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Thomas M. Torrens

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## PROFESSIONAL FOOTBALL TELECASTS AND THE BLACKOUT PRIVILEGE

In 1961 Congress granted professional sport leagues two exemptions from the sanctions of the antitrust laws.<sup>1</sup> One exemption authorized agreements between professional sport leagues and television networks to pool and sell as a package the rights to televise league games.<sup>2</sup> Such an agreement may not restrict telecasts of games in 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."<sup>3</sup> This "home territory" exception is the second antitrust exemption. It authorizes the restriction of game telecasts in the area surrounding the site of a game—the blackout.<sup>4</sup>

Difficulties with the definition and administration of blackouts of professional football games have caused recent controversy.<sup>5</sup> In addition, the economic circumstances of professional football have changed dramatically since the exemptions were enacted.<sup>6</sup> These developments

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<sup>1</sup> Act of Sept. 30, 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified in 15 U.S.C. §§ 1291-95 (1970)).

<sup>2</sup> 15 U.S.C. § 1291 (1970). See note 13 and accompanying text *infra*. The agreements eliminate competition among league "businesses" for the sale of game television rights, but are exempted from antitrust consequences because competition among the teams might threaten the survival of the league:

The purpose of this bill is to permit professional sports leagues to deal jointly in the sale of their TV rights and, by grouping their weaker and stronger clubs and those clubs with greater or lesser home territory population, to provide equal access to television facilities and television income for all member clubs of their league.

107 CONG. REC. 20,662 (1961) (remarks of Senator Hruska).

<sup>3</sup> 15 U.S.C. § 1292 (1970). Section 1293 protects intercollegiate football gate receipts by making section 1291 inapplicable to agreements permitting Friday night or Saturday professional football telecasting within 75 miles of an intercollegiate game site. A 1966 amendment gave this protection to interscholastic games as well. Section 1291 was amended at the same time to protect the merger of the American and National Football leagues from antitrust consequences.

Section 1294 provides that all professional sports activities other than those specifically enumerated in sections 1291-93 shall remain unaffected by the exemptions.

<sup>4</sup> Section 1292 removes the antitrust exemption for agreements prohibiting the telecasting of games in any area, except in the home territory when a team plays a home game. Thus the section allows agreements to black out telecasts of the home game itself, within the home territory, and of outside games between other teams, neither of which is the home team. The term "blackout" has often been used to refer to both of these situations, although they are not identical and have significantly different antitrust consequences. See notes 11-25 & 55 *infra*. The terms "home game blackout" and "outside game blackout" will be used here to distinguish the two types of blackouts.

<sup>5</sup> See notes 22-25 & 40 and accompanying text *infra*.

<sup>6</sup> See notes 56-62 and accompanying text *infra*.

indicate that the purposes and validity of the blackout privilege should be reconsidered.<sup>7</sup>

## I

### THE ORIGIN AND CURRENT STATUS OF THE BLACKOUT PRIVILEGE

#### A. *Legislative History*

The antitrust exemption for agreements to televise professional sports<sup>8</sup> was extended to the four major team sports at the time of its enactment.<sup>9</sup> However, it was the predicament of the National Football League (NFL), confronted with two decisions by Pennsylvania Federal District Court Judge Allan K. Grim, that actually precipitated the Congressional action.<sup>10</sup> Judge Grim first considered the broadcasting and television bylaws of the NFL in 1953<sup>11</sup> and found many of them to

<sup>7</sup> The sports telecasting provisions were enacted in recognition of the substantial interest the American public has in viewing professional team sport contests. See 107 CONG. REC. 20,059-63, 20,662 *passim* (1961). The provisions further the public interest in two ways. First, they allow more of the public to see games by causing more games to be televised. See note 67 *infra*. Second, they provide individual teams with a means to achieve the financial stability necessary to their survival. See note 2 *supra*.

The first exemption, which allows pooled television rights agreements, causes more games to be televised because the league can make a network cover the games of *all* league members, not just of those whose talent or television markets are most attractive to the network. The league itself is financially strengthened because the proceeds from the sale of television rights are divided among the several league clubs.

The second exemption, the blackout, ensures team financial stability to the extent that it protects gate revenues. *But cf.* note 18 *infra*. By definition, however, it directly limits the number of fans reached by a televised game. Compare notes 56-62 and accompanying text *infra*, with notes 22-43 and accompanying text *infra*.

<sup>8</sup> The uncertainty and confusion in both the courts and the Congress as to the applicability of the antitrust laws to professional sports must be kept in mind in considering Congress's enactment of the 1961 sport telecasting provisions. In *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), the Supreme Court reaffirmed its ruling in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), that professional baseball was not subject to the antitrust laws. Then, in *Radovich v. National Football League*, 352 U.S. 445 (1957), the Court ruled that professional football *was* subject to the antitrust laws. Admitting that such discrimination between the sports was probably illogical and inconsistent, the Court concluded that the problem was not one for solution by judicial decision. It suggested that Congress should delineate the appropriate antitrust position of professional sport enterprises after an examination of the entire business. *Id.* at 451-52. More than 60 bills have been introduced in attempts to reach Congressional agreement on the matter, but no comprehensive legislation has been passed. For a representative history of these efforts, see S. REP. NO. 462, 89th Cong., 1st Sess. 4-11 (1965).

<sup>9</sup> Section 1291 exempts baseball, basketball, football, and hockey. Professional soccer, which finished its first season in 1967, should probably now be included in this group.

<sup>10</sup> See 107 CONG. REC. 20,059 (1961); notes 12-13 *infra*.

