

A CRITIQUE OF THE NATIONAL FOOTBALL LEAGUE'S "BLACKOUT" EXEMPTION FROM THE ANTITRUST LAWS

INTRODUCTION

The National Football League (NFL) enjoys two exemptions from the sanctions of the Sherman Act.¹ The first exemption, 15 U.S.C. § 1291,² authorizes agreements between the NFL and television networks whereby the League pools and sells television rights as a single package. The second exemption, 15 U.S.C. § 1292,³ permits the blackout of outside game telecasts in the home territory when the home club is playing at home. As implemented today, it also permits the blackout of home games in the home territory.⁴

This note will show that reasons given by the Supreme Court in 1953,⁵ to permit "outside game blackouts," and by Congress in 1961, to support the section 1292 statutory exemption, are no longer available to the NFL in 1980. The League has misinterpreted the scope of the 1953 decree in *United States v. NFL (NFL I)*⁶ and the exception clause in section 1291. This misinterpretation, combined with problems in definition and administration inherent in the statute, call for judicial review and legislative reform. Section 1292 should be repealed or amended to limit the NFL's power to administer what is presently a broadly defined blackout exemption.

This note first addresses problems in definition and administration in the language of section 1292.⁷ Second, the judicial decisions behind

1. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976). The relevant text reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations, is declared to be illegal."
2. Professional Football, etc., Leagues-Television Contracts Act, 15 U.S.C. § 1291 (1976) exempts from antitrust consequences "any joint agreement by or among persons engaged 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."
3. 15 U.S.C. § 1292 (1976) is the "[a]rea telecasting restriction limitation" popularly known as the "blackout exemption." It removes the antitrust exemption, 15 U.S.C. § 1291, for agreements prohibiting the telecasting 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."
4. The outside game blackout occurs when a game, in which neither team is the home team, is blacked-out in the home territory when the home team is at home. Thus, the outside game between the Chicago Bears and Detroit Lions is blacked-out in New York, the home territory of the Giants, whenever they are playing at home. The home game blackout results in the blackout of the local Giants game in New York. The combination of an outside game blackout and a home game blackout coerces stadium attendance, and when the home team is at home, it prevents the telecast of any team in the home territory.
5. *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953) [hereinafter cited as *NFL I*].
6. *Id.*
7. See notes 18-27 *infra*, and accompanying text.

the enactment of the blackout exemption are reviewed.⁸ Third, the legislative rationale for the exemptions is discussed.⁹ Finally, an understanding of section 1292 and the 1953 decision in *United States v. NFL*¹⁰ requires reference to a later Supreme Court decision of the same name, *NFL II*, and to a Congressional enactment which followed the decision in *NFL II*, 15 U.S.C. § 1291.¹¹

The League has misconstrued section 1291 as giving the League an indiscriminate right to blackout any game it desires. Congress did not intend to grant such power. Section 1292 was enacted to lift the exemption from antitrust laws, which had been read into section 1291, with one exception: the blackout of a home game within the home territory when a member club is playing at home.¹² Congress did not intend the exemption to cover "home game blackouts."¹³ In employing such a blackout, the League has exceeded the permissible limits of the exception.

The second half of this note focuses both on the reasons why the economic protection afforded by the blackout is no longer required¹⁴ and on the erosion of the statute's exemption which has already occurred.¹⁵ The League's arguments for the blackout are contrasted with the public's interest in home game telecasts.¹⁶ Finally, solutions are proposed which will ensure financial stability for interested parties in the event that the home game blackout is lifted.¹⁷ Pay-cable television offers a potential solution capable of circumventing the home game blackout. Subscribers to cable television provide the revenue upon which cable systems may draw to bid competitively for the television rights to home game blackouts.

8. *NFL I*, 116 F. Supp. 319; *United States v. NFL*, 196 F. Supp. 445 (E.D. Pa. 1961) [hereinafter cited as *NFL II*]. The companion cases, *NFL I* and *NFL II*, decided in 1953 and 1961 respectively, addressed the antitrust implications of the League's television practices. Although the 1953 decision found many television and radio policies in violation of the antitrust laws, the blackout of outside games was held to be reasonable restraint on trade. The 1961 decision struck down a pooled television rights contract between the League and CBS as being in violation of the earlier 1953 decree.

9. See notes 46-57 *infra* and accompanying text.

10. *NFL I*, 116 F. Supp. 319.

11. 15 U.S.C. § 1291 supplants the 1961 decision. The section immunizes from antitrust attack any joint agreement by the NFL to transfer all or part of the rights of its member clubs in the telecasting of games. It was enacted to permit the execution of the pooled television rights contract, found illegal in *NFL II*. 107 CONG. REC. 20059 (1961).

