the gamut in the field of CATV regulation. Except for an inconsequential House

Communications Subcommittee hearing in 1969, 1965 and 1966 marked the extent of congressional activity in CATV regulation during the decade.

Initial Pay Cable Sports Hookups

The experiments in Palm Springs and Etobicoke attracted entrepreneurs to the box office potential of sports and feature films for a home audience. American businessmen didn't wait for the results from Hartford or California to test the pay cable home box office, via wire, interconnection, microwave or telephone relay. The predominant choice for such tests was sports.

In 1960, Irving Kahn of Teleprompter secured the closed-circuit theater TV rights for the second Floyd Patterson-Ingemar Johansson heavyweight championship fight. With all the ancillary rights for the bout in his possession and an eye on a home pay TV box office, Kahn fed the bout over Teleprompter's four CATV systems and to nine other systems for \$2.00 a subscriber.⁴⁹ The fee was collected on an honor system since Teleprompter had no cash boxes or recording tape devices for billing.⁵⁰ Consequently, no one had any idea about how many subscribers watched the fight, or cheated the system.

Teleprompter realized \$24,000 from the experiment.⁵¹ An estimated 50 to 75 percent of the 25,000 potential subscribers saw the fight.⁵²

Kahn, elated with the result, took larger strides in pay cable's direction. A fifth Teleprompter system with 4,000 subscribers was purchased in Eugene, Oregon later that summer.⁵³ Kahn predicted the

unprecedented third championship fight between Patterson and Johansson in March 1961 would be available to 100 CATV systems.⁵⁴

Kahn's prediction was about 80 too many. Some systems conflicted with theater showings. But a large number found the \$3,000-\$4,000 charges for picking up the telecast off the AT&T lines leased by Teleprompter too expensive. So, only 20 odd CATV systems with a 120,000 subscriber potential saw Patterson successfully defend his title against his Swedish adversary.⁵⁵ It wasn't the box office bonanza Kahn expected.

Kahn was cognizant of the impact of CATV and sports. There was no doubt he had cable plans for the NFL after two relatively successful pay ventures in boxing. When NBC paid \$615,000 for exclusive TV rights for the NFL's championship game in 1961, Kahn openly took credit for personally tripling the TV rights for the game. He confirmed reports that Teleprompter had bid one million dollars for a closed-circuit TV contract and was rejected.⁵⁶

When the NCTA convened for its 1961 convention a month after Kahn's revelation, controversy concerning pay TV was expected among the operators. Old liners wanted CATV to remain a community antenna service. They feared the will of come-lately outsiders who had bought into the industry in recent years. Some operators predicted that if CATV became a vehicle for pay TV operations, it wouldn't be long before the FCC and state PUCs would regulate it.⁵⁷

The Teleprompter action was the forerunner of the modern cable TV system. Teleprompter's influence on the 1961 NCTA convention was

minimal and the body adjourned without taking any formal position on pay cable.⁵⁸

Hybrid pay cable systems weren't feasible in the 1960's. The cost of conversion was prohibitive, between 50 and 150 percent of the operator's original investment, depending on what type of subscription television system one installed. Besides a lack of money, operators faced five prerequisites before they could convert to a hybrid system:

1. Amplifiers on the trunk line had to be altered to carry the additional load of pay channels in frequencies below the conventional TV band.
2. There had to be a two-way capability.
3. Headends had to be reequipped to receive more (pay) signals in addition to the broadcast signals they already received, plus be able to distribute those signals.
4. Establishment of a pay system meant having a studio for film, tape and slide projection, monitoring and channel transmission gear.
5. Each subscriber had to be outfitted with a pay TV selector device. There was also the expense of home installation.

If that wasn't enough, some local franchise agreements barred operators from making a per program charge. Some telephone companies also placed this restriction on CATV systems as a prerequisite for pole rights.⁵⁹

Pay cable wasn't destined to overwhelm the nation, but its potential was somewhat known as early as 1960. The FCC's third report on CATV in 1972 brought pay cable into reality.

Cable Television--The Recent Years

The effect of the second report and order was twofold. Investment capital was funneled into medium and small market expansion until penetration rates reached 50 to 60 percent. Secondly, mergers and consolidation became commonplace in major market areas to gain enough monetary resources to survive under the adverse conditions. Only large corporations could afford to absorb the losses in the major markets. The MSO-multiple system operator appeared.⁶⁰

The FCC's second report cited the peculiar situation created by sports for which broadcasters and cable competed. The Notre Dame-NCAA confrontation was just the opening round for future debate.

In 1967, the FCC vetoed a Cleveland, Ohio CATV operator's plan to use imported sports events as a subscriber inducement. Telerama, Incorporated, the operator of three CATV systems in the Cleveland suburbs, sought to import WSEE (Erie, Pennsylvania), a CBS affiliate, which carried all the Cleveland Browns' home football games for its proposed service to 15 neighboring communities. The Browns and the NFL immediately protested along with WJW TV, the CBS Cleveland affiliate which had to blackout the Browns' home games. Football claimed the importation of all Detroit Lions' and Browns' home games deprived the sport of its blackout protection.⁶¹ The FCC refused Telerama's request for a waiver of the importation rule for the Erie CBS affiliate, for any of the three systems in operation or the proposed franchises.⁶²

Telerama's quest for a declaratory ruling on the waiver was transformed into a consolidated hearing by the FCC on the impact of cable service in the Cleveland market.

In May 1967, the Cleveland Browns and the NFL unsuccessfully filed a joint petition seeking enlargement of the issue to mandate protection of pro football's blackout policy.⁶³

The league's allegations were supported by a Rozelle affidavit describing the NFL's blackout policy and a statement that Browns' home games on CATV would cause adverse economic impact on the team, the other franchises and the entire league.

The FCC refused to place the NFL petition on the agenda. The only discussion of Browns' home games was to be coincidental with resolving the adverse economic effect on broadcasting. There was no factual allegations to support pro football's economic injury claim according to the FCC. Yet the FCC had made a reverse decision on the economic impact concerning television stations in a market of 1,250,000 homes where there were less than 50,000 cable subscribers.

The NFL recovered its lost political yardage in 1969 when the FCC ruled in the league's favor in a Telerama-like controversy.

In 1968 Storer Cable TV of Rohnert Park, California petitioned to carry KHSL, a CBS affiliate in Chico, California, 140 miles from San Francisco.⁶⁴

Opposition to Storer's petition was filed by the San Francisco Forty-Niners and the NFL. Importation of Forty-Niner home games from Chico into a cable system only 41 miles north of San Francisco, and

consequentially within the 75-mile NFL blackout radius, would cause undue economic hardship.⁶⁵

In December 1968, the release of Docket 18397 allowed systems outside the 35-mile zone of any station to import any distant signal provided the closest network affiliate was imported before carriage of a more distant network station of the same affiliation.⁶⁶ Storer's importation request for KHSL was consistent with the new leapfrogging restrictions and the FCC approved the waiver--minus the pro football games. The FCC was mindful of the desirability of preventing unwarranted restrictions on viewer choices but the protection of pro football was deemed more important than the public interest.

Storer acquiesced and the FCC was left unchallenged in formulating separate cable policies for nonsports and sports programming. A double standard was arbitrarily created.

Congress didn't challenge the FCC's regulatory authority under the second report. Cable TV was not so complacent. Black Hills Video, Buckeye Cablevision and Southwestern Cable, a San Diego system, all mounted judicial offensives.⁶⁷ The latter case had the most influence on sports' potential growth on cable via importation. Also, it was the Southwestern Cable case that gave the FCC blanket jurisdiction over CATV.

Less than two weeks after issuance of the second report, Midwest Television, the owner of one of the three San Diego VHF stations, petitioned the FCC for protection from the importation of Los Angeles signals into the market by Southwestern Cable and two other systems. Midwest claimed CATV threatened both existing local service and further UHF development in San Diego, 54th largest TV market.⁶⁸

This wasn't Midwest's initial complaint to Washington. Its KFMB, San Diego station had testified at the 1966 House Commerce Committee hearings. While arguing the perennial broadcasting point of adverse economic impact at the hearing, Midwest also deemed itself a protector of the civic interest.

KFMB called CATV a threat to the amortization of a \$27 million bond issue borne by the taxpayers to construct a new sports stadium. The principal source of funds to retire the debt was gate receipts from the American Football League's San Diego Chargers.⁶⁹ To keep attendance high, blackouts were needed. But the Chargers' home games were seen in Los Angeles and in San Diego since local CATV systems were within the Brade B contour. CATV caused attendance to decline and impaired the bond retirement schedule. Consequently, local investors wouldn't risk capital to support major league sports if CATV was allowed to circumvent home game blackouts. The stadium would sit empty and the efforts of the San Diego Greater Sports Association to bring major league sports to the city were for nought.⁷⁰ It was an argument of obvious emotional appeal. However, bad team performance or the fact that stadiums are not profit makers was overlooked by Midwest Television.

The cable systems maintained they were not importing signals as Midwest had presupposed and the FCC concurred. The FCC did, however, designate the San Diego signals as the only signals as being local in the San Diego market. When the FCC imposed an immediate ban on "importation" of the Los Angeles signals, a California federal court of appeals blocked the action when challenged by Southwestern Cable. The court said the FCC exceeded its statutory authority.⁷¹

After this setback, a senior hearing examiner sent to San Diego by the FCC found that the CATV systems did not pose the economic threat alleged by the local stations.⁷²

Meanwhile, the D.C. Court of Appeals affirmed the FCC mandates in Buckeye Cablevision, so the diverse circuit court opinions opened a direct path to the Supreme Court for Southwestern Cable. The high court reversed the California circuit on June 18, 1968.⁷³ Justice Harlan in writing for the court found:

Nothing . . . in the [Communication] Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions.⁷⁴

The opinion held that Congress could not have possibly foreseen the development of CATV in 1934. The FCC had the authority to allocate broadcasting zones and areas, and to provide regulations "as it deem necessary" to prevent interference among the various stations. Therefore, the FCC's finding and action was reasonably ancillary to the effective performance of its responsibilities. Historically, the court exercised judicial restraint in interfering with administrative action imperative to achieving an agency's goal once Congress indicated its intention.⁷⁵

The FCC had a decisive victory for its second report in the Supreme Court decision. In December 1968, the FCC instituted Docket 18397, proposing rules to explore CATV's full potential.⁷⁶ Program origination, cross ownership restrictions, importation of signals into the top 100 markets with a retransmission consent and bringing in all three networks and an independent station into the smaller regions via

importation were discussed. Many answers to this inquiry were not resolved until 1972, when the FCC adopted its third report on CATV.

The first report on Docket 18397 in October 1969 ordered CATV systems with 35,000 or more subscribers to cablecast programming by January 1, 1971.⁷⁷ The FCC also explained its rationale for why over-the-air STV ceiling and siphoning rules weren't extended to cable. Because there had been no comparable test like Hartford for CATV, the FCC felt the development of pay cable systems was too far in the future. The FCC had also not authorized the importation of distant signals without a retransmission consent in the top 100 markets. The FCC was reluctant to make a pay cable decision inhibiting CATV's growth in the large cities until there was some evidence of public acceptance.⁷⁸

A second report on Docket 18397 on July 1, 1970 banned CATV cross ownership by broadcast interests and required the three national networks to dispose of their CATV properties.⁷⁹

The FCC also disposed of two cable and sports problems that same day. It extended the STV antisiphoning rule to include CATV⁸⁰ and proposed lengthening the siphoning period to five years.⁸¹

The Memorandum Opinion and Order on Docket 18397 added a new section to the Communications Act which prohibited cablecasting where a per-program or a per-channel charge was made for sports and feature films.⁸² The rule was adopted to insure that cablecasting did not force the public to pay for what it received free. CATV couldn't serve the same audience reached by an over-the-air station and the FCC thought it wise to protect viewers who did not wish, or could afford, to pay for

TV. The FCC also felt the need to ban advertising from any form of pay cable.⁸³

The 1969 House Communications Subcommittee's STV hearings led to a proposed rulemaking by the FCC.⁸⁴ The subcommittee's resolution to extend the siphoning period to five years for sports influenced the FCC to lengthen the period another three years. The FCC had for the first time placed STV and CATV together in one rule making.

NBC feared that sports entrepreneurs could still circumvent a five-year rule if new events for pay TV were devised while phasing out events subject to a five-year wait. A revision of a league's structure or playoff system would accomplish this.

Increasing the siphoning period was contrary to program diversity and eliminated a competitive source of programming said the NCTA. The FCC also lacked any evidence to justify its proposal.⁸⁵

The new FCC chairman, Dean Burch, who headed the Republican National Committee for the 1964 campaign, sought to pacify cable operators at the 1970 NCTA convention, less than a year after joining the FCC.

I am not pro or anti-CATV or broadcasting. My standard is and must be the public interest and that is not a cliché. From you I would ask for a little more patience, understanding and cooperation as we search for settlement of the questions that are plaguing all of us.⁸⁶

A CATV backlash developed around the country. A St. Louis federal court of appeals set aside the FCC's program origination rule in the Midwest Video case chastising the FCC for overstepping its regulatory power approved in the Southwestern Cable case.⁸⁷ Midwest

Video had also sought relief from the imposition of the siphoning rules on pay cable which were previously adopted for only STV. The Justice Department came to Midwest's aid with a brief claiming the FCC's pay cable restrictions were anticompetitive. The government felt previous decisions based on CATV being "reasonably ancillary" to broadcasting were faulty since no part of the radio spectrum was used for pay cable television. Such an important and far-reaching pay cable policy was a congressional responsibility according to the Justice Department.

In the absence of a clear congressional mandate . . . the adoption of any regulation which restricts CATV cablecasting so as to unduly handicap the growth and development of CATV conflicts with existing congressional policy-- particularly the important policy of competition embodied in the antitrust laws.⁸⁸

While the case sat on the Supreme Court's docket, the FCC was mistakingly interpreting the Communications Act to shield broadcasting from pay cable. Also, the pay cable rule was procedurally unsound under the Administrative Procedure Act. Adequate time was lacking to notify interested parties before adopting the anti-siphoning rule. Its announcement came with an FCC order denying petitions for reconsideration of the program origination rule.⁸⁹

Once again the Supreme Court overturned a pro cable appeals court ruling.⁹⁰ The five to four June decision expressed the view that while the FCC's position strained the outer limits of its jurisdiction with Midwest Video, it should be allowed wide latitude.

Later, in June, Dean Burch unveiled the FCC's CATV plan for the top 100 markets before John Pastor's Senate Communications Subcommittee. Burch spoke of a sports rule under consideration to require cable

operators in the top 100 markets to observe national sports telecasting policies concerning local blackouts.⁹¹ Burch said it was nonsensical to the FCC to allow cable television to sidestep blackout policies passed by the Congress and the courts.⁹²

Burch gave the same master plan to House Communications Subcommittee Chairman Torbert MacDonald in July.⁹³

On August 5, 1971, the FCC sent letters to Pastore and MacDonald outlining a proposed third report on CATV ready for adoption in March 1972 unless Congress intervened. The new rules opened the top 100 markets to significantly viewed stations outside the community and distant signal importation of one to three independent stations depending on the size of the market. The nonduplication rule became simultaneous replacing the same-day requirement.

Twenty channels was the new minimum capacity requirement. All new systems needed a two-way capability and nonbroadcast channels were set aside for local educational, governmental and public access use. The FCC clearly altered the future course of cable in an unprecedented positive way.

Relaxing the importation rules encouraged operators but the FCC's announced separate treatment for importing sports events did not. It was an issue that the FCC did not want to delay.

We intend to issue very shortly a notice of proposed rule-making directed to this specific area, in order to ascertain the full thrust and purposes of (Public Law) 87-331 and how best we can formulate a rule to implement these purposes. We will give this proceeding expedited treatment, so that it is concluded before the significant emergence of new systems under these rules.⁹⁴

The FCC avoided any specific new policies concerning sports importation, blackouts, copyright liability and the siphoning of events by pay cable when it issued its third report. An investigation of the proposed importation rule, Docket 19417, was announced coincidentally with the third report's release.⁹⁵ A copyright revision bill was far from passage and the liability of sports programming was the subject of hot debate that the FCC wanted Congress to resolve. The siphoning rule was under consideration for extension to five years.

Again, procrastination in Washington produced another communications crisis. CATV grew because there was a demand for it despite FCC, congressional and Supreme Court obstacles.

Broadcasting's undocumented claim of adverse economic impact set the theme for the FCC's capricious regulation of cable in the 1960's. Its second report in 1966 curtailed imported sports signals that many cable operators used as a subscriber inducement. The FCC arbitrarily burdened cable with the STV siphoning restrictions in 1970 while proposing to lengthen the siphoning period to five years. The 1971 consensus agreement among broadcasters cable interests and copyright owners leading to the third report in 1972 gave cable the right to import distant signals under relaxed nonduplication rules in exchange for cable's support of copyright legislation. Coincidental with the third report, the FCC proposed a separate policy for imported sports programming. It was a discriminatory decision not based on any fact.

Cable's growth in the 1970's meant overcoming three great problems--the FCC's proposed rule for imported sports events, whether

sports programming was copyrightable and the repressive STV siphoning restrictions the FCC extended to cable. Cable needed sports as a subscriber inducement and soon sports found pay cable a valuable source for supplemental revenue.

Footnotes--CHAPTER III

¹It is assumed that sports events were imported by CATV systems, especially in eastern Pennsylvania, during those early days. Pottsville, Pennsylvania subscribers were able to see Yankee and Dodger baseball imported from New York City stations. New York Times, June 20, 1955, p. 80. A specific date or location is impossible to cite as the first occurrence of sports on CATV save for the hibrid CATV-pay experiment in Palm Springs, California by Telemeter in 1953.

²Don R. LeDuc, Cable Television and the FCC--A Crisis in Media Control (Philadelphia: Temple University Press, 1973), p. 70.

³Ibid., pp. 70-71.

⁴If the CATV systems were within the contours of more than one television station, the FCC would not have jurisdiction over it. Robert L'Heureux, "The CATV Industry: Its History, Nature and Scope," TV & Communications, August 1965, p. 56.

⁵Mary Alice Mayer Phillips, A History of Community Antenna Television (Evanston, Ill.: Northwestern University Press, 1972), p. 30; and Broadcasting, February 18, 1963, p. 9.

⁶LeDuc, p. 141.

⁷First Report and Order, 38 FCC 683 (1965).

⁸Robert L'Heureux, "The CATV Industry: Its History, Nature and Scope," TV & Communications, December 1965, p. 30.

⁹First Report and Order, 38 FCC 683 (1965), pp. 742-743.

¹⁰U.S., Federal Communications Commission, Notice of Inquiry and Proposed Rulemaking, "Distribution of Television Broadcast Signals by Community Antenna Television Systems," Federal Register, XXX, No. 82, (April 29, 1964), 6078.

¹¹A school was exempt from the stringent NCAA controls when its home game was sold out. Local television was allowed in the home towns of the team involved, or if at a neutral site, the city where it was played.

¹²Broadcasting, October 18, 1965, p. 64.

¹³Ibid., November 1, 1965, pp. 9, 73.

¹⁴The TV Committee recommended "Any televising privilege granted under article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such stations or station. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature." Report of the 1965 NCAA Television Committee, January 12, 1965, as cited in Second Report and Order, 2 FCC 2d 725 (1966), p. 787.

¹⁵Broadcasting, November 8, 1965, p. 61.

¹⁶H.R. 7715 authorized the FCC to regulate all CATV systems only if it established a national TV policy "to give the people of the United States access to the greatest practicable diversity of local, network, educational and other television programs." The Harris bill preempted for exclusive Federal regulation "those aspects of intra-state and local television communications which may affect the accomplishment of the national television policy." The FCC couldn't license CATV systems nor could it allow less than 90 days for CATV rules to take effect in order to permit congressional review.

¹⁷U.S., Congress, House, Committee on Interstate and Foreign Commerce, Regulation of Community Antenna Television, Hearings, before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 7715, 89th Cong., 1st sess., 1965, p. 360.

¹⁸Ibid., p. 361.

¹⁹Ibid., p. 399. Testimony of Mitchell Wolfson, President of Wometco Enterprises, which had majority interests in three television stations.

²⁰Ibid., p. 65.

²¹Robert L'Heureux, "The CATV Industry: Its History, Nature and Scope," TV & Communications, August 1965, p. 55.

²²Ibid.

²³Robert L'Heureux, "The CATV Industry: Its History, Nature and Scope," TV & Communications, September 1965, p. 41.

²⁴Hearings before the House Communications Subcommittee on the Regulation of Community Antenna Television, 89th Cong., 1st sess., 1965, p. 374.

²⁵Wasau is 88 air miles from Green Bay. The station had operated on 100,000 watts and carried all Packer home games until 1958. Then the station boosted its power to 316,000 watts and the Packers invoked a home game blackout. WSAU had a net weekly circulation of 121,000 according to the 1965 ARB report. U.S., Congress, The Committee on Interstate and Foreign Commerce, Regulation of Community Antenna Television Hearings, before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 13286, 89th Cong., 2nd sess., 1966, p. 559.

²⁶Hearings before the House Communications Subcommittee on the Regulation of Community Antenna Television, 89th Cong., 1st sess., 1965, p. 415.

²⁷Ibid., p. 469.

²⁸The Williamsport CATV system carried all three Scranton/Wilkes Barre stations and seven others, some off the air and some via microwave. This included a substantial duplication of all the network shows on the three stations serving Scranton/Wilkes Barre as well as what Rogers called "very substantial round-the-clock sports events brought in by microwave from the three independent non-network stations in New York." Hearings before the House Communications Subcommittee on the Regulation of Community Antenna Television, 89th Cong., 1st sess., 1965, p. 467.

²⁹Hearings before the House Communications Subcommittee on the Regulation of Community Antenna Television, 89th Cong., 1st sess., 1965, p. 470.

³⁰Ibid., p. 471.

³¹Ibid., p. 200.

³²Broadcasting, May 3, 1965, p. 67.

³³Second Report and Order, 2 FCC 2d 725 (1966).

³⁴Ibid., p. 777.

³⁵Ibid., p. 780.

³⁶Ibid., p. 787.

³⁷Oren Harris resigned his post to await his appointment as a federal judge.

³⁸ U.S., Congress, House, The Committee on Interstate and Foreign Commerce, Regulation of Community Antenna Television, Hearings, before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 13286, 89th Cong., 2nd sess., 1966, p. 260.