<sup>11</sup> In 1953 each NFL team individually contracted for the sale of its television rights.

be in violation of the antitrust laws. He did, however, extend a limited blackout privilege to football.<sup>12</sup> In 1961, in a proceeding initiated by the NFL for a construction of his 1953 order, he voided a pooled television rights contract between the NFL and the Columbia Broadcasting System as repugnant to the provisions of the 1953 decree.<sup>13</sup> The 1961 decision, handed down July 20, caused "widespread anxiety among fans of professional football . . . that televised professional games [might] be severely restricted [in the] fall."<sup>14</sup>

Congress acted quickly to give the NFL legislative relief.<sup>15</sup> Bills

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The "home game" blackout was considered the privilege of a producer of entertainment not to offer for free in the same locality the very entertainment for which the public was being asked to buy tickets. It was not in issue in the 1953 case. *See* note 12 *infra*. The "home game" blackout is arguably an antitrust violation today. *See* note 55 *infra*.

<sup>12</sup> *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953). The Justice Department had filed suit alleging that NFL bylaws, binding upon all league members, restricting telecasts and radio broadcasts of league games constituted a contract in restraint of trade which violated the Sherman Antitrust Act (15 U.S.C. §§ 1-7 (1970)). All restrictions on radio broadcasts and a restriction on the telecasting of other football games into the home territory of a team that was playing away but telecasting its own game back to the home territory were declared illegal. The NFL Commissioner's veto power over individual team's television agreements was limited to effect these restrictions. Although Judge Grim did not doubt that the "outside game" blackout restrained trade (116 F. Supp. at 322), he applied the antitrust "rule of reason" and found it to be a reasonable, and therefore legal, restraint. *Id.* at 326.

<sup>13</sup> *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961). By a provision in the judgment decree of the 1953 decision, Judge Grim retained jurisdiction of the case for the purpose of enabling the parties to petition for construction of the final decree. The NFL petitioned to have the judgment construed so as to accommodate the contract it had entered with CBS, which gave the network the exclusive right to televise league games for two years and permitted CBS to decide which games would be televised. Prior to this contract, each NFL club had individually negotiated the sale of its own television rights (*see* note 11 *supra*), so the 1961 pooled rights agreement was a significant change in the television policy of the league. Judge Grim felt the contract violated his 1953 judgment because the league members' agreement to eliminate competition among themselves in the sale of television rights, coupled with the network's contractual right to control telecasts, would operate to restrict the areas to which telecasts might be transmitted.

<sup>14</sup> 107 CONG. REC. 15,223 (1961). The alarm was premature because the NFL clubs had individually negotiated contracts in force which provided for telecasts of the 1961 season games. *Hearings on H.R. 8757 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess., ser. 13, at 4-5 (1961) [hereinafter cited as *TV Hearings*]. Before the "pooled" contract was disapproved, only CBS had enforceable options affecting 1961 games. These options involved "9 or 10" clubs, and CBS was willing to sign the "pooled" contract to get the exclusive telecast rights for all 14 league members. *Id.* at 33-34.

<sup>15</sup> The relation of professional team sports and antitrust laws was not a new subject of concern when Congress acted on the matter of professional football telecasts. Prior to Judge Grim's 1961 order, both the House and Senate Judiciary Committees had investigated the subject, and a bill to limit the applicability of the antitrust laws to professional

were introduced in the House and Senate granting professional sport leagues the pooled television rights exemption.<sup>16</sup> The blackout exemption<sup>17</sup> was added by amendment to the House bill.<sup>18</sup>

Only seventy-two days after Judge Grim's decision that the NFL's pooled television rights contract violated the antitrust laws, such contracts were granted antitrust immunity, and the judicial blackout privilege became a legislative blackout privilege.<sup>19</sup> Although neither all

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team sports was before the Senate. S. 1856, 87th Cong., 1st Sess. (1961). Congress, however, failed to act on this proposal. See note 8 *supra*.

<sup>16</sup> S. 2427, H.R. 8757, 87th Cong., 1st Sess. (1961).

<sup>17</sup> See *TV Hearings* 31.

The pooled rights exemption was intended to provide more sports telecasts for the viewing public and to place the individual NFL clubs in comparable financial positions vis-à-vis television revenues. See notes 2 & 7 *supra*. Standing alone, however, this exemption would have granted "to the sports involved unchecked power to deprive the American public of the right to see over TV any sports contest." *TV Hearings* 29. The antitrust subcommittee did not want to "give [the NFL] carte blanche to black out at any time." *Id.* at 30. They felt "the adoption of this legislation without amendment would completely nullify the [1953] decision of Judge Grim." *Id.* However, because the NFL had been "operating satisfactorily" under Judge Grim's 1953 blackout compromise (see notes 4 & 11-12 *supra*), the blackout amendment was proposed with the intent that only those blackouts sanctioned by Judge Grim would be exempt after passage of the bill. *Id.* at 28. See also H.R. REP. NO. 1178, 87th Cong., 1st Sess. 5 (1961).

<sup>18</sup> Proponents of the blackout argue that a football fan, either because he would prefer to see an outside game between teams more talented than his home team, or because he would prefer watching in the comfort and convenience of his home, will elect a televised game over a live one. The result would be a significant diminution of stadium ticket sales, against which the blackout protects. *United States v. National Football League*, 116 F. Supp. 319, 325 (E.D. Pa. 1953). The conclusion that gate revenues would be significantly diminished without the blackout's protection is not necessarily correct. Judge Grim's finding that home game telecasts endangered live attendance was based on evidence that the 1950 Los Angeles Rams suffered poor attendance when all their home games were televised. *Id.* That single experiment should not control today.

Many fans would not trade a stadium seat at the 20-yard line for a 50-yard line television seat in an easy-chair, even if they had the option. Anyone who has attended a professional game in person knows television viewing is a different experience. It might be simply the bark of the "hot dog man," or it might be the more complex exhilaration of being part of the crowd's reaction to a big play, but there is more to be seen and heard and felt at the stadium.