12. See notes 53-57 *infra* and accompanying text.

13. Sobel, *Television Sports Blackouts: Private Rights v. Public Policy*, 48 L.A.B. BULL. 169, 173 (1973).

14. See notes 58-63 *infra* and accompanying text.

15. See notes 64-70 *infra* and accompanying text.

16. See notes 71-80 *infra* and accompanying text.

17. See notes 81-90 *infra* and accompanying text.

DEFINITIONAL AND ADMINISTRATIVE PROBLEMS REQUIRING REFORM OF SECTION 1292

Definition of "Home Territory"

Section 1292 permits "home territory" blackouts when a team is playing at home. The statute does not state which games may be blacked-out. In addition, it does not define home territory. Confused administration of the statutory provision has resulted. The NFL has interpreted the provision to permit the blackout of both a home game and an outside game.¹⁸ The legislative history of section 1292 shows that the statute was enacted to preserve the 1953 decision in *NFL I*, applicable only to outside games.¹⁹

The geographic bounds of the "home territory" are similarly ill-defined. The 1953 NFL Constitution and By-laws²⁰ defined "home territory" as that territory within 75 miles of the "League City."²¹ The stadium site was treated as the measuring point. Under the present constitution "home territory" includes "the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits."²²

The Nature of the Blackout

A third construction problem arises in interpreting the nature of the blackout permitted. One interpretation may allow a blackout of the reception of the game within the home territory (reception blackout).²³ A second interpretation permits a blackout of the telecast of a game within the home territory (telecast blackout).²⁴

Reception Blackout. Under a reception blackout no game signals can be received within the home territory. Unfortunately, some viewers just outside of the blacked-out territory are also affected. This infringement is caused by the Federal Communication Commission's (FCC) prohibition on "fuzz-outs." In *Lee Enterprises, Inc.*, an Iowa affiliate of CBS just outside of the home territory telecast the Vikings-Packer game.²⁵ It reduced its broadcast power twenty percent, so that the signal could not be received in the blacked-out Minneapolis home territory. The FCC ruled this reduction of power, or fuzz-out, to be in violation of FCC rules.

18. P. Rozelle, Answers to Questions About The National Football League's TV Policy (Feb. 1973) (available upon request from the Broadcasting Office of the National Football League, New York, New York) [hereinafter cited as NFL TV Policy].

19. NFL I, 116 F. Supp. 319; see also note 13 *supra*.

20. NFL CONST. art. X (1953).

21. NFL CONST. art. X (1953).

22. NFL CONST. arts. IV & X (1976).

23. *Lee Enterprises, Inc.*, 27 F.C.C.2d 887 (1971); see also Torrens, *Professional Football Telecasts and the Blackout Privilege*, 57 CORNELL L. REV. 297, 304-05 (1972).

24. *Id.*

25. 27 F.C.C.2d 887 (1971).

A reception blackout deprives a fan of the opportunity to watch on television a game played at a stadium too distant for him to attend. Because out-of-town fans are not members of the "potential ticket buying market" residing in the home territory, broadcasting a game for their benefit will not cause a reduction in gate receipts.

If section 1292 is interpreted to permit a reception blackout, the statute is overly broad. It infringes on the public's right to enjoy the widest dissemination of interstate telecasts of professional sports events available under the Sherman²⁶ and Communication Acts.²⁷

Telecast Blackout. The alternative construction of section 1292 is the telecast blackout, and its application also creates problems. Such a blackout frustrates the statute's purpose. It enables a network affiliate just outside the home territory to telecast the game to prospective ticket buyers in the blacked-out area. Thus, the non-home territory affiliate achieves the result that is prohibited to an affiliate within the area.

A Congressional "Hands-Off" Policy Giving the NFL the Freedom to Define Its Own Exemptions

Traditionally, federal agencies have been empowered to regulate economic enterprises which are beneficiaries of an antitrust exemption.²⁸ These enterprises are usually characterized by unique circumstances which affect the economic sector, a factor absent with respect to the NFL. The economic circumstances of the NFL are not unique, for they include the interest in maximizing profits by ensuring stadium attendance. Yet, the NFL has been given almost blanket authority to regulate itself.²⁹ The unique combination of antitrust exemptions and minimum federal regulation applicable to the NFL illustrates Congress's hands-off policy in dealing with professional football. Congress fears that its intervention in League practices will impair "public confidence in the honesty of sports contests."³⁰

26. 15 U.S.C. §§ 1-7 (1976).

27. *NBC v. United States*, 319 U.S. 190, 216 (1943): The public interest to be served by regulation is "the interest in the listening public in 'the larger and more effective use of radio.'" (quoting Communications Act of 1934 47 U.S.C. § 151, § 303(g)). If the larger and more effective use of the airwaves is to be pursued, it is necessary to prevent the mandatory imposition of programming and the discretionary withholding of programming otherwise committed to the public airways.

28. See, e.g., 16 U.S.C. §§ 824-824h (1976 & Supp. I 1977). Electric utility companies engaged in interstate commerce are regulated by the Federal Power Commission (FPC). In 1977 the FPC was terminated and its functions were transferred to the Federal Energy Regulatory Commission under 42 U.S.C. §§ 7172(a)(1)(B), 7293 (1976).

29. The NFL's power as sole administrator of the blackout is an especially acute problem. The greater the restriction on home game telecasts, the more the League gains in ticket sales and stadium attendance.

30. The social value of sports has been judicially noticed. *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970); S. REP. NO. 462, 89th Cong., 1st Sess. 14 (1965). It would seem that the government may not regulate the blackout exemption because of the desire to avoid the appearance of intervention in professional sports. Lotter, *Keeping The Illusion Alive: Public Interest in Professional Sports*, 12 SUFFOLK U. L. REV. 48 *passim* (1978).

