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NFL NETWORK BLACKOUTS: OLD LAW MEETS NEW TECHNOLOGY WITH THE ADVENT OF THE SATELLITE DISH

ALAN FECTEAU*

INTRODUCTION

The National Football League (NFL)¹ has been around a long time. Since its inception in 1920,² the NFL has emerged from a poorly-financed, loosely-organized association of struggling clubs into a mega-industry.³

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1. The NFL is an unincorporated, non-profit association of member clubs which own and operate professional football teams. THE NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BY-LAWS, art. 2, § 2.2 (1976) [hereinafter NFL CONSTITUTION].

2. The founding franchise owners of the NFL, then known as the American Professional Football Association (APFA), met at the Hupmobile automobile dealership in Akron, Ohio, during the summer of 1920. The 11 owners each tendered \$100, and elected legendary football player and Olympian, Jim Thorpe, the league's first president. APFA teams included the Akron Steels, Buffalo (N.Y.) All-Americans, Chicago Cardinals, Chicago Tigers, Canton (Ohio) Bulldogs, Cleveland Panthers, Decatur (Ill.) Staleys, Detroit Heralds, Hammond (Ind.) Pros, Rochester (N.Y.) Jeffersons, and Rock Island (Ill.) Independents. Ex-major league baseball player George "Papa Bear" Halas represented the Staleys. Halas, whose franchise later became the Chicago Bears, remained with the NFL more than 50 years as a coach and administrator. See NATIONAL FOOTBALL LEAGUE PROPERTIES, INC., THE NFL'S OFFICIAL ENCYCLOPEDIA HISTORY OF PROFESSIONAL FOOTBALL 18-43 (1973) [hereinafter NFL ENCYCLOPEDIA]. After mergers with rival leagues, and internal franchise shifts, today's expanded NFL consists of 30 franchises, including; the Atlanta Falcons, Buffalo (N.Y.) Bills, Chicago Bears, Carolina Panthers, Cincinnati Bengals, Cleveland Browns, Dallas Cowboys, Denver Broncos, Detroit Lions, Green Bay (Wis.) Packers, Houston Oilers, Indianapolis Colts, Jacksonville Jaguars, Kansas City Chiefs, Los Angeles Raiders, Los Angeles Rams, Miami Dolphins, Minnesota Vikings, New England Patriots, New Orleans Saints, New York Giants, New York Jets, Philadelphia Eagles, Phoenix Cardinals, Pittsburgh Steelers, San Diego Chargers, San Francisco 49ers, Seattle Seahawks, Tampa Bay Buccaneers, and Washington Redskins. See *infra* notes 4-5 & 32-34.

3. The NFL made financial strides under Alvin Raymond "Pete" Rozelle, elected NFL commissioner in 1960. Rozelle negotiated the first league-wide television contract covering the 1962 and 1963 seasons with the Columbia Broadcasting System (CBS) for \$4.65 million. Revealing the emerging high value of televised pro football, CBS thereafter renewed in 1964 for a whopping \$14.1 million. DAVID HARRIS, THE LEAGUE: INSIDE THE NFL 13 (1987). Today, the NFL has television contracts with the Fox Network (FOX), the National Broadcasting Company (NBC), the American Broadcasting Company (ABC), and two nationwide cable television services—the Entertainment & Sports Programming Network (ESPN) and Turner Network Television (TNT). Commentators have argued that by "tying up" most of the

When the NFL opened for business, league franchises could be found in smallish hamlets like Hammond, Indiana, and Decatur, Illinois. More recent history has shown major cities such as Memphis, Tennessee, and San Antonio, Texas, have bid unsuccessfully for league entry.⁴ Other large municipalities, like Oakland, California, and Baltimore, Maryland, have lost their highly-valued franchises to rival cities willing to make better offers.⁵

country's nationwide television broadcasters and cable services, the NFL illegally monopolizes professional football. "A league can effectively eliminate competition by contracting with (multiple) networks." Philip A. Garubo, Jr., Note, *The Last Legal Monopoly: The NFL and its Television Contracts*, 4 ENT. & SPORTS L. Q. J. 357, 360 (1987).

4. Memphis, Tennessee, and Jacksonville, Florida, hosted franchises in two ill-fated rival leagues that sought to compete with the NFL in recent years. In 1974, the Jacksonville Sharks and Memphis Southmen became charter members of the short-lived World Football League (WFL), which expired after two seasons. (The Southmen had actually began as the Toronto "Northmen" before moving to Memphis prior to the start of the first WFL season). Then beginning in 1983, the Jacksonville Bulls and the Memphis Showboats proved to be two of the more stable franchises in the United States Football League (USFL), which lasted three seasons. With respect to the established NFL, Jacksonville and Memphis have manifested two fine examples of how an NFL owner, experiencing a lack of "cooperation" locally, tries to coerce local politicians into helping his club by wooing cities without a league franchise. Unable to secure a new stadium in Baltimore, Colts' owner Robert Irsay visited Jacksonville and Memphis in 1980. In Jacksonville, Irsay received promises of a renovated stadium, limo rides, a police escort, and visits by lovely young women in T-shirts reading "I Got Colt Fever." After a similar reception in Memphis, Irsay declared "We are moving out of Baltimore. At this moment, it's either Memphis or Jacksonville." HARRIS, *supra* note 3, at 365-66. Irsay kept his Colts in Baltimore through the end of the 1983 season, before moving the team to Indianapolis. See *infra* note 5 and accompanying text. Memphis remains without a franchise, but the city of Jacksonville recently secured a team, as the league in 1994 voted to expand to Jacksonville, as well as to Charlotte, N.C.

5. Attracted by the sudden, unexpected availability of the expansive Los Angeles Memorial Coliseum — which was also to soon be renovated by local authorities in anticipation of the 1984 Summer Olympic Games based in Los Angeles, Oakland Raider owner Al Davis moved his team to Los Angeles in 1981. The suddenly-troubled Los Angeles Rams franchise, which had occupied the Coliseum, had recently moved to Anaheim Stadium, south of Los Angeles. The Baltimore Colts, on the other hand, were more directly lured away from Baltimore by a government-funded "sweet deal" — to include rent-free access to a newly-constructed domed stadium, free access to a newly-constructed practice facility, and a substantial low-interest loan — by authorities in Indianapolis, and so the Indianapolis Colts were born, starting with the 1984 season. HARRIS, *supra* note 3, at 363-69. Unlike Oakland and Baltimore, St. Louis represents a city which has been able to replace a previously-lost NFL franchise. The NFL's St. Louis Cardinals vacated the midwest for Phoenix prior to the 1988 season. Originally the Phoenix Cardinals, the franchise re-named itself the Arizona Cardinals in 1994. Private sector assets assumed most of the burden of luring the Cardinals from St. Louis. The many inducements extended to St. Louis owner Bill Bidwill, from a consortium of Phoenix businesses, included: (1) guaranteed attendance revenue; (2) guaranteed concessions revenue; and (3) pay-offs to local Arizona State University (ASU), designed to offset ASU's cost of constructing "luxury stadium boxes" in ASU's 70,000-seat "Sun Devil" stadium, which was also to be made available to the Cardinals. See Hal Lancaster, *St. Louis Cardinal's Deci-*

One can point to several factors that may be said to have contributed to the ongoing, staggering popularity of the NFL. But no factor has been more significant than the advent of national network-televised NFL games.