³⁹ Ibid., p. 263.

⁴⁰ Ibid., p. 266.

⁴¹ Ibid., p. 263.

⁴² Ibid., p. 267.

⁴³ Ibid., p. 244. The NFL felt that Public Law 87-331 should be amended to provide protection instead of following the AFL's proposal.

⁴⁴ Ibid., pp. 797-798.

⁴⁵ Ibid., p. 356.

⁴⁶ Ibid., pp. 559-560.

⁴⁷ Ibid., p. 159.

⁴⁸ LeDuc, pp. 157-158.

⁴⁹ Theater admission for the fight was \$4.00-\$5.00 while seats at the Polo Grounds were scaled from \$10 to \$100. Broadcasting, June 27, 1960, p. 79.

⁵⁰ Broadcasting, June 6, 1960, p. 86. In the interim, Teleprompter started work on its Participation TV billing system. A viewer control box with a key to open a TV channel would be given to subscribers. Acceptance of programming would be recorded electronically. No coinbox was used. The system was later named Key TV. Broadcasting, June 20, 1960, p. 5; and September 19, 1960, p. 60.

⁵¹ New York Times, December 26, 1960.

⁵² Broadcasting, June 27, 1960, p. 79.

⁵³ Ibid., August 15, 1960, p. 5.

⁵⁴ Teleprompter had acquired the ancillary rights for this fight also.

⁵⁵Broadcasting, March 6, 1961, p. 60. Teleprompter used another method of collecting fees for this bout. Before it permitted a telecast piped into a CATV system, that system had to sign a written guarantee for the sum requested by Teleprompter based on a system's potential number of subscribers. Teleprompter allowed the operators to decide whether to levy an extra charge on their viewers. The Teleprompter-owned systems carried the fight free as a public relations gesture. Broadcasting, March 6, 1961, p. 60.

⁵⁶Ibid., May 8, 1961, p. 106. An NFL spokesman denied Teleprompter's bid had caused the record fee.

⁵⁷Ibid., June 19, 1961, p. 104. In 1960, FCC regulation of CATV failed by one Senate vote.

⁵⁸Ibid., June 26, 1961, p. 60.

⁵⁹Ibid., July 13, 1964, p. 27.

⁶⁰LeDuc, pp. 158-159.

⁶¹Telerama also proposed importing stations from Detroit, Toledo, Windsor and London, Ontario, primarily for their sports programming. Detroit Lions football, Detroit Tigers baseball, Canadian football and "Hockey Night in Canada" were additional selling points for potential subscribers. Opposition to the proposal came from a UHF permittee in the Cleveland suburb of Lorain, and a Cleveland UHF applicant. Memorandum Opinion and Order, 7 FCC 2d 809 (1967), p. 813. The broadcasters claimed signals would adversely affect the local UHF operations.

⁶²Importation of the Detroit, Toledo, Windsor and London stations was also denied. Memorandum Opinion and Order 7 FCC 2d 809 (1967), p. 816.

⁶³Memorandum Opinion and Order, 8 FCC 2d 1126 (1967). The NFL said it represented member teams, including the Browns, in negotiating TV contracts. CBS had assured the league that all the Cleveland road games were shown in Cleveland but that all the home games were not. When the Browns played in Cleveland, the telecasting of other league games in the market was restricted to situations which didn't cause a conflict for viewers and the Browns game at the stadium.

⁶⁴Memorandum Opinion and Order, 18 FCC 2d 1046 (1969).

⁶⁵The petition was also opposed by stations KGO and KPIX, San Francisco.

⁶⁶Memorandum Opinion and Order, 15 FCC 2d 417 (1968).

⁶⁷Black Hills Video v. United States, 399 F 2d 65 (1968); Buckeye Cablevision v Federal Communications Commission, 387 F 2d 220 (1967); and Southwestern Cable v. Federal Communications Commission, 378 F 2d 118 (1967).

⁶⁸LeDuc, p. 170.

⁶⁹There was no major league baseball team in San Diego in 1966.

⁷⁰Hearings before the House Interstate Commerce Committee on the Regulation of Community Antenna Television, 89th Cong., 2nd sess., 1966, p. 217.

⁷¹Southwestern Cable Co. v. United States and Mission Cable TV v. United States, 378 F 2d 118. The court held the FCC's authority was only applicable against licensees or applicants. A nonlicense (CATV) was not under such jurisdiction.

⁷²LeDuc, p. 171.

⁷³United States v. Southwestern Cable, 392 U.S. 157 (1968).

⁷⁴United States v. Southwestern Cable, 392 U.S. 157 (1968), p. 172.

⁷⁵As the Supreme Court rendered its decision, Southwestern Cable became the property of Time-Life which owned a San Diego VHF station. LeDuc, p. 173.

⁷⁶Notice of Inquiry and Notice of Proposed Rulemaking, 15 FCC 2d 417 (1968).

⁷⁷First Report and Order, Docket 18397, 20 FCC 2d 201 (1969).

⁷⁸Ibid., pp. 204-25.

⁷⁹Second Report and Order, Docket 18397, 23 FCC 2d 816 (1970).

⁸⁰Memorandum Opinion and Order, 23 FCC 2d 825 (1970).

⁸¹U.S., Federal Communications Commission, Notice of Proposed Rulemaking, "Subscription Television and Cablecasting, Showing of Sports Events," Federal Register, XXXV, No. 132 (July 9, 1970), 11040.

⁸²Memorandum Opinion and Order, 23 FCC 2d 825 (1970), p. 831.

⁸³The restraints on movies, only films less than two years old or older than ten could be cablecasted, and the 90 percent ceiling on total cablecast hours consisting of movies and sports combined also applied.

⁸⁴ U.S., Federal Communications Commission, Notice of Proposed Rulemaking, "Subscription Television and Cablecasting, Showing of Sports Events," Federal Register, XXXV, No. 132 (July 9, 1970), 11040.

⁸⁵ Broadcasting, August 10, 1970, p. 42.

⁸⁶ Address by Dean Burch, Chairman FCC, Before the Annual Convention of the National Community Television Association, 1970, p. 2.

⁸⁷ Midwest Video Corporation v. United States, 441 F 2d 1322 (1971).

⁸⁸ Broadcasting, January 18, 1971, p. 36.

⁸⁹ Broadcasting, May 10, 1971, p. 20; and Memorandum Opinion and Order, 23 FCC 2d 825.

⁹⁰ United States v. Midwest Video Corporation, 406 U.S. 649 (1972).

⁹¹ Broadcasting, June 21, 1971, p. 21.

⁹² U.S., Congress, Senate, The Committee on Interstate and Foreign Commerce, Community Antenna Television Problems, Hearings, before the Communications Subcommittee of the Committee on Interstate and Foreign Commerce, Senate, 92nd Cong., 1st sess., 1971, p. 41.

⁹³ U.S., Congress, House, The Committee on Interstate and Foreign Commerce, Cable Antenna Television (CATV), Hearings, before the Communications Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 92nd Cong., 1st sess., 1971, p. 14.

⁹⁴ Summary of FCC Proposals for the Near-Term Regulation of CATV, 31 FCC 2d 115 (1971), p. 124.

⁹⁵ Notice of Proposed Rulemaking, 36 FCC 2d 641 (1972).

PART TWO

CURRENT PROBLEMS FOR CABLE TELEVISION AND SPORTS

CHAPTER IV

THE IMPORTATION OF DISTANT SIGNALS

In 1972, the FCC attempted to end the virtual freeze on cable's growth in its third report by opening the top 100 markets to imported signals. Cable systems which had begun since 1966 in the top 100 markets were restricted by the second report because the FCC believed that importation adversely affected UHF development in the large cities. Despite its appearance of opening up the marketplace, the new importation rules had leapfrogging, exclusivity and market size provisions which hampered cable's fullest potential.

The third report did much to eliminate the omnipresent argument used by broadcasters to keep audience competition to a minimum. Cable operators were optimistic about the third report's importation rule for all programming except sports. As the broadcasters were forced to accept a live and let live attitude, organized sports interests came to the foreground.

Sports felt the more lenient importation rules spelled the death knell for their low gate attendance figures and a means of illegally circumventing Public Law 87-331.

Sports promoters felt there were any number of ways imported cable signals of distant athletic events would ruin gate receipts or the value of local television rights.

1. If the Rangers and Bruins played hockey in New York, and the game was televised back to Boston, it was possible for a cable system in the New York metropolitan area to import the game from the Boston station.
- or 2. If the Yankees chose not to televise a home game with a less attractive foe like the California Angels, a cable system might keep fans from going to the ball park by importing another baseball game of greater interest into New York coinciding with the Yankee-Angel game.
- or 3. A different sport was imported. For example, if the Celtics played a mediocre basketball team in Boston and the game was blacked out, Boston cable systems importing Ranger hockey from New York could cause fewer fans to pass through the Boston Garden turnstiles.
- or 4. If a team wasn't playing at all but cable systems imported several other games of the same sport during the week, the fans' appetite might be satisfied.
- or 5. If the Mets televised a meaningless road game from Philadelphia and a cable system brought in a more attractive game like Oakland-Boston, the Mets' ratings would drop and the advertising revenue would decline. Therefore, TV rights wouldn't be so exclusive or as valuable to a local station. The ball club would lose important income on its local TV rights.

Organized sports cited the importation examples above as ample evidence of CATV's adverse economic effect on their gate receipts.¹ Previously, FCC actions in the Telerama and Storer cases on the basis of the second report had protected sports. Now promoters sought protection from cable against importation of a game in the same sport at the very minimum with a ban against importation of any sports event as even more desirable.

Sports promoters had only one property right--the exclusivity of their event. The promoters felt unlimited access by cable might destroy the financial structure of professional sports.

Sports sought protection from importation of competing athletic attractions by two means: (1) the blackout policy as supported by the courts and Congress and (2) copyright legislation on the basis that contests were exclusive events belonging to their promoters, namely the individual team or league, and therefore copyrightable.

To understand the rationale employed by organized sports to protect their product, a history of the televised sports blackout is required.

Professional football began blacking out its games within a 75 mile radius of the home team's city in the 1950's. The Los Angeles Rams had televised all their 1950 home games after blacking them out a year earlier. In 1951, the Rams reinstituted the home game blackout after gate receipts fell. The Rams blamed their attendance decline on television.

In 1951, the NFL added Article X to the by-laws of its constitution to provide for a blackout. The Justice Department's Antitrust Division reacted with a suit against the league in October. Article X was an alleged violation of the Sherman Act because TV stations were blacked out arbitrarily for home games and the government felt the people had the right to see and hear what they wanted free of monopoly.² The NFL said Article X wasn't an unreasonable restraint of trade and the case went before a federal district court in January 1953.

Article X was contested on four counts of antitrust violations. The article's four basic provisions (1) prevented the telecasting of outside games into the home territories of other teams on days when

the other teams played at home,³ (2) prevented the telecasting of outside games into the home territories of other teams on days when the other teams were playing away from home and permitting the telecast of their games back to their home territories, (3) prevented the broadcasting by radio of outside games into the home territories of other teams both on days when the other teams played at home and on days when the other teams played away from home and permitted the games to be broadcast or televised into their home territories and (4) gave Commissioner Bert Bell unlimited power to prevent any or all clubs from televising or broadcasting any or all of their games.⁴

U.S. District Judge Allan Grim found the first provision--the home game blackout--was a reasonable method of protecting attendance at games and not a violation of the antitrust laws.

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 it may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied. . . . Professional teams in a league, however, must not compete too well with each other in a business way . . . the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.⁵

Grim approved the reasonable restriction of games on radio and TV into the home territories of other teams.

Reasonable protection of home games attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football as we know it today.⁶

Grim was less kind with the remaining three provisions in question. It was an unreasonable restraint of trade to restrict the telecasting of outside games into the home territory when the home team was not playing at home. The league had argued this stipulation was necessary to protect the home team from a loss of gate receipts at subsequent home games but Grim found this opinion nothing more than "conjecture." The court also declared all territorial restrictions on the sale of radio rights and the unlimited and arbitrary power granted to the Commissioner to disapprove all radio and TV contracts was illegal.

In April 1961, CBS signed a \$9.3 million two-year contract with the NFL for its regular season games. The money was divided equally among the 14-member franchises⁷ and CBS promised to honor the home game blackout provision.⁸

Judge Grim invalidated the CBS-NFL contract three months later.⁹ The club owners' agreement to eliminate competition among themselves by selling their TV rights as a package coupled with CBS' contractual right to control telecasts, restricted the areas to which games were transmitted.¹⁰ Grim believed this contract was contrary to his 1953 decision.¹¹

The league was caught between a binding network contract and a judicial decree against such an agreement. Rozelle asked Grim to stay his decision until December 31, 1961 to allow the NFL to honor its CBS pact or to modify the 1953 decision to allow arrangements with a single network. If the NFL wasn't on CBS, said Rozelle, only seven of the

fourteen clubs would have television coverage in 1962. Grim consulted with the Justice Department and found that the government had reservations about the legality of the National Basketball Association's and NCAA's football contracts and refused to alter his decision.¹²

The NFL turned to Congress for legislative relief. On August 16, 1961, Senator Estes Kefauver introduced a bill permitting the member clubs of an organized professional sports league to pool their individual television rights for sale by the league as a package. The Kefauver bill also included a prohibition against the telecasting of pro football at times traditionally used for playing college games. The following day Emanuel Celler introduced similar legislation in the House.

Celler's Antitrust Subcommittee held hearings August 28. On September 7, Celler introduced another measure similar to his initial proposal, but including the Kefauver prohibition relating to pro telecasts interfering with college games. Celler's new bill, H.R. 9096, was passed by the House September 18 and adopted without change by the Senate three days later.¹³ It became Public Law 87-331 on September 30, 1961. Two months later after Grim refused to review his decision, the NFL had the antitrust exemption it wanted and a future weapon against CATV.

Public Law 87-331 included three sections. The first provided the antitrust exemption for "packaged" or "pooled" TV rights sold by the league for games of its member clubs. Section two provided for the television blackout of games in the home territory of a team when it

played at home. The third section protected college football from professional football telecasts within a 75-mile radius of an intercollegiate contest.¹⁴

It was section two that was cited again and again in pro football's future disputes with cable television. This exemption was the only statutory ground that might withstand importation of home games via distant signals into blacked out areas. The NFL was standing on sand and not the gridiron. CATV was a retransmitter bound not to alter or delete any broadcast signals. CATV was immune to the blackout laws when importation was considered. The FCC sought to alleviate the blackout controversy in its second report in 1966 with reference to the WNDU (Notre Dame) and the NCAA. The FCC recommended amending section 325 (a) of the Communications Act to insure that CATV systems obtained the retransmission consent of the originating station before importing its signal.¹⁵

The proposed amendment was not good enough in practicality for pro sports. WNDU was an educational station whose permission to telecast Notre Dame home football games rested with the NCAA. Section 325 (a) was effective in such cases.¹⁶ However, pro sports with its network contracts faced a harder time convincing affiliates to withhold retransmission consents when stations could increase their revenue by allowing cable to increase their audience.

The NFL wanted Public Law 87-331 amended to apply the blackout to CATV. The league was naturally interested in maintaining its financial upswing and used two emotional arguments before a 1966

House Commerce Committee hearing to conceal its profit-oriented image. Collegiate football was the first decoy at the CATV regulation hearings. The NFL claimed it couldn't meet the 1961 congressional directive when it was unable to prevent a cable operator from bringing a distant telecast into local areas where a college game was played.¹⁷ Secondly, Commissioner Rozelle hinted that pro football might find its way into closed-circuit television sooner if CATV was allowed unregulated importation.¹⁸ Some committee members thought Rozelle was punting and offered blackout protection in return for the Commissioner's influence to keep football on commercial television. The strategy proved to be a quick kick designed to force the committee into a statutory mistake.

Pro football won baseball, basketball and hockey support in its move to amend Public Law 87-331. No action was forthcoming because the courts, legislators and the FCC refused to tackle a controversy not specifically mentioned in the 1961 exemption and was or was not to be included in a copyright revision bill. It was six years before the political players reappeared on the field.

The FCC finally confronted the cable sports blackout problem in 1972. The agency, heretofore unexposed to the peculiarities of sports economics, released a proposed rule bringing cable systems under the same blackout guidelines television stations followed.¹⁹ The notice, released with the landmark third report, applied only to pro football, baseball, basketball and hockey. It was less restrictive than the sports blackout provision sought by sports in the copyright revision bill. The

FCC rule prohibited systems from importing a distant telecast if a home team in the same sport was playing a home game.²⁰ Meanwhile, organized sports sought copyright legislation exclusion carriage of any pro sports telecast not carried locally.

The FCC welcomed congressional guidance. Determining the effect of telecasting on gate receipts and the ability of teams to survive was complex. Public Law 87-331 was the middle ground between sports interests which wanted a ban on any event not telecast locally and the FCC's own proposed rule which allowed cable to carry all the programming on the stations they imported.

The FCC acknowledged Public Law 87-331 was not an omnipotent answer. The legislation permitted blackouts where there were pooled or packaged agreements. It did not restrict telecasts in home territories when a team played at home and no pooling was involved. The FCC's proposed rule was illegal procedure. It failed to distinguish between sports teams that pooled their rights and those that did not.²¹

Systems within the Grade B contours of stations not located in the home territory of a professional team were free of any importation restrictions because blackouts weren't effective outside the home territory.

The FCC also asked whether an extension of the cable blackout to other sports such as golf, auto racing and collegiate athletics was feasible. It had hoped to finish the proceeding "expeditiously," but after one hearing and almost three years, the blackout proposal is still pending.

The FCC received a lukewarm response from broadcasting and organized sports, and an even cooler one from cable operators. The NAB backed the adoption of the rule plus the consideration of the effect distant signals had on the ability of local stations to televise games of local teams. The AMST favored banning importation of any event if the local television station didn't carry the same sport. The three major networks endorsed any rule that insured cable's compliance with commercial television's blackout provisions.

The NFL, NHL, organized baseball and the Philadelphia 76ers and Milwaukee Bucks basketball teams wanted cable carriage of any games prohibited that were unavailable to local TV stations without authorization from teams and the leagues.

The proposed rule was too broad for the NCTA. Cable favored home game blackouts locally, but that systems be allowed to import games of other teams. Some cable interests disagreed only because they thought Congress should adopt any such rules.

Sports associations, lawyers and government and industry officials offered their opinions during two days of oral arguments before the FCC in July 1972.²²

Organized sports said the proposed rule did not go far enough and they warned of dire consequences to their respective leagues and ultimately the fans if the language didn't afford blanket protection. Some sports officials even wanted their teams' road games blacked out when they weren't televised locally. The NBA wanted each of its clubs guaranteed the right to prohibit carriage of distant signals of its

games, not only in its home city under the blackout concept, but also in any other areas. The AMST supported the NBA and warned of cutbacks in telecasts if the proposed rule wasn't adopted. Cable carriage of distant signals fragmentized the audience for locally televised contests. Advertisers would refuse to pay the prevailing cost per thousand rate and would abandon sports. The AMST called sports a television loss leader since profit margins, if any, were thin for broadcasters after the escalating exclusive rights contracts were considered. Sports was prestige, not profit, programming.

Hardly any programming would remain for cable to import if the rule was adopted. The third report's leapfrogging restrictions limited systems to the stations they imported.²³ Moreover, the new exclusivity requirements denied cable motion pictures and the more popular syndicated series. David Foster called the rule "unnecessary, discriminatory, overly protective of broadcast stations, broadcast networks and sports owners "and a flagrant violation of the legitimate interests of consumers served by cable television."²⁴ That sports wanted to protect its games from outside competition via cable was a bonafide contention, but there was also the matter of the potential future prosperity of selling games to pay cable. The television dollar had made sports big business and the leagues felt they should get a slice of the CATV pie.

A situation where the proposed rule was utilized occurred in West Palm Beach, Florida in December 1972. The FCC ruled 4-1, with Nicholas Johnson dissenting, that a cable system couldn't import a distant network station for a sports program that was normally blacked out locally.

WPTV located in a market within 75 miles of Miami's Orange Bowl, petitioned the FCC to prevent a West Palm Beach cable system from showing two Dolphin home playoff games. The cable system intended to carry the games by picking up a distant NBC affiliate not normally carried on the system on the theory that the third report permitted such carriage.

The cable operator's interpretation had merit, but the FCC said the rules did not encompass sports blackouts.²⁵ The FCC was stuck in a quagmire of creating separate policies for sports and nonsports programming.

Miami wasn't a unique blackout example. The Dolphins sold out their home games as did many other NFL teams. Congress renewed its investigation of the sports blackout in October 1972 in a specific hearing for that purpose.

Congressional committees had touched on the blackout previously in cable regulations, antitrust and copyright hearings, but the questioning had never turned into grilling. Legislators never devoted any substantial time to blackouts before 1972. Pro football, the main target of the controversy, was growing and as it became larger and larger, it managed to keep any congressional offensive from getting past the line of scrimmage. When more fans crowded the stadiums and fewer tickers remained for nonseason ticket holders the stature of pro football changed. No longer was football the struggling sport which fought so righteously for the blackout privilege almost two decades earlier. The game had grown into big business.

The blackout was a volatile issue, easily recognized by the public and ripe for voter sentiment. Senator John Pastore's

Communications Subcommittee examined it at a most advantageous time, a month before the general election. At issue was whether the political appeal of legislation that protected every man's right to sports entertainment on home TV was justifiable.

Four reasons for blackout lifts were advanced by Senator William Proxmire (D-Wisc.) in 1971 when he introduced the first of the "ban the blackout" bills of the 92nd Congress. Proxmire believed:

1. The airwaves belonged to the public.
2. There was a public subsidation of the stadia where games were played.
3. There would be no unfairness to the regular ticket holder if the lifting would occur only if the game was sold out.
4. There would be an increase in TV revenue for professional teams from added coverage.²⁶

It was altruistic to believe that congressmen tackled the blackout rule solely for their constituencies. As the Washington Redskins went from league doormats to become a championship contender in the late 1960's, more lawmakers encountered trouble acquiring Redskins' tickets. Scalper's prices increased as more and more legislators became football fans. Congress became incensed with the NFL when it was forced to sit home Sunday afternoons under the blackout veil. Even former President Nixon, a personal friend of Redskins' coach George Allen, was an active supporter of anti-blackout legislation. Around Washington sports blackouts were ripe for scrutiny.