CASE HISTORY BEHIND THE BLACKOUT

United States v. NFL I's Analysis of the Antitrust Aspects of the Home Territory Blackout

The outside game blackout has been found to be a reasonable restraint of trade, not in violation of the Sherman Act. In *NFL I*,³¹ the Justice Department alleged that Article X of the NFL Constitution³² constituted a contract between League members restraining interstate trade in violation of the Sherman Act. The Department argued that the blackout is a horizontal agreement to allocate market territories: an agreement among competing clubs of the NFL to restrict the projection of an outside game or home game into the home territory of a team when that team is playing at home. The agreement to restrict projection of televised games is a restraint of trade. It cuts off a potential market, television viewers in the home territory. Without the blackout a club could compete in the sale of television rights to its games, as well as in the sale of tickets to those attending.³³

It can also be argued that the blackout is a vertical agreement between a seller (the NFL) and a buyer (the network) to restrict the territory in which the buyer may televise the outside and home game. The NFL is selling its product, the games, to an independent distributor, the television network. The NFL reserves the exclusive right to sell that product within the home territory. The distributor is prohibited from televising in the blacked-out home territory.³⁴

In analyzing the antitrust implications of the outside game blackout, the *NFL I* court stated, "[t]here can be little doubt that [this] provision constitute[s] a contract in restraint of trade."³⁵ The court concluded that the "purpose and effect" of the provision was a "clear case of allocating market territories among competitors, . . . a practice generally held illegal under the antitrust laws."³⁶ The court, however, declined to apply a *per se* rule.

31. 116 F. Supp. 319.

32. NFL CONST. art. X (1953). Article X of the NFL Constitution gives each team the exclusive right to provide live or televised football to the residents of its own home territory. Under article X, Team A was not permitted to broadcast any of its games within 75 miles of Team B's home territory, when Team B was either playing at home or televising its game back to its home city. As a result, each club had a monopoly on football telecasts in their respective home territories.

33. See note 1 *supra*.

34. *NFL I*, 116 F. Supp. at 322; see also *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). *Continental TV, Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977).

35. *NFL I*, 116 F. Supp. at 322.

36. *Id.* The court reasoned that when a team agrees to prohibit the projection of its game in the home cities of other teams, it cuts off part of its potential market. In exchange for not competing for other team's television audiences, each team receives an exclusive television market in its home territory free from competition from other clubs.

*United States v. NFL I's Analysis of the Outside Game
Blackout as Reasonable*

Although the *NFL I* court conceded that the outside game blackout is a restraint of trade, it declined to apply a *per se* rule, relying instead on the rule of reason analysis enunciated in *Chicago Board of Trade v. United States*.³⁷ Under the *Chicago Board of Trade* analysis, the "true test of legality is whether the restraint imposed . . . merely regulates and perhaps thereby promotes competition or whether it . . . may suppress or even destroy competition."³⁸ Thus, the question before the court in 1953 concerned the reasonableness of the restriction preventing the telecast of outside games in the home territory of other teams on days when those teams were playing at home. If the restriction was found to be reasonable, it would be legal notwithstanding its restraint on trade.³⁹

Judge Grim's decision characterized the NFL as a joint venture in accordance with *Appalachian Coals v. United States*.⁴⁰ Under *Appalachian Coals*, a horizontal market division agreement central to a joint venture is an exception to the *per se* prohibition and is examined under a rule of reason analysis. The court recognized that if clubs were to compete with each other in the traditional business fashion, the stronger teams would soon drive the weaker ones into financial ruin. This fact alone would not justify an exception for the blackout. However, the court determined that without the blackout the demise of the entire league would result, eliminating competition altogether. Applying the rule of reason, the court found that on balance, the home territory blackout of outside games would benefit competition.⁴¹ For example, the outside game blackout eliminates competition between the home team which seeks a sell-out crowd and the network telecasting that team's games. This ensures tickets sales for the home game, producing revenue from ticket sales, concessions and parking.

The *NFL I* court reasoned that financial strength obtained through ensured gate revenue would upgrade the quality of professional football. This revenue would be used to obtain better players and coaches and to improve training programs. Financial strength would generate physical strength and increase competition among all clubs.⁴²

The court's conclusion in 1953 that the outside game blackout was reasonable was supported by the NFL's unique economic circumstances and fledgling status at that time. In the first three decades of the

37. *NFL I*, 116 F. Supp. at 322-23.

38. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

39. *NFL I*, 116 F. Supp. at 323.

40. 288 U.S. 344 (1933).

41. *NFL I*, 116 F. Supp. at 325.

42. *NFL I*, 116 F. Supp. at 323; see also 107 CONG. REC. 20662 (1961) [hereinafter cited as 1961 CONG. REC.].

League's existence, forty-one franchises failed.⁴³ The evidence in *NFL I* revealed that less than half of the clubs in the early years of the League would be financially successful without a guarantee of gate revenue.⁴⁴

LEGISLATIVE HISTORY BEHIND THE ENACTMENT OF THE BLACKOUT EXEMPTION

United States v. NFL II and the Pooled Television Rights Exemption under Section 1291

Judge Grim's court was given the opportunity to take a second look at the NFL's television practices in *NFL II*.⁴⁵ In 1961 the NFL made an agreement with CBS, granting the network exclusive rights to televise a package of League games for two years and permitting the network to decide which games would be televised.⁴⁶ The fourteen member clubs, the individual clubs, and the League agreed, under the contract, to pool their television rights and sell them as a package to the purchasing network. Each club would receive an equal share in the proceeds.

Fearing that the CBS contract would violate the earlier 1953 decree, the NFL petitioned Judge Grim's court for a construction of his earlier decree. In *NFL II*, the court struck down the CBS contract, ruling that the agreement violated the Sherman Act. By pooling their television rights, the clubs were in effect contracting to eliminate competition among themselves in the sale of television rights to their games.

