No. 83-271

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether an agreement among virtually all producers of commercially salable intercollegiate football to sell football television rights exclusively through a common sales agency may be held unlawful *per se* when it eliminates price competition, restricts output, forecloses small telecasters and advertisers from the market, and restrains trade more than is reasonably necessary to promote the efficiencies of the integration.

2. Whether an antitrust defendant may obtain a rule of reason analysis for otherwise *per se* illegal restraints by asserting that such restraints are ancillary to other purported goals, irrespective of the actual impact of the restraints on competition, without showing the alleged goals are procompetitive or that the restraints are reasonably necessary to the attainment of such goals, and in the face of factual findings that the restraints do not further the goals.

3. Whether the district court's finding, affirmed by the court of appeals, that NCAA has sufficient market power to produce anticompetitive effects through its controls over its members' football television rights is clearly erroneous.

4. Whether a combination by virtually every producer of commercially salable intercollegiate football to sell broadcast rights only as a package, on an exclusive basis, to a limited number of buyers, and restricting the total number of games sold, should be treated as a suppression of competition although the package is sold by a process of competitive bidding.

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ADDITIONAL STATUTE INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

STATEMENT OF CASE [1]

1. Although NCAA has permitted all the other sports it regulates to operate in a free television market (D.C., 47a), it has controlled football television since 1953 (D.C., 44a). Through its television restrictions, the NCAA has made itself the exclusive sales agent for television rights to college football games, and has prohib-

[1] The following abbreviations will be used: ("Statement, ¶____") for respondents' Statement of the Case; ("D.C., ____a; 10th, ____a") for references to the opinions of the lower courts in the Appendix to NCAA's Petition for Certiorari; ("Br. in Opp.") for respondents' Brief in Opposition; ("A.____") for references to the Joint Appendix; ("Tr. ____") for references to the transcript.

ited individual schools from freely negotiating with television networks or cablecasters outside its own contract (D.C., 93a, 113a; 10th, 14a, 16a-17a). Until 1982, after this action was instituted, NCAA sold the exclusive football television rights for all of its members to a single network; from 1965 to 1981, ABC was that network (D.C., 45a). NCAA entered into contracts beginning in 1982 to sell exclusive television rights to two networks and one cablecaster for a period of three years. These contracts, which will be in effect until 1985, operate in substantially the same manner as NCAA's previous contracts (D.C., 61a).[2] Under NCAA's controls, the contracting network(s) pay a "minimum aggregate fee" (D.C., 57a, 61a; 10th, 2a). Part of this minimum aggregate fee is paid directly to NCAA, and the rest is paid to schools whose teams are televised (D.C., 56a). NCAA, after subtracting the amounts allocated to its championship football telecasts, "recommends"[3] that specific uniform amounts be paid by the contracting network(s) for national and regional telecasts, and NCAA recommendations are always the minimum and maximum amounts actually paid for any individual game (D.C., 56a-57a; 10th, 7a). NCAA also sets the minimum and maximum total number of permitted telecasts and the maximum number of appearances per school, and prohibits the sale of football telecast rights outside the NCAA contract with very limited exceptions (D.C., 58a-64a; 10th, 2a-3a).

2. NCAA membership is essential to an institution "wishing to sponsor a major, well-rounded athletic program," and affects not just football, but virtually all sports (D.C., 53a-54a). This action was precipitated when the College Football Association ("CFA"), consisting of five of the seven major football-playing conferences and virtually all major football-playing independent schools, also mem-

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[2] The record confirms this (A. 487-89; 516-17; 527-28; 613). NCAA's 1982-1985 contracts with two networks "eliminate any possibility of competitive bidding between the networks" (D.C., 62a). "NCAA substantially dictated the terms under which both networks could televise NCAA football. The networks were offered a take-it-or-leave-it proposition" (D.C., 61a).

[3] NCAA began using the word "recommend" rather than "set" in describing its activities regarding rights fees for individual games in 1976, at the direction of its Executive Director (D.C., 78a; A. 393-94). NCAA and its exclusive purchaser have long been aware of these antitrust problems (D.C. 78a, 132a; A. 422-26).

bers of NCAA, attempted to develop an independent television plan with the National Broadcasting Company ("NBC") while NCAA was negotiating its television plan with NBC's competitors (D.C., 49a). NCAA reacted immediately, consolidating its power in 1981 by adopting a bylaw "official interpretation" (later to become the content of the bylaw interpreted) that: "The [NCAA] shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season . . ." (D.C., 49a, 111a). The NCAA publicly threatened CFA members with a myriad of sanctions ranging from reprimand to expulsion, affecting not only their football programs but other sports as well, and stated that it would seek expedited disciplinary procedures against offending CFA schools (D.C., 51a). NCAA suspended its "campaign of veiled threats and coercion" only after the district court ordered it to do so (D.C., 126a). The CFA contract failed, nevertheless, substantially because of the NCAA intimidation of its members that had already occurred (D.C., 51a, 126a; 10th, 22a).[4]

Price-Fixing and Restriction of Output

3. The district court found that NCAA, through its "minimum aggregate fee", has set the "minimum, maximum, and actual price" paid for the telecasting rights of its members' games (D.C., 87a, 113a); that NCAA controls distort the prices which would otherwise be paid in a free market; that the purpose of the controls is to obtain an artificially high price by restricting output and fixing prices (D.C., 79a, 112a); that the "raison d'etre" for the existence of the controls is to restrict competition (D.C., 93a, 114a); that the price paid for telecasting rights "is responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "the controls restrict the number of games shown by local telecasters far below that which would be shown in a free market" (D.C., 114a); and that because of the controls, "many games for which there is a large viewer demand are kept from the viewers, and many games for

[4] This action was originally filed as a class action on behalf of the members of the CFA; NCAA opposed class certification, and when the CFA-NBC contract failed, plaintiffs withdrew their application for class certification on the ground it was no longer needed to protect the interests of the class.

which there is little if any demand are nonetheless televised'' (D.C., 115a).