Furthermore, the prevalence of television football makes stadium attendance an attractive alternative. In most areas fans can watch three games a weekend for the fourteen week NFL season; two Sunday afternoon and one Monday night. Only on seven Sundays during the season can local fans watch the home team play at the home stadium. It is reasonable to assume that many home team fans will continue to take advantage of those opportunities, even if the game is televised.

<sup>19</sup> H.R. 9096, 87th Cong., 1st Sess. (1961). The antitrust exemptions were passed by the House on September 18 (107 CONG. REC. 20,064 (1961)), by the Senate on September 21 (*id.* at 20,662), and signed into law on September 30 (*id.* at 21,552).

The pooled rights exemption, plus the blackout and college football provisions, were supported by both the House and Senate Judiciary Committees because they ensured television coverage of teams that would have difficulty negotiating individual television

legislators<sup>20</sup> nor all football fans<sup>21</sup> have been happy with the blackout, until recently it has not been significantly challenged.

### B. *The Blackout and the Public*

The 1971 NFL Championship Game, Super Bowl V, was held at the Orange Bowl in Miami, Florida. The Bowl's 80,000 seats were sold out, with "scalpers" asking as much as \$100 a ticket the night before the game.<sup>22</sup> The Miami area was to be blacked out for a radius of seventy-five miles. In the week immediately before the game 75,000 Floridians signed petitions and mailed newspaper coupons protesting the blackout. Suits were filed in state and federal courts in unsuccessful attempts to force NFL Commissioner Pete Rozelle to lift the blackout.<sup>23</sup> The Commissioner refused requests to allow Miami-area broadcast of the game, explaining that ticket sales for future Super Bowl games would suffer if the fans felt they could avoid paying for a stadium seat and watch the game on television for free.<sup>24</sup>

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contracts. They also abolished the disparity between the contract rights of the NFL and the rival American Football League (AFL). The AFL was not subject to the 1953 order, and the 1961 construction of that order did not affect the AFL. It was free to sell the pooled television rights of its member clubs. S. REP. NO. 1087, 87th Cong., 1st Sess. (1961); H.R. REP. NO. 1178, 87th Cong., 1st Sess. (1961).

<sup>20</sup> The definitional vagueness of the statutory blackout and concern for its equitable administration have prompted proposals to amend section 1292, none of which has succeeded. See notes 35 & 46 *infra*. The most recent action involving section 1292 is a proposal for its repeal made by Congressman Emanuel Celler, chairman of the House Judiciary Committee and the Antitrust Subcommittee. Congressman Celler strongly supported the blackout at the time of its original enactment. See note 66 *infra*.

<sup>21</sup> In 1962 fans without tickets to the sold out New York Giants-Green Bay Packers NFL championship game sought a preliminary injunction to force the NFL to lift the New York City area blackout of the game. *Blaich v. National Football League*, 212 F. Supp. 319 (S.D.N.Y. 1962). The action was brought on the Friday before the Sunday the game was to be played. The plaintiffs argued that the blackout privilege should not apply to championship games and also raised "vaguely defined" constitutional issues. *Id.* at 321-22. The court, finding that the plaintiffs had asked too much and brought too little too late as justification, denied the injunction. This case was not a real test of the statute. The issue of championship game blackouts is still a *cause célèbre* with many football fans. See notes 22-26 and accompanying text *infra*.

<sup>22</sup> N.Y. Times, Jan. 18, 1971, at 31, col. 1.

<sup>23</sup> Letter from Ellis Rubin, Attorney, to the *Cornell Law Review*, September 7, 1971. Mr. Rubin, active in a "Ban-The-Blackout Club," filed the state and federal actions. The federal court held that he lacked standing to sue. However, State Circuit Court Judge Franza, although powerless to lift the blackout, held the blackout to be a clear violation of the Sherman Antitrust Act (15 U.S.C. §§ 1-7 (1970)). N.Y. Times, Jan. 17, 1971, § 5, at 3, col. 1. The "Ban-The-Blackout Club" has shifted its base of operation to New Orleans and will continue to fight against Super Bowl blackouts. Letter from Ellis Rubin, *supra*. See text accompanying notes 25-26 *infra*.

<sup>24</sup> N.Y. Times, *supra* note 23. It is extremely difficult to see any Super Bowl as a risky business venture that requires congressional protection. When NBC televised the 1971

The 1971 Super Bowl is history, and it was blacked out. But the legality and propriety of blackouts of championship games is still at issue. A group of attorneys in New Orleans, site of Super Bowl VI in 1972, is preparing a court action on the strength of 30,000 signed protests to the announced blackout of the game, seeking to enjoin it as a violation of the blackout statute.<sup>25</sup> With the New Orleans Saints not in the Super Bowl, neither team will be a "home team" within the letter of the statute,<sup>26</sup> and a blackout of the game should not be protected.

Although the viewing public's objections to the NFL's blackout policy<sup>27</sup> have surfaced most noticeably in relation to the Super Bowl blackouts, regular season blackouts are objectionable as well. The NFL employs a regular season blackout that has affected far more cities and more fans in 1971 than it did in 1961,<sup>28</sup> yet the league's economic circumstances have greatly improved during those ten years.<sup>29</sup> Because the NFL is no longer financially unstable, there is no compelling need for blackout protection today.<sup>30</sup>

Perhaps the clearest statement of the NFL's position on blackouts is offered by Commissioner Rozelle:

If a club announced in advance of its ticket sales, that all of its home games would be telecast locally, the impact on ticket sales

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game, it was estimated that 64 million viewers watched it over 510 local stations. *Id.* at col. 4. Sponsors paid the network \$200,000 per minute of commercial time during the game. *Id.* at 4, col. 7. The NFL Commissioner's refusal to lift the blackout of a sold out game that is so financially successful evidences an insensitivity to the public interest. The antitrust exemptions in favor of professional sports carry with them a responsibility to the public. This was reiterated by the Senate Judiciary Committee when it studied 1965 legislation pertaining to professional sports: "Certainly the exemptions granted to the team sports . . . constitute an obligation on them to act in the public interest." S. REP. NO. 462, 89th Cong., 1st Sess. 14 (1965).