Two bills were introduced. Robert Griffin's (R-Mich.) S. 4007 abolished the sports blackout exemption provided by section two of Public Law 87-331. John Pastore's S. 4010 banned the blackout only when a game was sold out 48 hours in advance. The bills applied to professional football, baseball, hockey and basketball.

CATV declined to honor the blackout restrictions for three reasons. Cable wasn't mentioned specifically in section 2 of Public Law 87-331. The 1961 exemption was granted because television signals couldn't be selectively blocked. Therefore, cable's technology of a limited service area and fractional penetration of homes made the imposition of any blackout inappropriate.²⁷ Besides, network contracts with the professional leagues didn't require cable to blackout sports.

The NCTA also felt that once the FCC permitted a system to carry a particular station's signals, sports shouldn't be excluded.

Senator Pastore concurred:

I think it would be a sad thing to say to CATV, "Even though you could take this signal from a far away place beyond the home territory, you are denied doing it because you can't give your people what others are prevented from getting." I say let's not suffer. Let's both have the advantage. So far as I'm concerned, it isn't a matter of giving. I am in favor of removing the blackout, I am trying to.²⁸

Cable interests were elated over the Griffin bill. The legislation relieved television stations of the blackout and provided a clear directive for the FCC to revise its proposed rule making on sports importation. Cable proponents believed it wasn't a function of any government agency to protect the gate.²⁹ The FCC needed "congressional direction" according to Foster to prevent it from implementing a sports blackout on cable systems that was more stringent than those attached by leagues to network television contracts. Only Congress had the statutory authority to impose the blackout on cable.³⁰ The Southwestern Cable decision limited the FCC's authority over cable to that ancillary to the agency's regulation of television broadcasting. Foster believed protecting gate attendance was hardly ancillary.³¹

Pastore's bill didn't force the FCC to rethink its approach. The NCTA suggested modification of the measure to counter the intent of the FCC's proposal prohibiting blackouts for other games of the same sport when the home game was sold out. Under the Pastore bill, a Miami-Minnesota football game couldn't be imported into Washington when Dallas was visiting the sold-out Redskins.

The FCC was in an awkward position. It had wedged itself between its proposed sports rule and Public Law 87-331. Dean Burch admitted that on the one hand the FCC proposed to deny sports to someone only because other people were denied the same thing. However, that was the FCC's only alternative because it was powerless to avoid such discrimination when it was Congress' prerogative whether to give sports to everyone.³² Whatever Congress did, Burch promised the proposed cable rule would automatically reflect the new policy.³³

Broadcasting enthusiastically supported lifting the blackout. Home games on local television meant larger audiences and larger advertising revenues. Also, cable importation had cost some stations their audiences during home game blackouts.

WNEP TV, Scranton, Pennsylvania, was particularly irate after blacking out an ABC Monday Night Football game when the New York Giants played at Philadelphia in 1970.³⁴ The approximately 130 cable systems in WNEP's service area imported ABC affiliates from New York City, Baltimore, Harrisburg and Binghamton, New York for their subscribers on the night of the game.³⁵ WNEP couldn't understand why Baltimore, 90 miles from Philadelphia, and Harrisburg, 93 miles from Philadelphia, weren't blacked out while Scranton, 103 miles from the game site, was.

WNEP felt the blackout cheated over half of the area viewers who were unwired or couldn't afford CATV for the Eagles. Thomas Shelburne, the station's general manager, explained, "When a particular game is shown in our service area by CATV but not by us, it is in a very real sense pay TV and we are the ones that are paying."³⁶ WNEP's rate card was devalued because the game occurred in a Nielsen and ARB sweep week. The ratings were distorted and Shelburne predicted WNEP would lose advertising revenues for months. Either blackouts had to be banned or cable had to abide by the same restrictions as commercial television.³⁷

CBS was naturally concerned with its heavy financial stake in the NFL and the advent of pay cable. A blackout lift was needed because games would eventually go to pay television if Congress didn't act.³⁸

Roone Arledge, ABC's sports czar, said the basic question was whether it was in the public interest to blackout the television industry for the ostensible purpose of protecting the spectator gate, while allowing television's competitors (sic CATV) to carry the games.³⁹

The hearings ended October 5. Rozelle waited until Columbus Day, two days before the congressional adjournment, to take the first step. He lifted the blackout for the Super Bowl on January 14, 1973 if the game was sold out ten days in advance. The timing was masterpiece. Rozelle hadn't made a big concession, Pastore had something to show for his efforts and Congress had no time to rise up in indignation.

In December, Rozelle enraged former President Nixon when he arrogantly refused to lift the blackouts for the conference playoff

games sold out 48 hours before the kickoffs. It was a costly fumble and resentment to the blackout peaked.⁴⁰

Pastore introduced new legislation similar to his 1972 baseball bill in May 1973. The new measure amended the Communications Act to prohibit TV stations, networks or cable systems from entering into agreement to prohibit home telecasts of the four major sports when tickets were sold two days in advance. The bill was effective for only one year.⁴¹

The Senate approved Pastore's bill September 6 by a 76-6 vote with an amendment extending the 48-hour provision to 72 hours.⁴²

Torbert MacDonald had a similar bill pending with his House Communications Subcommittee. Hearings were held but the result was a foregone conclusion. The House made the bill effective for three years and passed it 336-37 on September 13.⁴³ The Senate accepted the measure and Rozelle promptly announced a blackout lift for nine of the twelve opening day games September 16.

Harrassment of cable by professional football subsided with the legislation, but cable still faced the ramifications of the FCC's proposed sports importation rule for the overwhelming number of events that were not sellouts. Problems like Scranton, Pennsylvania still existed. Scranton had no independent stations and imported sports signals from New York City were an important subscriber inducement for operators. The Scranton market, however, had nine minor league baseball teams. Importation of Met and Yankee games was impossible under the FCC provision since one of the nine teams was always playing at home. The

adverse economic impact strategy, used so effectively for so long by broadcasting and organized sports, became the legitimate rallying cry for cable operators. Cable became militant with the ill-conceived importation blackout. It was that choice or perishing under a regulatory edict.

NCTA studies found 15 percent of the sports programming denied to systems in Scranton under the proposed rule. Already, 35-60 percent of the imported signals were precluded by existing syndication exclusivity rules. So, cable systems faced the loss of 75 percent of their imported programming in some cases.

In the Boston market, more than 60 percent of the independent programming imported from New York City was currently denied to local cable systems by the exclusivity rules. The sports blackout provision threatened to add another 20 percent.

The NCTA concluded: "The proposed rule gives the sports leagues more than they need, goes contrary to existing TV practices, disrupts established viewing patterns and cuts another vital hunk out of major market distant signal importation which is already marginal."⁴⁴ The NCTA suggested prohibiting systems from carrying home games of the local teams only if the local TV station didn't have access to them.

Docket 19417 represents a different policy for sports and non-sports cable programming, and a restriction on viewer choices. The FCC hasn't any logical basis for separating sports from other programming. The FCC is saying, in effect, that if there are any comedy shows on Sunday afternoons, then importation of other comedy programs is void on Sunday afternoons.

The proposed rule is a reversal from the stand the FCC assumed during its 1959 battle against Senator Estes Kefauver's sports antitrust bill. At that time the FCC declined to decide whether television blackout exemptions were "reasonably necessary" on the basis that public interest considerations of antitrust matters were really congressional policy questions. In 1959, the FCC recognized its lack of expertise in appraising competitive and economic factors against a framework of antitrust doctrines. Nothing has changed in the interim to warrant such an FCC role reversal.

Congress adopted a separate rule for sports programming with Public Law 87-331 in 1961, but the statute in no way mentions cable television or nonpooled contracts.

A Federal Sports Commission is not the answer.⁴⁵ When it was proposed in 1972, sports commissioners were given the authority to promulgate blackout rules after consultation with the FCC. Inevitably, there would be a collision between the two commissions to satisfy their respective interests. A federal commission like the FCC was established to protect consumers through regulation of a quasi-monopoly. The FCC protects the public from abusive practices by holders of broadcast licenses.

A Federal Sports Commission would primarily protect the sports promoter: the quasi monopoly. All other federal commissions deal with essential services. Sports entertainment is not a necessity, but in order to continue, the preservation of the familiar context of sports must be maintained.

Two commissions--communications and sports--would have a built-in dissension point. Protecting the sports viewer and the promoter by two agencies is impossible unless the sports commission takes precedence in making rules for televised sports. After all, it was organized sports that abused its power and pushed the FCC into proposing its restrictive sports importation rule. Similar obstacles would develop with the National Labor Relations Board over the reserve clause and player contracts if a federal sports commission existed.

A Federal Sports Commission is far from reality as ever. Senator Marlowe Cook (R-Ky.) left office in 1974. His departure erased one potential solution for the importation of distant signal problem when the FCC vacillated on Docket 19417.

If organized sports couldn't get blackout protection from distant signals from the FCC, copyright liability for CATV was another avenue for achieving the same end. Organized sports took an active interest in new copyright legislation starting in the mid-1960's.

Footnotes--CHAPTER IV

¹Sports derives one-third to one-half of its gross income from radio and TV rights. The ultimate cost of high salaries, fancy pension plans and minor league player development rests on the value of the broadcast contracts. Ticket sales are important but limited by seating capacities and admission prices are already at a peak. New York Times, July 23, 1972, v, p. 23.

²Ibid., October 10, 1951, p. 1.

³Outside games were defined as games played outside the home territory of a particular home club and in which that home club was not a participant. United States v. National Football League, 116 F Supp 319 (1953), p. 321.

⁴United States v. National Football League, 116 F Supp 319, (1953), pp. 321-322.

⁵United States v. National Football League, 116 F Supp 319, (1953), pp. 322-323.

⁶United States v. National Football League, 116 F Supp 319, (1953), p. 325.

⁷Each club received \$320,000 annually. By pooling the league rights for the first time instead of letting each club negotiate its own TV contract, the NFL sought to eliminate uneven competition which they believed would destroy the league. For example, the New York Giants in the nation's number one TV market could demand considerably more for their TV rights than the Green Bay (Wisconsin) Packers. Teams with higher TV incomes could sign better players, win more championships and drive the weaker clubs, and eventually the NFL itself, into bankruptcy. Prior to the CBS contract, each member club negotiated individually and sold its TV rights to sponsors and broadcasters making the best offer.

⁸New York Times, April 27, 1961, p. 43. The contract divided the United States into seven TV regions. Each region would see its area team when it played outside the area. New York Times, July 22, 1961, p. 45.

⁹United States v. National Football League, 196 F Supp 445 (1961).

¹⁰Commissioner Rozelle had discussed the pooling plan with the Justice Department and the government said a single network contract violated the antitrust laws. New York Times, July 21, 1961, p. 1.

¹¹ The 1961 Grim decision did not run against the American Football League which had made a similar package deal with ABC in 1960 and 1961. The AFL was immune to litigation because such a provision for pooled TV contracts was made in its league charter written at its birth in 1959. New York Times, July 22, 1961, p. 45.

¹² New York Times, July 28, 1961, p. 45.

¹³ Ibid., September 22, 1961, p. 51.

¹⁴ College football was protected from pro football telecasts within 75 miles of the collegiate game site from 6:00 PM Friday night and all day Saturday from the second Friday in September through the second Saturday in December.

¹⁵ Second Report and Order, 2 FCC 2d 725 (1966), p. 787.

¹⁶ Commissioner Joe Foss of the AFL asked the House Commerce Committee to make Section 325 (a) applicable to CATV in 1966. This plan was abandoned when the AFL and NFL merged shortly afterward in favor of amending Public Law 87-331.

¹⁷ U.S., Congress, House, The Committee on Interstate and Foreign Commerce, Regulation of Community Antenna Television, Hearings, before The Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 13286, 89th Cong., 2nd sess., 1966, p. 260.

¹⁸ Ibid., p. 261.

¹⁹ Notice of Proposed Rulemaking, 36 FCC 2d 641 (1972). Docket 19417, the proposed sports blackout rule for importation stated: "When a professional baseball, basketball, football, or hockey team is playing at home, no cable television system located within the predicted Grade B contour of a station located within the home city of the team shall, without the consent of the home team and its league, carry the television broadcast of a professional game of the same sport if such event is not available on a television station that: (a) Is located within 35 miles of the reference point of the community of the system or (b) Has an audience in the county or community of the system meeting the significant viewing test."

²⁰ If the home game was televised locally, the cable system was obliged to carry the telecast as part of its basic requirement to carry all local signals. The FCC did not elaborate whether a local game scheduled during the daylight prohibited the importation of a telecast at night.

²¹ Notice of Proposed Rulemaking, 36 FCC 2d 641 (1972), p. 644.

²² Broadcasting, July 17, 1972, p. 49.

²³ If a cable system imported a network station, it had to be the closest affiliate within the same state. Where systems imported independent stations from the top 25 markets, the signals had to be taken from one or both of the two required markets. Systems permitted to carry a third independent station were required to select a UHF station from within 200 miles.

²⁴ Broadcasting, July 24, 1972, p. 73.

²⁵ Boston Globe, December 12, 1972, p. 106.

²⁶ Philip R. Hochberg, "Second and Goal to Go: The Legislative Attack in the 92nd Congress on Sports Broadcasting Practices," New York Law Forum, XVIII, No. 4 (Spring 1973), 841.

²⁷ U.S., Congress, Senate, The Committee on Commerce, Blackout of Sporting Events on TV, Hearings, before the Subcommittee on Communications of the Committee on Commerce, Senate, on S. 4007 and S. 4010, 92nd Cong., 2nd sess., 1972, p. 149.

²⁸ Ibid., p. 150.

²⁹ Ibid.

³⁰ Broadcasting, October 9, 1972, p. 21.

³¹ Hearings before the Senate Communications Subcommittee on the Blackout of Sporting Events on TV, 92nd Cong., 2nd sess., 1972, p. 151.

³² Ibid., p. 129.

³³ Broadcasting, October 9, 1972, p. 21.

³⁴ WNEP said the CBS coverage of Sunday Eagle home games was not blacked out in Scranton.

³⁵ Hearings before the Senate Communications Subcommittee on The Blackout of Sporting Events on TV, 92nd Cong., 2nd sess., 1972, p. 42.

³⁶ Ibid., p. 44.

³⁷ Ibid., p. 45.

³⁸ Ibid., p. 44.

³⁹Broadcasting, October 9, 1972, p. 23.

⁴⁰ A Louis Harris survey found 64 percent of the public favoring an end to the blackout. Boston Globe, December 28, 1972, p. 41. A House Commerce Committee poll of NFL season-ticket holders after the 1972 season found 65 percent favoring lifting the blackout for sold-out games. Broadcasting, May 7, 1973, p. 13.

⁴¹Broadcasting, May 21, 1973, p. 48.

⁴²New York Times, September 11, 1972, p. 57.

⁴³New York Times, September 14, 1973, p. 1.

⁴⁴Broadcasting, February 18, 1974, p. 60.

⁴⁵ Senator Marlowe Cook (R-Ky.) introduced S. 3445 in March 1972 to establish a Federal Sports Commission. Three commissioners would be appointed by the President to regulate (1) the pattern of televising events, (2) the movement of franchises, (3) the nature of player contracts and (4) the drafting of amateur players into professional leagues and the financial structure of teams and leagues. An eight man Sports Advisory Council, selected by the FSC from various elements of the sports world, would make recommendations to the FSC. The Sports Advisory Council would consist of people serving part-time. Two council members would be officials of pro sports leagues. There would also be two representatives of pro athlete organizations, two representatives of amateur athletics and the remaining two representatives would be chosen from sports writers, broadcasters or recognized leaders in the field of sports. The bill only got as far as the hearing stage and the NCTA approved of the idea. U.S., Congress, Senate, Committee on Commerce, Federal Sports Act of 1972, Hearings, before the Committee on Commerce, Senate, on S. 3445, 92nd Cong., 2nd sess., 1972.

CHAPTER V

COPYRIGHT LIABILITY

The idea of a copyright system is an Anglo tradition. The British Copyright Act of 1710 is said to be the first legislation known to the world.¹

After the colonies achieved independence, Connecticut, Massachusetts and Maryland passed copyright statutes in 1783. Later that year the Continental Congress adopted a resolution recommending the enactment of copyright laws by the states. Legislation was adopted in nine of the ten remaining original colonies, Delaware being the only exception.

Congress enacted the first copyright law in 1790 under Article I, section VIII of the Constitution.² Subsequent revisions of the United States Copyright Law in 1831, 1870 and 1909 enlarged the categories of protected works and extended the duration of protection. Originally, limited to books, maps and charts, the copyright law was broadened to include works as plays, music and motion pictures.

A copyright's life was 28 years originally and was later extended to 42 years and then to the present 56 year term to account for the increased life expectancy of the creators of literary and artistic works.³

The objective of a copyright system was to insure that the "well-springs of creation" did not dry up through lack of incentive. Creativity had to continue but wouldn't if works were not recognized as exclusive.⁴ A copyright system also permitted industry to profit from the publication, distribution and promotion of these products. An adequate copyright system insured widespread communication of these works and provided a legal basis permitting their distribution and dissemination without loss of dominion over the inherent literary property.⁵

Since enactment of the 1909 law, motion pictures, hi-fi records, radio and TV, jukeboxes, wire communications, photocopying equipment, video tape recordings, electronic computers, communications satellites, and cable television have outdated the present Act.⁶

Congress, recognizing the need for general copyright revision, appropriated money for three years of research in 1955. In 1961, the Copyright Office issued proposals for a new bill in its Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law.⁷ There was no reference to CATV in the 1961 report. Numerous meetings and discussions were held by the Copyright Office with a panel of consultants selected from the copyright bar.

Section 13 of the draft revision included a heading called "Public Reception of Broadcasts." In 1963, the Copyright Office admitted its awe and ignorance of CATV's technology. Still, the Copyright Office did not feel cable should be exempted from liability though it was a gray area where the office needed education.⁸

Arguments supporting and opposing an outright exemption for CATV inundated Washington. The cable proponents advanced three contentions:

1. CATV systems were nothing more than a service to provide subscribers better television reception.

Home viewers were entitled to good reception. If CATV wasn't exempted, the cost of copyright royalties would be passed on to individual subscribers. Copyright liability would discriminate between those viewers who needed no special equipment and those who did.

2. No community antenna operator had any control over the content of the broadcasts he passed on to his subscribers, nor did he know in advance what works would be performed in the broadcasts.

Obtaining blanket clearance in advance was virtually impossible and the establishment of a clearinghouse system large enough to insure against multiple suits for copyright infringement would result in a giant monopoly of copyright owners.

3. Performance royalties paid by broadcasters already included compensation to copyright owners for further transmission to CATV subscribers.

Those royalties were based on the size of the ultimate audience receiving the broadcast. CATV operators actually benefitted copyright owners by enlarging the broadcaster's audience which increased the station's advertising revenues and therefore enlarged the copyright royalties paid by broadcasters.

Television networks, local stations, motion picture companies, authors and publishers were in favor of copyright liability. This wide range of economic interest also focused on three points:

1. A CATV system was much more than a "passive" service.

CATV was an extremely complex transmission system which did exactly what a broadcaster did--transmitted programs to the public. Not only did CATV take a free ride on broadcaster-produced programming, but it also made a direct charge to the public for reception of transmissions.

2. CATV deprived the copyright owner of control over his work.

CATV's ability to import distant signals from another area meant the actual loss of the CATV's system's market for future broadcasts of that work by local stations.

3. CATV was a prosperous business enterprise which was showing signs of being a broadcast revolution in the United States.

CATV didn't deserve a free ride at the expense of copyright owners, or in competition with local broadcasters, wired music services or other users who had to pay royalties for similar uses.⁹

Emanuel Celler introduced H.R. 11947 in July 1964, a revision bill that the Copyright Office recommended. The bill was not considered before Congress adjourned.¹⁰

Revision bills were introduced in both houses in 1965. H.R. 4347 was a partial revision of the 1964 bill and did not exempt CATV because the Copyright Office believed systems performed works.¹¹ However, the legislation did not specifically mention sports on cable. There was some question whether copyright protection of live broadcasts ought to be extended to sports events in the Copyright Office. The Office acknowledged that all prerecorded, taped or otherwise copyrighted

broadcasts should receive protection from CATV.¹² No mention of live telecast liability was made in the bill. When a House Judiciary subcommittee began its hearings in May, sports and broadcast interests appeared seeking compulsory licensing of imported sports events.

These hearings marked the start of an organized sports lobby against CATV for copyright liability. Sports felt it should have the same infringement protection extended to it that other television programming--motion pictures and series-type shows--received. From 1965 through the present, pro football has sought protection against importation of blacked out games into a home team's television market. Importation threatened the value of exclusive network TV contracts. Sponsors simply would not pay the networks the same fees to reach a fragmented audience. Consequently, the networks would pay football less.

NFL Commissioner Pete Rozelle appeared before Edwin Willis' (D-La.) Judiciary subcommittee complaining that the 1953 Grim decision and Public Law 87-331 were eroded by CATV. Blackouts couldn't be prevented when importation occurred within the 75-mile radius. The home game blackout privilege, so essential to pro football's financial health, was impaired by cable. Also, when CATV imported an NFL Friday night game into areas where collegiate football was played, it violated Public Law 87-331.¹³

American Football League Commissioner Joe Foss cited a Buffalo Courier-Express newspaper advertisement for a Buffalo, New York cable system promoting subscriptions with Buffalo Bill home games as an inducement. Seven of eight AFL teams had cable systems in existence or in the planning stages within 50 miles of their cities.¹⁴

Cable's ability to import local games from outside the 75-mile radius into the blacked out area threatened to destroy pro football said Foss. As CATV gained more subscribers, fans would remain at home to watch their team's home games. Gate receipts, which the sports needed to retain to pay league expenses and player salaries, would diminish when CATV's importation didn't face any copyright liability to pro football.

The AFL Players Association also took a dim view of CATV. They sent a letter to a subcommittee member asking for protection.¹⁵ CATV's importation of home games into areas where they played threatened to reduce the rights to games obtained by the networks. Less TV money meant lower salaries. Since football careers averaged less than five years, there was only a limited time for a player to make a healthy income. The Players Association contended that upon retirement from the game, there was a limited number of pro football jobs available--coach, scout, front office--and athletes forfeited the years of their lives when most people established a foundation for their lifetime careers. The players, most of whom were married and had families, frequently found it difficult transferring into business or industry. Therefore, copyright protection was extremely important to maintain pro football's high salary scale.¹⁶

The argument wasn't exclusive to the players. In future years the pro football owners and city fathers used it to maintain the TV revenue, concession and parking receipts and for speedier amortization of stadium bonds.