4. The Tenth Circuit held that NCAA has fixed the minimum and maximum total prices for the NCAA television packages (10th, 7a); that the compensation paid by the networks ''does not vary from game to game'' (10th, 7a); that NCAA's controls consist of ''two groups of restraints, those that create an exclusive franchise arrangement with the networks and those that distort the prices paid for the individual games'' (10th, 11a-12a); that both the grant of exclusivity and the distortion of prices appear anticompetitive (10th, 12a); and that NCAA controls potentially reduce output of desired products and increase consumption of less desirable products (10th, 10a). The court also noted and relied upon the district court's finding ''that without the restraints imposed by the television plan more games would be shown at the local level'' (10th, 21a).

5. Both courts considered — and rejected — NCAA's contention that it should not be subjected to *per se* antitrust scrutiny because its restraints had procompetitive justifications and were incident to a joint venture. As to NCAA's argument that athletic competitive balance was promoted by the television restraints, the district court found that ''NCAA has failed to show why this competitive balance cannot be maintained without NCAA acting as the exclusive bargaining agent for its members'' (D.C., 7a); that NCAA's other extensive regulations over its members were sufficient to maintain athletic balance (D.C., 70a, 97a); that NCAA controls contribute only indirectly, if at all, to this goal (D.C., 110a, 115a); and that the ''marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy'' (D.C., 109a).

6. The Tenth Circuit, addressing NCAA's athletic competitive balance justification, held that it appeared to be a noneconomic justification which could not justify a restraint on competition (10th, 11a); that the NCAA appeared to be advancing the impermissible argument that economic competition would destroy the market (10th, 11a); that the district court found on adequate evidence that athletic balance could be achieved by less restrictive means (10th, 11a); and that in fact, since the district court found that many more games (particularly local and regional) would be telecast without controls

(D.C., 59a, 66a, 91a, 114a, 118a119a), eliminating the controls would have the effect of equalizing revenues among NCAA members (10th, 21a).

7. As to NCAA's argument that its restraints increased live gate attendance at its members' games, the district court held that NCAA controls have no effect on gate attendance (D.C., 68a, 107a, 115a), and in any event NCAA does not employ its restraints in order to protect gate attendance, but rather to maximize television revenues to its members (D.C., 69a-70a, 108a, 109a). The court held that "the NCAA's argument regarding gate attendance is either an ill-founded belief at best, or at worst, a deception employed to make the majority of the NCAA membership believe that they should control football television out of self interest" (D.C., 70a).

8. The Tenth Circuit, addressing NCAA's argument that its restraints promoted gate attendance and therefore spectator viewership of football games, held that it was doubtful "that the output may be properly characterized as viewership" (10th, 10a); that even if it is assumed viewership is output, total viewership — both live and televised — should be considered, and there was no evidence in the record to permit total viewership to be gauged (10th, 10a); that even if total viewership was enhanced, it did not justify NCAA's restraints because it came at the expense of other options by reducing output of desired products and increasing consumption of less desirable products (10th, 10a); and that the restraints were broader than necessary to achieve NCAA's professed goals (10th, 11a).

9. NCAA also contended that its controls facilitated the marketing of college football television by a system comparable to that approved in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979). The district court held that the most important distinction between the *Broadcast Music* arrangement and NCAA's is that NCAA members have been forced to agree by the will of the majority not to contract outside NCAA's television plan (D.C., 93a). It held that "[t]he networks pay the extraordinarily high price they pay for NCAA football because of the guarantee of exclusivity" (D.C., 91a); that NCAA's witnesses were not even able to "articulate any credible reason as to *why* it is necessary for NCAA to act as an exclusive agent with the authority to bind all NCAA members to an exclusive contract" (D.C., 96a; *e.g.*, A. 634-36;

672-76; 752); that "NCAA controls are not necessary for the protection of NCAA's members' right to sell their football games for broadcast" and "many more games would be televised in a free market than are televised under NCAA controls" (D.C., 90a-91a); and that college basketball television is exemplary of the fact that college football will continue to be shown even on the network level without the interference of NCAA (D.C., 76a, 48a).

10. The Tenth Circuit, distinguishing this case from *Broadcast Music*, held that here, "the new and different product . . . comes at the expense of the product that would otherwise be offered by the schools" because the "schools are not permitted to sell outside the network contracts" (10th, 14a); that the contracts restrict the total number of games to be broadcast (10th, 14a); that the NCAA package is sold on an exclusive basis whereas in *Broadcast Music* an unlimited number of blanket licenses were offered for sale (10th, 14a); and that because of the character of the NCAA restraints, "those broadcasters that are unable to bid for the entire package are permanently foreclosed from the market" (10th, 14a).

Group Boycotts

11. The district court found two forms of group boycotts. "First, by granting exclusive rights to certain networks for televising college football, the NCAA essentially agrees not to bargain or make its product available to other broadcasters" (D.C., 67a). "There is an absolute refusal to deal with all of the major competitors of ABC, CBS and TBS" (D.C., 103a). Second, non-members of NCAA cannot appear on television against NCAA members (even outside the NCAA television package), and so "NCAA controls in effect deprive the non-member of the means of producing its final product, a football game" (D.C., 102a, 68a). This forces the non-member to attempt to compete against a monopolist (D.C., 54a).

12. The Tenth Circuit held that NCAA members' agreement between themselves and a few members of the television industry to refuse to deal with the remainder of the television industry did not constitute a group boycott because "the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level" (10th, 23a). The Tenth Circuit held that NCAA members' refusal to appear on television with

non-members was not a group boycott either. The court focused on the NCAA rule as an "expulsion sanction" which appeared "to be an enforcement mechanism and not a sham for an anticompetitive purpose" (10th, 25a).