Congress's Action to "Rescue" the NFL

The decision caused an uproar among angry football fans. Amidst widespread anxiety that there would be no televised professional football in the fall of 1961, Congress moved quickly to extend legislative relief to the NFL and its fans.⁴⁷ It enacted section 1292 which superseded the 1961 decision by permitting the League to pool the individual club's television rights.⁴⁸

43. *TV Hearings: Hearings on H.R. 8757 Before the Antitrust Subcomm. on the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 4 (1961) [hereinafter cited as *TV Hearings*].

44. *NFL I*, 116 F. Supp. at 323-25; see also 1961 CONG. REC. 20059-63, 20662.

45. 196 F. Supp. 445 (E.D. Pa. 1961); *id.* Judge Grim retained jurisdiction by a provision in the judgment decree of the 1953 decisions for the purpose of enabling the parties to petition for a construction of the final decree.

46. *Id.*

47. H.R. REP. 9096, 87th Cong., 1st Sess. (1961). The antitrust exemptions were passed by the House on September 18th. 1961 CONG. REC. at 20064. The exemptions passed the Senate on September 21st, 1961 CONG. REC. at 20662; they were signed into law on September 30th. 1961 CONG. REC. at 21552.

The anxiety among fans was unnecessary. Prior to the disapproval of the pooled CBS contract, the League had individually negotiated contracts providing for telecasts of the 1961 season. 1961 CONG. REC. at 15223.

48. *TV Hearings*, *supra* note 44, at 28; 1961 CONG. REC. at 20059, indicating that 15 U.S.C. §§ 1291-1292 were needed to supersede the decision of Judge Grim issued July, 1961 in *NFL II*.

Congress justified the pooled-television-rights exemption by relying on the rationale applied by Judge Grim in *NFL I*.⁴⁹ Curiously, Congress used the 1953 rationale, in effect, to reverse the 1961 case, *NFL II*. Congressional purpose was clear. The elimination of competition among the clubs was justifiable as a financial necessity.

The purpose of this bill is to permit professional sports leagues to deal jointly in the sale of their television 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.⁵⁰

The Reason Why Section 1292 Does Not Protect the Home Game Blackout from Antitrust Laws

The 86th Congress passed section 1292 in the wake of *NFL II* and the ensuing statutory antitrust exemption given the League's television agreements by section 1291.⁵¹ Drafting section 1291 broadly to exempt agreements by which professional teams sell rights to telecast games, Congress unintentionally imbued the NFL with the power to blackout any game it desired. This power extended to home territory blackouts when the team was playing at home.⁵²

Section 1292 prohibits all blackouts excluding those within the home territory of a club playing at home. Thus, the so-called blackout exemption in section 1292 was enacted for the purpose of prohibiting most blackouts.⁵³ The exception clause, which allows blackouts within the home territory of a member club playing at home, was enacted for the limited purpose of preserving the *NFL I* decision.⁵⁴ The home game blackout was not an issue before the *NFL I* court, and Judge Grim did not address or rule upon its legality. Thus, to the extent section 1292 codifies the 1953 decree, it does not extend antitrust protection to the home game blackout.

In view of the judicial and legislative history, the correct interpretation of the statute would recognize the League's authority only to blackout outside games in the home territory. As such, the practice of blacking-out home games in the home territory exceeds the scope of the

49. *NFL I* exempted the outside game blackout in recognition of the substantial interest the public has in viewing professional football contests. The exemption was intended to place the individual clubs in comparable financial positions. 1961 CONG. REC. at 20059-63.

50. 1961 CONG. REC. at 20059; *TV Hearings*, *supra* note 44, at 4-5.

51. The Antitrust Subcommittee feared that standing alone the exemption would grant "to the sports involved unchecked power to deprive the American public of the right to see over TV any sports contest." *TV Hearings*, *supra* note 44, at 29. The committee went on to say that they did not want to "give [the NFL] carte blanche to blackout at any time." *Id.* at 30.

52. *Id.*

53. The Antitrust Subcommittee felt that the adoption of section 1292 as an amendment to section 1291 would "completely nullify the (1953) decision of Judge Grim." *TV Hearings*, *supra* note 44, at 29. The blackout amendment was proposed with the intent that only those blackouts sanctioned by Judge Grim would be exempt. *Id.* at 28. See also H.R. REP. NO. 1178, 87th Cong., 1st Sess. 5 (1961).

54. *TV Hearings*, *supra* note 44, at 28.

exemption.⁵⁵

THE ECONOMIC PROTECTION OF THE BLACKOUT NO LONGER NECESSARY

The outside game blackout was reasonable in 1953 because it provided financial stability essential to the survival of the weaker teams.⁵⁶ However, three decades later, the NFL has emerged as a thriving business, and special treatment under antitrust laws is no longer warranted. The strength of the League can be measured by the growth in several areas.

The League has increased the number of its member clubs. It has grown from the twelve teams in 1953 to the present roster of twenty-eight with the American Football Conference and National Football Conference sharing equally.⁵⁷

The number of games played each season has increased. In 1953 the NFL teams played a twelve-game season. The eight AFL teams played a fourteen-game schedule in their first season in 1960. Currently, sixteen regular-season and four preseason games are played. The number of post-season games has also increased,⁵⁸ with the addi-

55. Another blackout not entitled to protection under § 1292 is the championship game blackout. In *Blaich v. NFL*, 212 F. Supp. 319 (S.D.N.Y. 1962), ticketless fans sought a preliminary injunction to force the NFL to lift the blackout of the soldout New York Giants - Green Bay Packers championship game. The plaintiffs challenged the blackout, arguing that section 1292 was designed to meet the problems created by the 1961 ruling that concerned only regular season games. The court denied the injunction.