<sup>25</sup> Letter from Ellis Rubin, *supra* note 23.

<sup>26</sup> This issue was not a factor in *Blaich* because the New York Giants were a home team in a game played in New York. The court in that case relied on a literal reading of section 1292 to determine that Congress did not intend to limit the blackout protection to regular season games. If the section is read literally in deciding the issue of Super Bowl blackouts, the absence of a "home team" should exclude such blackouts from protection.

<sup>27</sup> There are other objections to the NFL's exercise of the blackout privilege. Because of the blackout, home territory fans must buy tickets to see home games, and some NFL teams force fans to buy "tie-in" tickets for exhibition and regular season games. At least one fan and his attorney feel that, where the exhibition and regular season game tickets are tied-in, fans are compelled to purchase an inferior product (exhibition game tickets) in order to get a superior one (regular-season tickets). A suit alleging that this practice constitutes an antitrust violation has been filed against the NFL. *Coniglio v. Highwood Servs., Inc.*, Civil No. 1970-408 (W.D.N.Y., filed Sept. 9, 1970).

<sup>28</sup> See notes 38 & 59 *infra*.

<sup>29</sup> See generally notes 56-62 and accompanying text *infra*.

<sup>30</sup> See notes 55-59 and accompanying text *infra*.

for the season or on a game-by-game basis could be dramatic. Fans could hold back on the buying of tickets to await the progress of the team during the season, skip cold weather games, buy tickets only to the particular games of their choice, and generally keep the ticket sale pattern in a state of continuing confusion.<sup>31</sup>

It is difficult to reconcile this statement and the attitude it represents with the obligation of professional football to act in the public interest.<sup>32</sup>

## II

### REFORM OF THE BLACKOUT EXEMPTION

The blackout statute provides that the antitrust laws will apply when an agreement for the sale of television rights prohibits the purchaser from "televising any game" in any area except the "home territory" of a team playing at home. Both quoted phrases are ambiguous and have never been legislatively or judicially defined.

The blackout declared legal in 1953 was the "home territory" blackout then used by the NFL clubs pursuant to the NFL constitution and bylaws.<sup>33</sup> The blackout statute, drafted to codify the 1953 decision,<sup>34</sup> sanctioned this type of blackout. Today, "home territory" is defined by the NFL bylaws as "the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of [a home] city."<sup>35</sup> The NFL has generally applied the seventy-five mile standard in impos-

<sup>31</sup> Letter from Pete Rozelle, Comm'r, Nat'l Football League, to the *Cornell Law Review*, Oct. 5, 1971. See note 65 *infra*.

<sup>32</sup> See note 24 *supra*.

<sup>33</sup> *United States v. National Football League*, 116 F. Supp. 319, 321 (E.D. Pa. 1953). See notes 4 & 11-12 *supra*.

<sup>34</sup> See note 17 *supra*.

<sup>35</sup> CONSTITUTION AND BY-LAWS OF THE NATIONAL FOOTBALL LEAGUE art. 4.1 (1971). Exceptions to the general 75-mile rule are made in two instances: (1) where two league clubs, other than San Francisco and Oakland, are in cities within 100 miles of each other, the territorial right of each extends half the distance between them; and (2) the Green Bay Packers' territory is the 75-mile area plus the county of Milwaukee, Wisconsin. *Id.* art. 4.1(a), (b).

Nevertheless, blackout areas can vary widely under this definition, depending upon the sprawl of a home city's corporate limits. This variance inspired the proposal of an amendment to section 1292 in 1963 to define the home territory as that area within 75 miles of the game site. The concern was that

professional football leagues have attempted to apply a new and more restrictive television practice which has blacked out additional areas from these telecasts. . . .

Such new practice would black out additional television stations serving millions of people which are located up to 125 or more miles from the game city . . . .

109 CONG. REC. 12,136 (1963). The amendment was referred to the House Judiciary Committee and died there.

ing blackouts,<sup>36</sup> although there is no statutory requirement that it must.<sup>37</sup> The seventy-five mile limit is not realistic for purposes of ensuring gate receipts today, and the blackout area should be constricted and individualized.<sup>38</sup>

Whatever the "home territory" is or should be, if the NFL can prohibit a network from "televising any game" within it, does that mean the game cannot be *received* within the blackout area, or that it cannot be *telecast* from within the blackout area?<sup>39</sup> The difference between these two possible readings is measured by the difference in the number of viewers who will be deprived of seeing the blacked out game.

Under a "reception blackout" reading of the statute, the NFL can keep all game telecast signals out of the home territory. However, to achieve this type of blackout, a television station cannot "fuzz-out" its telecast signal by diminishing its power and "shortening" the reach of the signal.<sup>40</sup> Therefore, the only alternative of a station whose signal

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<sup>36</sup> The blackouts in *Blaich* and of the 1971 Super Bowl V were for 75 miles. See notes 4 & 22-24 and accompanying text *supra*.

<sup>37</sup> See note 35 *supra*. Section 1293, which protects intercollegiate and interscholastic football gate revenues, is more explicitly drafted than section 1292. It provides that the antitrust laws will apply to any agreement "which permits the telecasting . . . of any professional football game . . . from any telecasting station located within seventy-five miles of the game site" of a scheduled collegiate or scholastic game. Congress did not want to leave the fate of college and high school football revenues to the NFL's good faith adherence to its policy of not interfering with school football. See *TV Hearings* 36-39. The implication is that the NFL was trusted to act in good faith with the public in applying the section 1292 blackout, which is not defined in terms of a mile limit. *Quaere* whether the NFL is living up to that trust today. See notes 22-32 *supra*; note 66 *infra*.