Rule of Reason

13. Both the district court and court of appeals evaluated NCAA's television controls under the rule of reason, with the observation that doing so would not offend the interest in litigation efficiency in this particular case (D.C., 105a; 10th, 15a). The district court found that "the history and circumstances surrounding the controls lead readily to the inference that they were intended to restrain and enhance prices" (D.C., 107a); that "[t]he controls dictate which broadcasters and cablecasters NCAA members may deal with, and which they may not" (D.C., 113a); that "NCAA has commandeered the rights of its members and sold those rights for a sum certain," making the price paid for their television rights "responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "[f]ewer different teams would appear on the networks, and more games involving more teams would be telecast by local and regional stations, in the absence of the NCAA controls" (D.C., 114a); and that "the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls" (D.C., 115a). The district court concluded that there were no redeeming procompetitive benefits that outweighed these adverse effects on the free market (D.C., 115a).

14. The Tenth Circuit concluded that the NCAA television plan increases concentration in the marketplace, prevents producers from exercising independent pricing and output decisions, precludes broadcasters from purchasing a product for which there are no readily available substitutes, and facilitates cartelization (10th, 22a). The court found that NCAA's assertions of procompetitive benefits "do not overcome the anticompetitive effects of the restraints" (10th, 20a-21a).

15. Both the district court and Tenth Circuit concluded that NCAA had market power over collegiate football television, primari-

ly because of the special suitability of college football to fulfill the needs of networks for Saturday afternoon programming (D.C., 72a; 10th, 19a) and because of the needs of telecasters to reach the demographically unique college football audience — composed substantially of middle-aged male college graduates in the middle to upper income brackets (D.C., 77a, 75a; 10th, 18a). The district court said, particularly, that "[i]t strains credulity to suggest that broadcast programming does not consist of submarkets" (D.C., 76a), and both courts agreed that Saturday afternoon college football television was a relevant market (D.C., 71a-78a; 10th, 18a-19a). Both courts pointed out that Saturday afternoon programming consists largely of sports, cartoons and old movies (D.C., 72a; 10th, 18a); that the most logical substitute for college football, which is professional football, is precluded from televising on Saturday afternoon during the college football season by the strictures of its television antitrust exemption granted by Congress (D.C., 71a, 121a; 10th, 19a); and that other professional sports, *e.g.*, baseball, were not substitutable with NCAA football (D.C., 75a; 10th, 18a-19a). Both courts noted that advertisers spend 2½ times more per viewer to advertise on NCAA football than on the average for other programming (D.C., 75a, 120a; 10th, 18a); and that the unique appeal of college football was indicated by the fact that CBS frequently offered no programming at all, *i.e.*, "went dark", half of each Saturday afternoon in the last few years when ABC had exclusive rights to televise college football (D.C., 72a; 10th, 19a). The district court observed that "ABC was willing to suffer a net loss in televising college football for the benefits it derived from being affiliated with the sport" (D.C., 75a), and the Tenth Circuit held that the networks "need" college football "programming to offer on Saturday afternoon" (10th, 19a). The district court pointed out that ABC and CBS have agreed to dramatic price increases (a 62% increase per exposure from 1981 to 1982, and a 100% increase per exposure from 1981 to 1985) for college football programming in the present contracts (D.C., 122a-123a). The Tenth Circuit held alternatively that even had the district court defined the market too narrowly, the evidence showed that NCAA possessed sufficient market power to make "the risks of cartelization and price enhancement . . . imminent" for purposes of a rule of reason analysis (10th, 20a).

Monopolization

16. The district court found NCAA in violation of §2 of the Sherman Act because it had unlawfully obtained monopoly power in a relevant market (D.C., 124a-125a). NCAA did not argue either in the district court or the court of appeals that, if it had monopoly power (turning on the question of market definition), it had obtained it lawfully (D.C., 124a-125a; 10th, 20a n. 16). The Tenth Circuit, while affirming the district court's market definition (10th, 18a), found it unnecessary to consider the monopolization claim separately because it "would not affect the scope of the relief granted" (10th, 20a n. 16).[5]

SUMMARY OF ARGUMENT

I.

The NCAA television plan is *per se* violative of the Sherman Act because its restraints destroy economic competition among members for the sale of football telecasting rights. These restraints were created and are administered with the openly acknowledged purpose of enhancing the price charged for telecasting rights by limiting the number of games offered for sale. It is not disputed that the television controls additionally foreclose much of the television industry from the market, suppress local and regional telecasts for which there is great demand, and restrict the viewer's choice.

These restraints, in purpose and effect, constitute traditional categories of *per se* illegal conduct. The television plan is an intricate and very efficient multilateral agreement between competitors and a small portion of the television industry, administered with the purpose and effect of fixing prices by restricting output, boycotting all nonassociation members to prevent them from producing competing products, and boycotting a substantial amount of the television industry, all enforced by express and elaborate provisions for disciplining association members who stray from the restraints of the cartel.

[5] NCAA presents arguments pertaining to standing and remedial issues neither raised nor fairly comprised within its questions presented (Br., ns. 1 and 3). NCAA may not raise additional questions in this manner under Supreme Court Rule 34.1(a), and there is no "plain error" in this case, as the Court has defined that term. *See Silber v. United States*, 370 U.S. 717, 718 (1962). NCAA's contentions are meritless in any event (D.C., 81a-85a; 10th, 3a-6a; D.C. 130a-133a; 10th, 25a-27a).

II.

The establishment of a *per se* violation forecloses the NCAA's attempts to proffer "procompetitive justifications," under any of its various guises.

The NCAA is a cartel, not a joint venture. Its members independently invest in, control, and receive revenues from their football programs, just as they do for their other athletic and academic programs. Where legally separate entities combine with the purpose or effect of restraining competition, they are not joint venturers, but a cartel.