During the past forty years, the nationwide broadcast networks and the NFL have developed something of a symbiotic relationship. The NFL has provided the networks "up-close" adventure, with real people featured in a "which side are you on" conflict. The networks, in turn, have provided the NFL with national exposure, and substantial revenues from broadcast rights fees.⁶

Though the league and the networks have flourished together, the NFL has been forced to regularly deflect legal challenges related to its relationship with the television industry. One of the most regularly-challenged NFL policies has involved the league's historical propensity to impose a television "blackout"⁷ within a league member's "home territory."⁸ As pro football gained wide popularity, annoyed fans and local media outlets began suing the NFL to have its blackout rule changed or eliminated.⁹

sion to Move Highlights a Trend, WALL ST. J., Jan 18, 1988, at 18. In early 1994 St. Louis, long home to one of the most loyal league sponsors, Anheuser-Busch, Inc., was believed to be on the verge of earning a replacement NFL franchise, as the NFL was said to be about to vote to select St. Louis as an "expansion" franchise city. Surprisingly, however, private financing in St. Louis fell through as the expansion vote approached. The Jacksonville (Fla.) Jaguars, emerged to earn one of the two available league expansion franchises, along with the so-called Carolina Panthers, based in Charlotte, N.C. In 1995, the still-troubled Los Angeles Rams elected to attempt to relocate from Anaheim to St. Louis, which would finally land St. Louis its much-awaited replacement team. The NFL moved to block this proposed relocation and as of the date of this article no move has been undertaken.

6. The NFL negotiated its first collective television rights package in 1962 for two years at \$4.65 million dollars per year. By 1987, the league had signed television rights packages with three national broadcast television networks (CBS, NBC & ABC), and two nationwide cable television services (ESPN & TNT), totaling \$1.438 billion. Garubo, *supra* note 3, at 371. The NFL continued to contract with the five national networks until 1994, when one of the nation's original and bulwark broadcast networks, CBS, found itself outbid by the emerging FOX Network. Landing a contract for NFL coverage has been widely perceived to have been a dramatic step toward FOX's gaining of credibility within the national broadcast television industry as a bona fide "fourth network," that could vigorously compete with the traditional "big three" broadcast networks (CBS, NBC & ABC).

7. In this context, the term "blackout" means to eliminate an otherwise televised event from live television coverage within a specific geographic area.

8. The NFL defines a team's "home territory" as; "The city in which the club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior of the corporate limits of such city." NFL CONSTITUTION, art. IV, § 4.1 (1976)(emphasis added).

9. *Blaich v. National Football League*, 212 F. Supp. 319 (S.D. N.Y. 1962) (blackout in New York of NFL championship game in New York upheld, even where no tickets remained

In cases challenging NFL blackouts, courts have entertained issues under the Federal Sherman Act of 1890,¹⁰ the Federal Copyright Revision Act of 1976,¹¹ the Federal Communications Act of 1934,¹² and even the Constitution of the United States.¹³

The league has historically asserted television blackouts are necessary to protect local ticket sales. League administrators have argued the NFL should not be required by the law to "give something away."¹⁴ Fans have countered, saying that the NFL has had it "both ways" to the extent that the NFL has received nationally-generated income from television, while at the same time the league has received locally-generated income from ticket sales. Fans have also relied upon studies questioning the validity of the assumption that local televising harms local ticket sales.¹⁵

Legal issues regarding NFL television blackouts date back to the early days of television, and have persisted through the advent of cable television and the home earth station or satellite dish. Although consti-

unsold); *WTWV v. National Football League*, 678 F.2d 142 (11th Cir. 1982)(NFL's home territory, for the purposes of television blackout, extended to include stations outside home territory, with signal penetration into home territory); *see also* *Colorado High Sch. Activities Ass'n v. NFL*, 711 F.2d 943 (10th Cir. 1983)(NFL held to have received insufficient notice to comply with statutory exception to television blackout rule, designed to protect local ticket sales to high school football game).

10. *See infra* note 19; *Blaich*, 212 F. Supp. 319 (blackout in New York of NFL championship game upheld, even where no tickets remained unsold, as within the statutory term home game, for the purposes of immunization from Sherman Act of 1890); *WTWV*, 678 F.2d 142 (NFL's home territory, for the purposes of television blackout, extended to include stations outside home territory, with signal penetration into home territory, held consistent with purpose of immunization from Sherman Act of 1890).

11. *See infra* note 70; *National Football League v. McBee & Bruno's*, 621 F. Supp. 880, (E.D. Mo. 1985), *aff'd*, 792 F.2d 726 (1986) (use of Home Earth Station or satellite "dish" to intercept blacked out NFL game by bar owner not covered by statutory exemption from the Copyright Revision Act of 1976, allowing unauthorized retransmission with device "commonly used in private homes").

12. *National Football League v. The Alley*, 624 F. Supp. 6 (S.D. Fla. 1983)(transmission of locally blacked out game not under the Communications Act of 1934 proviso allowing unauthorized interception of material "transmitted. . .for the use of the general public").

13. *Blaich*, 212 F. Supp. at 319 (no deprivation of "property right," for the purposes of the Constitution's 5th Amendment Due Process Clause).

14. Some commentators generally support the NFL on this position. *See* Gary R. Roberts, *Pirating Satellite Signals of Blacked-Out Sports Events: A Historical and Policy Perspective*, 11 COLUM.-VLA J. L. & ARTS 363, 383-86 (1987).

15. In the mid-1970s, the Federal Communications Commission (FCC) concluded that anti-blackout legislation, enacted by Congress from 1973 to 1976, *see infra* notes 52-53 and accompanying text, caused "no significant detrimental impact on any sport." *Inquiry into Professional Sports, 1976: Hearings Before the House Select Comm. on Professional Sports*, 94th Cong., 2d Sess., pt. 2, at 53 (1976).

tutional issues raised by NFL blackouts appear to be something of a stretch,¹⁶ other claims regarding: (1) monopoly; (2) copyright; and (3) broadcast statutes, are more plausible.

This paper outlines development of the law regarding NFL blackouts in the three areas listed above, with some predictions for the future. The paper also analyzes how courts have broadly interpreted federal statutes, to the benefit of the NFL, throughout the technological changes characterizing the telecommunications industry during the last forty years.