<sup>38</sup> The improvement in roads and suburban transit systems and the growth of metropolitan population today give a larger segment of the population access to professional football games than in 1953. This increase in potential ticket buyers should decrease the amount of blackout protection necessary to support gate revenues. Cf. note 18 *supra*. The exact extent of a blackout should vary according to league, city, and game. See text accompanying note 51 *infra*.

<sup>39</sup> Even the NFL bylaws are confused on this point. In one section they say no club shall permit its game to be "telecast into any area." CONSTITUTION AND BY-LAWS OF THE NATIONAL FOOTBALL LEAGUE art. 10.2(a) (1971) (emphasis added). In another they refer to a "telecast . . . within the home territory." *Id.* art. 10.2(b) (emphasis added). The drafting is not ambiguous in defining the championship game blackout, however: "No television station may carry or broadcast the game if its signal is visible in the home territory (75 miles) of the home club in the city where the game is being played. The Commissioner's decision in this matter shall be final." *Id.* art. 10.5(2).

<sup>40</sup> This point was recently decided by the Federal Communications Commission. *In re Violation by Lee Enterprises, Inc.*, 27 F.C.C.2d 887 (1971). A CBS affiliate in Iowa, Station KGLO-TV (KGLO), owned by Lee Enterprises, Inc., was given permission by CBS to telecast the Minnesota Vikings-Green Bay Packers football game on November 22, 1970, but only if it reduced its broadcast power by 20% so that its signal could not be received in the Minneapolis area, the game site. The FCC decided that the deliberate reduction of

reaches the home territory is not to carry the ball game.<sup>41</sup> This means that viewers who are sufficiently distant from the game site so that it is unreasonable to expect them to attend will be deprived of the telecast. If the "public has the right to enjoy the fullest practicable dissemination of the interstate telecasts of professional sport events,"<sup>42</sup> this construction of the blackout privilege would seem to be contrary to public policy.

Under a "telecast blackout" reading of the statute, the NFL would only be able to direct stations within the home territory not to telecast a game when a home game was being played. A proposed 1963 amendment to the blackout statute would have adopted such an interpretation.<sup>43</sup> This interpretation would allow a station just outside the area defined as the home territory to telecast the game, and do essentially what a station just inside the home territory is forbidden to do. Read this way, the statute is ludicrously arbitrary, inviting frustration of its purpose as long as there is technical compliance with its terms.

Technical difficulties in defining a workable blackout, therefore, may be insurmountable. The "reception blackout" affects more of the public than just that segment within the home territory, and the "telecast blackout" does not ensure that prospective ticket buyers will not receive the telecast.

Compounding the ambiguity of the blackout statute is the NFL's authority to regulate its own antitrust exemption.<sup>44</sup> The greater the

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power, the "fuzz-out," constituted a violation of FCC rules. *Id.* at 888. The Commission was content with KGLO's promise not to commit similar violations in the future and imposed no sanctions against either KGLO or CBS. This decision was scathingly denounced in a dissent by Commissioner Nicholas Johnson. *Id.* at 890. The violation was caused by the CBS-KGLO attempt to comply with the NFL's blackout requirement, and for Commissioner Johnson this privilege was the real culprit in the case:

Perhaps it is time for this Commission to formally ask the U.S. Department of Justice for a full-scale review of the blackout policy and the apparent abuses that have developed since the anti-trust exemption authorizing the blackout was adopted by Congress in 1961.

*Id.* at 891.

Since this case was decided the FCC has investigated sports blackouts, and "[a] report has been submitted to the Commission by the staff, but no position has yet been taken by the Commission. The report itself is a confidential document . . . [un]available . . . for perusal." Letter from Richard E. Wiley, General Counsel, FCC, to the *Cornell Law Review*, Oct. 14, 1971.

<sup>41</sup> 27 F.C.C. 2d at 889 (concurring statement of Chairman Burch).

<sup>42</sup> 109 CONG. REC. 12,135 (1963) (remarks of Congressman Stubblefield).

<sup>43</sup> H.R. 7365, 88th Cong., 1st Sess. (1963). This is also the current approach used by the statute to protect school game revenues from the competition of professional football telecasts. See note 37 *supra*.

<sup>44</sup> Typically, federal agencies are empowered to regulate economic enterprises benefited by an antitrust exemption. See, e.g., 16 U.S.C. §§ 824-824h (1970) (FPC regulation of

restriction on home territory telecasts, the more the NFL stands to gain<sup>45</sup> and the more the viewing public stands to suffer. Because the interest of a prosperous NFL is inversely related to that of the public in this area, the administration of the blackout privilege should not be vested solely in the league.

The most recent legislative attempt to amend the blackout statute implicitly recognized that administration of the blackout in a manner consistent with the public interest is a *sine qua non* of the exemption's validity.<sup>46</sup> To minimize the number of fans deprived of a telecast, application of a blackout privilege should be responsive to the particular circumstances of each game.

The first issue to be settled is the degree of financial protection that should be extended to the NFL. That is, should the blackout be imposed unless there is a sellout, or would ensuring the league a three-quarter capacity crowd be sufficient? Commissioner Rozelle feels that the league clubs should be entitled to sellouts. He comments:

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electric utility companies engaged in interstate commerce). For several exemptions which do not provide for governmental regulation as an alternative to antitrust control, see Pogue, *Introduction to Antitrust Exemptions*, 33 ABA ANTITRUST L.J. 1 (1967). These exemptions are necessitated by the unique circumstances of the economic sector affected, about which it is difficult to generalize. *Id.* at 6.