Moreover, NCAA's entire defense in this case, that it destroys competition between its horizontally positioned individual members in order to enhance competition for television time against other forms of entertainment, is foreclosed by this Court's decision in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

Finally, NCAA's purported procompetitive advantages are contrary to the express findings of both lower courts, which NCAA refuses to acknowledge, and contrary to common sense and experience in other sports where television is not regulated — most notably basketball.

Notwithstanding NCAA's interesting but irrelevant observations regarding the allocation of the burden of proof and the distinction between absolute and reasonable necessity, the fact remains that the courts below both flatly rejected the justifications proffered by NCAA, holding that the justifications were not procompetitive, that the restraints were neither effective nor reasonably necessary to achieve the alleged goal, and that in any event the serious anticompetitive effects of NCAA's plan warranted its condemnation.

III.

Both lower courts properly held that NCAA's television plan failed the rule of reason test also. None of NCAA's arguments on rule of reason even resemble a direct challenge to both lower courts' conclusions that the anticompetitive effects of its plan outweigh the procompetitive benefits it claims. NCAA neither denies the existence of the anticompetitive effects, nor addresses the fact or result of the rule of reason balancing tests applied by the lower courts. Rather, NCAA argues that competition by prospective purchasers for the

NCAA's exclusive television package is a satisfactory substitute for the extinguished competition between its member-sellers. However, the Sherman Act has never permitted cartel members to justify the destruction of competition among themselves by reference to competition among buyers to purchase from the cartel.

IV.

Ultimately, every defense urged by NCAA, either in connection with its *per se* or rule of reason analysis, or to escape the district court's monopolization holding, is dependent upon its assumption that it has no market power. This assumption is in turn dependent upon NCAA's premise that the product market should not be determined by examining what NCAA members sell and telecasters purchase, which is telecasting rights, but rather by assessing power of NCAA members over advertisers who purchase commercial time on network telecasts. This premise has no basis in logic or authority, and was properly rejected by both courts and the Justice Department below. If its premise is not accepted, NCAA attempts no answer to the clear findings of the lower courts that the NCAA has market power over the telecasters which purchase its product. The evidence abundantly supports the finding that college football television is a unique product, fulfilling a special need for telecasters, having distinct prices and specialized vendors, and that there is no reasonably interchangeable substitute for it. NCAA has come nowhere near discharging its almost insurmountable burden to prove the lower courts' findings clearly erroneous. Its restraints are therefore illegal.

V.

Because the relevant market was properly defined, the district court's monopolization holding is correct also. Even if NCAA could properly be regarded as a single entity (and it cannot) it would still be a monopolist.

ARGUMENT

Simply put, the issue in this case is whether virtually all of the competing producers of a commercial product may agree to sell exclusively through a common sales agent by an arrangement which has significant anticompetitive effects and is not reasonably necessary to a legitimate integration. The simple answer to this question is "no": such an arrangement is — and always has been — a violation of the Sherman Act. Neither the issue nor the answer changes simply because the question arises in the context of intercollegiate athletics.

As the courts below both recognized, NCAA has utilized its power in intercollegiate athletic regulation to declare itself, by fiat, the mandatory and exclusive sales agent for the television rights of virtually all of the competing producers of commercially salable college football. In this capacity, NCAA has fixed prices, restricted output, and foreclosed competition in the market. Moreover, it has enforced its controls over the sale of college football television rights with threats of the practical excommunication from all intercollegiate sports. Such practices would be unthinkable in any other context, and they should not be spared here.

The courts below properly recognized that this case has nothing whatever to do with the validity or desirability of NCAA's rules relating to amateurism, rules of play or conditions of competition. Respondents do not challenge NCAA's rule-making powers in these traditional areas of concern. What respondents do challenge is NCAA's venture away from its heritage and into *economic* regulatory functions — a venture which NCAA has seen fit to undertake in only one of the numerous intercollegiate sports which it regulates (D.C., 47a).[6]

The lower courts carefully considered NCAA's attempts to justify its entry into economic regulation on the grounds that it is reasonably necessary to either a rule-making or marketing integration. Stripped of any supporting justifications, NCAA's usurpation

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[6] The distinction between athletic and economic regulation is well stated in *Justice v. NCAA*, No. 83-552 TUC ACM (D. Ariz. Nov. 17, 1983): ("NCAA is now engaged in two distinct types of rule-making activity. One type . . . is routed in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose. [Citing this case]" Slip Op. at 49. "The regulations at issue here, as distinguished from the rules governing television contracts in *Board of Regents of Oklahoma v. NCAA*, 707 F.2d 1147, pertains solely to NCAA's stated goal of preserving ameteurism." Slip Op. at 41. *Hennessey v. NCAA*, 564 F.2d 1136, 1149 n. 14 (5th Cir. 1977). *See also M & H Tire Co. v. Hoosier Racing Tire Corp.*, 560 F.Supp. 591, 603 (D. Mass. 1983); Ponsoldt, *The Application of Sherman Act Antiboycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles*, 55 S.Cal.L.Rev. 1, 38-43, 55 (1981). For an economist's testimony discussing the distinction in this case, *see* Tr. 599-600.

of the exclusive right to sell college football television rights can be judged for what it really is — a naked restraint of trade in violation of the Sherman Act.

I. THE PURPOSE AND EFFECT OF NCAA'S TELEVISION PLAN IS TO RESTRAIN COMPETITION AND ENHANCE PRICES THROUGH EXCLUSIVITY, WHICH CONSTITUTES A *PER SE* VIOLATION OF THE SHERMAN ACT.