I. MONOPOLY

A. Monopoly Challenges to NFL Blackouts

In different contexts, the National Football League has been sued for monopolizing professional football in the United States.¹⁷ However, most plaintiffs raising federal anti-trust claims against the NFL under the Sherman Act of 1890,¹⁸ have been unable to show a "causal link" between the NFL's monopoly status and injury,¹⁹ or have been unable to show definitive damages to earn a significant jury award.²⁰

16. The court evidenced little regard for the plaintiff's Fifth Amendment claim. The court stated:

[P]laintiffs assert they are deprived of a valuable property right without due process of law, contrary to the [5th] Amendment of the [f]ederal Constitution. (Plaintiffs assert a right to) observe the telecast in common with the millions of Americans to whom it is being televised . . . While it is unnecessary for the purposes of this motion that the Court consider and pass upon this somewhat *nebulous constitutional issue* . . . nonetheless it is of *doubtful validity*.

Blaich, 212 F. Supp. at 322 (emphasis added).

17. See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (established "Rozelle Rule" named after longtime NFL commissioner Alvin Raymond "Pete" Rozelle, held illegal restraint of trade under the Sherman Act of 1890). In dicta, the court flatly stated the NFL "enjoys a monopoly over major league professional football in the United States." *Id.* at 610.

18. The Sherman Act of 1890 reads, in pertinent part, "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . .," 15 U.S.C. § 1 (1988).

19. See *Kapp v. National Football League*, 390 F. Supp. 73, (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978) (jury found no causal link between proven league "group boycott," otherwise violating the Sherman Act of 1890, and damage to plaintiff).

20. See *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986) (jury awarded only nominal damages to plaintiff in absence of willingness to speculate as to actual damages, after plaintiff proved illegal monopoly, and harm caused to plaintiff).

1. Early Anti-Trust Challenge

In the early days of televised NFL games after World War II, the league's twelve clubs separately sold broadcast rights to local television stations at their discretion without much league interference. Fearful of lost ticket revenue, most teams refrained from selling television rights to home games. NFL rules also prevented teams from selling television rights where a game could be viewed in the home territory of another team.²¹

The practical impact of the league restraint resulted in a blackout of all NFL games when the local team played at home. It was only when the local team played away from home, that the game could be seen in that city.²²

In the early 1950s the NFL's policy seemed heavy-handed, as there were few television stations and some of the league's twelve franchises' home territories intersected. Two teams occupied Chicago,²³ while both Washington and Baltimore²⁴ had franchises.

NFL blackout rules began to impact league scheduling, which annoyed some franchises.²⁵ Viewing choices became so limited that fans often found themselves with no game to watch, even though several games were being televised, simply because of league rules. After receiving complaints from fans and local television station operators, the Federal Justice Department challenged the NFL's blackout rules in 1953 as violating the Sherman Act of 1890.²⁶

A federal court in Philadelphia upheld the portion of the NFL's television scheme regarding blackouts of home territories for the purposes of *home games*—but struck the portion protecting home territories when the home team played *away* from home.²⁷

21. United States v. National Football League, 116 F. Supp. 319, 322-27 (E.D. Pa. 1953).

22. *Id.*

23. The Chicago Bears and Chicago Cardinals occupied the Chicago home territory for more than 30 years, until the end of the 1950s. NFL ENCYCLOPEDIA, *supra* note 2, at 301-03. Cardinal owner Bill Bidwill moved the team to St. Louis in 1960, then to Phoenix in 1988. *Id.* at 110; *See also, supra* note 5 and accompanying text.

24. The Baltimore Colts franchise eventually moved to Indianapolis in 1984. *See supra* notes 4-5.

25. The Chicago Bears and Chicago Cardinals franchises found themselves particularly affected by blackout rules. Naturally, the Chicago teams wished to avoid scheduling home games opposite each other, so as to maximize ticket sales for each franchise in Chicago. But if the Bears played away from Chicago, while the Cardinals played at home, *neither* team would be seen on local television.

26. *See supra* note 23.

27. The court examined the NFL blackout rules by using the "Rule of Reason" analysis. The court stated;

The league declined to appeal the decision, leaving itself subject to a court decree regarding any future league agreements with respect to television. The NFL likely did not contest the decision because, in the early 1950s, television revenue did not represent a substantial portion of the league's income.²⁸ At that time, the NFL had little at stake. But soon, that changed.

2. The "Greatest" Game

On December 28, 1958, the NFL staged what has been called the "greatest game ever played,"²⁹ when the popular New York Giants hosted the upstart Baltimore Colts for the league's championship contest. The Colts won the title, 23-17 in overtime, after the game had ended in a 17-17 tie.³⁰

Despite the game's thrilling conclusion, players and coaches from both clubs have often since stated that the game on the field was not played particularly well. What has made the game great, in the view of others, was the more than 50 million people who watched the game on television.³¹

The first restriction imposed by [the NFL] is a *reasonable one* and a legal restraint of trade. . . The *reasonableness* of [the other] restriction must also be tested by its effect on gate receipts of a team's home games. It is obvious that on a day when the home team is playing an away game there is no gate attendance to be harmed back in its home area[.] . . Several of defendants' witnesses attempted to justify the restriction with the opinion that it is necessary in this situation to protect the home team's 'good will[.]'. However. . . this is nothing more than conjecture.

United States v. National Football League, 116 F. Supp. at 326 (emphasis added).

Since the court applied a "Rule of Reason" analysis, it must have treated the NFL as a group of multiple actors, for the purposes of anti-trust law. Some commentators believe sports leagues to be "single entities," and, therefore, divorced from anti-trust liability. See Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983).

28. Roberts, *supra* note 14, at 370.

29. See *infra* notes 30-31 and accompanying text.

30. The game marked the first sudden death overtime game in NFL history, decided only after the teams were forced to play an extra indefinite time period, beyond the standard 60 minutes. The game ended with the Colts winning after running back Alan "The Horse" Ameche scored on a short plunge into the end zone. See NFL ENCYCLOPEDIA, *supra* note 2, at 110-11.

31. Even the league's own publications seem to concede the game to have been of average quality, but of high impact due to the large television audience.

This is the game that did it for the NFL. It has been called the *greatest game ever played*. That can be argued, but one thing is certain: As John Unitas led the Colts in their sudden-death drive to the winning touchdown, pro football was *exploding into the mind* of America.

Id. at 110 (emphasis added).

The 1958 NFL Championship Game's viewership statistics shocked the offices of the NFL and the networks. All at once, the league began regarding network television as the best way to expose pro football to the masses. For the next three seasons, the league struggled with how to best exploit national television, while at the same time protecting local ticket sales.

3. A New League Brings a New Approach

The high television ratings from the 1958 NFL title game also quickly got the attention of Texas millionaire oil mogul Lamar Hunt. An avid sports enthusiast, Hunt wanted "in" on pro football. He proposed to purchase the NFL's least successful franchise, the Chicago Cardinals,³² and move the team to Dallas.