Organized baseball also sought copyright protection to guarantee local and network exclusive rights for its telecasts. Baseball had another interest in CATV copyright liability--its long-standing problem of the minor leagues and its inability to solve it since the elimination of rule 1 (d). Minor league attendance sagged and franchises and entire leagues disappeared from the map.¹⁷ If the elimination of rule 1 (d) hadn't left the minor leagues for dead, cable's importation of major league games without copyright liability would kill the national pastime.¹⁸

The Association of Maximum Service Telecasters felt CATV impaired exclusivity in local programming such as sports that was owned by others and produced by the station under exclusive territorial license.¹⁹ The AMST suggested that Section 102 (Subject Matter of Copyright: In General) be amended under the term "original works" to include sports events.²⁰

Broadcasters believed copyright clearance for sports wasn't as much a burden as CATV operators thought. Regularly scheduled sports events were known well beforehand and there was ample opportunity to arrange prior clearance with the particular source, whether it was the athletic league, athletic team, the network or the station.²¹

The FCC headed for the sidelines when the copyright dispute began. The agency offered no formal comments to the hearing about cable's relationship to H.R. 4347. The FCC though a middle-ground was appropriate concerning a new law. Any revision of the 1909 Act had to strike a fair balance between the rights of copyright owners

"to have appropriate control over the public dissemination of their works and the interest of the public in their widest dissemination."²² Little did the FCC realize that almost a decade later it would face the sports copyright problem after it bounced around the courts, congressional committees and the Justice Department.

H.R. 4347 was reported favorably by the Judiciary Committee in May 1966.²³ CATV was defined as a commercial subscription service capable of receiving programming originated by others and retransmitting it to paying subscribers.²⁴ Sports importation was fully liable under subsection 111 (b)(5)(B) to pay a "reasonable license fee."²⁵ H.R. 4347 was not enacted.²⁶ Its Senate counterpart, S. 1006, had hearings in 1966 and the arguments raised by pro and con cable forces started showing more sophistication.

Pete Rozelle used CATV as a scapegoat for the NFL's experimental plan to bring outside games into blacked out home territories before John McClellan's (D-Ark.) copyright subcommittee.²⁷ Telerama in Cleveland and Courier Cable in Buffalo ruined the new network-league importation policy. CATV's unauthorized importation undid exclusivity and therefore the value of the game rights.²⁸

NFL TV contracts required CBS to carry all the road games of each team to its home territory regardless of the economics involved or CBS's game preferences. Regional networks were established weekly for each game to implement this policy. Rozelle felt CATV's imported signals threatened to destroy the regional network structure. CBS was placed under considerable economic pressure to resist paying heavy

tieline charges to bring every road game back to the team's hometown if cable could compete with local stations without such costs.²⁹ Cable's alleged adverse economic effect would cause attendance figures to decline and the impact would be felt first by the least successful franchises.

Defining motion pictures to include sports telecasts in Section 101 of S. 1006 was Rozelle's solution. Section 411 dealing with awarding statutory damages also needed amending.³⁰ It was a power play up the middle on the cable defense.

Organized baseball sent its counsel, Paul Porter, back to the new hearings with copies of The Sporting News and bad news on the farm. Unregulated expropriation of live major league games by CATV was decimating minor league gate attendances. An editorial in the July 2, 1966 edition of "baseball's bible" asserted:

The Citizens Cable Company of Williamsport [Pennsylvania] recently advertised it would carry over 350 games this season and others as they develop and the Game of the Week.

With the baseball blanketing provided by the company, it's a wonder that the Williamsport [Eastern League] Mets have anyone at their games. As a matter of fact, the club's crowds have been slim, averaging 960 for their first twenty home dates this year. On nonpromotional nights, it has been even less, 375-400 paid.³¹

The NCTA thought some complaints of sports interests had some merit. President Frederick Ford had no objection to amending the Communications Act to protect the blackout privileges already granted to pro sports. The solution did not lie in copyright law said Ford.³²

The Justice Department concurred with the NCTA. Whether CATV was subject to copyright liability was an open question to Edwin

Zimmerman, the Acting Assistant Attorney General. Enactment of S. 1006

raised three possibilities of harmful anti-competitive consequences:

1. Networks and other large copyright holders (movie studios and TV producers) might withhold permission to rebroadcast their programs and seek to monopolize or eliminate the CATV market.
- or 2. If Congress or the FCC allowed systems to originate their own programming, CATV could compete with the networks by providing an additional means of expression for program producers and an important channel for reaching viewers. It was undesirable to allow the networks to use their copyright control to extend their power into ownership of cable systems, or to limit the independence of cable operators.
- or 3. When CATV developed a two-way capability, there would be access to new electronic services. S. 1006 would permit a few large copyright holders to control the second wire. The development of competition among the industries supplying electronic services would be discouraged.³³

The government wasn't in favor of the radical departure from the 1909 system of compensating copyright owners. The TV viewer paid for programming indirectly by purchasing advertised products. The sponsor's payments for advertising included royalties for the copyright holders. Making CATV subscribers pay twice--through their subscription fee and a direct royalty payment--was unfair when non-cable viewers paid only once.³⁴

The sports importation question was clearly overshadowed by the government's description of the big picture. As sure as S. 1006 was enacted, which it wasn't, the Justice Department would initiate antitrust action. Organized sports didn't get beyond first base in its efforts seeking copyright protection. Hamilton Carphers, the NFL's counsel, was the first to admit the shaky foundation sports

pursued for copyright shelter several months earlier at the 1966 House hearings on CATV regulation.

Copyright is not likely to be a solution to this problem, either legislatively or at common law or in litigation, the reason being that professional football telecasts must be telecast live. There is no tangible object, no preexisting script, no recording of the game, subject to routine copyrighting principles and procedures. We cannot with radius access to these games, run these games a half-hour later from tape, which would give us the routine copyright privilege. We have made our appearance before the Copyright Committee . . . but live, television signals . . . are as intangible a subject matter for copyright as they have ever dealt with.³⁵

The 1966 and 1967 Fortnightly decisions at the federal district and circuit levels were a ray of hope for organized sports. United Artists Television, which distributed and licensed motion pictures to TV stations, charged the Fortnightly Corporation, owner of CATV systems in Clarksburg and Fairmont, West Virginia, with copyright infringement. The cable systems imported the signals of TV stations which were licensed by United Artists to telecast copyrighted motion pictures.

Despite Fortnightly's claim that it was merely a reception service which had no control over which of the available signals a subscriber used, New York District Judge William Herlands found the two systems to be "large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs."³⁶

Herlands' decision was an extensive account of television's technology in relation to the operation of CATV systems.

There can be no doubt that there are physical differences, but they arose out of differences in technique of communication--not in what is being transmitted and what is ultimately seen and heard by the viewing public.³⁷

Herlands cited a 1954 Canadian case, Canadian Admiral Corporation v. Rediffusion, as precedent. Rediffusion supplied radio and TV programs to its Montreal subscribers and such acts constituted a "performance." The Canadian Copyright Act defined "performance" as "any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication."³⁸

Fortnightly appealed but didn't fare any better in the New York Court of Appeals.

It would seem anomalous to hold that the operation of defendant's CATV systems did not result in public performance because defendant's subscribers obtained their own television sets, when a television broadcast received in home television sets constitutes a public performance.³⁹

Chief Judge Edward Lumbard found considerable guidance in the 1931 Buck v. Jewell-LaSalle Realty Supreme Court decision.⁴⁰

Certiorari was granted to Fortnightly and the Supreme Court reversed the trial and appellate decisions by a 5-1 vote in June 1968.⁴¹ Solicitor General Griswold invited the high court to render a compromise decision that would accommodate copyright, communications and antitrust policies in an amicus curiae brief. Justice Potter Stewart spoke for the majority and refused saying that was Congress' task.

Fortnightly was held as a nonperformer of United Artists' copyrighted works in any conventional sense or manner envisaged by Congress when it enacted the 1909 law.

We must read the statutory language of sixty years ago in the light of drastic technological change.⁴²

If CATV was liable because reception on a set in a home constituted a public performance, then the apartment house owner who erected a master antenna for his tenants, the shopkeeper who sold or rented TV sets and every television manufacturer might also be liable.⁴³

Cable TV was a master antenna and if a line were drawn somewhere between the broadcaster and the viewer indicating a division between dissemination and reception, CATV fell on the viewers side. Justice Stewart did not call CATV broadcasting or rebroadcasting.

Broadcasters perform. Viewers do not perform. Thus, while broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as an active performer; the other, as passive beneficiary. . . . If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.⁴⁴

The high court decision dashed any hope of establishing the possibility of CATV's copyright liability under the 1909 Act.

When the 90th Congress convened in 1967, bills were again introduced in the House (H.R. 2512) and the Senate (S. 597). The House bill was reported favorably,⁴⁵ and after amendment, it was passed by the full House. The bill as reported contained a provision dealing with CATV, but the provision was struck on the House floor.

H.R. 2512 went before John McClellan's Senate Copyright Subcommittee where it was considered along with S. 597 at a day-long

hearing in April 1967. S. 597 was different from any preceding bill. It gave producers of live sports events the same copyright protections extended to the owners of taped or filmed TV series.

However, the measure left much to be desired in Pete Rozelle's opinion. While it afforded specific protection in subsection 111 (b) (6)(A), there were no remedies for pro football. S. 597 failed to consider certain unique aspects of the situation confronting leagues which telecast live said Rozelle.

Sections 410 and 411 of the bill obligated producers to register tapes or recordings which were telecast on a prerecorded basis with the Copyright Office. Registration was a precondition to the remedies of injunction or statutory damages. However, sports producers couldn't possibly register game tapes and recordings with the Copyright Office until after the games were telecast. Therefore, producers of live sports programs, unlike the producers of motion pictures or pre-recorded programs, were stopped at the line of scrimmage looking for access to the remedies of injunction and statutory damage.⁴⁶

Rozelle suggested amending Section 410 with a 10 day transmission notice given by the sports producer to the defendant in such actions that the work (game) would be registered within three months after transmission.

Pro football also thought the bill was technically deficient because protection hinged on the copyright owner granting exclusive license for the telecast of his material to a local television station located in the same market. This wouldn't work with home game blackouts

and many different games being simultaneously telecast in many different markets. A local station would not always be in a position to receive from the league or purchasing network an exclusive license for the same game or for the many other games a local CATV system could import.

Copyright legislation languished in the Senate from 1967 to 1974. S. 543 introduced in 1969 provided for a compulsory licensing system of CATV based on a system operator's gross revenues. The McClellan subcommittee recommended that cable systems abide by the practices of the national sports blackout policy.⁴⁷ Cable importation as authorized by the bill allowed cable to "contaminate" protected audiences through importation of feature films by eroding first run prices and lessening the value of reruns held for later release. An alliance of broadcasters and film producers resulted and the revision bill was trapped in the Judiciary Committee as the decade ended.⁴⁸

McClellan introduced S. 644 when the 92nd Congress convened in 1971. Baseball Commissioner Bowie Kuhn asked the FCC to include subsection 111 (a)(4)(c) in its 1972 third report on CATV concerning sports exclusivity.⁴⁹ Baseball suggested a broad rule precluding the carriage of any live organized professional team sporting event on a distant signal unless the cable system obtained the consent of the originating station and of the team authorizing the telecast. In addition, no live professional sporting event could be carried as a local signal if that signal was carried more than 35 miles from the community of the originating station to within 35 miles of a television station community in another market. The American Hockey League (minor

league) and the NFL supported baseball's proposal. Authority for the FCC to adopt such restrictions was cited in Public Law 87-331 according to organized sports. The FCC ducked the issue and lateraled it to McClellan.⁵⁰

McClellan introduced S. 1361 in March 1972, a measure nearly identical to S. 543 and S. 597. Again, cable systems were liable for copyright payments and quarterly fees under a compulsory licensing system were established.⁵¹ The application of the compulsory license provision to cable's sports carriage was examined during two days of mid-summer hearings.

S. 1361, in effect, allowed pro sports interests to continue determining when and where their games were telecast. The sports provision reflected an existing policy heretofore unchanged by legislation or the FCC.

The NCTA applauded McClellan for leading the way on copyright and endorsed the S. 1361 without the sports provision.⁵² However, David Foster thought the revision bill contained antitrust and communications policies.⁵³

The sports provision was unique. It was the only section that made a distinction based on the program content of the secondary transmission. Sports received special treatment which was unrelated to Public Law 87-331 according to NCTA Chairman Amos Hostetter. The 1961 exemption merely allowed league members to pool their separate TV rights without violating the antitrust laws and previewed such TV package contracts from being used to impair the football gate receipts of the

NCAA. Hostetter found nothing about production of a pro team's home gate. Congress intent was to exempt blackout agreements for pooled (league) contracts only. The legislators attempted solely to limit the blackout exemption as long as it agreed with the 1953 Grim decision.⁵⁴

Hostetter told McClellan the sports interests went beyond congressional intent. Hostetter, concerned about cable's growth and its current availability of programming to the public, sought a compromise with the subcommittee if it still believed sports programming needed preferential treatment. He suggested the following alternative to the sports blackout provision.

A cable system located within the urbanized area of a city in which a professional baseball, basketball, football or hockey team is permanently headquartered, which carries secondary transmission of distant stations pursuant to a compulsory license as provided for herein, may be required to delete programs on such signals embodying home games of such team, if the home team or its league had made the game unavailable to all television stations which serve the city in which the cable system is located. Cable systems in existence on the date of enactment of this act shall not be required to delete such programs.⁵⁵

The blanket blackout policy sought by pro football without regard to the popularity and success of other, less-followed sports was unwarranted and restrictive. Hostetter faulted the bill on three other counts and the fact that the legislation was too rigid and should be left for the FCC to handle.

First, subsection 111 (c)(4)(C)(iii)'s language was not limited to days when a team in the local market played at home game. It was not even limited to markets which had a local team in the league, or even that particular sport, to which the blackout applied.

Second, the subsection applied even where none of the local television stations were interested in telecasting the game in question. A local station could nullify coverage of the game and cable was powerless to serve its subscribers for no other reason than the station's whim or tie-line economics.

Third, the subsection was limited to the geographical area based on the geographical area critical to a team's gate receipts since it was influenced by Public Law 87-331. Cable's unique ability to pinpoint audiences was not considered.

The law wasn't flexible enough for the NCTA and it petitioned the subcommittee to permit the FCC to handle any sports copyright liability. The FCC was flexible, the only unit that could grant needed waivers and was able to deal with an area of blackout protection that differed from market to market, sport to sport and year to year.⁵⁶ Changes in the public interest were constant and only the FCC was flexible enough to accommodate it.⁵⁷

Telecable, an MSO with systems in 33 states, worried about the economic harm S. 1361 would do to most of its subsidiaries and any new systems.

Where none of the local television stations was interested in carrying a game, S. 1361 blocked importation of a Los Angeles Rams-San Francisco Forty-Niners football game as far away as the East Coast. Telecable found this contrary with the 1961 antitrust exemption. It wasn't in the public interest if a broadcaster chose not to clear a game and cable wasn't allowed to import it.⁵⁸

Docket 19417,⁵⁹ released with the third report on CATV in March 1972, welcomed comments from amateur sports interests concerning the proposed importation blackout rule.

The NCAA entered the downybrook and also appeared before McClellan to amend the sports provision to include amateur sports. The NCAA had financial troubles, only 85 of its 771 members were in the black.⁶⁰ James Higgins, chairman of the NCAA's cable television subcommittee, endorsed S. 1361 as being consistent with section III of Public Law 87-331, the NCAA's TV plan and maintaining protection of collegiate football.⁶¹

The NCAA wanted only one game televised in any given area of the country at one time. Cable's ability to import signals defeated this strategy to avoid overexposure especially when time zone differences came into play. When UCLA and USC were shown on the West Coast at 1:00 PM Pacific time, an East Coast game with a twilight kickoff could be imported by Far West cable systems. Attendance would decline at the Los Angeles Coliseum, the ABC regional rating would suffer and the income derived from the network for exclusive coverage would decrease.⁶²

Cable's capacity to interconnect systems might also undo the protection pro football gave collegiate games in 1961. For example, if Atlanta and Minnesota played a Saturday afternoon game in early December, and the NFL found there was no college or high school game scheduled within 75 miles of the game site, then the league could televise it under the law. If CATV interconnected systems to send the game nationwide, other college and high school games would be hurt.⁶³

Collegiate athletics wasn't the only sports interest in the financial doldrums. Thirteen of the 24 major league baseball franchises and almost all its farm clubs were in the red.⁶⁴ The minor leagues were supported by their meager gate and attendance receipts plus a major league subsidy.⁶⁵

Commissioner Bowie Kuhn painted a gloomy picture for the national pastime unless the proliferation of imported signals into all franchise markets was halted. The FCC proposed rulemaking on cable blackouts was of little value. No action had been taken by the Commission since its February 1972 issuance despite its pledge to complete the proceeding expeditiously. Baseball's patience was wearing thin while hundreds of certificates of compliance were authorized for operators who planned to use sports as a major sales pitch to subscribers.⁶⁶

Cable was already hurting the minor leagues but the third report threatened to cut the umbilical cord between the majors and the minors. Three distant signals penetrated all but one of the major league areas where systems operated.⁶⁷ Distant signals of other major league games threatened to erode the ratings of the local teams telecast and lessen the value of the local television rights. Twenty-five percent of the team's income came from the sale of exclusive rights, and less money meant more major league clubs losing money. Any cutback in the major leagues \$31 million operating revenue most surely would be felt in the minors where funds for player development were so desperately needed.

The FCC had granted over 300 certificates of compliance to operators in major league territories within one year of its third report on CATV. Of these systems, 171 imported signals of other major league games.⁶⁸

Kuhn cited several examples. Eleven systems within 35 miles of Boston imported Yankee and Met games from New York City independent stations.⁶⁹ Twelve systems in the Philadelphia area imported WOR TV and the Mets while six systems carried WPIX TV's coverage of the Yankees.⁷⁰ The Mets (112 games) and Yankees (69 games) gave Boston and Philadelphia fans a choice the lords of baseball did not want available.⁷¹

The National Hockey League concurred with baseball's plan for protection in underwriting player development. Cable threatened to freeze hockey's growth. Don Ruck, vice president for the league, explained that of the four cable systems within the Philadelphia city proper, one was literally across the street from the Spectrum, the home of the Flyers franchise.⁷²

Pro football was also tired of the FCC's vacillation on the sports blackout rule. Twelve of the 26 NFL cities had cable.⁷³ The NFL took exception to the NCTA's interpretation of Public Law 87-331. Pro football believed Congress knew full well in 1961 that it was enacting an exemption that allowed the league to sell TV rights resulting in one game telecast per market. The merger of the AFL and NFL in 1966 together with expansion led to the availability of two, and often three games, in every TV market on Sunday afternoons.⁷⁴

The NFL sounded paternalistic when it told McClellan there was enough football on television which was distributed in the league's own and the public's interest.⁷⁵

The National Basketball Association felt it deserved S. 1361's protection because the sport did not have as high a degree of national acceptance for a specific game as pro football. Each NBA club televised as many games as possible locally without interfering with attendance. Cable burdened a team with deciding whether to exclude the visiting club's cameras to protect against importation into its home blackout area and therefore, ticket sales. A team's only alternative was depriving the public of television or not adding to the number of games already shown. This was a choice the NBA felt it and other sports should not have to make.⁷⁶

The McClellan subcommittee headed for the sidelines after the hearing to await the CBS-Teleprompter Supreme Court showdown or the promised FCC ruling on sports importation. The bill was also stalled by copyright owners who felt the royalty fee schedule was unreasonable.⁷⁷

CBS initiated the infringement action against Teleprompter in 1964. The network used an argument similar to United Artists', but efforts to consolidate the cases were unsuccessful. CBS and Teleprompter agreed to await the Supreme Court's Fortnightly decision before starting litigation. Even if passive reception and distribution were not a "performance," CBS felt the cable technology employed since the 1968 Fortnightly case outdated the decision. CBS cited five Teleprompter systems which cablecasted, sold commercial sponsorship on their

origination programming, interconnected systems and utilized microwave relays to import signals from several hundred miles away for subscribers. The question before the judiciary was whether CATV was so changed by the additional services undertaken since Fortnightly as to be deemed a performer of the broadcast programming it distributed.

A New York District court found Teleprompter innocent of copyright infringement in 1972.⁷⁸ Judge Constance Baker Motley said the Supreme Court did not imply a geographical limit beyond which signals could not be imported in Fortnightly. That was for Congress, not the courts, to decide. Even though Teleprompter imported more stations than Fortnightly, and seemingly picked and chose the most popular signals, its latitude was still not comparable to a broadcaster's, which controlled programming content and scheduling.⁷⁹

CBS appealed and the New York circuit court reversed the decision on liability where distant signals were imported.⁸⁰

We hold that when a CATV system imports distant signals, it is no longer within the ambit of the Fortnightly doctrine, and there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it. For this reason, we conclude that the CATV system is a "performer" of whatever programs from these distant signals that it distributes to its subscribers.⁸¹

In the absence of copyright legislation, the court attempted to define what a distant signal was for copyright purposes.⁸²

Justice Potter Stewart acknowledged the Supreme Court's position when it overruled the circuit court's distant signal decision in March 1974.⁸³ The new functions undertaken by cable since Fortnightly were

"extraneous" to a determination of copyright liability. Importation produced a larger base for the broadcaster to calculate compensation he paid for use of the copyright material. CATV did not alter the function it performed for its subscribers.

The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.⁸⁴

Even the three dissenting justices agreed with Stewart and the majority that "detailed copyright regulation was up to Congress." The court's judicial restraint moved the copyright contest back to the congressional arena. Cable was immune to copyright liability. The FCC had not formulated a sports importation rule in the year since it was first proposed. McClellan was running out of time to squeeze his bill through the 93rd Congress. Even if the Senate passed a revision bill, the House Judiciary Committee was bogged down with the impeachment proceedings involving Richard Nixon.