The professional sports telecasts exemption allows NFL clubs to contract as a league with a television network and in that contract to restrict home territory telecasts. Congress leaves the regulation of this exemption to the NFL. Traditionally, because of its sensitivity "to the preservation of public confidence in the honesty in sports contests," Congress has followed a hands-off policy in its dealings with professional sports. S. REP. NO. 462, 89th Cong., 1st Sess. 14 (1965). Thus, the professional sports telecasts exemption may not be regulated by the government because of the desire to keep professional sports free, in the eyes of the public, from outside control. Pogue, *supra* at 3.

<sup>45</sup> As to whether the converse is true, that milder restrictions on home territory telecasts would mean a loss to the NFL, see note 18 *supra*. It should also be noted that the additional television income the NFL clubs might secure from allowing telecasts within the 75-mile area could partially offset any loss of ticket sales.

<sup>46</sup> In attempts to keep games before as much of the public as possible, two bills have been introduced which would terminate the antitrust exemption for blackouts when the home game is sold out. H.R. 15128, 91st Cong., 1st Sess. (1969) provided for termination of the exemption if a game were sold out three days before game day. It died in the House Judiciary Committee.

S. 1521, 92d Cong., 1st Sess. (1971) is currently being considered jointly by the Senate Judiciary and Commerce Committees. It would add to the blackout section: "but this exception shall cease to apply with respect to any such game when tickets for admission to such game are no longer available to the general public." 117 CONG. REC. S 4748 (daily ed. April 14, 1971). See also *id.* S 6423 (daily ed. May 6, 1971). The amendment was proposed by Senator Proxmire because over 90% of the seats in NFL stadiums were sold out for the 1970 season games. *Id.* Cf. text accompanying note 47 *infra*. Noting that the airwaves belong to the public and not to professional football, he said: "Times have changed since the blackout section was passed. Pro teams are no longer struggling to survive. It is time that the fan got a break as well as the owners of the clubs." 117 CONG. REC. S 4748 (daily ed. April 14, 1971).

It is a complete mistake to assume that all or even most NFL clubs are guaranteed advance sellouts of all of their home games, even under the present rules. A few are, but many experience sellouts only on infrequent Sundays or only through ticket sales continuing right up to the start of the game.<sup>47</sup>

The substantial television revenues which the league realizes would seem to indicate that less than sellout crowds would not mean financial disaster.<sup>48</sup> It may be impossible, however, to administer a blackout dependent upon a full or substantial sellout. Commissioner Rozelle states that "[i]t is quite impractical to attempt to make the availability of the local game on home TV turn on the existence of a sellout at the stadium."<sup>49</sup> He argues that "unworkable problems" in securing sponsors and cable facilities, and in coordinating local and network stations, would result. Neither does he wish the league and its fans to be forced into a "great guessing game" over which contests might be televised. According to the commissioner these practical difficulties would cause "a major disruption of the League's television contracts and arrangements with the networks."<sup>50</sup>

Another issue involves the size of the area actually blacked out. This should bear some relation to the game site and type of game. The administrator of the blackout should individualize the "home territory" of each club according to the population of its home city and the accessibility of the stadium.<sup>51</sup> He would have to consider these factors for as many as thirteen games weekly, beginning with exhibition games in August and ending with the Super Bowl in January. Such individualization would thus be a formidable task.

With cable television developing as an alternative to free microwave television,<sup>52</sup> administrative problems with the blackout become more complicated. The possibility that cable transmissions into blacked out areas will be used to undercut the blackout's effect,<sup>53</sup> or for closed

<sup>47</sup> Letter from Pete Rozelle, *supra* note 31.

<sup>48</sup> See note 62 *infra*.

<sup>49</sup> Letter from Pete Rozelle, *supra* note 31.

<sup>50</sup> *Id.*

<sup>51</sup> See text accompanying note 38 *supra*.

<sup>52</sup> Cable television systems receive the signals of telecasting stations, amplify them, transmit them by cable, and distribute them by wire to the receivers of their subscribers. Noting that cable television "is developing and expanding at a very rapid rate," the FCC has asserted jurisdiction over cable television, applying rules governing carriage of local signals and nonduplication of local programming. *In re* Community Antenna Television Sys. (CATV), 2 F.C.C.2d 725, 726-28 (1966).

<sup>53</sup> Although cable transmissions of distant signals into the 100 largest television markets have been generally banned to protect local broadcasters, they will be allowed "upon a showing approved by the Commission that such extension would be consistent with the public interest . . ." 47 C.F.R. § 74.1107(a) (1971). The FCC's authority to

circuit telecasts for which admission is charged,<sup>54</sup> is a further issue which must be considered in any attempt to reform the blackout exemption.

Commissioner Rozelle's objections to "sellout blackouts" have merit, and the problems in fairly administering an individualized blackout are substantial. Since the problems attendant upon a reformation of the blackout exemption preclude its efficient administration on a game-by-game basis, the more fundamental issue of whether the blackout is at all viable in 1971 must be reached.

### III

#### REPEAL OF THE BLACKOUT PRIVILEGE

It has been ten years since Congress exempted professional sports telecasting from the application of the antitrust laws, and eighteen years since the blackout privilege was judicially extended to football. Judge Grim's decision to allow blackouts in 1953 was based upon his appraisal of the economic status of the NFL at that time. The NFL's restraint of trade<sup>55</sup> was reasonable then partly because of the peculiar nature of the

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regulate cable television in this manner was upheld in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). FCC Commissioner Johnson feels that "affirmative cable policies" would be one way to reduce the number of fans deprived of seeing games by telecast blackouts. Letter from Nicholas Johnson, Comm'r, FCC, to the *Cornell Law Review*, Oct. 28, 1971. Although this would increase public access to games, it would make such access depend upon one's ability to pay cable charges.