Perhaps because the NFL had sponsored an unsuccessful Dallas franchise in 1952,³³ the league refused Hunt's offer. Thereafter in 1959, the jilted Hunt joined with other prospective pro football owners to form the American Football League (AFL).³⁴ The AFL began play in 1960

32. Roberts, *supra* note 14, at 371 n.13. The Cardinals began as a charter franchise of the APFA in 1920. Until 1960, the Cardinals had never been forced to relocate, a feat unmatched in the NFL to that point. Throughout the 1950s the Cardinals had performed poorly on the field. That decade the Cardinals enjoyed only one winning season, finishing with the league's worst record four times. NFL ENCYCLOPEDIA, *supra* note 2, at 301-03. Attendance at Cardinal games dipped to low levels. Former NFL place-kicker and receiver Pat Summerall, veteran sports announcer with CBS, classified the 1950s Cardinals as "not the big leagues." After declining Hunt's offer, the NFL moved the Cardinals to St. Louis for the 1960 season. *Id.* at 110.

33. In 1952, the NFL experimented with the Dallas market. The league's New York Yanks (previously Boston Yanks) franchise moved to Dallas after the 1951 season, becoming the Dallas Texans. The experiment turned out to be a dramatic flop, however, as the Texans lost 11 of 12 games and most of their already small band of followers. Before the regular season ended, the NFL moved the floundering franchise to Hershey, Pennsylvania. The league assumed player contracts for the rest of the season. In 1953, the Texans became the Baltimore Colts. NFL ENCYCLOPEDIA, *supra* note 2, at 302. The Colts, as it turned out, won the NFL title in 1958. *Id.* at 110.

34. Eight franchises formed the AFL. Hunt owned the "new" Dallas Texans (*see supra* note 33, for discussion of the NFL version of the Dallas Texans), while other AFL clubs included the Houston Oilers, Los Angeles Chargers, New York Titans, Denver Broncos, Buffalo Bills, Boston Patriots and Minnesota Vikings. Before AFL play began in 1960, Viking ownership accepted an offer for an NFL franchise, beginning in 1961. The AFL awarded its vacant eighth franchise to the Oakland Raiders. The Vikings' shift resulted in an anti-trust suit by the AFL against the NFL. *See American Football League v. National Football League*, 205 F. Supp. 60, 71-75 (D. Md. 1962) (franchise shift held not as a result of NFL attempt to monopolize pro football). After six seasons successfully competing against the established NFL, the AFL in 1966 agreed to "merge" with the NFL. Between AFL inception and merger completion in 1970, the Los Angeles Chargers had moved to San Diego, the Dallas Texans had moved to Kansas City (renamed the Kansas City Chiefs), and the New York Titans had simply

with eight league members playing before sparse crowds in worn, Great Depression-era stadiums.

But despite consistently poor local ticket sales in its early years, the AFL survived. In part, the rival league stayed afloat because of a novel television rights contract it had arranged with the American Broadcasting Company (ABC). The AFL pooled its broadcasting rights into a package, then sold the package to ABC. The fledgling AFL then evenly distributed the television revenue among the eight league members.³⁵

The AFL's pooling concept caught the eye of newly-appointed NFL commissioner Alvin R. "Pete" Rozelle. If the AFL could use television revenue to cover for *generally* poor ticket sales, why couldn't the NFL use such funds to compensate for low ticket sales by weak NFL franchises, or even the more solid franchises that may be located in small television markets?

B. *The Sports Broadcasting Act of 1961*

After battling through internal squabbles,³⁶ and an adverse federal court ruling,³⁷ Rozelle pushed the Sports Broadcasting Act of 1961

been renamed the New York Jets. The AFL had also added the Miami Dolphins and Cincinnati Bengals franchises. Ultimately, the NFL found itself forced to assume the AFL's entire roster of teams, a feat unmatched by any rival league in American professional sports history. In 1950, the NFL had also merged with the rival All-American Football Conference (AAFC), agreeing to assume three of 7 existing AAFC clubs in 1949; the Cleveland Browns, San Francisco 49ers, and the Baltimore Colts. Ironically, the Browns won the NFL's 1950 league championship. The Colts franchise proved not to be as competitive, however, disbanding after the 1950 season. Pro football returned to Baltimore in 1953, as a second version of the Colts surfaced after that NFL franchise had been based in Boston, New York and Dallas. *See supra* note 33 and accompanying text. Included in the AFL-NFL merger terms, approved by Congress, was an agreement to play a championship game after their respective seasons ended. The first inter-league championship game after the 1966 season (later dubbed the "Super Bowl") featured the NFL's Green Bay Packers and the AFL's Kansas City Chiefs in a game won by the Packers, 35-10, at the Los Angeles Memorial Coliseum. NFL ENCYCLOPEDIA, *supra* note 2, at 126-27.

35. Roberts, *supra* note 14, at 371.

36. Some NFL owners, like the Washington Redskins' George Preston Marshall, objected to the revenue-sharing plan. Through the 1950s, Marshall considered the whole southeast of the United States as Redskins' home territory, and he did not endear himself easily to the notion that NFL franchises from smaller markets would receive the same portion of network television revenue as the Redskins. HARRIS, *supra* note 3, at 15.

37. The NFL had more to worry about with respect to pooling agreements than the AFL. NFL television policies found themselves remaining under the scrutiny of a 1953 decree resulting from *United States v. National Football League*, 116 F. Supp. at 319. Therefore, the NFL returned to the same federal courthouse to test the agreement. The court found the agreement violative of the terms of its prior decree. According to the court, the league's agreement placed too much discretion regarding where games were to be televised with the network. The court stated the league's agreement "restrict[ed] the individual clubs from determining

through Congress.³⁸ The Act allowed professional sports leagues to pool television rights, then sell them to a network in a fashion exactly as devised by the AFL.³⁹

The Act immunized the NFL from the above-mentioned adverse ruling, delivered from the same court that had reviewed NFL blackout rules in 1953.⁴⁰ Since the NFL remained subject to that court's decree, the court had properly reviewed the NFL plan, and struck it down as violating the anti-trust laws. But when Congress passed the Sports Broadcasting Act, federal lawmakers effectively "overruled" the federal court.

1. Blackout Provision

The Act also contained an important provision regarding television blackouts. Under the provision, Congress *adopted* part of the federal court's 1953 ruling regarding the NFL. The Act banned protection of home territories from other sports league teams when a team played away from home, but allowed blackouts for the benefit of a team playing at home in the name of protecting ticket sales to the game.⁴¹

It is important to note that under the Act, blackouts included *any type* of sports league-imposed blackout. So if the NFL wished to black-

the areas within which. . .telecasts of games. . .may be made," as barred under the decree. *United States v. National Football League*, 196 F. Supp. 445, 447 (E.D. Pa. 1961). After the decision, the NFL and AFL for once agreed on something. With pooling agreements in both leagues in jeopardy, the rival leagues spent the next several weeks lobbying Congress for what would, in only 72 days, become the Sports Broadcasting Act of 1961. *See infra* notes 38-39.