In refusing to ban the blackout of the championship game, the *Blaich* court went beyond the 1953 ruling which applied only to "games" defined to be "regular season games." The judgment entered by Judge Grim back in 1953 specifically stated in ¶ 11(e) that "the term 'games' meant regular season and exhibition professional football games, not including conference playoff games or the 'World Professional Championship Game.'" *TV Hearings*, *supra* note 44, at 24.

Additional arguments for excluding championship games from the blackout privilege is found in *Int'l Boxing Club v. United States*, 348 U.S. 236 (1955). In defining a relevant product market the court ruled that championship sporting events constitute an entirely different market than ordinary events within the same sport.

56. An exception to the various antitrust provisions is carved out for "new entrants." In *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1960), the court first recognized the new entrant defense to the antitrust laws. But as the industry takes root and grows the newcomer defense is lost and the industry's practices are subject to antitrust attack. See also *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), where the court denied the new business defense 11 years after defendant first entered the market.

57. 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 American Football League (AFL) was founded and added eight more professional teams: Boston Patriots (now New England Patriots), Buffalo Bills, Dallas Texans (now Kansas City Chiefs), Denver Broncos, Houston Oilers, New York Jets, Oakland Raiders, and San Diego Chargers. Four more clubs were added after 1966: Atlanta Falcons, Cincinnati Bengals, Miami Dolphins, and New Orleans Saints. The recent entrance by the Seattle Seahawks (NFC) and Tampa Bay Buccaneers (AFC) increases the NFL roster to 28 teams. NFL CONST. art. IV, § 4.4 (1976); H. CLASSEN, *THE HISTORY OF PROFESSIONAL FOOTBALL* 480-83, 503 (1963).

58. In 1970 the NFL reorganized the League into two conferences with three divisions each

tion of the Super Bowl and Pro Bowl.

Regular and playoff game attendance has continued to rise. In 1960 total attendance was four million, in 1965, six and one-half million, and in 1970, ten million. The League posted a record number of fans attending the 1979 season games, thirteen million.⁵⁹

In addition, the price tag for the television rights contract has increased substantially. In 1970 a four-year contract with the three major networks (ABC, CBS, and NBC) amounted to annual income of thirty-five and one-half million dollars. Under the four-year contract negotiated in 1977, each of the twenty-eight teams receive five million dollars annually.⁶⁰

Faced with this evidence and with recommendations for the repeal of section 1292, proponents argue that clubs have a private right to maximize ticket sales by blacking-out home games.⁶¹ The blackout has outlived its limited purpose of ensuring ticket sales for a fledgling league. In 1980 the viability of the NFL is not in jeopardy and does not merit a special blackout exemption. Clubs no longer earmark ticket sales for survival income, as clubs did in 1953. The section 1292 exemption cannot be justified in this situation. Established, viable privately owned clubs should not be assisted in "profit maximization" by protective government regulation that distorts the competitive process of the market place.

EROSION OF THE EXEMPTION

Modified Lifting of the Blackout: Outside Game Telecasts

Erosion in the exercise of the blackout exemption has minimized

(Eastern, Central and Western). Four teams from each conference enter the playoffs. Two wild-card playoffs, four divisional, and two conference championship games constitute the post-season schedule. See CLASSEN, *supra* note 57, at 480-83.

59. Attendance figures:

Professional Football Attendance				
League	1960	1965	1970+	1979
AFL	958,000	1,812,000		
NFL	3,195,000	4,685,000	9,913,000	13,182,039
Total*	4,153,000	6,597,000	9,913,000	13,182,039

+ AFL-NFL merger was effected in 1969

* Does not include exhibition games

Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States: 1971*, at 201 (1971); *id.* 1968, at 207 (1968); *id.* 1961, at 196 (1961); see Torrens, *supra* note 23, at 310 n.61.

60. Television revenue constitutes about 37 percent of an NFL team's annual gross income. NFL TV Policy, *supra* note 18, at 5; P. Rozelle, NFL/TV History 10 (1979) (available through the Broadcasting Office of the National Football League, New York, New York) [hereinafter cited as NFL/TV History].
61. NFL/TV History, *supra* note 60, at 8. *Hearings On The 48 Hour Sellout Exception: Hearings on S. 4007 and S. 4010 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 49, 83, 89 & 130 (1972) [hereinafter cited as *Sellout Hearings*].

application of the blackout and weakened NFL arguments for continued protection from the antitrust laws. In 1966 the NFL lifted the outside game blackout permitted by *NFL I*.⁶² The League had voiced concern that outside game telecasts would result in a decrease in ticket sales. The lifting of the blackout revealed that this prediction was unfounded. Five years after the first such telecasts, attendance at home games had not diminished. In 1971 ninety-five percent of all seats in NFL stadiums were sold.⁶³

The Local Telecast of Super Bowl VII

In 1972 the 92d Congress considered another modification of the blackout, a bill requiring the local telecast of any home game sold out forty-eight hours before game-time.⁶⁴ With this legislative gun pointed at him and in the face of mounting public pressure,⁶⁵ NFL Commissioner Pete Rozelle announced that local television coverage of Super Bowl VII would be allowed in the event of a ten-day advance sellout.⁶⁶