The basic tenet of NCAA with respect to football television is that the price received for television rights will be increased if the number of available telecasts of college football games is decreased. The district court found that this restriction of output and enhancement of price were both the purpose and the effect of NCAA's controls (D.C., 79a, 112a).[7] NCAA has sought — and achieved — these anticompetitive effects in the capacity it has established for itself as exclusive sales agent for the football television rights of all of its members.

NCAA has never made any secret of its purpose to enhance prices by restricting output, and indeed proclaimed it openly at trial. NCAA's executive director testified that NCAA had made projections demonstrating that there would be an increase of at least forty-five to fifty percent in football telecasting on Saturday afternoon without television controls (A. 673). He testified further that the purpose of the controls was to restrict the choices of viewers (A. 674), that the exclusivity of NCAA's contracts has "greatly escalated rights fees for colleges" by preventing a saturation or flooding of the market with college football games on Saturday afternoon (A. 676-78), and that NCAA has put a minimum aggregate floor under the prices "so that the network won't grind down the fees paid to those games which have less bargaining power" (A. 670). Similar testimony was given by the chair of NCAA's Football Television Committee (A. 751-52) (networks are willing to pay extra for exclusivity); by a member of NCAA's Executive Committee (A. 756-57) ("It's like anything else, when we got lots of it, the price of it in all

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[7] A civil violation of the Sherman Act is found by proof of either an unlawful purpose or an anticompetitive effect. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 44 U.S. 1, 19 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978).

probability will go down to meet whatever the conditions are."); by NCAA's economist, who flatly admitted that NCAA keeps the price of its football games up by restricting their output (A. 725-28); and by the Senior Vice President of ABC Sports ("The exclusivity is really the essence of our agreement, and has been with the N.C.A.A., and will continue to be") (A. 530). *See also* A. 431-32.

To enforce the exclusivity and output limitations, NCAA has at its disposal the ultimate in sanctioning mechanisms. Not only does it have the power to prohibit television appearances under its plan and to prohibit participation in football bowl games, or, for that matter, in all intercollegiate athletic championship events, but it also has the power to expel a school from the NCAA, which would destroy the viability of that school's athletic program (D.C., 53a-54a; A. 444-45, 549; 486; 510). NCAA has willingly and vigorously threatened the use of these powers, as it did when the College Football Association attempted to implement a competing package of football television rights (Statement, ¶2; A. 435-40, 465-70; 445-46, 449-50; 458-59; 583-86; 631-33; 567-74; 28; 374-77; 379; 380-84).

The lower courts found that the television plan had not only an anticompetitive purpose but also substantial and wide-ranging anticompetitive effects. In the interest of litigation efficiency, the courts analyzed the effects under both the *per se* rule and the rule of reason, and reached the same conclusions under both standards. These findings, which are outlined in paragraphs 3, 4, 11, 13 and 14 of the Statement, *supra*, are fully supported by the record. Both lower courts found and the record shows that the NCAA has fixed the actual price paid for its members' *cumulative* games (D.C., 87a, 113a; 10th, 7a; A 483, 497, 499-500, 524-25, 667-70) as well as *individual* games (D.C., 113a; 10th, 7a; A. 482-83, 578, 665-71, 393-94, 418-21). Plaintiffs' economist, Dr. Ira Horowitz, testified that NCAA's restraints served to raise the price for the television rights sold, restrict output, and restrict the viewer's choice by limiting the games viewers can watch (A. 605-606). Additionally, the restraints substantially reduce opportunities for small or independent telecasters to compete in the market, and for small local and regional companies to advertise on football television, reserving these opportunities for major corporations (A. 609). Another economist, distinguished for his prior studies and writings on intercollegiate athletic economics and especially the NCAA, concluded that NCAA has fixed prices, reduced output, and is behaving as a typical and very effective cartel (A. 500-510, 513). Similar testimony was given by a third economist (A. 617-19). Witnesses for both plaintiffs and defendant were in firm agreement that without NCAA's exclusivity requirement, many more local and regional telecasts would occur, because of football fans' greater interest in local college teams (A. 548; 583-84; 607-608; 673-74; 783-85). Moreover, restriction of the viewer's choice, by limitation of number and selection of games, is at the heart of NCAA's television controls (A. 605-606, 674, 800), most significant in view of the fact that the antitrust laws are a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).[8]

These actions constitute — both in purpose and effect — classic models of price-fixing by limitation of output and direct price-control, and of enforcement of price-fixing measures by boycott. They are the types of actions which have long been held to fall into well recognized categories of *per se* illegal restraints.

A. *Price-Fixing and Restriction of Output*

Any combination which tampers with price structures is engaged in an unlawful activity, and is subject to condemnation under the *per se* rule. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 346-47 (1982). "[I]nterference with the setting of price by free market forces is unlawful *per se*," *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969), and "[a] horizontal agreement to fix prices is the archetypal example of such a practice." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Price-fixing agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

[8] NCAA's exception telecasts have virtually no meliorative impact on this suppression of competition. The exception telecasts are within the control of NCAA's exclusive purchaser, whose affiliated station in the selling schools locality has the first right of refusal for the game (A. 67-68, 98-99). Moreover, the price for such telecasts has consistently been fixed, pursuant to a formula derived from the price of games on the series (Tr. 530-31). Further, exception telecasts are extremely limited in number. For example, in 1981, there were 72 exception telecasts of Division I games (A. 156), most on one or two stations (A. 64-67). In contrast, there were 23 "exposures" on the network series, involving an average of 211 stations each, for a total of more than 4,800 individual station telecasts (A. 238-39).

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951). This is particularly true where, as here, all televised teams receive "the same economic rewards . . . regardless of their skill, their experience, [or] their training." *Maricopa County*, 457 U.S. at 348.