38. Pub. L. No. 87-331, 75 Stat. 732 (1961)(codified as amended at 15 U.S.C. §§ 1291-1295 (1988)).

39. The Sports Broadcasting Act of 1961 allowed sports leagues to package broadcast rights, sell the package, then pool the resulting revenue among the member franchises. The law states;

The anti-trust laws. . .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.

15 U.S.C. § 1291 (1988)(emphasis added).

40. *See supra* note 37 and accompanying text.

41. The Act mirrored the 1953 federal court ruling that stated, in pertinent part; [The Sports Broadcasting Act] shall not apply to any joint agreement. . .which prohibits any person to whom 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*.

15 U.S.C. § 1292 (1988)(emphasis added).

out *all other league games* from an area, to protect the local entry playing at home that day, it could legally do so.

2. AFL Competition

In the early years of the Sports Broadcasting Act a growing incentive emerged for the NFL *not* to blackout games. Increasingly, the NFL did not mind beaming out-of-town league games into home territories, even on days when the local team played at home. Competition from the rival AFL provides insight as to why.

The NFL found itself in an exposure battle with the emerging AFL at the time, and the NFL apparently became willing to sacrifice local ticket sales to match AFL television exposure.

AFL policy allowed for out-of-town league games to be viewed in any given AFL city, even while a local AFL team played at home. The AFL reasoned that by so doing, overall positive exposure for the AFL would increase. Soon the NFL matched the AFL's strategy, despite statutory authority for the NFL to blackout at will.

In the end, the NFL and AFL competed for six years, with the leagues announcing a merger in 1966.⁴²

3. Local Ticket Sales or National Exposure?

Since the AFL-NFL merger was consummated in 1970, the expanded NFL has returned to a policy limiting television interference with the local team playing at home. If a league member plays at home, no other game can be shown locally during that time period.⁴³

The NFL's flip-flopping with this policy raises the reasonable question: What is more important to the NFL, local ticket sales or nationwide television exposure?

The NFL's current monopoly status seems to provide clues as to the answer. During a period of competition with a rival league the NFL opted for nationwide television exposure, therefore, one can reasonably conclude that for all its talk about protecting local ticket sales the NFL is really more interested in protecting television markets. Once the leagues merged, and the then-enlarged NFL returned to monopoly sta-

42. See *supra* note 34.

43. Today, both FOX and NBC televise several NFL games each Sunday during two time periods: (1) 1 to 4 p.m. (early); and (2) 4 to 7 p.m. ET (late). If the NFL's Atlanta Falcons, for instance, play a game at home during the early period, and that game is not sold out, neither network can show any other league game during that period in the Atlanta home territory.

tus, protection of local ticket sales seemed to take on renewed importance.

C. Court Interpretation of the Sports Broadcasting Act of 1961

The first court to review league policy under the Sports Broadcasting Act of 1961 expanded its language for the benefit of the NFL. The court in *Blaich v. National Football League*, held that the NFL could legally blackout the otherwise sold out 1962 league championship game between the Green Bay Packers and the host New York Giants.⁴⁴

The court held the Act's language could be easily read so that the statutory term "game at home" included a league championship game played at home.⁴⁵ According to the court, it would be foolish to judicially amend the Act by interpreting the term to also mean "except for a championship game."⁴⁶

Although its statutory interpretation seemed sound enough, the *Blaich* court seemed to gloss over the key fact that the game had been sold out well ahead of time. Since the purpose of the statute had purportedly been to protect local ticket sales, a sold out contest would appear to obviate the need for statutory protection. In the case of a sellout, it would appear that there would be no local ticket sales left to protect.

The *Blaich* court relied on a dubious historical examination of the less-than-capacity crowds for NFL championship games, and concluded "[t]he fact that *this year's* game is a sellout does not overcome the demonstrated experience of recent years."⁴⁷ The rationale is questionable because the examined years were *before* enactment of the Sports Broadcasting Act of 1961, which officially established the NFL's rationale as local ticket sale protection.

Although the NFL blackout prevailed in *Blaich*, arguably the seed had been planted for future change. How long could the NFL continue to blackout sold out home games, with the clear purpose of the immunizing Sports Broadcasting Act of 1961—the protection of local ticket sales?

44. *Blaich*, 212 F. Supp. at 319.

45. *Id.* at 322.

46. *Id.*

47. *Id.* (emphasis added).

1. Congress Softens Blackout Policy

About ten years after *Blaich*, the NFL's historically poor Washington Redskins started winning games,⁴⁸ and attracting new fans, including some who had been elected to Congress. When Congressional representatives experienced difficulty obtaining tickets⁴⁹ to sold out Redskin home play-off games⁵⁰ against the Green Bay Packers and Dallas Cowboys, the inevitable happened.

Before the next season started, Congress had amended the Communications Act of 1934,⁵¹ requiring the NFL to lift any local blackout of a home game if the game is sold out⁵² at least seventy-two hours in advance of the scheduled starting time.⁵³

The NFL complained that local ticket sales would be lost because large numbers of local fans, who might otherwise have bought tickets in advance of the deadline, would delay a buying decision until the last moment—in anticipation of a ruling as to whether the game will be locally-televised. With that dubious argument,⁵⁴ however, the league convinced Congress to write the law so as to allow it to expire on December 31, 1975.⁵⁵

48. In 1972, the Redskins enjoyed their best season on the field since 1945. NFL ENCYCLOPEDIA, *supra* note 2, at 301-08. The Redskins finished with 11 wins and only three defeats on their way to a league championship berth against the Miami Dolphins. Miami won Super Bowl VII by a score of 14-7. *Id.* at 156-59.

49. Roberts, *supra* note 14, at 379-81.

50. At the time of the decision in *Blaich* the NFL sponsored only one post-season game. It was a title game featuring two conference champions. The AFL used the same system. The leagues soon employed play-off systems, with more teams in post-season. By the late 1960s, a play-off team needed two play-off victories simply to reach the championship contest.

51. 47 U.S.C. § 101 (1975).

52. According to the amendment, a game was "sold out" at the point when tickets "available for purchase by the general public *one hundred and twenty hours* or more before the scheduled beginning time of such game have been purchased *seventy-two hours* or more" before the scheduled starting time of the game. *Id.* (emphasis added).