The Sellout Exception

Following the 1973 Super Bowl telecast, a third legislative wedge was driven into the blackout exemption. For the 1973 and 1974 seasons, an experimental two-year law prohibited the blackout of any game sold out seventy-two hours prior to kickoff.⁶⁷ The law expired in 1975, but the NFL continues to abide by the sellout exception. This is a remarkable change in League policy, considering the Commissioner's vehement statements to the 92d Congress denouncing local telecasting of soldout home games.⁶⁸

THE LEAGUE'S ARGUMENTS FOR THE BLACKOUT VERSUS THE PUBLIC'S INTEREST IN HOME GAME TELECASTS

Ticket Sales and No-Shows

The battle to televise a soldout game within the home city was not won easily. In appearances before the Congress in 1972, Rozelle ar-

62. NFL/TV History, *supra* note 60, at 5; NFL TV Policy, *supra* note 18, at 2.

63. Shooshan, *Confrontation with Congress: Professional Sports and the Television Anti Blackout Law*, 25 SYRACUSE L. REV. 719 (1974).

64. In 1972, Senators John Pastore (D. R.I.), William Proxmire (D. Wis.), and Robert Griffin (R. Mich.) introduced S. 4010, 92d Cong. 2d Sess. (1972) that would have required the local telecast of any home game which was soldout 48 hours in advance.

65. In the past the NFL has repeatedly refused to permit the telecasting of championship games, even in the event of a sellout. *Rubin v. Reese*, Civ. No. 70-1489 Civ. T.C. (S.D. Fla. 1970); other attempts to ban the blackout include *Rubin v. NFL*, Civ. No. 70-22897 (Dade County, Fla. Cir. Ct. 1970); *Kretschmar v. NFL*, Civ. No. 710342 (Broward County, Fla. Cir. Ct. 1971). Ellis Rubin 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.

66. See N.Y. Times, Jan. 17, 1971, § 5 at 3, col. 1.

67. Pub. L. No. 93-107 § 1, 87 Stat. 350 (codified at 15 U.S.C. § 331(d) (expired 1975)).

68. S. REP. NO. 347, 92d Cong., 1st Sess. 4 (1973).

gued that future game attendance would suffer if local telecasts were allowed. He reasoned that home-team fans, accustomed to watching a soldout game on local television free of charge, would not pay to watch games from a stadium seat.⁶⁹

The Commissioner further asserted that the blackout would guard "no-shows," those fans who buy tickets but elect to remain at home because of weather conditions, team standings, relative quality of opponents, or other personal reasons. The League feared that telecast of soldout games would result in football's demise into a video sport with teams playing to empty, albeit "soldout" stadiums.⁷⁰ The modifications permitting the outside game telecasts in the home territory when the home club is at home and permitting the local telecast of a home game soldout forty-eight hours in advance, however, have not had an adverse effect on either ticket sales or stadium attendance.⁷¹ FCC studies⁷² and an independent study by Vanderbilt University⁷³ indicate that the local televising of home games does not affect stadium attendance. The FCC study, conducted pursuant to the 1973 experimental law, revealed a miniscule seven-tenths of one percent increase in the number of no-shows at televised home games.⁷⁴

Stadium Attendance at Televised Home Games

The FCC and Vanderbilt findings can perhaps be attributed to the fan's desire to attend the game rather than watch the event on television. Fans will not forfeit the opportunity to attend a professional football game for a multitude of reasons, ranging from pre-game festivities to the excitement of cheering after a touchdown.⁷⁵ The hometown fan has a limited opportunity to watch his team play at the local stadium. He is likely to attend the home game despite simultaneous local telecast of the contest.

During the sixteen-week season, fans can watch five televised games. There are three Sunday telecasts (the CBS and NBC "doubleheaders"), one Monday Night telecast (ABC), and late-season Thanksgiving, Thursday, and Saturday games (CBS and NBC). This plethora of televised football games⁷⁶ makes stadium attendance at the eight home games all the more appealing to the home town fan.

The NFL erroneously cites the success of televised football to justify continuance of the home game blackout. A December 1971 study

69. H.R. REP. NO. 1786, 94th Cong., 2d Sess. (1977).

70. *Sellout Hearings*, *supra* note 61.

71. See note 69 *supra* and notes 64-68 *infra*.

72. See note 69 *supra*. FCC, FED. COMM. REP., THE SPORTS ANTI-BLACK-OUT ISSUE (1st rep. 1974) (report done pursuant to 15 U.S.C. § 331(d)). See note 69 *supra*.

73. H.R. REP. NO. 1786, 94th Cong., 2d Sess. (1977); see Peterson, *Blackouts and the Public Interest: An Equitable Proposal*, 4 J. CONTEMP. L. 143-68 (1978).

74. See note 72 *supra*.

75. Torrens, note 23 *supra*, at 300 n.18.

76. NFL/TV History, *supra* note 60.

indicates that seventy-one percent of the public believes that the amount of professional football games televised is "about right."⁷⁷ The survey, however, is inherently deceptive. It measures only the quantity of telecasts available. It does not distinguish between the total of all games televised and the limited number of home games telecasts. During the season, the average home territory receives approximately seventy-four free NFL game telecasts. A home team's game is not televised in the home territory, unless it is an away-game (a maximum of eight telecasts) or a game sold-out forty-eight hours before game-time.⁷⁸ The repeal of the blackout does not call for more telecasts. Rather, it answers the hometown demand to see the local team's game on television. It is an attempt to withdraw the restriction on a local telecast which would be permitted except for section 1292.