The NCTA was the top seed in the copyright tournament. The major cable firms stood behind their earlier commitment to limited copyright liability as a political fact of life. However, cable fought hard for the deletion of the sports blackout provision from S. 1361.⁸⁵

McClellan's subcommittee sent the bill to the parent Judiciary Committee in April 1974. It included the sports blackout provision.⁸⁶ The NCTA found an ally in its "kill the bill" strategy. Section 114 instituted a new royalty payment for the broadcast of recorded music and was vehemently opposed by the NAB.⁸⁷ Indication that the sports subsection was headed for the scrap pile came from Hugh Scott (R-Pa.),

the ranking Republican on the Judiciary Committee and McClellan. Both entertained a plan of amending the bill to eliminate the controversial sports provision and to replace it with a mandate to the FCC to consider the sports carriage issue. McClellan thought the matter was regulatory, not statutory. After all, the FCC had announced a proposed rule making on sports importation in 1972.⁸⁸

A clear victory came for cable interests in the June 11, 1974 Judiciary Committee vote. The full committee deleted the sports provision by an 11-1 count without mention of the FCC purview.⁸⁹

The Committee's approval came a decade after the first draft revision bill was introduced into the House. The House-passed H.R. 2512 had languished since 1968 waiting for industry, regulatory and judicial resolution of cable issues.⁹⁰

Full NCTA support of S. 1361 resulted. McClellan agreed to comity and sent the bill to the Commerce Committee for consideration. McClellan originally refused to refer the bill to Commerce on the basis that removal of the sports provision involving FCC regulation left nothing for John Pastore and his Communications Subcommittee to consider.⁹¹ There was apprehension among cable interests that John Pastore who was a staunch firend of broadcasting, intended to reopen discussion on the sports subsection. Instead, the Commerce Committee amended the revision bill to direct the FCC to promulgate a sports blackout rule "provided that, in adopting such rules the FCC may consider the effect upon broadcasting, cable television, sports, the policy objectives of Public Law 87-331 and any other factors it deems appropriate."⁹²

A 180 degree turn of sports copyright liability was made in five weeks!⁹³ The Commerce amendment wasn't the albatross for cable interests it could have been. Sports interests wanted the FCC to consider gate receipts as a factor but the Commerce-written FCC amendment was less specific.⁹⁴

Six Judiciary Committee members wrote a letter to their Commerce colleagues to gain support of the sports deletion Senators Tunney (D-Cal.), Thurmond (R-S.C.), Gurney (R-Fla.), Ervin (D-N.C.), Hruska (R-Neb.) and Kennedy (D-Mass.) chastised the Commerce Committee for not holding hearings on its sports amendment.⁹⁵

After vigorous debate on the Senate floor in early September, the Commerce Committee's amendment was narrowly defeated, 36-34. Senators McClellan and Gurney argued there was no room for a sports blackout provision in a copyright revision bill and that the FCC already had a proposed sports importation rule pending.⁹⁶

Once the amendment logjam was cleared, S. 1361 was passed overwhelmingly, 70-1, on September 9.⁹⁷

The 93rd Congress adjourned without further action on S. 1361. Cable's ardor for the new legislation lessened somewhat in the fall of 1974.

A copyright analysis by Sol Schildhause, formerly head of the FCC's cable television bureau and now a Washington cable attorney, found some provisions in S. 1361 that could damage cable. The NCTA voted in November to work in the House of Representatives for a series of amendments in the Senate-passed bill, including payment of copyright fees in

return for a congressional directive to the FCC to drop nonduplication and exclusivity rules, exclusion of systems with fewer than 1,500 subscribers from copyright payment rules and making the bill's definition a cable system conform to the FCC's definition.⁹⁸

The NCTA anticipated the successor to S. 1361 would clear the Senate with a minimum of difficulty. Meanwhile, House Majority Leader Thomas (Tip) O'Neill (D-Mass.) felt cable should pay copyright fees while opposing the defunct sports blackout provision. O'Neill, a sports fan, commented about the amount of football he watched at his Cape Cod residence, "You take cable TV away from my home and I think I'd sell the house."⁹⁹

Imposing liability on cable television is a major departure from the Anglo-American copyright tradition. Historically, copyright royalties were imposed on active users, not on the enjoyment of a work. The Supreme Court upheld this in the *Fortnightly* and *Teleprompter* decisions. However, in a political world cable must compromise and pay copyright fees if it hopes for an easing in federal restrictions. This occurred in 1971 with the consensus agreement as a prerequisite for the liberalized importation and nonduplication rules of the 1972 third report.

Cable faced political reality in its support of S. 1361 and was justifiably adamant about compromise on an obnoxious sports blackout provision. Organized sports' claim that it loses precious gate receipts when other games of the same and different sports are imported into its home territory is short-sighted. Attendance declines can be balanced

by cable's ability to increase a game's TV audience, sponsor's fees and hence the value of the TV rights.

However, cable systems located within the home territory of a professional team should refrain from importing that team's home games into its home territory when the home game is blacked out locally. This will not severely limit the number of events cable can import nor restrict viewer choice as organized sports sought in the sports blackout provision of the copyright revision bill. This affords the protection of a home game blackout where sports deems it necessary. This is a compromise between cable and sports economics. Neither side will suffer substantially from it. It is the only rational solution for the importation of distant signals for cable television and sports. The FCC's proposed rule and any copyright liability for sports disregard cable economics. Subscribers who had their homes wired on the understanding that cable would increase their choice of sports events are cheated by these capricious rules.

Footnotes--CHAPTER V

¹Appendix to Statement of John Schulman, Chairman for Revision of Copyright Law, American Bar Association, as cited in U.S., Congress, Senate, Copyright Law Revision, Hearings, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 1006, 89th Cong., 1st sess., 1965, p. 98.

²The Article provides that "The Congress shall have power: To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

³Appendix to Statement of John Schulman, Chairman for Revision of Copyright Law, American Bar Association, as cited in U.S., Congress, Senate, Copyright Law Revision, Hearings, before the Subcommittee on Patents, Trademarks and Copyright of the Committee on the Judiciary, Senate, on S. 1006, 89th Cong., 1st sess., 1965, pp. 98-100.

⁴U.S., Congress, Senate, Copyright Law Revision, Hearings, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 1006, 89th Cong., 1st sess., 1965, p. 100.

⁵Ibid., p. 96.

⁶Ibid., p. 65.

⁷The term increased from 56 to 76 years. The basic term ran 28 years from first public dissemination and was renewable for a second term of 48 years.

⁸U.S., Congress, House, Committee on the Judiciary, Copyright Law Revision, Part Three, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, Subcommittee Number Three of the Committee on the Judiciary, House of Representatives, 88th Cong., 2nd sess., 1964, p. 240.

⁹U.S., Congress, House, Committee on the Judiciary, Copyright Law Revision, Part Six, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Subcommittee Number Three of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st sess., 1965, pp. 41-42.

¹⁰H.R. 2237, 89th Cong., 2nd sess., 1966, p. 31.

¹¹Deputy Register of Copyrights, George Cary, said the Copyright Office believed the copyright owner should share in the profit when CATV operators "performed" his work. If there was no compensations, the performance could have damaging effects on the value of the copyright. Therefore, CATV was not exempted. U.S., Congress, House, Committee on the Judiciary, Copyright Law Revision, Part Six, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Subcommittee Number Three of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st sess., 1965, pp. 1242-1243.

¹²U.S., Congress, Senate, Committee on the Judiciary, Copyright Law Revision--CATV, Hearings, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 1006, 89th Cong., 2nd sess., 1966, p. 162.

¹³U.S., Congress, House, Committee on the Judiciary, Copyright Law Revision, Hearings, before Subcommittee Number Three of the Committee on the Judiciary, House of Representatives, on H.R. 4347, 89th Cong., 1st sess., 1964, p. 1825.

¹⁴Ibid., p. 1832. New York, Houston, Boston, San Diego, Oakland, Denver and Buffalo were the seven cities. Foss was unsure whether or not there was a system within 50 miles of Kansas City.

¹⁵The letter was sent to subcommittee member Herbert Tenzer (D-N.Y.).

¹⁶Hearings before House Subcommittee Number Three of the Judiciary on Copyright Law Revision, 89th Cong., 1st sess., 1965, p. 1840.

¹⁷The commissioner's office received the most minor league complaints about CATV importation of major league games into their areas from farm clubs in upstate New York, Pennsylvania and the Pacific Coast. Hearings before House Subcommittee Number Three of the Judiciary on Copyright Law Revision, 89th Cong., 1st sess., 1965, p. 1844.

¹⁸Hearings before House Subcommittee Number Three of the Judiciary on Copyright Law Revision, 89th Cong., 1st sess., 1965, p. 1843. Both baseball and football sought to amend the term "motion pictures" under Section 101 (Definitions) of the revision bill to include live telecasts of sports events which were recorded simultaneously with their original transmission. Hearings before House Subcommittee Number Three of the Judiciary, 89th Cong., 1st sess., 1965, pp. 1826; 1844.

¹⁹Ibid., pp. 1224-1225.

²⁰ Ibid., p. 1229. Section 102 read: "Copyright protection exists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." Hearings before Subcommittee Number Three of the Judiciary, 89th Cong., 1st sess., 1965, p. 4.

²¹ Ibid., pp. 1239-1240.

²² Ibid., p. 473.

²³ H.R. 2237, 89th Cong., 2nd sess., 1966.

²⁴ Ibid., pp. 77-78.

²⁵ Section 111 was titled Limitations on Exclusive Rights: Secondary Transmissions. "The secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement if the secondary transmission is made for reception wholly or partly outside the limits of the area normally encompassed by the primary transmission and the secondary transmission is made for reception wholly or partly within the limits of an area that is adequately served by transmitting facilities other than the primary transmitter." H.R. 2237, 89th Cong., 2nd sess., 1966, pp. 7-8.

²⁶ The Committee recommended basing fees for copyright licensing upon the degree of impact CATV had on the market value of the copyrighted programming. CATV was exempted where it was merely a fill-in service to improve reception. Cable was fully liable where it operated as pay TV by originating programming or altering program content. Limited liability occurred in areas which didn't receive all the networks unless the cable operator did not give advanced notice to the local television station that had exclusivity to show the program in that area. H.R. 2237, 89th Cong., 1st sess., 1966, p. 81.

²⁷ In December 1965, CBS and its advertisers pressured the NFL to modify its blackout restrictions. Beginning with the 1966 season, another league game was televised on a local station on afternoons the home team played at home. This "imported" game was televised at a time when it would not directly conflict with the home team's game. The imported game was shown before or after the home contest. NBC made a similar request of the AFL and the league adopted a similar "imported" policy in June 1966. In both cases, games played locally would still not be on home TV. New York Times, June 3, 1966, p. 79; and August 26, 1966, p. 7.

²⁸A few weeks before Rozelle's Senate subcommittee appearance, the NFL and Philadelphia Eagles petitioned the FCC to stop a suburban Philadelphia CATV system from importing NFL games from WMAR-TV, Baltimore. Holly City Cable TV in Millville, New Jersey planned to import three Baltimore stations. If this happened, the petition claimed, Baltimore Colts' games would be shown in the Eagles' market when Philadelphia played at home. The petition said this was contrary to the congressionally-supported NFL blackout rules and it could adversely affect games seen on WCAU-TV, Philadelphia, a CBS owned and operated station. Broadcasting, August 8, 1966, p. 38.

²⁹U.S., Congress, Senate, Committee on the Judiciary, Copyright Law Revision--CATV, Hearings, before the Subcommittee on Patents, Trademarks and Copyrights, Senate, on S. 1006, 89th Cong., 2nd sess., 1966, p. 157.

³⁰Rozelle wanted the term "motion pictures" to include these additional words. ". . . And specifically include television broadcasts of sporting contests simultaneous with the conduct of the contest which are recorded simultaneously with their transmission." Section 411 was to be amended with these words. "In any action under this title, no award or statutory damages or attorney's fees shall be made for (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration unless, in the event of a television broadcast of a sporting contest simultaneous with the conduct of the contest, such registration is made within three months after its original transmission." Hearings before the Senate Copyright Subcommittee on Copyright Law Revision--CATV, 89th Cong., 2nd sess., 1966, p. 159.

³¹The Sporting News, July 2, 1966 as cited in Hearings before the Senate Copyright Subcommittee on Copyright Law Revision--CATV, 89th Cong., 2nd sess., 1966, p. 164. Citizens Cable subscribers saw major league games imported from Philadelphia, New York and Baltimore. Williamsport was the largest system in the United States at the time with over 20,000 subscribers.

³²Hearings before the Senate Copyright Subcommittee on Copyright Law Revision--CATV, 89th Cong., 2nd sess., 1966, p. 108.

³³Ibid., p. 213.

³⁴Ibid., p. 214.

³⁵U.S., Congress, House, Committee on Interstate and Foreign Commerce, Regulation of Community Antenna Television, Hearings, before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 13286, 89th Cong., 2nd sess., 1966, pp. 263-264.

³⁶United Artists Television v. Fortnightly Corporation, 255 F Supp 177 (1966).

³⁷Ibid., p. 204.

³⁸Canadian Admiral Corporation v. Rediffusion, Incorporated, File No. 67452, Canadian Exchequer Court, May 21, 1954, p. 410. Canadian Admiral Corporation obtained exclusive rights from the Montreal Football Club for live telecasts of home games and film telecasts of road games. Rediffusion owned a CATV system in Montreal and received the football games over CBFT-TV, Montreal for more than 100 subscribers and on its salesroom screen. Canadian Admiral brought action and the court held live telecasts seen by home viewers were not susceptible to the Canadian Copyright Act, but the salesroom screen showings were liable as being "performances in public."

³⁹United Artists Television, Incorporated v. Fortnightly Corporation, 377 F 2d 872 (1967).

⁴⁰The LaSalle Hotel in Kansas City, Missouri provided loudspeakers or headphones in each of its public and private rooms over which guests could hear programs received on the hotel's master radio. The hotel argued that it did not perform the programs because a broadcast could give rise to only one performance, that by the broadcaster. The hotel also contended it did not perform the program because it could not determine their content but only choose among the programs broadcast. Finally, the hotel said its master radio was no more than a mechanical or electrical ear for distant performance reception. Nevertheless, the Supreme Court held such an act constituted a performance.

⁴¹Fortnightly Corporation v. United Artists Television, 392 U.S. 390 (1968).

⁴²Ibid., p. 396.

⁴³Ibid., p. 397.

⁴⁴Ibid., pp. 399-400.

⁴⁵H.R. 83, 90th Cong., 1st sess., 1967.

⁴⁶U.S., Congress, Senate, Committee of the Judiciary, Copyright Law Revision, Hearings, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee of the Judiciary, Senate, on S. 597, 90th Cong., 1st sess., 1967, pp. 1235-1236.

⁴⁷Broadcasting, December 15, 1969, p. 20.

⁴⁸Don R. LeDuc, Cable Television and the FCC--A Crisis in Media Control (Philadelphia: Temple University Press, 1973), pp. 179-181.

⁴⁹Steven R. Rivkin, Cable Television: A Guide to Federal Regulations (Santa Monica, Calif.: The Rand Corporation, 1973), p. 286. The subsection entitled Limitations on exclusive rights: Secondary Transmissions read, ". . . the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement . . . if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public."

⁵⁰U.S., Federal Communications Commission, Cable Television Report and Order, "Cable Television Service; Cable Television Relay Service," Federal Register, XXXVII, No. 30 (February 12, 1972) 3252, 3259.

⁵¹Section 111 (c) was entitled Limitations on exclusive rights: Secondary transmissions by cable systems. The sports provision rule read: ". . . the secondary transmission to the public by a cable system or a primary transmission made by a broadcast station . . . is actionable as an act of infringement where the reference point of the cable system is within a United States television market . . . and the content of the particular transmission program consists primarily of an organized professional team sporting event occurring simultaneously with the initial fixation and primary transmission of the program and the secondary transmission is made for reception wholly or partly within the local service area of one or more television stations, none of which has received authorization to transmit said program within such area."

⁵²Broadcasting, November 26, 1973, p. 34.

⁵³U.S., Congress, Senate, Committee on the Judiciary, Copyright Law Revision, Hearings, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 1361, 93rd Cong., 1st sess., 1973, p. 425.

⁵⁴Ibid., p. 516.

⁵⁵Ibid., p. 518.

⁵⁶Ibid.

⁵⁷Ibid., p. 521.

⁵⁸Ibid., p. 520.

⁵⁹Notice of Proposed Rulemaking, 36 FCC 2d 641 (1972).

⁶⁰Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 526.

⁶¹The aims of the TV plan were: (1) To reduce adverse effects of live TV on attendance, (2) To spread TV participation among as many schools as possible, (3) To help athletic and related educational programs which need football proceeds, (4) To promote college football via television, and (5) To advance overall interest in college athletics. Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 527.

⁶²Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 528.

⁶³Ibid., p. 527.

⁶⁴Ibid., p. 545 (1969 figures).

⁶⁵Ibid., p. 534.

⁶⁶Ibid., p. 541.

⁶⁷The lone exception was San Diego, the 51st television market. Two stations could be imported.

⁶⁸Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 540.

⁶⁹Somerville, just across the Charles River from Fenway Park, the home of the Red Sox, was the nearest cable system. Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 543.

⁷⁰Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 540. WOR TV was the most dramatic example of what Kuhn called the "super station syndrome." Met signals were leapfrogged as far west as Ashtabula, Ohio, and as far north as Nashua, New Hampshire.

⁷¹The Pittsburgh Pirates, Cleveland Indians, Kansas City Royals and Cincinnati Reds had also been affected by imported signals said Kuhn. In Minnesota, the Twins competed with 148 Cubs' games imported via WGN, Chicago on a cable system in Bloomington, a Twin Cities suburb and the site of the Twins' ball park. Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 541.

⁷²Hearings before the Senate Copyright Subcommittee on Copyright Law Revision, 93rd Cong., 1st sess., 1973, p. 548.

⁷³Ibid., p. 551.

⁷⁴Ibid., p. 537.

⁷⁵ Ibid., p. 538.

⁷⁶ Ibid.

⁷⁷ The measure specified a 1 percent to 5 percent payment of a cable system's gross revenues into an ASCAP-type central authority. The NCTA supported this McClellan-authorized standard but the motion picture industry insisted on fee arbitration comparable to the consensus agreement reached among broadcasters, cable operators and copyright owners in 1971. The legislation called for arbitration on the fee scale after three years, but the Motion Picture Association of America feared initial payments would set a low standard that would reduce future copyright payments. Variety, March 13, 1974, p. 43.

⁷⁸ Columbia Broadcast System, Incorporated v. Teleprompter Corporation and Conley Electronics Corporation, 315 F Supp 618 (1972).

⁷⁹ Under the interconnection issue, CBS claimed Teleprompter was liable when it purchased the rights for the February 25, 1964 and May 25, 1965 Muhammed Ali-Sonny Liston heavyweight championship fights. The bouts were carried live to closed-circuit theaters by an independent company and to Teleprompter's Farmington, New Mexico, Elmira, New York, and Great Falls, Montana systems by AT&T facilities. The cable systems were linked to the nationwide AT&T circuits carrying the signals. No additional or separate charge was made to the subscribers for the fights. The court ruled, "This interconnection occurred on two separate, temporary and special occasions. Teleprompter's CATV's were interconnected only in the sense that several of them were linked to the same independent, nationwide circuits. Whatever this brief interconnection may portend for the future, it does not transform defendant's present CATV system into a broadcast network as plaintiffs suggest." Under the commercial sponsorship issue, CBS claimed that Teleprompter's New York City system sold advertisements for its cablecast coverage of Madison Square Garden sports events since January 1, 1970. The court ruled that commercial sponsorship was ". . . merely one of a number of indicia of broadcasting, not as a sole determinant. The sale of commercials in the case before us was small in both the amount of money involved and in relation to the amount of programming carried by the New York CATV." Columbia Broadcast System, Incorporated v. Teleprompter Corporation and Conley Electronics Corporation, 315 F Supp 618, pp. 625-626.

⁸⁰ Columbia Broadcast System, Incorporated v. Teleprompter Corporation and Conley Electronics Corporation, 476 F 2d 338 (1973).

⁸¹ Rivkin, p. 275.

⁸²The court found it easier to state what was not a distant signal. ". . . Any signal capable of projecting, without relay or retransmittal, an acceptable image that a CATV system receives off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal."

⁸³Teleprompter Corporation v. Columbia Broadcast System, Incorporated, 415 U.S. 394 (1974).

⁸⁴Ibid., p. 408.

⁸⁵Variety, March 13, 1974, p. 43.

⁸⁶The sports blackout provision was preserved by a 2-2 subcommittee vote.

⁸⁷Broadcasting, May 13, 1974, p. 39.

⁸⁸Ibid., May 20, 1974, pp. 5, 27.

⁸⁹Section 114 was preserved in the markup session by an 8-8 vote.

⁹⁰S. 1361 was radically different from the House-passed legislation, H.R. 2512 did not contain a performer's copyright (Section 114) or a provision for CATV. Broadcasting, June 17, 1974, p. 18.

⁹¹Broadcasting, July 1, 1974, p. 5.

⁹²Ibid., July 22, 1974, p. 5.

⁹³The Commerce Committee deleted Section 114 from the bill. Broadcasting, July 29, 1974, p. 21.

⁹⁴Variety, July 24, 1974, p. 34.

⁹⁵Ibid., August 29, 1974, p. 35.

⁹⁶Ibid., September 11, 1974, p. 1. Section 114 was deleted, 67-8.

⁹⁷Broadcasting, September 16, 1974, p. 23.

⁹⁸Ibid., November 25, 1974, p. 33.

⁹⁹Ibid.

CHAPTER VI

PAY CABLE

The third current, and most recent, problem facing cable television is the pay cable issue. The application of the siphoning rule and the 1961 exemption for sports blackouts greatly affects the future of a new communications force hatched by the FCC's third report in 1972.

Organized sports saw cable as a new market with a pre-selected audience enabling promoters to control the blackout when near the home team's city.