53. Congress amended the Communications Act of 1934 to read, in pertinent part:

If any game of a professional sports club is to be. . . (televised). . . and all tickets of admission for seats at such game which were available for purchase by the general public one hundred and twenty hours or more before the scheduled beginning time of such game have been purchased *seventy-two hours or more* before (the start of the game), no agreement which would prevent the. . . (telecasting). . . of such game. . . shall be valid.

The Communications Act, 47 U.S.C. § 331 (1975), amended by Pub. L. No. 93-107, 87 Stat. 350 (1973) (repealed under its own terms December 31, 1975) (emphasis added).

54. As suggested by the court in *National Football League* (116 F. Supp. at 322-27) any speculation as to the ticket buying habits of football fans should not be taken seriously by the courts or lawmakers as it is "nothing more than conjecture." *Id.* at 326.

55. 47 U.S.C. § 331 (1975).

2. Instant Replay—Local Ticket Sales or National Exposure?

Since the statute expired, the NFL has voluntarily adhered to its terms with one exception.⁵⁶ Interestingly, under current NFL rules, where a franchise sells all its tickets in time to allow for a local telecast, *no other* NFL game can be shown on the telecasting network's local affiliate that day. This is the case even where a game had been previously scheduled to be televised, and starting times for games *do not conflict*.

For example, imagine that the NFL's Atlanta Falcons play at home, starting at 1:00 p.m., Eastern time. The game would be blacked out on the Atlanta FOX-affiliated station. A later game would routinely be scheduled by FOX and the NFL for Atlanta, likely featuring a San Francisco 49ers or Arizona Cardinals home contest from the West.

When the Falcons' game sells out, the NFL lifts the local blackout on the early Falcons game. Strangely enough, however, the NFL goes one step further and *also eliminates* the later game from Atlanta FOX coverage. An old movie is dusted off and appears on the screen. The NFL's television "penalty" imposed upon localities for high ticket sales seems to undermine the purpose the NFL put forth in support of the Sports Broadcasting Act of 1961—to protect such sales. If the NFL believes local ticket sales are important enough to warrant statutory protection, why would the league effectively penalize local viewers in NFL cities by reducing league television coverage, after other locals have filled the stadium?

Arguably, the answer can be found by examining who regularly purchases remaining tickets to sold out NFL games. Often a local network affiliate, which otherwise regularly televises the games of a given NFL franchise when the team is away from home, purchases the remaining tickets to that team's home contests in the interest of local goodwill.⁵⁷ The NFL is, of course, powerless to stop the purchase and allows the local blackout to be lifted. Not wishing to give one network an edge in NFL exposure, simply because some local network affiliate is willing to buy remaining tickets, the league chooses to remove any further televised games from that network affiliate that day.

Still, the NFL's policy glibly assumes network affiliates—not fans—always buy remaining tickets.

56. Roberts, *supra* note 14, at 380-81.

57. For instance, let's say an Atlanta Falcons home game against the Los Angeles Rams nearly sold out before the deadline. Predictably, public pressure locally would be applied to Atlanta's CBS affiliate, which otherwise carries most Falcon away contests, to purchase the remaining tickets before the deadline, and lift the blackout.

3. Signal Penetration into Home Territories

A federal court in Florida, in like manner of the *Blaich* court, more recently loosely interpreted the Sports Broadcasting Act of 1961 for the benefit of NFL blackout rules.⁵⁸

Since passage of the Act, the NFL has interpreted the statute's section regarding television blackouts of home territories to include television stations with studios and transmitters outside the seventy-five-mile limit, but with signal penetration inside the protected zone.⁵⁹ According to the league, the NFL could blackout home games from telecast on such stations.

The studios and transmitter of television station WTWV in south Florida were located beyond the seventy-five-mile barrier defining the Miami Dolphins' home territory, but the station signal easily penetrated the blackout zone so WTWV tested the NFL's interpretation of the Act in court.⁶⁰

The court held for the NFL based upon the view that the purpose of the Act—to protect local ticket sales—would be undermined if the plaintiff were allowed to beam Dolphin home games inside the seventy-five-mile NFL radius.⁶¹

The legislative history surrounding the language of the Sports Broadcasting Act of 1961 is inconclusive.⁶² But clearly, Congress seemed to codify part of the 1953 case *United States v. National Football League* as part of the Act.⁶³ Testimony in that case by then NFL commissioner Bert Bell defined a league's home territory as not inclusive of television stations and transmitters located beyond the seventy-five-mile circle.⁶⁴

58. WTWV, 678 F.2d 142.

59. Robert L. Waldman, *Antitrust Law — Signal Penetration or Station Location: the Scope of the National Football League's Television Blackout Antitrust Exemption*, 6 W. NEW ENG. L. REV. 877, 886-89 (1984).

60. WTWV, 678 F.2d at 142.

61. *Id.* at 146.

62. Waldman, *supra* note 59, at 886.

63. *Id.* at 883-886.

64. In testimony at trial, Bell testified that a home territory did not impact signals from television stations with transmitters located outside the home territory, but with signal penetration into the home territory.

Court questioning of Bell provides insight, and is provided below in pertinent part:

Q. This rule may not be so clear in some points. Take this situation: A new . . . television station has just been opened, a very powerful one, just outside the 75-mile limit. The studio is in Reading, within the 75-mile limit, but the transmitter is just outside the 75-mile limit. How do you take a situation of that kind under your rule?

A. Well if the station was within the 75-mile limit —

The impact of a signal penetration definition for the NFL's federally endorsed home territory is to greatly enlarge the territory for the purposes of television blackouts. Because a station's signal may be seen within the seventy-five-mile zone, viewers residing outside the zone are effectively pulled into the zone for the purposes of the blackout.

4. Interpreting the Sports Broadcasting Act—Language or Purpose?

In *Blaich*, the court strictly interpreted the language of the Sports Broadcasting Act of 1961, giving little weight to a key fact striking at the purpose of the Act. However, in *WTWV*, the court relied upon the purpose of the Act as the basis of its decision. It appears the only judicial consistency evidenced between *Blaich* and *WTWV* is that the court ruled for the NFL both times.

5. Dish Owners Emerge: Old Statutes v. New Technology

Courts backed the NFL's right to blackout telecasts throughout the emergence of nationally-televised professional football. Bouncing games across the continent required use of specialized equipment to send and receive signals, to include home earth stations or satellite dishes. For years, professional broadcasters monopolized this sort of historically expensive hardware. Consumers simply could not afford to outfit themselves with satellite dishes and other such high-tech communications equipment.

In recent years, of course, that has changed. The satellite dish has become increasingly available and affordable to consumers and small businesses alike. With respect to NFL blackouts, the result of the advent of the satellite dish has been predictable, and is generally described in Part Two and Part Three of this article. Satellite dish owners have by-

Q. Understand, the studio is but the transmitter is not and it is so powerful that. . .it is going to beam right down in Philadelphia.