This is not, as NCAA seems to suggest, a case of "literal price-fixing." *Maricopa County*, 457 U.S. at 355. There is nothing merely "literal" about a joint selling arrangement, the purpose and effect of which are to restrict output, enhance price, limit product diversity, and eliminate competition among all of the producers of a product. This is precisely the type of arrangement which traditionally has received *per se* treatment because it "almost always tend[s] to restrict competition and decrease output," *Broadcast Music*, 441 U.S. at 19-20. As to reduction of output, *see also* 1 Von Kalinowsky, *Antitrust Laws and Trade Regulation* §1.03[4][b][ii].

B. *Group Boycotts*

The district court found two forms of *per se* illegal group boycotts (Statement ¶11)[9]. The first type of boycott, that NCAA members have agreed not to bargain or make their product available to any buyers other than those with whom they collectively deal, is a boycott of the variety condemned in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959). There, a number of sellers agreed with a single buyer to refuse to deal with the buyers' competitors. The Tenth Circuit discounted respondents' boycott claim on the ground that "the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level" (10th, 23a), but there was no such attempt by the boycotting sellers in *Klor's*.[10] The *Klor's* type boycott has

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[9] The Tenth Circuit did not uphold the district court's findings of boycotts, but it is well settled that "the prevailing party may defend the judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

[10] This is well explained in *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 775 (11th Cir. 1983). Any question as to whether NCAA was induced to boycott by one horizontally positioned to those boycotted can be quickly resolved by the district court's finding (D.C., 91a), confirmed by the record (A. 530), that the essence of the agreement is payment for exclusivity. It is not significant that the horizontally positioned beneficiary of the boycott had to bid for the restraint.

been repeatedly recognized in both this and lower court decisions, including sports association cases.[11]

The second type of boycott was found by the district court in NCAA's rule forbidding its members from competing on television with non-members (D.C., 102a, 68a), a rule of obvious utility to a monopolist (D.C., 54a). The rule is not merely a sanction against schools violating NCAA's television plan, but a flat prohibition against dealing with non-members. Such an association rule constitutes an illegal boycott under well settled precedent.[12]

C. Judicial Inexperience With the NCAA Television Plan Is Irrelevant

Price-fixing and boycotts constitute traditional categories of *per se* illegal conduct, and NCAA is therefore mistaken in its fundamental premise, that the lower courts applied the *per se* rule to "practices that have [not] been placed in the regular *per se* category . . . ." (Br. at 10.)

The analysis need not change simply because the issue arises in the context of intercollegiate football. The sale of football television

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11 *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Com-Tel, Inc. v. Du Kane Corp.*, 669 F.2d 404, 412-14 (6th Cir. 1982); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 365 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478, 484-85 (5th Cir. 1966); *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 560 F.Supp. 591, 601-602 (D. Mass. 1983); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1320-21 (D. Conn. 1977); *Robertson v. NBA*, 389 F.Supp. 867, 893 (S.D.N.Y. 1975); *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049, 1063-67 (C.D. Cal. 1971), *injunction reinstated sub nom.*, *Haywood v. NBA*, 401 U.S. 1204 (1971). *Supra*, n. 17.

12 *See Associated Press v. United States*, 326 U.S. 1 (1945) (holding illegal a membership rule forbidding members from selling news to non-members); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (holding illegal boycott by member firms of the New York Stock Exchange of wire connections between members and non-members); *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) (holding illegal boycott by members of AMA to deprive doctors advocating prepaid health plans of facilities within which to practice). The rule has also been applied to an athletic association. *Blalock v. Ladies Professional Golf Ass'n*, 359 F.Supp. 1260 (N.D. Ga. 1973). *See also* Ponsoldt, *supra* n. 6, at 27-28, 61; Sullivan, *Antitrust* 253 (1977).

rights is — or, but for the NCAA restraints, would be — just as much a competitive commercial enterprise as the sale of medical services in *Maricopa County*. In that case, this Court rejected the argument that the *per se* rule should be abandoned simply because the issue arose in an industry with which the judiciary has had little experience. The Court stated that " '[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.' " 457 U.S. at 349 (quoting from *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)). As the Court recognized in *Maricopa County*, "judicial inexperience" is relevant only where a *new per se* rule for a particular restraint is being created, not in applying established *per se* rules to particular industries. 457 U.S. at 349, n. 19.

II. THE NCAA'S JUSTIFICATIONS DO NOT ALLOW ITS RESTRAINTS TO ESCAPE *PER SE* CONDEMNATION

It is beyond argument that the myriad of restraints in the television plan stifle competition. As NCAA appears to concede, in a masterpiece of understatement, the effect of the plan "looks at first instance to be the elimination of competition" (Br. at 13). NCAA well understands that it must find some legal justification, cognizable under antitrust analysis, to escape *per se* application of the Sherman Act.

NCAA attempted at trial and is attempting again here to offer a variety of tenuous "procompetitive justifications" for its restraints. These justifications were flatly rejected by both of the courts below on various grounds, including that the restraints were neither effective nor necessary to achieve the asserted goals. These findings are not clearly erroneous and, despite NCAA's attempt to manufacture a new ground for reversal, they would not change if the burden of proof were allocated differently. That should — and, in any other case, would — be the end of the inquiry. Surprisingly, however, NCAA asks this Court to analyze the issues presented here as if "the NCAA has established all of the justifications it asserts" (Br. at 19).

NCAA is mistaken in believing that such an analysis would alter the outcome. Whether or not the allegedly procompetitive justifications proffered by NCAA are legitimate, they may not be considered in evaluating a naked restraint under the *per se* rule.[13]

NCAA appears to concede that "bare" (i.e., outside the context of its joint venture and integration arguments) procompetitive justifications may not be considered under *Maricopa County*. The Court there held:

> "The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

457 U.S. at 351.[14]

Nevertheless, NCAA argues that its justifications should be considered on one or both of the following bases:

1. NCAA argues that it is actually a joint venture of the individual schools, as to which *per se* treatment is inappropriate;

2. NCAA argues that it is a contractual marketing integration, and that the restraints in question are procompetitive because they improve the ability of that integration to compete against other television programming and other forms of entertainment.[15]

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[13] NCAA even goes so far as to argue that its escape from *per se* analysis depends upon the absence of market power (Br. at 9, 25 and 34). Market power is irrelevant to *per se* condemnation of NCAA's restraints. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956). This Court went to great lengths to obviate any confusion on this when it adopted the *per se* rule. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 and n. 59 (1940). NCAA's economist expressed fundamental disagreement with this principle, stating that price-fixing "to an economist" means restriction of output in a relevant market, and requires market power (with one exception for unsuccessful attempts to fix prices) (A. 683, 716-17).