In 1971, Cleveland sportsman Nick Mileti, owner of the baseball Indians, basketball Cavaliers and hockey Crusaders, signed a four-year contract with Akron (Ohio) Cablevision to carry live all the Cavaliers' home games plus some hockey games of a minor league club also owned by Mileti. Additionally, Akron Cablevision taped all the game for after hours replays for late shift factory workers in the industrialized city.¹

In March 1972, the FCC extended the sports siphoning period to five years for over-the-air STV.² However, the FCC did not amend the two-year rule for cable which it adopted in 1970 with Docket 18397.³ The FCC preferred to postpone the notice of proposed rule making tightening the cable siphoning rule which it had initiated in 1970 in Docket 18893.⁴

When the FCC considered CATV, broadcast interests petitioned that the siphoning rules be applied to all cablecast programming, whether or not there was a per-channel or per-program charge. The AMST wanted even further restrictions on sports by banning:

1. Cablecasts of live or recorded pro sports within one week of their occurrence.
2. Cablecasts of live or recorded college or high school events within one week of their occurrence if events of the same sport involving one or more of the participants were telecast on a nonsubscription basis within the past five years, or if events of the same sport not involving either participant were seen regularly on a nonsubscription basis.⁵

NATO urged the FCC to scrap its mandates applying the siphoning rule to cable and its proposal to extend the anti-siphoning period to five years. The theater interests favored a new proceeding to determine whether cable systems should be authorized to engage in pay operations and, if so, appropriate rules and regulations to prevent siphoning.

The FCC reacted with Docket 19554 in July 1972.⁶ A notice of proposed rule making was instituted for all the parties who cried foul under the Administrative Procedure Act when Docket 18397 was adopted and to consider whether the paycasting rules needed improvement. The primary issue wasn't the authorization of pay cable as NATO believed, but what the optimum regulations were for designating cablecasting as a beneficial supplement without undermining conventional TV service.⁷

Other pay cable operations were springing up in the interim. In September 1972, Sterling Communications of New York City, one of the firms handling the Madison Square Garden Knicks and Rangers package, agreed to send between one-half to three-quarters of the Boston Celtic

home basketball games through a New England, upper New York state and Pennsylvania network. Systems within 75 miles of the Boston Garden were blacked out and revenue was gathered from a pool of systems, whose profit came from higher penetration rates with the Celtics as a subscriber inducement.⁸

Optical Systems of Los Angeles leased a San Diego channel and presented sports events blacked out locally to pay subscribers starting in November 1972. Sports and feature films were transmitted as a scrambled signal and cleared when the subscriber inserted a special card purchased for a specific program or blocks of programming into a program selector.⁹

Twenty thousand cable subscribers in metropolitan Atlanta could see home games of the NBA's Hawks and the NHL's Flames along with feature films for \$12.50 a month via Cable Theatre Corporation.¹⁰

Teleprompter, which shared the Madison Square Garden package with Sterling Communications, assembled a package of games from the Nassau Coliseum for sale to its Suffolk County, New York subscribers on a pay basis in October 1972. Eighty regular season home games of the New York Nets and New York Islanders cost viewers \$50.00, or sixty-five cents per game. Playoff games were carried at no extra cost.¹¹ New converters were installed in subscriber's homes which had a game channel selector not on previous converters.¹²

Home Box Office, a pay cable subsidiary of Time, Inc., signed a \$1.5 million three-year contract with the American Basketball Association in March 1972. The pact was the first signed by a league for

pay cable and the Kentucky Colonels and Virginia Squires game on March 9 was available to over 5,000 subscribers over Wilkes-Barre, Allentown and Bethlehem, Pennsylvania systems. Subscribing fans paid \$6.00 monthly in addition to their regular cable cost for the ABA, other sports and movies piped in on a Home Box Office channel.¹³ Sports promoters drooled when the ABA, a league with a most uncertain future, had a cash value of \$1.5 million. A fair price for the more prestigious NBA and National Hockey League was much higher. The NFL figure was in the stratosphere.

Broadcasting wasn't so fond of the mutual admiration between pay cable and sports interests. The 1972 Senate blackout hearings were a chance for the networks to campaign for a blackout lift that precluded home pro football games from going to pay cable. Also broadcasters asked for a lengthening of the siphoning rule.

John Schneider of CBS asked the Pastore subcommittee to block the sale of any previously blacked-out home games to pay cable. The 1971 Ali-Frazier "fight of the century" was seen by only a few in a handful of theaters and for an exorbitant price. Pay TV was interested solely in the box office, said Schneider, not in the public interest.¹⁴

ABC's Boone Arledge said the 1961 blackout exemption created "a potential for abuse of the blackout privilege in a manner inconsistent with the interests of the public."¹⁵ The NFL could use its blackout shield to place its home games, which were unaffected by the siphoning rule, on pay cable.

Pro football's increasing interest in pay cable was the worst kept secret of the hearings. Commissioner Pete Rozelle yielded only a tip of the iceberg as he explained the rationale for retaining the blackout. Rozelle never uttered a word about pay cable in the sport's future plans, but explained the blackout was necessary to maintain high attendance levels, concession and parking incomes and for speedier amortization of stadium bonds. Overtly, he feared a blackout lift destined the game to become a studio sport. No fans attended games when they saw them on home television. Covertly, Rozelle felt the commercial networks eventually would reach the limits of their purchasing power and pay cable represented a bigger pot of gold. Pete Rozelle, the man who moved the game from penny-ante TV stakes to a star attraction on all three networks, was banking on a congressional time out before the legislators ended the blackout game.

Sudden death to Rozelle's pay plans came in September 1973 when Congress lifted the NFL's blanket blackout protection with Public Law 93-107. Torbert MacDonald's 1973 hearings had a predetermined conclusion, and they were also a forum for anti and pro cable forces to present their differences in a congressional spotlight. Broadcasting thought the NFL wanted to retain its home game blackout in order to enter pay TV. Cable, pro football and other organized sports vehemently disagreed.

NBC Sports vice president Carl Lindemann said the 1961 exemption allowed pro football to sell home games to pay cable. Siphoning destroyed the financial ability of commercial television to continue broadcasting sports events.¹⁶

Rozelle arrogantly warned MacDonald the impetus for any movement into pay TV would come from anti-blackout legislation rather than any independent decision by NFL members.¹⁷ Rozelle denied CBS's allegations that the club owners pressured him to word the three network contracts to permit pay cable experiments.¹⁸ The four-year, three network deal let Rozelle have all he wanted. Rozelle could outwardly discourage cable entrepreneurs, which he told the subcommittee he would. Nevertheless, the last two years, 1976-1977, of the CBS contract permitted pay experiments.¹⁹ Rozelle denied it was the kickoff for pay TV. Pro football wanted to retain the right to make the political, public relations and business decision whether the league wanted pay experimentation or not, rather than being restricted by network contract.²⁰ Rozelle was not concerned with having a pay clause in the contract as much as he wanted a precedent for such language when and if a new network contract was drafted in 1978.²¹ CBS was the lone dissenter among the networks against the pay clause. The NFL resisted because 1977 was too far away to predict the future course of American television. Some sort of minimal experience might be needed if a club decided to experiment with pay TV in 1977.²²

Broadcasting mistakenly equated the blackout bill with pro football because the NFL was the easiest point of entry for pay TV. There were other sports though--sports that didn't have constant sell-outs and that pay cable could provide an alternative means of supplying blacked-out games to the public while being a supplemental source of revenue for the teams involved. Various sports were in different

stages of growth, faced varying market place conditions, had varying degrees of fan acceptance, from region to region and city to city. Many teams blacked out their home games to avoid overexposure, and not solely to circumvent the siphoning rule as broadcaster's believed. Sports couldn't afford a two-year hiatus from commercial TV revenues in order to enter pay TV. Baseball's Bowie Kuhn told the MacDonald subcommittee that the national pastime was on unstable financial ground and the pay TV option was open, but baseball's NBC and local contracts were too valuable to discard. Kuhn wanted MacDonald to look at baseball's economic situation, not just broadcasting's.²³

Even the biggest potential box office bonanza, the NFL, said two years without commercial income was too long.²⁴ It was already known that Rozelle inserted a pay clause into the current network contracts. So pro football wasn't shunning pay TV nor was Dean Burch if the blackout privilege remained. Burch commented,

It [pay cable] is a supplemental source of information, and obviously I have no desire to pay for the Super Bowl if I can watch it on NBC, CBS or ABC. . . . I would like some option other than going to the arena when I can't get a ticket after I get there. If the way I have to do it is to see it on pay cable, so be it.²⁵

The NCTA felt the 1973 hearings personified broadcasting's misinterpretations of cable's intentions. Cable was worried about the fate of existing contracts between its pay entrepreneurs and sports interests if blanket anti-blackout legislation passed. Banning blackouts also threatened to activate the anti-siphoning dispute. If television carriage of formerly blacked out home games had a serious adverse impact on attendance figures and the events were not sold commercially,

then the effect of the legislation precluded alternative means of providing these games to the public via pay cable. This defeated cable's chances to offer a wider choice of programming.²⁶

Amos Hostetter told MacDonald that broadcaster's siphoning fears were premature. Broadcasting grossed \$.31 billion from 65 million homes in 1972 according to the FCC while cable garnered only \$420 million from 7 million subscribers. Most of the 3,000 separate cable systems had no means of interconnection which made networking impossible even if cable operators had the money to bid competitively against the networks.²⁷

Seventy percent of all sports events were not televised according to the NCTA and cable wanted the public to have the opportunity to decide if it wanted to see what it missed. Hostetter left a parting shot at the broadcasters.

I see no equities in the argument that all programming that is now not being delivered to the American public should be denied them because some people selfishly choose to smutty the vehicle that would try to deliver it. I think the marketplace should be allowed to operate free and openly on programming that is not vested with the national interest through use of the antitrust exemption.²⁸

Hostetter didn't shun pay cable either. Viewers subscribing to a Home Box Office-type service already enjoyed a sports previously unavailable. Sports experienced limited and controlled telecast expansion via cable and the NCTA didn't want these experiments killed by broad, retroactive legislation based on broadcasting's preconceived notions.²⁹ The NCTA suggested a narrower experimental bill that applied to only sold-out events. The blackout bill eventually passed satisfied

the NCTA. Besides providing a wider access to sports programming for the consumer, Public Law 93-107 lifted the blackout for sellouts only and was effective until December 31, 1975, three football seasons.

Hostetter was dismayed with the new law in one respect. Where games were shown commercially and subsequently dropped due to the blackout lift's adverse effect on attendance, cable would not be allowed to originate the games because of the siphoning restriction.

The sports issue occupied the limelight along with feature film paycasting at the November 1973 oral arguments on Docket 19954 before the FCC. Dean Burch and organized sports buried the idea that major events would ever leave commercial television. The only problem was that Burch's solution called for lengthening the siphoning rule. Sports, on the other hand, acted less impetuously, arguing that the FCC needed to consider the peculiar economics of athletics and that inaction on the proposed importation rule and copyright revision bill made any siphoning action impractical.

Alan Rothenberg,³⁰ counsel to California Sports, Inc.,³¹ urged removal of the anti-siphoning rule. Only three of the 17 member teams in the NBA had operated at any significant profit level between 1969 and 1973 and the league was searching for new methods to increase basketball's popularity and the income derived by its franchises. Pay cable was such a lucrative arrangement and Rothenberg pointed to the New York Knicks' cable arrangement in Manhattan.

A siphoning paranoia existed at the FCC according to Rothenberg. The present pay TV potential was so limited that the Lakers could not

abandon their present network TV, local radio and television packages in favor of pay TV.³² Pay cable would therefore develop as a supplement to the present TV arrangements.³³ In markets outside Los Angeles, cable could be used for Lakers' home games and road contests not presently seen in those markets.

Once sufficient homes were wired to make the potential pay cable return greater than the commercial rights fees, the Lakers would not desert commercial television. Rothenberg's reasoning was nothing short of logical eloquence.

First, Rothenberg defined basketball as "strictly a leisure time recreational entertainment non-essential package." A total switch from commercial to pay TV would elienate Laker fans who would lose interest and seek other forms of entertainment.

Second, Rothenberg believed no one would pay to view games unless the fan had a preexisting interest. Supplanting all commercial radio and TV coverage with pay cable would not develop fans who cared enough to pay for Laker games. The theory was to whet the fans' appetite. It was already used with existing radio and TV coverage. Commercial coverage was a product exposure device to the public to convince fans that basketball was so entertaining that they should buy tickets for home games.

Third, live commercial home game telecasts were impossible since they detracted from the gate receipts and concession revenues. A per-program charge was the only means to persuade the Lakers to telecast their games at the Forum.

Fourth, Rothenberg mentioned the Lakers thought they had a "keen public responsibility" not to create a situation where the fans could watch "their team" only by paying.

Sports' intentions weren't surreptitious. Rothenberg wanted the FCC to permit pay cable to outgrow its infancy and not overreact to broadcasting's lobbying. Rothenberg thought it contrary to the public interest if the FCC unduly prohibited pay cable's growth or the selection of available sports events. Retaining, tightening or lengthening the anti-siphoning rule would cause athletic interests to withhold games. A laissez faire stance let fans see the games they presently saw plus added a selection of games they could buy. Added selection, according to Rothenberg, served the public interest.³⁴

Less attractive basketball franchises like the ABA's New York Nets paid athletes salaries comparable to the rival NBA. Nets' President Roy Boe told the FCC that his club was a relatively new team which was just beginning to develop a loyal fan following. Even playing home games in New York City didn't guarantee sell outs.

Boe said TV exposure was necessary to create fan interest and for additional income because ticket prices were at a ceiling. The Nets found sports-oriented advertisers in short supply, especially when road games of the Knicks and Rangers were televised. Sponsors didn't want the sports viewing market split. Consequently, the Nets televised no more than 25 road games per season.

Pay cable was a very attractive alternative to Boe. It was a chance to obtain television coverage and exposure for his fledgling

team with the opportunity for additional income unobtainable from commercial TV.³⁵

Jack Dolph, formerly an ABA Commissioner and a CBS sports director, now a broadcast sports consultant, said less than 15 percent of all away games in the ABA were carried on television stations in the home markets.

Many of the league's ten teams were not located in major markets.³⁶ Half of the ABA markets had no independent stations, so local coverage was restricted to network affiliates where the conflict with prime time programming prevented basketball's exposure. Also, the distances between the league cities entailed high line charges.

Minimal fan interest occurred where a team had not been in existence very long and television exposure was lacking. Pay cable was Dolph's hope to give the ABA better financial footing.³⁷ Restricting pay cable in the face of escalating costs and no ABA-NBA merger troubled the former ABA Commissioner.

I submit that if, on the one hand, the Congress of the United States does not see fit to enact legislation to give relief to the financially hard pressed sports franchises and, on the other hand, regulations are promulgated which effectively limit these franchises in their efforts to sell and expose their product on television, we are creating an unfair double standard; a free market to pay high salaries, but a restricted market in which teams' sales potential is limited by commission directive.³⁸

National Hockey League vice president Don Ruck attacked the FCC's "substantial number" concept.³⁹ In essence, if the NHL televised a substantial number of games in the nonspecific category--home or road--the remainder of the games in that category wasn't available to pay

cable. The net effect denied the remaining games to anyone. An eastern team televising 33 of its 39 road games might not carry the six West Coast encounters because of the transmission cost. Ruck felt it was unfair to deny those six games to fans willing to bear that cost by some pay system.

Ruck wanted the words "substantial number" defined and recommended the FCC set its figure in excess of 50 percent before games were denied to pay cable. Ruck promised the House Communications Subcommittee two months earlier that hockey had no intention of abandoning commercial television. He told the FCC the NHL was also interested in pay cable, conventional cable and theater TV. But above all, those interests were subject to the maintenance of healthy gate receipts.

Bowie Kuhn said baseball could not foresee a time when its prize attractions, the World Series, league championship playoffs and the All Star Game, would not be shown commercially. However, there was a plethora of regular season games already unavailable to the television fan. Kuhn wanted the FCC to move cautiously on pay cable because (1) of its technological novelty, (2) the lack of reliable market data to make sensible predictions and rulings and (3) the effect that gate receipts and viewing patterns could have on advertiser response to commercial rights. Baseball desired a limited pay cable experimentation period to formulate a sounder policy based on pertinent data. Kuhn didn't want the FCC to adopt any regulations foreclosing the sport from this experimental possibility. He labeled the current FCC hearings "a piecemeal approach" to the cable problem. A satisfactory decision

on pay cable policy was unattainable until interrelated issues involving cable's use of distant sports signals and copyright liability were resolved.

Any action on the anti-siphoning rule foreclosed sports from determining whether it was possible to utilize pay cable in a manner that didn't jeopardize existing television relationships. Hockey and baseball believed it was futile for the FCC to refine its pay cable rules, only to find its policy negated by distant signal importation. Teams didn't know what events they could sell, either locally or practically, without resolution of the distant signal question.

Broadcasting opened another front in its anti-pay cable war in 1973 aside from the Washington hearings. The NAB launched an advertising and public relations campaign designed to convince Congress, the FCC and the public that pay TV was "less a revolution than a sneak attack on the family pocketbook."⁴⁰

The NAB fanned the pay cable fire in Washington's two daily newspapers on August 1, 1973 urging readers to demand that the government not allow pay entrepreneurs to lock up TV rights to pro sports and recent motion pictures. The advertisements claimed pay TV could ultimately cost viewers another \$40-\$50 monthly.⁴¹

Dore Schary, president of Theatrevision, which was engaged in pay services to Florida and Pennsylvania cable systems, called the NAB a tough-minded and powerful adversary. Its Washington lobby had succeeded in spreading misinformation about pay TV and scaring the public, the press and the FCC.

In November, David Foster invoked the fairness doctrine and rebutted anti-pay cable allegations made in editorials by four Nebraska TV stations. Foster had warned the NAB earlier to cease using its broadcast facilities to criticize cable without the NCTA exercising the equal time requirement.⁴²

The NAB allocated \$600,000 and a semi-autonomous staff for legal and promotional attacks while the NCTA earmarked \$270,000 for its defense.⁴³ The NAB-sponsored National Coalition to Keep Free TV Free claimed the support of 20 million members representing minorities, the poor, the elderly and farmers at its annual convention in March 1974.⁴⁴

Cable sought relief from the NAB's alleged fraudulent and misleading advertising before the FTC in September 1974. The NCTA urged an FTC investigation of broadcasting's advertising practices and to order the NAB to desist from making similar future claims.⁴⁵ Vincent Wasilewski dismissed the cable complaint as groundless and an obvious attempt to influence the FCC's ultimate pay cable decision.⁴⁶

Politicking the FCC's pay cable decision wasn't beyond the NAB though. Its Special Committee on Pay TV asked the FCC to end Home Box Office's distribution of New York Yankee games to cable systems in New York, New Jersey and Pennsylvania in June 1974.⁴⁷ The anti-siphoning rules were violated because WPIX, New York had carried a substantial number of Yankee games during the two preceding years.

Chairman Richard Wiley ordered a study in July and Home Box Office countered that the games were offered to subscribers on weekdays

when WPIX's coverage was not "substantial" since the station's game schedule was limited primarily to weekends. WPIX had complete freedom to choose the number of games it telecast, and in fact had preempted coverage of four games HBO originally planned to carry. The Yankees did not add to HBO's revenues, but merely added to the variety of its program fare. There was no per-program charge for the ball games, so the anti-siphoning rules were inapplicable according to Home Box Office. Even if the FCC decided against HBO, the First Amendment prohibited FCC interference with its carriage of occasional Yankee games.⁴⁸

No ruling on the merits of the Yankee controversy was forthcoming. Instead in mid-September the FCC waived the rest of the baseball season. The FCC explained that games distributed by Home Box Office were unavailable to the public on conventional television. While the FCC believed HBO had made a good-faith effort to comply with the anti-siphoning rules, it didn't want the ruling considered as precedent.⁴⁹ Commissioner Abbott Washburn said it was insane to deny the Yankees to pay cable subscribers when they were in a tight pennant race and only two games remained on the HBO contract. There were no complaints from the public, the Yankees or WPIX--just the NAB. It proved an unsuccessful buttonholing attempt for broadcasters.

Though the FCC failed to emerge with a pay cable ruling after two days of discussion in February 1974, there were hints about the shape of the ultimate anti-siphoning decision. Cable was happy about the most frequently discussed approach to feature films extending the

rule from two to three years with a "wild card" exception. Pay cable would have access to 12 to 24 blockbuster films for display between any nine to twelve month period between three and nine years after their release.

Broadcasters won the sports round. One alternative allowed pay cable to carry a specific number of games after broadcasts had their pick. Another established a high water mark during the previous five years that permitted broadcasters to air the largest number of games in that time frame, leaving pay cable the remaining untelevised games.⁵⁰

Action was postponed on the movie and sports proposals when broadcasting, notably ABC's Leonard Goldenson and Elton Rule, pressured key legislators to convince the FCC to wait until its three commissioner vacancies were filled before proceeding.⁵¹

The new FCC Chairman Richard Wiley told Variety in July 1974 that cable was one of the three top priority items confronting the agency.⁵² He favored more open hearings on pay cable's relation with sports and movies. After former Chairman Dean Burch's exit to the White House another briefing for Wiley and the three new commissioners, James Quello, Glen O. Robinson and Abbott Washburn, was necessary.

ABC petitioned the FCC for renewed pay cable proceedings in July 1974. The network said fresh input was needed to account for Public Law 93-107 and the pending copyright bill.⁵³

The FCC issued a further notice of rulemaking on August 12.⁵⁴ Updated written comments were solicited and a second round of oral

arguments was scheduled for late October. Under one proposal, the FCC revised the specific and nonspecific, home and away categories in favor of concentrating on a sport in general to decide whether a substantial number of games were aired and what constituted a substantial number. Another proposal dropped the substantial number concept in favor of a flat percentage of games not shown commercially that pay cable would be allowed to have. The FCC also wanted to know whether the percentage would be a constant or fluctuate in different situations. For example, if commercial coverage decreased, it may or may not mean that games available to pay cable would increase.⁵⁵

The NCTA noted in its comments that the present rules were created despite "a total absence of any data supporting the siphoning theory which underlies the rules." Pay cable entrepreneurs were on "difficult financial ground because of severe restrictions of a saleable product."⁵⁶ Cable desired a complete suspension of the rules for a four-year experimental period to allow the FCC to evaluate whether the restrictions were necessary. The NAB countered that the FCC would be hard-pressed to reimpose any rules if they become necessary later. Inconvenience to pay subscribers and a disruption of established program distribution practices might be used by cable to justify complete abandonment of the restrictions.