A. If it is outside the 75-mile limit —

Q. What, the studio, or the transmitter?

A. Where it is sent from.

Q. The transmitter.

A. Where it is sent from, yes. If it is sent from the transmitter and that is outside the 75-mile limit. That happens, Your Honor, to us, to our New York stations and different stations outside the 75-mile limit. . .*Now in my opinion what we have to do is learn to live with this situation.*

Id. at 882-83, quoting Record at 1813-1814, *United States v. National Football League*, 116 F. Supp. 319.

Some commentators argue the court failed to give enough consideration to Bell's testimony, as Congressional intent relating to the Act seemed to include codifying the decision. Waldman, *supra* note 59, at 882-83.

passed NFL blackouts with the new competing technology. The league quickly sought courtroom protection for broadcasts from unauthorized reception. Since courts have been forced to apply dated legislation to consumer use of modern equipment, the results have not been without strained reasoning.

II. COPYRIGHT LAW: NFL 1, DISH OWNERS 0

To date, there has been one challenge by a home earth station owner to the NFL television blackout policy under the Federal Copyright Revision Act of 1976.⁶⁵

In St. Louis, several bar owners imported the "dirty feed"⁶⁶ of blacked-out St. Louis Cardinals home games with a satellite dish they had purchased and placed atop their buildings. The bar owners freely admitted pirating the plaintiff NFL's dirty feed, but the bar owners claimed protection from the NFL's reliance upon the Act under an exemption in the Act. The exemption allowed retransmitting otherwise copyrighted material with "apparatus of a kind commonly used in private homes."⁶⁷

Enacted before satellite dishes were generally available to consumers, Congress passed the exemption to protect small businesses from liability for using audiovisual equipment to retransmit otherwise copyrighted material.⁶⁸

Two lower federal courts and the Eighth Circuit held against the bar owners as they were not yet prepared to conclude that satellite dishes amounted to audiovisual equipment "commonly used in private homes" for the purposes of the statute.⁶⁹

Interestingly, however, the circuit court left itself open to the proposition that some day satellite dishes would be commonplace in private homes, and thereby might fall within the Act's exemption.⁷⁰ In so doing,

65. 17 U.S.C. § 101 (1988).

66. Signals sent from event to network headquarters. The "clean feed" contains no commercial advertising. Advertisements are added by the network at its headquarters to create the "dirty feed," which is then transmitted back to the broadcast area. Roberts, *supra* note 14, at 365-66.

67. 17 U.S.C. § 110(5) (1988).

68. Francis M. Nevins, *Antenna Dilemma: The Exemption from Copyright Liability for Public Performance Using Technology Common in the Home*, 11 COLUM.-VLA J.L. & ARTS 403, 406-07 (1987).

69. National Football League v. Cousin Hugo's, 600 F. Supp. 84 (E.D. Mo. 1984); *McBee & Bruno's*, 621 F. Supp. 880 *aff'd*, 792 F.2d 726.

70. *McBee & Bruno's*, 621 F. Supp. at 885.

the circuit court in *National Football League v. McBee & Bruno's*⁷¹ properly sent out a warning signal to the NFL and Congress that an amendment to the Copyright Revision Act of 1976 may be in order if satellite dish use by consumers expands.

III. COMMUNICATIONS LAW: NFL 2, DISH OWNERS 0

To date, there has been one challenge to the NFL blackout rules by a home earth station under the Federal Communications Act of 1934.⁷²

Like the bar owners in *McBee & Bruno's*, the owners of The Alley, Inc., in Miami, freely admitted pirating otherwise locally-blacked-out NFL games featuring the Miami Dolphins. Unlike the St. Louis bar owners, the defendants in *National Football League v. The Alley*,⁷³ claimed protection under the Communications Act of 1934, not the Federal Copyright Revision Act of 1976.⁷⁴

The principal legislation regulating broadcasting in the United States, the Communications Act, prohibits unauthorized interception of "communication by wire or radio."⁷⁵ However, the same section of the Act contains a proviso, allowing unauthorized interception where the communication is transmitted "for the use of the general public."⁷⁶

In its defense, The Alley, Inc. argued that the NFL's "dirty feed"⁷⁷ had been broadcast "for the use of the general public," and so was covered by the proviso. In a brief opinion, without much discussion, the court in *The Alley* declared that the NFL's satellite communications were not intended for public use.⁷⁸

There can be little doubt that the court correctly found that the NFL's satellite feed was not intended for public use, at least insofar as the otherwise blacked-out Miami area is concerned. As discussed in Part One above, the Sports Broadcasting Act of 1961⁷⁹ allows local blackouts. As such, the court's holding is well-grounded. Still, the court's rationale appears to be wanting. According to the court, "[T]he necessity of spe-

71. *Id.*

72. 47 U.S.C. § 101.

73. *The Alley*, 624 F. Supp. 6.

74. 17 U.S.C. § 101.

75. 47 U.S.C. § 605(a) (1975).

76. *Id.*

77. See *supra* note 66 and accompanying text.

78. *The Alley*, 624 F.Supp. at 7. The Federal Communications Commission later concluded that network feeds could not be legally pirated under § 605(a). See *Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, 2 F.C.C.R. (Vol. 6) 1669, 1695 (1987).

79. 15 U.S.C. § 1292 (1988).

cial and expensive receiving equipment not in common household use demonstrates that the satellite transmissions cannot have been intended for use by the general public."⁸⁰

According to the court, because satellite dishes were expensive at the time of its ruling, the NFL could not have intended to use them to transmit information for public use. By this rationale, the court seems to have tied the NFL's communicative intent to the cost and availability of a product. This rationale is strained, especially when one considers that satellite dish prices have declined in recent years, making them more available to consumers. As stated by the court in *McBee & Bruno's*, satellite dishes may some day be much more commonplace.⁸¹

In its own way, therefore, the court in *The Alley* has left an opening under the Communications Act of 1934 similar to the opening left by *McBee & Bruno's* under the Copyright Act of 1976. If and when satellite dish use becomes less expensive, the NFL's intent to communicate for the use of the general public will change accordingly. As such, unauthorized interception under the Communications Act of 1934's proviso may well be permissible.

IV. PUBLIC REACTION TO NFL BLACKOUTS

Perhaps because of the local notoriety of *National Football League v. The Alley*,⁸² a group of Miami bar owners organized the now-defunct United Sports Fans of America (USFA).⁸³ A central stated purpose of the USFA was to oppose what it believed to be oppressive NFL television policies, including blackouts.⁸⁴

A. Signal Scrambling — "Blacking Out" the Satellite Dish

Just prior to the 1990 NFL season, the league announced it would code the broadcast signal, or "scramble"⁸⁵ all NFL games—except for the NFL's weekly "Monday Night Football" game carried on ABC, and

80. *The Alley*, 624 F. Supp. at 10 (emphasis added).

81. *McBee & Bruno's*, 621 F. Supp. at 882.