A SOLUTION TO THE MUNICIPALITY'S FEAR OF DECREASED GATE RECEIPTS

Representatives of professional sports⁷⁹ argue that a home game blackout is reasonable in light of municipal reliance on gate receipts. League cities own the majority of stadiums and would feel the financial crunch resulting from a decrease in stadium rentals, most of which are based on a percentage of gross admission receipts.⁸⁰ The League points to the additional loss of parking and concession revenues that would result from the blackout's repeal.

These contentions do not provide sufficient justification for home game blackouts. First, the estimated decrease in revenues for municipalities due to local home game telecasts is speculative.⁸¹ Second, if additional deficits were to arise, the municipality could be compensated with a share in the additional television revenue. The municipality

77. Lou Harris study surveying 1,991 households (Dec. 1971):

	Amount of Pro Football on TV		
	Total Fans	Men	Women
Too much	21%	17%	27%
Too little	7	9	5
About right	71	73	67
Not sure	1	1	1

See note 61 *supra* (also available from the Broadcasting Office of the National Football League).

78. NFL/TV History, *supra* note 60.

79. Present with Commissioner Rozelle at the Oct. 4, 1972 Sellout Hearings before the Senate Communications Subcommittee were Art Rooney, President of the Pittsburgh Steelers, Gerald Phipps, Chairman of the Denver Broncos, and Jim Finks, Vice President and General Manager of the Minnesota Vikings.

80. Some municipalities raise construction funds through bonds to be repaid from stadium rentals and guaranteed by the local government. Operating costs are paid from stadium rentals but deficits are met with local taxes. Local police direct traffic and provide security at the expense of the city taxpayers. Furthermore, local taxes are usually sales and property taxes and are regressive, placing the deficit burden on the poor, those very people that are hurt the most by the blacking-out of home games.

81. See note 76 *supra* and accompanying text.

could achieve this by directly contracting for it or by indirectly recouping the loss through a rental increase.

In the event of a rental increase, the club could then elect to pay either through television revenue or through a raise in ticket prices. The rent transfers the true economic cost of promoting a live professional football game to those who benefit most. A tax increase, therefore, offers another solution for the League city. Local residents may elect to pay an additional tax for the opportunity to view televised home games.

PAY CABLE TELEVISION'S ANSWER TO THE BLACKOUT

The Economics

The movement to lift the blackout may be answered affirmatively by pay cable television.⁸² For example, if the Chicago Bears are playing at home and the game is not soldout within forty-eight hours of kickoff, it will be blacked-out both in Chicago and in the home territory within seventy-five miles of the corporate limits of the city. The Bears game is not blacked-out in Indianapolis, clearly outside the home territory. The Indianapolis telecast will have a negligible effect on gate revenue, since it is outside of the Bears ticket-buying market. The Bears can generate television revenue, while maintaining optimum gate attendance by selling the home game to pay cable⁸³ or extracting fair compensation from Chicago cable stations importing the Indianapolis signals carrying the game.⁸⁴

82. Cable television, also known as CATV, originated around 1950 and for the first decade was primarily used as a means of importing broadcast signals to communities where reception was poor or nonexistent. 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.

Pay cable provides programming to viewers via cable at a per-program or pre-channel charge. This charge is in addition to the monthly fee for Basic cable service. For general background on the regulatory history and development of cable television, see F. BERNER, *CONSTRAINTS ON THE REGULATORY PROCESS*, (1976); see also Siedlecki, *Sports Anti-Siphoning Rules For Pay Cable Television: A Public Right to Free TV?*, 57 IND. L.J. 821 (1978).

83. Pay cable's potential market power may enable it to outbid conventional television for the right to telecast the home game locally. The hometown subscribers may be willing to pay more than an advertiser on conventional television for the right to see the game, permitting cable to outbid the local network affiliate. For example, free television currently pays \$800,000 for a network showing of a movie. If five percent of 30 million cable subscribers (one and one-half million) are willing to pay one dollar or 19% paying \$.50 or 20% paying \$.25, then cable can generate the funds necessary to outbid free television. P. MACAVOY, *Deregulation of Cable Television* 150-51, 155 (1977). For a chronology of cable growth since 1950, see D. LE DUC, *Cable TV and the FCC* (1973); K. PENCHOS, *The Outlook for Cable Television* (1975).

84. Copyright Act, 17 U.S.C. § 111 (1976), mandates compulsory licenses for secondary transmission. Section 102 extends the copyright privilege to live telecasts that are simultaneously recorded. The copyright owner of live sports events is no longer forced to rely on the common law rather than statutory rights in proceeding against an infringing user of the live professional football game. Thus, cable television cannot circumvent a home game blackout by importing signals from non-home territory stations without being subject to the Act requirement of fair compensation. Prior to the revised Act in 1976, cable could make secondary transmissions without any copyright liability. See *Teleprompter Corp. v. CBS*, 415

Local advertisers will find the cable audience especially desirable because of the selectivity of the hometown audience; a new, indirect source of revenue for the team will result.⁸⁵ The system has disadvantages. When the signal from Indianapolis is imported to Chicago, it will generate competition with other regional and national games televised over the networks. This will fractionalize the audience for local football telecasts. For example, Chicago viewers may watch the Bears on cable, the Detroit Lions on CBS, or the Dallas Cowboys on NBC. As a result, the networks cannot guarantee their advertisers as large an audience, for they must now compete with the home game on cable. The NFL television package becomes less attractive to the networks, and they will recoup their losses in advertising revenue by lowering their bids for the League's television package. Nevertheless, the NFL's total revenue from televised football will not be affected. The decrease in revenue from the sale of limited television rights to the networks can be fairly compensated with sales to cable systems. The newly acquired contract with the cable company for the rights to the heretofore blacked-out game will contribute to the League's total profits.⁸⁶