The NBA, NHL and Major League Baseball wanted the rule rescinded. Basketball argued that a five-year anti-siphoning period would have pay cable dealing at "arms length" with broadcasters negotiating a fair compensation.⁵⁷

Several members of Congress attacked the Commission's "unreasonable restraints" on pay cable. Senator Philip Hart (D-Mich.), chairman of the Antitrust Subcommittee, called the siphoning rules "anti-competitive in nature." Hart wanted the forces of the market place to enjoy free play. Program producers ought to sell their product to any medium on reasonable terms to stimulate competition and enhance diversity.

The Justice Department concurred with the NCTA, pro sports and Hart. The government suggested lifting all the existing pay cable regulations so that "the assertions and counterassertions of the parties to the proceeding might be freely tested in the market place."⁵⁸

Over 100 participants appeared before the FCC during two and a half days of oral arguments in October. The positions were familiar. Sports, motion picture producers and cultural groups sided with cable. Broadcasting, and theater owners were prepared to keep so-called "free TV" free.⁵⁹

The NAB sought political yardage by presenting two nationally known economists, Robert Nathan and Eliot Janeway, who both warned of added inflation if the pay cable rules were relaxed. An increased demand for financing pay cable plus the effect of pay TV on the low income families would be inflationary according to the economists.⁶⁰

It was certain the FCC wouldn't suspend its pay cable rules as the NCTA suggested. During the arguments Commissioners Robinson, Lee and Chairman Wiley repeatedly stated the real test could come only when cable was visible enough to compete with the networks for the programs,

many years from now. By that time it would be impossible to retract the rules without claims of severe economic harm to the industries built around pay cable.⁶¹

The FCC eased the pay cable rules somewhat on October 15. The outline form of the new rules which doubled as tentative instructions to the FCC staff allowed pay cable to show new motion pictures within three years of their theatrical release if pay cable secured them from the producers. Restrictions were also lifted on films more than ten years old shown by a local station during the preceding four years.

The new sports rule conformed with the STV five-year siphoning restriction. Specific events (World Series and Super Bowl) were denied to pay cable unless they hadn't been televised commercially for five years. If commercial television carried 25 percent or more of the nonspecific events (preseason, regular season and postseason games) in any of the previous five years, pay cable was allowed to carry up to one-half the remaining number of games in the home and away categories that commercial television did not carry in the one year of the preceding five when television aired the most games.⁶²

This protected broadcasting from sports promoters seeking to reduce the number of games available for commercial television for a move into pay cable. Reducing the number of commercially televised games reduced proportionately the number of games available to pay cable. This rule also allowed broadcasting first pick of the games it wanted for its telecast schedule.

The NCTA Board of Directors called the amended rule "an illusion of meaningful relief" and claimed the FCC's plan "only strengthens

broadcasting's hold on the means of distributing programming to the American public."⁶³

Former FCC Chairman Dean Burch derided his old colleagues asking them to "play traffic cop, not God." The FCC had substituted its judgment for the consumer's on the premise that the FCC knew better than the public what the public really wanted, said Burch at a California cable convention.⁶⁴

Lionel Van Deerlin (D-Calif.) of the House Communications Subcommittee urged cable and STV proponents to take the FCC to court. John Eger, acting director of the Office of Telecommunications Policy, asked support for his agency's bill to free cable from unwarranted FCC restrictions. Eger conceded the OTP's bill was no panacea for pay cable's problems, but that it did permit open competition.⁶⁵

The pay cable debate is a carryover from the STV configuration between pay TV entrepreneurs and the broadcast/theater owner interests. The new pay cable rules are token relief and those arguing for the continuation of such harsh restrictions against the public's opportunity to purchase additional sports programming should have the burden of proving their case. Instead, the anti-pay forces have misinformed the FCC and Congress. Historically, Washington has only listened to broadcasting's economic arguments. Little attention has been given to the economics of sports, which needs supplemental income, and cable television, which needs a pay service to expand into the largest cities.

The issue is not so-called "free TV" versus pay TV. There is no such thing as free TV. The only difference between commercial

television and pay television is their method of collecting revenues. The real issues are the spirit of free competition and the guarantees of the First Amendment.

Claims that pay TV is inflationary or discriminatory against the poor are insubstantial. Pay cable would allow as many fans that could squeeze in front of a TV set as possible to see a heavyweight championship boxing match for less than the \$15.00-\$20.00 price an individual pays for a closed-circuit theater ticket. Sports without commercial television appeal like the America's Cup yachting races or the World Cup Soccer championship are not necessarily devoid of fan interest. Pay cable companies offer a movie/sports service for less than \$10.00 monthly, about equal to the cost of taking a family of four to attend a sports event. Pay cable saves the family entertainment dollar and permits those of limited means to enjoy at-home entertainment for less than actually attending the event. The siphoning restrictions indicate a paranoia among broadcasters and theater owners. Pay cable is merely a supplement for commercial television. After all, restaurants haven't spelled the end of home cooking.

Footnotes--CHAPTER VI

¹Boston Globe, November 3, 1971. Miletic was noncommittal, but the deal was estimated at more than \$150,000 for the four years. Coincidentally, the NBA's Milwaukee Bucks applied for two franchises in suburban Milwaukee, apparently believing the lure of Kareem Jabbar was a subscriber inducement. The Philadelphia 76ers hired a cable consultant.

²Report and Order, 34 FCC 2d 271 (1972). The five year rule said (1) new events never previously telecast were not available for STV if they were the result of a sport's restructuring, (2) "regularly" was defined as telecast events in any one of the preceding five years in contrast to the prior rule requiring use in each of the preceding years and (3) the rules applied to events that might be used for pay on a same day delayed basis as well as to live events.

³Memorandum Report and Order, 23 FCC 2d 825 (1970).

⁴U.S., Federal Communications Commission, Notice of Proposed Rulemaking, "Subscription Television and Cablecasting, Showing of Sports Events," Federal Register, XXXV, No. 132 (July 9, 1970), 11040.

⁵Notice of Proposed Rulemaking and Memorandum Opinion and Order, 35 FCC 2d 893 (1972), p. 895.

⁶Ibid.

⁷Ibid.

⁸Boston Globe, September 24, 1972, p. 79.

⁹Broadcasting, October 2, 1972, p. 48.

¹⁰Variety, October 18, 1972, p. 28. Hawks and Flames road games were televised commercially.

¹¹Ibid., October 25, 1972, p. 39.

¹²Broadcasting, October 30, 1972, p. 49.

¹³Boston Globe, March 9, 1973, p. 28. Home Box Office also presented various events from Madison Square Garden, home basketball games of the NBA's Celtics, Milwaukee Bucks and Cleveland Cavaliers, home hockey games of the WHA's Philadelphia Blazers (now Vancouver Blazers), New England Whalers and Cleveland Crusaders plus home games of baseball's Cleveland Indians. Variety, February 7, 1973, p. 42.

¹⁴ U.S., Congress, Senate, Committee on Commerce, Blackout of Sporting Events on TV, Hearings, before the Subcommittee on Communications of the Committee on Commerce, Senate, on S. 4007 and S. 4010, 92nd Cong., 2nd sess., 1972, p. 143.

¹⁵ New York Times, October 6, 1972, p. 49. / 10

¹⁶ U.S., Congress, House, Committee on Interstate and Foreign Commerce, Professional Sports Blackouts, Hearings, before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 9536, 93rd Cong., 1st sess., 1973, p. 108.

¹⁷ Ibid., p. 195.

¹⁸ Ibid., p. 82. CBS proposed amending the blackout bill to prohibit the origination by any cable or pay cable system of any non-sellout or non-blackout game in the area where the game was played. Hearings, p. 79. CBS didn't want the NFL to have the right to have home games on pay in competition with other games CBS brought into the home areas according to Rozelle. Hearings, p. 210.

¹⁹ In such experiments, an individual club needed the consent of the visiting team and league discussion concerning how the income was dispersed. Article VI, the pay cable provision read:

"Any changes in past practice regarding member club blackout of home territories where games are played forced or otherwise, will result in good faith negotiation of financial terms between the league and the networks.

During the terms of the agreement, should the league make any change in local television policy, such change, if any, will be on an experimental basis only and will also result in good faith negotiation of financial terms." Hearings before the House Communications Subcommittee on the Blackout of Sporting Events on TV, 93rd Cong., 1st sess., 1973, p. 81. For anti-pay interests, the contract had a giant loophole. If the league went into pay TV, local live coverage changed and the contract was void under the second paragraph.

²⁰ Hearings before the House Communications Subcommittee on the Blackout of Sporting Events on TV, 93rd Cong., 1st sess., 1973, p. 210.

²¹ Ibid., p. 218.

²² Ibid., p. 195.

²³ Ibid., p. 167.

²⁴ Ibid., p. 210.

²⁵ Ibid., pp. 71, 76.

²⁶ Ibid., p. 258.

²⁷ Ibid., p. 262.

²⁸ Ibid., p. 263.

²⁹ Ibid., p. 257.

³⁰ National Cable Television Association, Letter from Elizabeth Olenbush, Public Affairs, December 4, 1973. Rothenberg served on the NBA's Board of Governors and was a member of the league's TV committee. He negotiated and drafted the CBS-NBA pact early in 1973.

³¹ Ibid., California Sports operated the Los Angeles Lakers franchise of the NBA, the Los Angeles Kings of the NHL and the Forum, a sports arena in Los Angeles.

³² Ibid., the Lakers assumed they would participate in two or three of CBS's 38 games-of-the-week, with more appearances if they made the playoffs. Twenty-five of 41 regular season road games were shown by KTLA, Los Angeles. Also, all road playoff games not seen on CBS were carried by KTLA. All home and away games were heard on radio in Los Angeles.

³³ The Milwaukee Bucks supplemental income from Home Box Office amounted to less than 1 percent of the team's annual gross income. Hearings before the House Communications Subcommittee on the Blackout of Sporting Events on TV, 93rd Cong., 1st sess., 1973, p. 53.

³⁴ National Cable Television Association, Letter from Elizabeth Olenbush, Public Affairs, December 4, 1973.

³⁵ Ibid.

³⁶ The ABA had franchises in such cities as Salt Lake City, San Antonio, Greensboro and Memphis.

³⁷ The ABA hoped to merge with the NBA to end the bidding war for basketball talent. The players in each league opposed any merger in order to keep salary scales high. In 1972, at a Senate Judiciary Committee hearing, Sam Ervin urged that merger legislation was ill-advised because it destroyed the free market for player's services. The ABA-NBA merger is as distant as ever in 1974.

³⁸ National Cable Television Association, Letter from Elizabeth Olenbush, Public Affairs, December 4, 1973.

³⁹ The substantial number concept only applied to nonspecific events (regular season games) and was categorized in accordance with existing sports and broadcast practices. Each category, as for example home and away games, was looked at separately. If a substantial number in either category were telecast in each of the two preceding years, then none of the games in that category could be seen on a pay basis. For example, the Philadelphia 76ers televised none of their home basketball games in the 1973-74 season and 36.6 percent of their road games. If 36.6 percent was not a substantial number, then the remaining away games could be paycasted. U.S., Federal Communications Commission, Further Notice of Proposed Rulemaking and Order for Oral Argument, "Cablecasting of Certain Programs," Federal Register, XXXIX, No. 165 (August 23, 1974), pp. 30498, 30500.

⁴⁰ New York Times, December 16, 1973, iii, p. 21. Speech by John J. Taylor, Arthur Taylor, President of CBS, to the Arizona Broadcasters Association, December 7, 1973.

⁴¹ Broadcasting, October 15, 1973, p. 27.

⁴² Variety, October 31, 1973, p. 41.

⁴³ Broadcasting, December 3, 1973, p. 54.

⁴⁴ Ibid., March 25, 1974, p. 46. Among the participating organizations were the American Farm Bureau Federation, the National Grange, the Association of Retired Federal Employees, the American Legion, the Veterans of Foreign Wars, the Elks, Kiwanis, Lions and Moose.

⁴⁵ Ibid., September 30, 1974, p. 31.

⁴⁶ Variety, October 2, 1974, p. 45.

⁴⁷ Home Box Office added 19 Yankee games to its service for 22,000 subscribers in more than 30 systems in the three-state area. None of the games offered to subscribers was available on WPIX, New York since the station reduced its Yankee coverage to 69 games in 1974. New York Times, August 15, 1974, p. 59.

⁴⁸ New York Times, August 15, 1974, p. 59.

⁴⁹ Broadcasting, September 23, 1974, p. 56.

⁵⁰ Variety, February 20, 1974, p. 29.

⁵¹ Ibid., July 17, 1974, p. 31; and July 31, 1974, p. 37.

⁵² Ibid., July 17, 1974, p. 31.

⁵³ Broadcasting, July 1, 1974, p. 38.

⁵⁴U.S., Federal Communications Commission, Further Notice of Proposed Rulemaking and Order for Oral Argument, "Cablecasting of Certain Programs," Federal Register, XXXIX, No. 165 (August 23, 1974), p. 30498.

⁵⁵The three proposals for movies were: (1) Change the rule to the 3-9 wild card provision discussed in February 1974 or (2) discard the concept or regulation based on a film's age and allow pay cable to show movies for an unspecified period of time after which the film would be exclusively reserved for commercial TV. The FCC wanted comments about the length of time of cable access. Or, (3) pay interests had access for two years after a film's release. After the initial period, commercial and pay interests would bid on the film and the winner would have exclusive access for a year. After the third year, whichever interest lost the initial bidding gained access for the fourth year. The cycle would repeat for ten years.

The Motion Picture Association of American petitioned the FCC to suspend its film siphoning rules in July 1974. It was a Jeckyl and Hyde relationship between the film producers and cable. Earlier there was animosity over copyright but now unanimity existed among the producers, craft and union members. The MPAA said the rules were "based on a protectionist philosophy . . . contravene the antitrust laws by artificially protected the oligopoly network structure from a new communications medium, by restricting the market for programming and by precluding program suppliers from selling and pay cable systems from buying in a competitive market. . . . The viewing public have suffered and are suffering irreparable injury to their First Amendment rights and development of a nationwide cable system had been stifled." Variety, July 31, 1974, p. 37.

⁵⁶Broadcasting, September 2, 1974, p. 32.

⁵⁷Ibid., September 30, 1974, p. 33.

⁵⁸Ibid., October 14, 1974, p. 39.

⁵⁹Variety, October 23, 1974, p. 83.

⁶⁰Broadcasting, October 28, 1974, p. 19.

⁶¹Variety, October 30, 1974, p. 1.

⁶²For example, if a commercial station carried 40 games out of 81 home baseball games during a team's regular season (50 percent), pay cable could bid for only 20 of the 41 remaining home games the broadcaster did not choose to cover. If a television station did not reach the 25 percent benchmark in any one of the previous five years, pay cable could bid on the least number of games left untelevised in any of those five years. Broadcasting, November 11, 1974, p. 5.

⁶³ National Cable Television Association, NCTA Board Adopts Resolution Criticizing FCC Pay Cable Rules for Ignoring Public Interest, Press Release, November 20, 1974, p. 2.

⁶⁴ Variety, December 11, 1974, p. 26.

⁶⁵ Ibid. The OTP plan, released in January 1974, envisaged obligatory carriage of local stations' programming by cable and permitted operators to program one or two channels with a requirement that the remaining channel capacity be leased on a common carrier basis. OTP believed a common carrier approach would provide for a variety of independent voices and eliminate the need for government regulation of programming. The report did not recommend rate regulation. No limits would be placed on the number of signals imported by an individual system under full copyright liability. Broadcasting, January 14, 1974, p. 4. OTP asked the FCC to relax its anti-siphoning rules for movies and to tighten them for sports. OTP believed a mixed system of advertiser and subscriber support could coexist. "The anticipated competition and flexibility in cable programming will make unnecessary and inappropriate any sweeping government restrictions on the public's right to purchase a wide variety of information and entertainment services and on the originator's right to sell such services." Variety, January 25, 1974, p. 29.

PART THREE

SUMMARY

CHAPTER VII

SUMMARY

Cable television and sports are interdependent upon each other for their future prosperity. The futuristic services unique to cable-- police and fire protection, at-home shopping, classroom instruction, etc.--are not yet economically feasible because few systems have enough subscribers to warrant institution of these new services. NCTA Chairman David Foster has stated that market tests showed people purchased new services once they were subscribers, but the public didn't subscribe to obtain the services. The key to obtaining subscribers to help cable's progress is greater program choice. The FCC already blacks out systems with series and syndicated program exclusivity requirements designed to protect local stations. Therefore, cable needs the lucrative appeal of sports programming to penetrate the major markets.

Organized sports need cable television as a supplemental income to the already remunerative network contracts. Prior to 1958, there were only 41 major professional franchises in 19 cities in the population centers stretching from the Great Lakes to the Northeast. By 1973, there were over 100 teams in all regions of the United States and the number of scheduled games rose from fewer than 2,000 to more than 4,000 annually.

Player salaries, operating expenses, pension benefits and ticket prices have risen at an astronomical rate. Gate receipts and commercial broadcasting can no longer pay the sports promoter's bill. Pay cable is a means of relieving the financial strain on sports' economics.

Broadcasting's fears about pay cable's alleged siphoning conspiracy are unfounded. Pay cable and sports have already decided to let the commercial networks remain the showcase for events. Besides, pay cable is still in its infancy. There are no potential purchasers of pay TV rights who are able or willing to offer substantial amounts of money for those rights. Such purchasers will not suddenly materialize because cable television markets develop slowly, subscriber by subscriber. Also, organized sports will not even consider a mass defection from commercial to subscription television. There are legal uncertainties about cable legislation by Congress or further regulations concerning copyright liability or the existing anti-siphoning rules. There are practical uncertainties such as potential fan resentment over paying for games they previously saw commercially or the possibilities of inter-league mergers in basketball and hockey.

- Sports programming on cable television will increase. The Fortnightly, Teleprompter, Hartford Phonevision and Subscription Television court decisions affirmed cable's freedom from copyright liability and STV's right to exist under the Communications Act of 1934 and the First Amendment. The Senate's decision to strike any sports liability from the copyright revision bill will remain intact when a new Act passes the Congress.

More hurdles lie ahead for cable, however. The FCC's 1972 proposed rule for importation of distant sport signals is dormant but not dead. If such a discriminatory rule does come to pass, cable's only alternative to overturn it will be through the courts. The same applies to the sports anti-siphoning restrictions. The FCC only considered broadcasting in its regulation of CATV and STV. It's time the FCC looked at the economics of cable and sports.

Broadcasting's advertising revenues won't suffer substantially from imported sports events. Cable expands a game's audience. Therefore, broadcasting can sell advertising time for a higher price.

The effect of imported sports on local events will be minimal if all new cable systems abide by the new blackout provisions of Public Law 93-107. Organized sports must realize that cable's *raison d'etre* is to expand viewing choices. Inevitably, there is conflict between any imported programming. Situation comedies are imported into areas where a situation comedy is running coincidentally. The same applies to movies, detective shows, variety shows, talk shows, etc. Sports is just another type of programming that should remain undifferentiated when it comes to formulating cable policy. The FCC and organized sports do not see this reality.

This isn't a difficult compromise for organized sports to make in lieu of the future. Cable's subscribers will increase resulting from more sports programming and this will hasten the development of pay cable and other futuristic services. Broadcasting will find its siphoning fears unrealized. Cable television will provide subscribers and fans with more athletic entertainment while sports will reap a financial reward.

APPENDICES

APPENDIX A

GEOGRAPHICAL/DEMOGRAPHICAL DISTRIBUTION OF MAJOR PROFESSIONAL SPORTS FRANCHISES^a

TV Market Rank	Market	Number of Professional Teams				Cable Systems ^b
		Baseball	Football	Basketball	Hockey	
1	New York	2	2	2	2	47
2	Los Angeles (Anaheim)	2	2	1	1	97
3	Chicago	2	2	1	2	10
4	Philadelphia	1	2	1	1	71
5	Boston	1	1	1	1	23
6	San Francisco/ Oakland	2	2	1	1	57
7	Detroit	1	1	1	2	8
8	Washington	-	1	1	1	19
9	Cleveland	1	1	1	1	29
10	Pittsburgh	1	1	-	1	111
11	Dallas/Ft. Worth	1	1	-	-	16
12	St. Louis	1	1	1	1	6
13	Minneapolis/St. Paul	1	1	1	2	5
14	Houston	1	1	1	1	6
15	Miami	-	1	-	-	8
16	Atlanta	1	1	1	1	9
18	Seattle/Tacoma	-	-	1	-	34
19	Baltimore	1	1	-	-	23
20	Indianapolis	-	-	1	1	27
21	Hartford/New Haven	-	-	-	1	-
22	Cincinnati	1	1	-	-	12
23	Kansas City	1	1	1	1	9
24	Milwaukee	1	-	1	-	4
25	Portland, Oregon	-	1	1	-	38
27	Denver	-	-	1	-	7
28	Buffalo	-	1	1	1	41
31	San Diego	1	1	1	1	20
32	Memphis	-	1	1	-	12
34	Charlotte	-	1	-	-	-
35	Phoenix	-	-	1	1	3
36	New Orleans	-	1	1	-	11
37	Louisville	-	-	1	-	-
44	Orlando/Daytona Beach	-	1	-	-	-
47	San Antonio	-	-	1	-	-
48	Birmingham	-	1	-	-	-
49	Norfolk/Portsmouth/ Newport News/ Hampton Roads	-	-	1	-	8
51	Salt Lake City	-	-	1	-	4
59	Shreveport/Texarkana	-	1	-	-	-
65	Omaha	-	-	1	-	--
69	Green Bay	-	1	-	-	-

Source: "TV Market Rank: Arbitration Television Estimates for 1974-1975," Broadcasting, November 18, 1974, p. 24.

^aTotals include franchises in Major League Baseball, The National Football League, World Football League, National Basketball Association, American Basketball Association, National Hockey League and World Hockey Association.

^bCable systems within Grade B contours of TV stations in each market (1972 cable figures); 1972 cable figures: Hearings before the Senate Communications Subcommittee on Blackouts of Sporting Events, p. 212.

APPENDIX B

PUBLIC LAW 87-331

September 30, 1971
[H.R. 9096]

An Act

To amend the antitrust laws to authorize leagues of professional football, baseball, basketball, and hockey teams to enter into certain television contracts, and for other purposes.