[14] *See also, United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 & n.59 (1940); *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942).

[15] In the court of appeals, NCAA argued that these restraints also related to its "rulemaking integration" (i.e., that gate attendance and athletic balance should be promoted for their own sake), an argument rejected by that court (App. 9a-11a), and apparently not presented here.

These arguments will be treated in turn.

A. *NCAA Cannot Escape Per Se Scrutiny By Asserting that It Is a Joint Venture*

NCAA asserts that it is a joint venture rather than a cartel, and that its joint venture status automatically exempts it from antitrust *per se* rules. Neither assertion is correct.

First, NCAA football is not the product of a joint venture; although NCAA suggests otherwise, the Tenth Circuit so concluded (10th, 12a n. 13). There is a consensus by courts and scholars alike, both within and outside the antitrust field, of the essential elements of a joint venture. A joint venture requires: (a) a contribution by the parties of capital, property, services or knowledge to a common undertaking; (b) a joint proprietary interest in and right of mutual control over the subject matter of the enterprise; and (c) a joint (not several) sharing of profits and losses.[16]

The members of NCAA have not combined their capital, property, or other assets to operate jointly their football programs; indeed, no school is compelled under NCAA's plan to play football or televise its games at all. Nor do they share a joint proprietary interest in, or a right to mutual control over each other's football programs or telecasting rights.[17] Their profits and losses are not jointly shared, only dependent upon a common variable — the price fixed for telecasting rights through their combined bargaining power.[18] Each school invests in and receives revenues from its football, basketball

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[16] 3 Von Kalinowsky, *Antitrust Laws and Trade Regulation* §17.08[1] at p. 17-99, n. 1; 1 Callmann, *Unfair Competition, Trademarks and Monopolies* §4.37; 2 Williston on Contracts §318A at pp. 563-65 (3d Ed. 1959); 48A C.J.S. *Joint Ventures §§10-16 (1981); Beavers v. West Penn Power Co.*, 436 F.2d 869, 873 (3d Cir. 1971); *Pinkowski v. Coglay*, 347 F.2d 411, 412-13 (7th Cir. 1965), *cert. denied*, 386 U.S. 1036 (1967); *Swann v. Ashton*, 330 F.2d 995, 996-97 (10th Cir. 1964).

[17] 2 Williston Contracts §318A, p. 567 (3d Ed. 1959), quoting from judicial decisions, elaborates: "'The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates in the trust and inducement that each would act for their joint benefit.'"

[18] As stated in *Swann v. Ashton*, 330 F.2d 995, 996-97 (10th Cir. 1964), the chief characteristic of a joint venture is a "joint and not a several profit."

and other sports programs just as in any of its functions — unilaterally. The district court found, and the record supports that the colleges of the nation compete in every aspect of their economic affairs (D.C., 55a; A. 546). They are legally separate entities which, as to their football telecasting rights, have combined to perfect a cartel (A. 507-510, 513; 618-19).[19]

That the NCAA is a lawful association with legitimate non-economic regulatory purposes does not mean that it is entitled to be treated as a single entity when it ventures into the realm of economic regulation. The Maricopa County Medical Society was a lawful association with many laudable purposes and rules. Moreover, it came to court with a bundle of asserted procompetitive justifications for its maximum price limitations. This Court held, however, that the *per se* rule applied, and that it was improper even to consider whether the justifications were plausible. *Arizona v. Maricopa County Medical Society,* quoted at p.19 *supra. See also National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978);[20] *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 535-536 and n. 4 (1944).[21]

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19 NCAA relies upon general language in *Maricopa County* and *Broadcast Music* to support its contention that it is a joint venture. In *Maricopa County* this Court held the defendants were "not analogous to partnerships or other joint arrangements in which persons who otherwise would be competitors pool their capital and share the risks of losses as well as the opportunities for profit", and gave the example of a clinic, 457 U.S. at 356-57, which only confirms the accuracy of the definition of a joint venture stated in the text. In *Broadcast Music,* the Court referred to joint ventures and mergers, but did not discuss their elements, and did not hold ASCAP or BMI to be either. 441 U.S. at 23.

20 *Professional Engineers* is described as a *per se* price-fixing case in *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 647 (1980).

21 Pooling agreements affecting price have long been held *per se* illegal. *United States v. Line Material Co.,* 333 U.S. 287 (1948) and claims of procompetitive benefits have been discounted on account of the control such agreements give over prices. *Id.* at 309-310, 315. *National Macaroni Mfrs. Ass'n v. FTC,* 345 F.2d 421 (7th Cir. 1965). *Cf., United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 149 (1948). Associations taking away the freedom of traders to the detriment of competition have also been uniformly condemned. *Anderson v. Shipowners Ass'n,* 272 U.S. 359 (1926); *United States v. American Linseed Oil Co.,* 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States,* 257 U.S. 377 (1921).

Moreover, even if NCAA could be considered a joint venture in this context, the bald assertion that the *per se* rule is inapplicable to joint ventures is not supportable. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), this Court applied the *per se* rule to horizontal agreements dividing territories among competitors, despite the contention of defendants that they had formed a lawful "joint venture".

> "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."