Local Cable Telecasts of Home Games and the Communications Act

Natural competition between the cable and conventional systems for both the football audience and television rights achieves the policy behind the Communications Act.⁸⁷ This statute was enacted in 1934 to regulate the public airwaves, including television, radio and cable, in the public interest.⁸⁸ The concept of using the public airways in the public interest emerged as early as 1924. In that year Herbert Hoover testified:

Radio communication is not to be considered merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our

U.S. 394 (1974), holding that CATV's importation of distant signals of conventional television broadcast was not "performing" and not liable for copyright infringement.

85. In purchasing advertising time during a home game telecast, the local car dealer will receive an exclusively local audience representing the limited and select market he desires. It is the hometown fans who are likely to purchase a car, not the viewers of a national game in another city or state. What the national advertiser views as a detriment, a concentrated local audience, the local advertiser welcomes. In purchasing commercial time during the home game, the local advertiser does not "waste" his advertising dollar upon an overly broad national audience.

86. *Id.*

87. Communications Act, 47 U.S.C. § 152(a) (1976) empowers the FCC to regulate television and radio, including cable television, when it is reasonably ancillary to the effective performance of the FCC's responsibilities for the regulation of television broadcasting. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 99 S. Ct. 1435 (1979); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). See note 27 *supra*.

88. Fair compensation for secondary transmission is required, 17 U.S.C. § 111 (1976) mandates compulsory licenses for secondary transmissions, as does the new copyright law, 17 U.S.C. §§ 102, 501 (1976). See note 86 *supra* for a discussion of the copyright requirements.

other public utilities.⁸⁹

Regulation and judicial construction have developed the concept of public interest into a policy geared toward protection of the airwaves by preventing manipulation and control by private interests.⁹⁰ The home game blackout violates the public interest. It is the discretionary restraint of programming by the NFL to ensure ticket sales and stadium attendance. Although the Communications Act does not give the public the right to demand the telecasting of any program, the public does have a right to prevent manipulation of programming for the private interest of the NFL.

CONCLUSION

The judicial and legislative history indicates that Congress did not intend home game blackouts to remain outside the scope of antitrust laws. *NFL I*⁹¹ addressed the outside game blackout. It found the blackout to be reasonable in 1953: it would ensure home game ticket sales and working capital to a fledgling industry. At that time the revenue from gate receipts was the lifeline of a team. In addition, the court reasoned that the decrease in competition between the home game and outside game telecasts would be offset by the increase in overall League competition. The financial strength received from ticket sales would strengthen a club's performance and promote competition on the playing field.

*NFL II*⁹² voided a pooled-television-rights contract between the League and CBS, prompting Congress to enact section 1291 to exempt such contracts from the antitrust laws. The section unintentionally imbues the League, however, with unreserved power to blackout any game. The so-called blackout exemption of section 1292 is Congress's remedy to section 1291. Section 1292 prohibits all blackouts and permits the League to blackout only those games played within the home territory of a team that is playing at home. This exception clause was attached to section 1292 solely to preserve the outside game blackout held to be reasonable in *NFL I*.⁹³

Thus, although the League relies on the exception clause for permission to blackout home games, the home game blackout was not intended to receive the protection of section 1292. Without the protection of a statutory exemption and unless reasonable under the *NFL I*⁹⁴ analysis, the home game blackout violates the antitrust laws. In 1980 the home game blackout is not a reasonable restraint of trade. The

89. *Regulation of Radio Communication: Hearings on H.R. 7357 Before the House Comm. on Merchant Marine and Fisheries*, 68th Cong. (1924).

90. See note 87 *supra*.

91. See note 5 *supra*.

92. See note 8 *supra*.

93. *Id.*

94. See note 5 *supra*.

justification for the blackout in 1953 was based on the need to ensure ticket sales for a fledgling enterprise. Today, the number of teams, games played, stadium attendance, and price for television rights define a national, billion-dollar enterprise business which neither requires nor merits federal economic protection by means of the blackout exemption.

Ironically, the statute is not used today to blackout outside games, the blackout that it was enacted to preserve. The blackout of games soldout forty-eight hours before game-time has also been lifted. In the past the NFL argued for the outside game and soldout game blackouts, predicting a decrease in ticket sales, concession and parking revenue, stadium rent to the municipality, and stadium attendance, should the blackouts be lifted. These predictions remain unrealized, despite the elimination of the outside game and soldout game blackouts. Identical arguments have been made for continuing the home game blackout within the home territory. Responding to these arguments, FCC and independent studies confirm the results of the earlier blackout repeals: telecasts of the games do not adversely affect ticket sales or stadium attendance.

The construction of the statute, its resulting misapplication by the League, and complications which will occur as cable-television enters the market demand review of section 1292. Legislative repeal of the blackout exemption is mandated. At the very least, amendment of definitions and administrative sections of the statute is necessary. Revision of the statute must emphasize the purpose of the blackout exemption and reconsider the statute's rationale in light of the NFL's economic strength. The public interest, as stated in the Communications Act, demands the widest possible dissemination of interstate telecasts.

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