Professional
sports contests.
Television
agreements.
15 USC 12.
15 USC 58.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

Limitation.

Sec. 2. Section 1 of this Act shall not apply to any joint agreement described in section 1 of this Act which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

Football games.

Sec. 3. Section 1 of this Act shall not apply to any joint agreement described in section 1 of this Act which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the

game site of any intercollegiate football contest scheduled to be played on such a date if--

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, and

(2) such intercollegiate football contest and such game site were announced through publication in a daily newspaper of general circulation prior to March 1 of such year as being regularly scheduled for such day and place.

Antitrust laws.

Sec. 4. Nothing contained in this Act shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the anti-trust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1 of this Act shall apply.

"Persons."

Sec. 5. As used in this Act, "persons" means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.

Savings clause.

Sec. 6. Nothing in this Act shall affect any cause of action existing on the effective date hereof in respect to the organized professional team sports of baseball, football, basketball, or hockey.

Approved September 30, 1961.

APPENDIX C

PRO TEAMS OF THE UNITED STATES AND CANADA IN THE FOUR MAJOR SPORTS

Major League Baseball

National Baseball League

Montreal Expos
New York Mets
Atlanta Braves
Chicago Cubs
Cincinnati Reds
Houston Astros
Los Angeles Dodgers
Philadelphia Phillies
Pittsburgh Pirates
St. Louis Cardinals
San Francisco Giants
San Diego Padres

American Baseball League

New York Yankees
Boston Red Sox
Detroit Tigers
Chicago White Sox
Cleveland Indians
Milwaukee Brewers
Minnesota Twins (Bloomington)
Baltimore Orioles
Kansas City Royals
Texas Rangers (Arlington)
California Angels (Anaheim)
Oakland A's

National Football League

Miami Dolphins
Minnesota Vikings (Bloomington)
Green Bay Packers
Washington Redskins
San Francisco 49ers
St. Louis Cardinals
Philadelphia Eagles
New York Giants
New York Jets
New England Patriots (Foxboro)
Kansas City Chiefs
Denver Broncos
Cincinnati Bengals

New Orleans Saints
Los Angeles Rams
Detroit Lions
Dallas Cowboys
Chicago Bears
Atlanta Falcons
San Diego Chargers
Pittsburgh Steelers
Oakland Raiders
Buffalo Bills
Houston Oilers
Cleveland Browns
Baltimore Colts

World Football League

Memphis Southern	Shreveport Steamer
Chicago Fire	Portland Storm
Charlotte Hornets	Florida Blazers (Orlando)
Philadelphia Bell	Birmingham Americans
Southern California Sun (Anaheim)	Honolulu Hawaiians

National Basketball Association

Boston Celtics	Milwaukee Bucks
Chicago Bulls	Houston Rockets
Buffalo Braves	New York Knickerbockers
Detroit Pistons	Kansas City/Omaha Kings
Washington Bullets	Seattle Supersonics
Cleveland Cavaliers	Portland Trail Blazers
Golden State Warriors (San Francisco)	Phoenix Suns
Los Angeles Lakers	New Orleans Jazz
Philadelphia 76ers	Atlanta Hawks

American Basketball Association

San Antonio Spurs	New York Nets
Denver Rockets	San Diego Conquistadors
Indiana Pacers (Indianapolis)	Utah Stars (Salt Lake City)
Kentucky Colonels (Louisville)	Virginia Squires (Norfolk)
Memphis Sounds	Spirits of St. Louis

National Hockey League

Montreal Canadians	Philadelphia Flyers
Toronto Maple Leafs	Atlanta Flames
Vancouver Canucks	St. Louis Blues
Boston Bruins	Buffalo Sabres
Chicago Black Hawks	Pittsburgh Penguins
Minnesota Nort Stars (Bloomington)	Detroit Red Wings
New York Islanders	Los Angeles Kings
California Golden Seals (Oakland)	Kansas City Scouts
Washington Capitals	New York Rangers

World Hockey Association

Edmonton Oilers
New England Whalers (Hartford)
Minnesota Fighting Saints (St. Paul)
Toronto Toros
Quebec Nordiques
Cleveland Crusaders
Chicago Cougars

Houston Aeros
Winnipeg Jets
Vancouver Blazers
San Diego Mariners
Baltimore Blades
Phoenix Roadrunners
Indianapolis Racers

APPENDIX D

PAY CABLE SYSTEMS IN THE UNITED STATES

<u>State and City</u>	<u>Number of Subscribers^a</u>	<u>Number of Pay Subscribers</u>	<u>Percentage Saturation</u>
Arkansas:			
Fayetteville	8,861	850	9
California:			
Concord	23,258	2,800	12
Escondido	14,339	1,600	11
Long Beach	6,853	1,200	19
Los Angeles	69,000	14,000	20
San Diego	680,000	13,300	13
Santa Barbara	74,000	3,400	10
Walnut Creek	9,500	1,800	18
Delaware:			
Wilmington	9,400	--	--
Florida:			
Pensacola	unknown	unknown	unknown
Winter Haven	4,914	1,099	22
Georgia:			
Atlanta	unknown	unknown	unknown
Iowa:			
Quint Cities (Moline, Ill.)	16,000	4,500	28
Massachusetts:			
Pittsfield	14,043	1,260	9
New Jersey:			
Wayne	9,400	--	--
New York:			
Babylon	unknown		
Beacon	unknown		
Corning	10,050	--	--
Endicott	6,300	--	--
Hicksville	unknown	--	--
Central Islip	60,000	2,000	3
Ithaca	unknown		
Jericho	unknown		

<u>State and City</u>	<u>Number of Subscribers</u> ^a	<u>Number of Pay Subscribers</u>	<u>Percentage Saturation</u>
New York--cont.			
Mt. Vernon	1,750	--	--
Olean	8,045	894	11
Vestal	6,000	--	--
Ohio:			
Columbus	15,000	--	--
Hamilton	6,959	650	9
Toledo	38,212	7,300	19
Oregon:			
Coos Bay	8,851	850	10
Pennsylvania:			
Allentown	41,300	--	--
Bethlehem	1,000	--	--
Coplay	--	--	--
Easton	21,000	1,000	5
Hazleton	12,000	--	--
Lansford	3,880	--	--
Leighton	2,550	--	--
Mahoney City	24,800	--	--
Mt. Carmel	3,700	--	--
Nazareth	2,058	--	--
Palmerton	9,500	--	--
Shamokin	3,800	--	--
Stroudsburg	3,400	--	--
Warren	6,535	802	12

Source: Judy Lockwood, "Pay Cable," TV & Communications, October 1974, pp. 22-28.

^aNew systems are operating in Fairfield, Ohio; Flint, Michigan; Hilo, Hawaii; Palos Verdes, California; Newark, New Jersey; and Manhattan in New York City.

APPENDIX E

CABLE TELEVISION GROWTH 1952-1974

<u>Year</u>	<u>Number of Cable Systems</u>	<u>Number of Cable Subscribers (thousands)</u>
1952	70	14
1953	150	30
1954	300	65
1955	400	150
1956	450	300
1957	500	350
1958	525	450
1959	560	550
1960	640	650
1961	700	725
1962	800	850
1963	1,000	950
1964	1,200	1,100
1965	1,325	1,200
1966	1,570	1,500
1967	1,770	2,100
1968	2,000	2,800
1969	2,260	3,600
1970	2,500	4,800
1971	2,600	5,300
1972	2,750	6,000
1973	3,000	7,250
1974	3,100	8,100

Source: Don LeDuc, Cable Television and the FCC--
A Crisis in Media Control (Philadelphia:
Temple University Press, 1973), pp. 219-
222; and Broadcasting, June 18, 1973,
p. 25, and April 22, 1974, p. 23.

SELECTED BIBLIOGRAPHY

SELECTED BIBLIOGRAPHY

Books

- Baer, Walter. Cable Television: A Handbook for Decisionmaking. Santa Monica, Calif.: The Rand Corporation, 1973.
- * Demmert, Henry. The Economics of Professional Team Sports. Lexington, Mass.: Lexington Books, 1973.
- LeDuc, Don. Cable Television and the FCC--A Crisis in Media Control. Philadelphia: Temple University Press, 1973.
- Phillips, Mary Alice Mayer. CATV: A History of Community Antenna Television. Evanston, Ill.: Northwestern University Press, 1972.
- Rivkin, Steven. Cable Television: A Guide to Federal Regulations. Santa Monica, Calif.: The Rand Corporation, 1973.

Congressional Hearings

- U.S., Congress. House. Interstate and Foreign Commerce Committee. Subscription Television. Hearings before the Interstate and Foreign Commerce Committee, House of Representatives, on H.R. 5319, 85th Cong., 2nd sess., 1958.
- U.S., Congress. House. Committee on Interstate and Foreign Commerce. Regulation of Community Antenna Television. Hearings before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 7715, 89th Cong., 1st sess., 1965.
- U.S., Congress. House. Committee on Interstate and Foreign Commerce. Regulation on Community Antenna Television. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 13286, 89th Cong., 2nd sess., 1966.
- U.S., Congress. House. Committee on Interstate and Foreign Commerce. Subscription Television. Hearings before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 12435, 90th Cong., 1st sess., 1967.

- U.S., Congress. House. Committee on Interstate and Foreign Commerce. Subscription Television--1969. Hearings before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 420, 91st Cong., 1st sess., 1969.
- U.S., Congress. House. Committee on Interstate and Foreign Commerce. Cable Antenna Television (CATV). Hearings before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, 92nd Cong., 1st sess., 1971.
- U.S., Congress. House. Committee on Interstate and Foreign Commerce. Professional Sports Blackouts. Hearings before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 9536, 93rd Cong., 1st sess., 1973.
- U.S., Congress. House. Committee on the Judiciary. Organized Professional Team Sports. Hearings before the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, on H.R. 5307, 85th Cong., 1st sess., 1957.
- U.S., Congress. House. Committee on the Judiciary. Organized Professional Team Sports. Hearings before the Subcommittee of Antitrust and Monopoly of the Committee on the Judiciary, House of Representatives, on H.R. 10378, 85th Cong., 2nd sess., 1958.
- U.S., Congress. House. Committee on the Judiciary. Copyright Law Revision Part Three. Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments of the Draft before Subcommittee Number Three of the Committee on the Judiciary, House of Representatives, 88th Cong., 2nd sess., 1964.
- U.S., Congress. House. Committee on the Judiciary. Copyright Law Revision. Hearings before Subcommittee Number Three of the Committee on the Judiciary, House of Representatives, on H.R. 4347, 89th Cong., 1st sess., 1965.
- U.S., Congress. House. Committee on the Judiciary. Copyright Law Revision Part Six. Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill before Subcommittee Number Three of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st sess., 1965.
- U.S., Congress. Senate. Committee on Commerce. Community Antenna Television Problems. Hearings before the Subcommittee on Communications of the Committee on Commerce, Senate, 92nd Cong., 1st sess., 1971.

- U.S., Congress. Senate. Committee on Commerce. Blackout of Sporting Events on TV. Hearings before the Subcommittee on Communications of the Committee on Commerce, Senate, on S. 4007 and S. 4010, 92nd Cong., 2nd sess., 1972.
- U.S., Congress. Senate. Committee on Commerce. Federal Sports Act of 1972. Hearings before the Committee on Commerce, Senate, on S. 3445, 92nd Cong., 2nd sess., 1972.
- U.S., Congress. Senate. Committee on Interstate and Foreign Commerce. Television Inquiry--Subscription Television. Hearings before the Committee on Interstate and Foreign Commerce, Senate, on S.Res. 13 and S.Res. 163, 84th Cong., 2nd Sess., 1956.
- U.S., Congress. Senate. Committee on the Judiciary. Organized Professional Team Sports. Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Senate, on S. 616 and S. 886, 86th Cong., 1st sess., 1959.
- U.S., Congress. Senate. Committee on the Judiciary. Organized Professional Team Sports--1960. Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Senate, on S. 3483, 86th Cong., 2nd sess., 1960.
- U.S., Congress. Senate. Committee on the Judiciary. Copyright Law Revision. Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 1006, 89th Cong., 1st sess., 1965.
- U.S., Congress. Senate. Committee of the Judiciary. Professional Sports Antitrust Bill--1965. Hearings before the Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary, Senate, on S. 950, 89th Cong., 1st sess., 1965.
- U.S., Congress. Senate. Committee on the Judiciary. Copyright Law Revision--CATV. Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 1006, 89th Cong., 2nd sess., 1966.
- U.S., Congress. Senate. Committee on the Judiciary. Copyright Law Revision. Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 597, 90th Cong., 1st sess., 1967.
- U.S., Congress. Senate. Committee on the Judiciary. Copyright Law Revision. Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, Senate, on S. 1361, 93rd Cong., 1st sess., 1973.

Congressional Reports

U.S., Congress. House. Committee on the Judiciary. House Report Number 2237 on H.R. 4347 on Copyright Law Revision, House of Representatives, 89th Cong., 2nd sess., 1966.

U.S., Congress. House. Committee on Interstate and Foreign Commerce. House Report Number 1110 on H.R. 16418 on Subscription Television, House of Representatives, 91st Cong., 1st sess., 1969.

FCC Documents

All FCC documents appear in the Federal Communications Commission Reports. Washington, D.C.: Government Printing Office. Reports examined began with Volume XXII (January 8, 1957) through Volume 45 (July 26, 1965) and Volume I (July 7, 1965) through Volume XLVIII, Number 9 (September 20, 1974) of the second series.

First Report. "In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations (Radio Broadcast Docket No. 11279) Services to Provide for Subscription Television Service." 23 FCC 532 (1957).

First Report and Order. "In the Matter of Subpart L, Part 11, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems. Amendment of Subpart I, Part 21, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Domestic Public Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems." 38 FCC 683 (1965).

First Report and Order. "In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals." 20 FCC 2d 201 (1969).

Fourth Report and Order. "In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service." 15 FCC 2d 466 (1968).

Further Notice of Proposed Rulemaking and Notice of Inquiry. "In the Matter of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service." 3 FCC 2d 1 (1966).

Memorandum Opinion and Order. "In re Petitions by Akron Telerama, Inc., Akron, Ohio, Armstrong Utilities, Inc., Orrville and Rittman, Ohio, Lorain Cable TV, Inc., Lorain, Ohio, Telerama, Inc. and Clear Pictures, Inc., Wooster, Ohio for Authority Pursuant to Section 74.1107 of the Rules to Operate CATV Systems in the Cleveland Television Market." 7 FCC 2d 809 (1967).

Memorandum Opinion and Order. "In re Petitions by Akron Telerama, Akron, Ohio, Lorain Cable TV, Lorain, Ohio and Telerama, Inc." 8 FCC 2d 1126 (1967).

Memorandum Opinion and Order. "In re Akron Telerama, Akron, Ohio, Lorain Cable TV, Lorain, Ohio and Telerama, Inc. for Authority Pursuant to Section 74.1107 of the Rules to Operate CATV Systems in the Cleveland Television Market." 16 FCC 2d 265 (1969).

Memorandum Opinion and Order. "In re Petition by Storer Cable TV, Rohnert Park, California for Authority Pursuant to Section 74.1107 of the Rules to Add Distant Signals to a CATV System in the San Francisco Market (7)." 18 FCC 2d 1046 (1969).

Memorandum Opinion and Order. "In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals." 23 FCC 2d 825 (1970).

Notice of Inquiry and Proposed Rulemaking. "In the Matter of Amendment of Parts 21, 74 (Proposed Subpart J, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters." 1 FCC 2d 453 (1965).

Notice of Proposed Rulemaking. "In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems." 36 FCC 2d 641 (1972).

Notice of Proposed Rulemaking and Notice of Inquiry. "In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals." 15 FCC 2d 417 (1968).

Notice of Proposed Rulemaking and Memorandum Opinion and Order. "In the Matter of Amendment of Part 76, Subpart G, of the Commission's Rules and Regulations Pertaining to the Cablecasting of Programs for which a Per-Program or Per-Channel Charge Is Made." Amendment of Section 73.643 (B)(2) and 74.1121 (A)(B) of the Commission's Rules and Regulations Pertaining to the Showing of Sports Events on Over-the-Air Subscription Television of by Cablecasting." 35 FCC 2d 893 (1972).

Order. "In the Matter of Request by RKO Phonevision for Extension of Authorization to Conduct Trial Subscription Television Operations over Station WHCT, Hartford, Connecticut." 45 FCC 2441 (1965).

Report and Decision. "In the Matter of Application of Hartford Phonevision Co. for Authority to Conduct Trial Subscription Television Operations over Station WHCT, Hartford, Connecticut." 30 FCC 301 (1961).

Second Report and Order. "In the Matter of Amendment of Subpart L, Part 91, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems." "Amendment of Subpart I, Part 21, To Adopt Rules and Regulations to Govern the Grant of Authorizations in the Domestic Point-to-Point Microwave Radio Service for Microwave Stations Used to Relay Television Broadcast Signals to Community Antenna Television Systems." "Amendment of Parts 21, 74 and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters." 2 FCC 2d 725 (1966).

Second Report and Order. "In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals." 23 FCC 2d 816 (1970).

Summary of FCC Proposals for the Near-Term Regulation of CATV. 31 FCC 2d 115 (1971).

Third Further Notice of Proposed Rulemaking. "In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service." 15 FCC 2d 601 (1968).

Third Report. "In the Matter of Amendment of Part 3 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service." 26 FCC 265 (1959).

Federal Register

- U.S., Federal Communications Commission. Notice of Proposed Rulemaking. "Radio Broadcast Services, Subscription Television Service." Federal Register, XX, No. 33 (February 16, 1955), 988.
- U.S., Federal Communications Commission. Notice of Proposed Rulemaking. "Radio Broadcast Services, Subscription Television Service." Federal Register, XXII, No. 104 (May 23, 1957), 3758.
- U.S., Federal Communications Commission. Notice of Inquiry and Proposed Rulemaking. "Distribution of Television Broadcast Signals by Community Antenna Television Systems." Federal Register, XXX, No. 82 (April 29, 1965), 6078.
- U.S., Federal Communications Commission. Notice of Proposed Rulemaking. "Subscription Television and Cablecasting, Showing of Sports Events." Federal Register, XXXV, No. 132 (July 9, 1970), 11040.
- U.S., Federal Communications Commission. Third Report. "Cable Television Service; Cable Television Relay Service." Federal Register, XXXVII, No. 30 (February 12, 1972), 3252.
- U.S., Federal Communications Commission. Further Notice of Proposed Rulemaking and Order for Oral Argument. "Cablecasting of Certain Programs." Federal Register, XXXIX, No. 165 (August 23, 1974), 30498.

Legal Decisions

- Columbia Broadcast System, Inc. v. Teleprompter Corp. 355 F Supp 618 (1972).
- Columbia Broadcast System, Inc. v. Teleprompter Corp. 476 F 2d 338 (1973).
- Fortnightly Corp. v. United Artists Television, Inc. 392 U.S. 390 (1968)
- John F. Banzhaf, III. v. Federal Communications Commission. 405 F 2d 1082 (1968).
- Midwest Video Corp. v. United States. 441 F 2d 1322 (1971).
- National Association of Theater Owners v. Federal Communications Commission. 420 F 2d 194 (1969).
- Radovich v. National Football League. 352 U.S. 445 (1957).

Southwestern Cable v. Federal Communications Commission. 378 F 2d 118 (1967).

Sylvester L. Weaver v. Frank M. Jordan. 411 P 2d 289 (1966).

Teleprompter Corp. v. Columbia Broadcast System, Inc. 415 U.S. 394 (1974).

United Artists Television, Inc. v. Fortnightly Corp. 255 F Supp 177 (1966).

United Artists Television, Inc. v. Fortnightly Corp. 377 F 2d 872 (1967).

United States v. International Boxing Club of New York, Inc. 348 U.S. 236 (1955).

United States v. Midwest Video Corp. 406 U.S. 649 (1972).

United States v. National Football League. 116 F Supp 319 (1953).

United States v. National Football League. 196 F Supp 445 (1961).

United States v. Southwestern Cable. 392 U.S. 157 (1968).

Legal Periodicals

Blackwell, Richard. "Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism." William & Mary Law Review 12 (Summer 1971):869

"Copyrights--In General--Unauthorized Rediffusion of Live and Film Telecasts of Sports Events to Home Viewers Held Nonactionable." Harvard Law Review 68 (February 1955):712.

Elder, David. "Subscription Television, the FCC and the Courts." Saint Louis University Law Journal 15 (Winter 1970):283.

Hochberg, Philip. "Broadcasting and CATV: The Beauty and the Bane of Major College Football." Law and Contemporary Problems 38 (Winter-Spring 1973):112.

Hochberg, Philip. "Second and Goal to Go: The Legislative Attack in the 92nd Congress on Sports Broadcasting Practices." New York Law Forum 18 (Spring 1973), 841.

Koppett, Leonard. "Sports and the Law: An Overview." New York Law Forum 18 (Spring 1973):815.

Olson, Theodore. "Aspects of Pay Television: Regulation, Constitutional Law, Antitrust." California Law Review 53 (December 1965):1378.

Torrens, Thomas. "Professional Football Telecasts and the Blackout Privilege." Cornell Law Review 57 (January 1972):297.

Verkuil, Paul. "CATV and Copyright Liability: On a Clear Day You Can See Forever." Virginia Law Review 52 (December 1966):1505.

Miscellaneous

National Cable Television Association. "NCTA Board Adopts Resolution Criticizing FCC Pay Cable Rules for Ignoring Public Interest." NCTA Press Release, November 20, 1974. (Mimeographed.)

National Cable Television Association. Oral Arguments on Docket 19554 (Pay Cable). Washington: Department of Public Affairs, 1973.

National Cable Television Association Television Committee. Year End Report of the NCAA Television Committee to the Forty-Eighth Annual Convention of the National Collegiate Athletic Association, January 1954.

U.S., Federal Communications Commission. Speech by Dean Burch, Chairman Federal Communications Commission, before the Annual Convention of the National Cable Television Association, 1970.

Newspapers and Magazines

Boston Globe, November 5, 1971 through August 28, 1973.

Broadcasting, January 1, 1950 through December 16, 1974.

New York Times, April 17, 1939 through August 15, 1974.

TV & Communications, June 1965 through January 1966.

Variety, October 30, 1971 through December 11, 1974.

MICHIGAN STATE UNIV. LIBRARIES



31293101705394