82. *The Alley*, 624 F. Supp. at 6.

83. The USFA described itself as "a powerful voice for the American sports fan." See Mark Robinchaux, *How The Sports Bar Huddled and Bent on NFL Blitz*, WALL ST. J., Nov. 9, 1990, at B1.

84. *Id.*

85. Technically, the commonly-used slang verb "scramble" means to encrypt with a special code, making a signal impossible to fully reproduce without the assistance of special receiving equipment. For a statutory definition of the term "encrypt," see Communications Act of 1934, 47 U.S.C. § 605(d)(3)(1988).

those few Sunday games otherwise designated by the league to be viewed in a given region or home territory. Such widespread scrambling of course frustrated football fans who owned satellite dishes, and could otherwise receive NFL games from around the country each week. For example, assume that an avid follower of the San Francisco 49ers lives in Miami and owns a satellite dish. Under the scrambling scheme, that fan would have been physically blocked by the league from viewing most, if not all, 49ers games.

The USFA viewed the NFL's scrambling policy as oppressive,⁸⁶ and pressured Congress to consider amending the Communications Act of 1934⁸⁷ with legislation limiting the NFL plan. The bill, known as the Access to Professional Sports Programming Act of 1990,⁸⁸ was fashioned and considered in committee, but never enacted.

Still, the USFA successfully persuaded key league sponsors, such as Anheuser-Busch, Inc., to lobby the NFL against enacting the plan.⁸⁹ USFA commissioner Marc Forlenza, a Miami-area bar owner, traveled the country, urging fellow tavern operators to boycott Anheuser-Busch products during the 1990 NFL season. Soon, Anheuser-Busch concluded it could not afford the lost potential revenue and adverse publicity, so the famous beer-maker sided with the USFA.⁹⁰ According to an Anheuser-Busch spokesman, corporate executives advised NFL officials "we are very sympathetic with the plight of these people."⁹¹ Since Anheuser-Busch had just signed a four-year, \$90 million contract with ABC to advertise on Monday Night Football, the league naturally took notice. Soon after, USFA officials met with the then relevant network executives representing the National Broadcasting Company (NBC) and the Columbia Broadcasting System (CBS), the NFL revoked its scrambling plan.⁹²

86. USFA literature described the NFL plan as follows: "Do you want the choice of watching your favorite football games either at home or at your local sports bar, via satellite dish? THE NFL SAYS NO! You have no choices. You'll watch the game we want you to watch, if at all." See UNITED SPORTS FANS OF AMERICA, MEMBERSHIP APPLICATION (1990).

87. 47 U.S.C. § 101.

88. *Id.* at § 605, as amended by H.R. 5709, 101st Cong., 2d Sess. (1990).

89. Robinchaux, *supra* note 83, at B1.

90. *Id.*

91. *Id.*

92. *Id.*

B. Unscrambling Some Revenue

Perhaps in reaction to the public debate regarding widespread scrambling of league telecasts, the NFL in 1994 cleverly devised a creative solution to address the concerns of satellite dish owners while adding revenue. Before the 1994 season, the NFL once again announced it would scramble Sunday pro football, except for those games designated for local broadcast, and the Monday Night Football game. The league also announced that a large "unscrambled" package of pro football telecasts, dubbed the "NFL Sunday Ticket" by the league, would be made available to satellite dish owners.

In fact, the NFL Sunday Ticket package offers dish owners authorized access to no less than each and every Sunday broadcast network telecast, each week of the season. Dish owners need only pay an arguably modest authorization fee to the league in order to receive NFL Sunday Ticket.⁹³ In addition, the dish owner, with NFL authority, can access NFL telecasts from around the country all day Sunday. This is an advantage the dish owner has over the conventional television viewer, who may be equipped with merely a conventional antenna, or the option to subscribe to cable television.

That is the good news.

The bad news? Even with respect to NFL Sunday Ticket, local telecasts of a home team playing at home remain blacked out to the satellite dish owner, via a scrambled signal unless the home game is sold out.⁹⁴

CONCLUSION

The NFL and television have flourished together during the past forty years. Despite challenges under federal law, the NFL has generally been allowed to protect local ticket revenue with television blackouts,

93. The NFL's suggested retail price for its fee is about \$130.00.

94. Satellite dish owners may also find themselves more directly scrambled by one of the two broadcast television networks currently under contract with the NFL — that being FOX. For instance, though all 1994 regular season games, otherwise telecast by FOX around the country, were made available to dish owners via the "NFL Sunday Ticket" plan, post-season league play-off games, to be telecast via FOX, were available to dish owners only via a separate subscription. Dish owners otherwise generally accessing FOX programming, via the several FOX network stations otherwise captured by a dish, found FOX programming generally available to them — with the exception, of course, being televised NFL football. Of course, subscribers to NFL Sunday Ticket enjoyed a built-in way to avoid any specific need to separately subscribe to FOX to view televised pro football during the regular season. However, the NFL Sunday Ticket plan only applied to the regular season, so dish owners who wished to view FOX-telecasted play-off games were forced to separately subscribe, with the designated dish-subscriber station normally being KDVR, a FOX affiliate in Denver.

while also commanding large rights fees from national television networks.

NFL policies created soon after passage of the Sports Broadcasting Act of 1961, however, seem to indicate that national television exposure is more important to the league than local ticket sales.

During the several years it competed with a rival league, the NFL chose not to take advantage of its statutory authority, so as to better compete for valuable television exposure. Since its merger with the AFL, the NFL has taken full advantage of its authority, and even enacted blackout policies that punish localities for high ticket sales.

Since the advent of consumer and small business use of satellite dishes, the NFL has successfully sued to stop pirating under both the Copyright Act of 1976 and the Communications Act of 1934. With respect to dish use, however, both acts are dated and do not provide the league complete protection if dishes become more commonplace consumer items. As a result, the NFL may conclude that it must lobby Congress for updated legislation. The better view is that Congress should not commit to updating the acts to regulate satellite dish use.

But, the emergence of new communications technology, like the satellite dish, should not be stunted by heavy-handed government involvement. Instead, the NFL would appear to be in the best position to alleviate pirating by working with the networks to encrypt, or "scramble," its broadcasts to prevent unauthorized reception. Along these lines, the NFL Sunday Ticket plan may be viewed as a very positive step, because it allows dish owners to lawfully take fuller advantage of a new technology.

Subscribers to NFL Sunday Ticket should thank members of the United Sports Fans of America (USFA) who were sympathetic characters—fans and small businessmen out to please customers. USFA members led the league out of the darkness, and showed that dish-owning fans and business operators might indeed be willing to pay the NFL to become authorized recipients of NFL broadcasts.

The satellite dish will only become more commonplace in the years ahead. The NFL would do well to adjust accordingly, and work with dish users to form other such equitable arrangements—rather than insisting upon protectionist legislation.