<sup>54</sup> The idea of using closed circuit telecasts to increase revenue is not new, but some NFL clubs with sold out home schedules have only recently turned to it. See note 66 *infra*. Many legislators are opposed to exclusive closed circuit telecasts of sporting events in which a large segment of the public is interested. Legislation pending before the House Interstate and Foreign Commerce Committee would prohibit production of games over closed circuit television whenever there is sufficient public interest to justify free microwave telecasts. H.R. 6718, H.R. 7679, H.R. 7680, 92d Cong., 1st Sess. (1971). Similar legislation is before the Senate Commerce Committee. S. 1435, 92d Cong., 1st Sess. (1971).

<sup>55</sup> There is "little doubt that [the blackout] constitutes a contract in restraint of trade." *United States v. National Football League*, 116 F. Supp. 319, 322 (E.D. Pa. 1953). The "outside game blackout" with which Judge Grim was concerned, is an agreement to allocate marketing territories. *Id.* The two teams involved in the home game share the gate revenues (*TV Hearings* 9) and thereby benefit by restricting in the home territory the television markets of the teams in outside games.

In the case of the "home game blackout" the network, a distributor of the game to the television market, is restricted from "reselling" the game within the home territory, giving an advantage to the two competing teams that sell the game directly to a live audience. The practice is analogous to the case of a manufacturer who sells products to his distributors subject to territorial restrictions on resale. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). If the manufacturer retains ownership of the goods so that the distributor is his agent or salesman, restrictions on the distributor's resale are lawful unless they unreasonably interfere with competition. *Id.*, at 380. Factors bearing on the reasonableness of such interference are the number of competitors of the manufacturer and

sports business. Financially weak teams, which cannot compete in the talent market, cannot compete on the playing field:

The evidence shows that in the National Football League less than half the clubs over a period of years are likely to be financially successful. There are always teams in the League which are close to financial failure. *Under these circumstances* it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance.<sup>56</sup>

Total financial failure was a very real possibility in 1953, when substantial gate revenues could mean the survival of a team:

The greatest part of [NFL] clubs' income is derived from the sale of tickets to games. Reasonable protection of home game attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football . . . .<sup>57</sup>

The "very existence of the individual clubs" in the NFL is no longer precarious, because professional football in 1971 is a much healthier creature than it was when the antitrust exemptions were granted.<sup>58</sup> Its growth is manifested by the increase in the number of clubs<sup>59</sup> and the number of games played each season.<sup>60</sup> The NFL regular

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whether the distributor handles some of the brands in competition with the manufacturer's product. *Id.* at 381. The NFL has no market competitors and the network handles no other brands. Therefore, to the extent the sale of the game is analogous to the sale of a product, the "home game blackout" is an antitrust violation. *See also* note 69 and accompanying text *infra*.

<sup>56</sup> United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (emphasis added). In the first three decades of the NFL's existence 41 franchises failed. *TV Hearings* 4.

<sup>57</sup> 116 F. Supp. at 325.

<sup>58</sup> It oversimplifies to attribute professional football's growth solely to the protective television legislation of 1961, although that legislation was a substantial contributing factor.

<sup>59</sup> In 1953 the NFL was composed of 12 clubs: Baltimore *Colts*, Chicago *Bears*, Cleveland *Browns*, Detroit *Lions*, Green Bay *Packers*, Los Angeles *Rams*, New York *Giants*, Philadelphia *Eagles*, Pittsburgh *Steelers*, St. Louis *Cardinals*, San Francisco *Forty-Niners*, and Washington *Redskins*. The Dallas *Cowboys* were added in 1960, and the Minnesota *Vikings* in 1961. In 1959, the AFL was founded, and added eight more professional football teams: Boston *Patriots*, Buffalo *Bills*, Dallas *Texans* (now Kansas City *Chiefs*), Denver *Broncos*, Houston *Oilers*, New York *Jets*, Oakland *Raiders*, and San Diego *Chargers*. Since 1966 four more clubs have been added: Atlanta *Falcons*, Cincinnati *Bengals*, Miami *Dolphins*, and New Orleans *Saints*. The NFL is currently comprised of 26 teams. CONSTITUTION AND BY-LAWS OF THE NATIONAL FOOTBALL LEAGUE art. 4.4 (1971); H. CLAASSEN, *THE HISTORY OF PROFESSIONAL FOOTBALL*, 480-83, 503 (1963).

<sup>60</sup> NFL teams played a 12-game season in 1953. With the addition of Dallas in 1960 and Minnesota in 1961, the number of season games increased to 13 and 14 respectively. The eight AFL teams played a 14-game schedule in their first season in 1960. H. CLAASSEN,

season and play off game attendance figure has more than doubled since 1960.<sup>61</sup> During the same period the television rights contract figure has increased by a factor of five.<sup>62</sup>

Originally the blackout was a paradox: a restriction on public access to professional sports contests to promote public access to professional sports contests. Today the blackout restricts public access to games more than it did in 1960,<sup>63</sup> although such economic protection is no longer essential to the NFL.<sup>64</sup> The original purpose of the legislative antitrust exemption has been achieved and there are no new or alternative justifications for its existence.<sup>65</sup> The exemption is neither necessary nor beneficial in 1971.

*supra* note 59. Today the 26 NFL teams play a 14-game season. There have been recent increases, however, in the number of pre-season (exhibition) and post-season (playoff) games. In spite of objections by many players and some coaches, the number of exhibition games played by each NFL team has been increased to six over the past few years. *See SPORTS ILLUSTRATED*, Sept. 13, 1971, at 18. The number of playoff games has also been increased. Originally only a championship playoff game was held unless there were ties. But in 1970 the NFL was reorganized into two conferences with three divisions in each conference. Under the new organization, four teams from each conference enter the playoffs. CONSTITUTION AND BY-LAWS OF THE NATIONAL FOOTBALL LEAGUE art. 20.1 (1971). Four quarter-final games, two semi-final games, the Super Bowl, and a consolation game between the semi-final game losers now constitute the league post-season slate. There are also the Pro Bowl (professional all-star) and College All-Star (Super Bowl winner against the best college graduates) games.

<sup>61</sup>

PROFESSIONAL FOOTBALL ATTENDANCE

League	1960	1965	1970†
AFL	958,000	1,812,000	—
NFL	3,195,000	4,685,000	9,913,000
Total*	4,153,000	6,497,000	9,913,000

\* Does not include exhibition games.

† AFL-NFL merger was effected in 1969.

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 201 (1971); *id.* 1968, at 207 (1968); *id.* 1961, at 196 (1961).

<sup>62</sup> The "pooled rights" contract which triggered the 1961 sports telecasting legislation would have garnered more than \$4.6 million for the NFL for the 1961 season. *TV Hearings* 57. The then separate AFL was under contract for \$2 million for its television game rights, *Id.* On January 26, 1970, NFL Commissioner Rozelle announced that the league had reached a four-year agreement with the three major television networks, reported to involve \$142 million. The agreement covers the telecast rights to all NFL games during the four years of the contract and amounts to \$35.5 million annually. *FACTS ON FILE YEARBOOK* 583 (1970).

<sup>63</sup> *See* note 28 and accompanying text *supra*.

<sup>64</sup> *See* text accompanying notes 56-62 *supra*.

<sup>65</sup> Commissioner Rozelle has stated that the NFL's adherence to its blackout policy "is not the product of greed nor is it an arbitrary or irrational decision." Letter from Pete Rozelle, *supra* note 31. *But see* Joint Statement of Senator Ervin and Congressman

## CONCLUSION

Football's anemia was judicially diagnosed in 1953, and treatment began in the form of a limited blackout privilege. Congress concurred in the diagnosis in 1961, rewrote the blackout prescription, and added the permission to pool television rights. In 1971 the anemia has been cured, but a new ill, avarice,<sup>66</sup> has replaced it. The new ill thrives on the blackout, and that prescription should be withdrawn.<sup>67</sup> Indeed, the NFL has even indicated that the blackout is no longer essential to its existence.<sup>68</sup> Professional football has grown strong enough to fend for

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Celler, N.Y. Times, Oct. 1, 1971, at 49, col. 5. To support his statement, the Commissioner bases the blackout policy on five necessary factors. Three of these directly relate to the "protection" of league revenues, which, considering the league's financial status today, can more properly be termed profit maximization. See text accompanying notes 31, 47 & 49 *supra*. "Good faith with the fans who have already purchased tickets to the game" is the fourth factor. League attitudes towards ticket holding fans (text accompanying note 31 *supra*) indicate that this "good faith" concern does not extend to other areas. Finally, the league desires to avoid having "vast television audiences watching events in comparatively empty arenas" because "fan attendance at the stadium is still the heart of the game." Empty arenas, of course, would not necessarily result if the blackout exemption were abolished. See note 18 *supra*.

<sup>66</sup> Not satisfied with revenues from the sale of season tickets, some NFL clubs have announced they will televise home games via closed circuits to the home territory and thus charge admission for the privilege of seeing a televised home game. N.Y. Times, Sept. 30, 1971, at 66, col. 3. Such league attitudes have prompted Senator Ervin and Congressman Celler to introduce bills before the Senate and House to repeal all antitrust exemptions in favor of professional football and baseball, and to overrule baseball's judicial exemption from the antitrust laws. See note 8 *supra*. Congressman Celler was responsible for guiding the 1961 legislation through the House. In a joint statement with Senator Ervin, he explained his change of heart:

Too often clubs have come crying for special legislation because they believe the health of pro sports is in the national interest. But when it comes to blacklisting, to throttling player negotiations, to charging high prices for tickets, to TV blackouts and to moving franchises at will, they act with the greedy single-mindedness of a child reaching for a candy jar—more, more, more.

N.Y. Times, *supra* note 65.

<sup>67</sup> The exemption favoring the pooling of television rights should not be withdrawn. It gives the NFL a bargaining position from which to negotiate television coverage for all teams in the league. This increases the number of games telecast and the number of fans reached. Commissioner Rozelle made the point well during the 1961 hearings:

The networks have their own problems of production costs, cable charges, costs per homes reached, and sponsor availability. If the league cannot have any voice in the manner in which its games are telecast, the networks will be guided, as they necessarily must, by their own economic interests—which in this instance are not the interests of professional football, [or] of the sports fans of America . . . .

*TV Hearings* 4.

<sup>68</sup> The NFL has voluntarily given up its "outside game blackout" privilege.

Since 1961, the member clubs of the League have abandoned a major element of their legally established blackout rights. They decided in 1966 to engage in a modified lifting of all home territory blackouts, *i.e.*, to permit outside games to

itself without the blackout privilege. Its blackout policies should be turned out to the antitrust wars, where football will be forced to use its strength to defend the blackout on its merits.<sup>69</sup>

*Thomas M. Torrens*

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come into a member club's home territory even when the home team was playing at home. As a result, an NFL home territory regularly offers three NFL game telecasts when the home team is playing away and a minimum of two when the home team is playing at home.

Letter from Pete Rozelle, *supra* note 31. The "home game" blackouts, however, continue.

<sup>69</sup> Withdrawal of the legislative antitrust exemption for football blackouts will not necessarily make future blackouts illegal. It will merely substitute the flexibility of judicial control for the inflexibility of statutory privilege. Blackouts will be required to be utilized "reasonably" or be subject to judicial antitrust sanctions.