Timken, supra, 341 U.S. at 598.[22] Other claims to joint venture status have been rejected by this Court as well as lower courts, where *per se* illegal conduct is involved, over the protests of competitors that the conduct entailed procompetitive benefits. *E.g., United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972);[23] *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969);[24] *United States v. Sealy*, 388 U.S. 350 (1967); *Virginia Excelsior Mills, Inc. v. FTC*, 256 F.2d 538 (4th Cir. 1958); *United States v. Columbia Pictures Industry, Inc.*, 507 F.Supp. 412 (S.D.N.Y. 1980). *See also* Ponsoldt, *supra* n.6, at 55-56. As this Court said in *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116-117 (1975):

> "The central message of the Sherman Act is that a business entity must find new customers and higher profits

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22 *Timken* is cited to illustrate horizontal *per se* illegal conduct in *White Motor Co. v. United States*, 372 U.S. 253 (1963), where this Court first used the phrase "naked restraint". The Court in *White* clearly referred to the type of restraint, rather than its purpose or the nature of the organization involved (*id.* at 259-60, 263).

23 In *Topco* the Court applied the *per se* rule, saying: "In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." 405 U.S. at 610.

24 In *Citizen Publishing*, this Court affirmed a grant of summary judgment, holding that profit pooling, price-fixing and territorial divisions between competitors under a "joint operating agreement" were *per se* illegal.

through internal expansion — that is, by competing successfully rather than by arranging treaties with its competitors.

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[I]ndependently owned firms cannot escape competing merely by pretending to common ownership or control, for the pretense would simply perfect the cartel."[25]

B. *The NCAA Television Plan Is Not a Permissible Marketing Arrangement Under Broadcast Music*

1. *This Court's Broadcast Music Analysis*

NCAA next argues that the restraints in its television plan are ancillary to a contractual marketing integration, and that these restraints are supported by plausible procompetitive justifications. On this basis, NCAA concludes that, under *Broadcast Music*, the *per se* rule is inapplicable. Its reliance on *Broadcast Music*, however, is unfounded. *Broadcast Music* did not involve what NCAA requests here — a search for procompetitive benefits of restraints to justify a rule of reason approach to what would otherwise clearly be *per se* violations of the Sherman Act. Rather *Broadcast Music* involved a determination that the integration itself was reasonably necessary in the market, that the restraint in question was reasonably necessary to that integration, and that the restraint had no adverse impact on free price competition in other markets.

In *Broadcast Music*, the Court first noted the *sui generis* aspects of the case — decades of judicial scrutiny, and a necessity for a blanket license to effectuate the Congressional Copyright scheme. Then the Court concluded that the blanket license had neither the

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25 The lower court cases cited in NCAA's note 6 do not support its contention here. None involve a finding of price-fixing, and even in those where a rule of reason analysis was applied to boycotts, no automatic exemption from *per se* rules for sports associations was recognized. See n. 27, *infra*. Most of the cases carefully distinguish restraints that would be *per se* illegal from the arrangements under scrutiny, and two specifically mention NCAA's television contracts as presenting a different issue. *Hennessey v. NCAA*, 564 F.2d 1136, 1149 n. 14, 1150, 1152 (5th Cir. 1977) (noting that NCAA television contracts and ticket sales are a big business venture subjecting NCAA to the antitrust laws, but holding "this particular restraint [limiting coaching staffs] . . . is not a *per se* violation of the antitrust laws"). *Justice v. NCAA*, No-83-552 TUC ACM (D. Ariz. Nov. 17, 1983) (discussed in n. 6, *supra*). *See* other cases discussed, Br. in Opp. n. 21.

purpose nor effect of threatening the free market economy; that it had created a market where individual composers could not function effectively (as demonstrated by experience); and that there was doubt as to whether the license threatened the central nervous system of the economy, pricing by the free market, because there was no impediment to CBS purchasing compositions individually — it had a "real choice". 441 U.S. at 24.[26]

The Court determined, in parts III B and C of its opinion, that the blanket license was "*reasonably necessary* to effectuate the rights" granted under the Copyright Act, observing that most users of copyrighted works want immediate access to any and all of the repertory of compositions, and that "[a] middleman with a blanket license was an *obvious necessity* if the thousands of individual negotiations, a virtual impossibility, were to be avoided." The Court concluded that "a bulk license of some type is a *necessary consequence* of the integration *necessary* to achieve these efficiencies, and a *necessary consequence* of an aggregate license is that its price must be established." (Emphasis supplied.) 441 U.S. at 19-21.[27]

In parts III D and E of its opinion, the Court made a separate inquiry: determining that the blanket license existed in a market apart from that in which individual composers were competing, and that

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[26] The only market under consideration was that involving BMI, ASCAP, and the three television networks. The thousands of other users of the license were not involved. *Columbia Broadcasting System v. ASCAP*, 620 F.2d 930, 934 and n.6, (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). In *Buffalo Broadcasting Co. v. ASCAP*, 546 F.Supp. 274 (S.D.N.Y. 1982), the court held that the blanket license was *not* freely chosen from "realistically available marketing alternatives" by local broadcasters, and was therefore illegal as to them.

[27] The *Broadcast Music* approach was used in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 356 n. 33, where this Court distinguished *Broadcast Music*, observing that price setting by doctors was not a "necessary consequence" of prepaid health insurance plans. The same methodology has long been used by lower courts in determining the applicability of *per se* rules, *e.g.*, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (applying least restrictive alternative test to determine whether tying arrangement was unlawful *per se*), and has been applied repeatedly in sports cases, under the rule announced in *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049, 1064-65 (C.D.Cal. 1971), *injunction reinstated sub nom.*, *Haywood v. NBA*, 401 U.S. 1204 (1971). *See M & H Tire Co. v. Hoosier Racing Tire Corp.*, 560 F.Supp. 591, 603 (D.Mass. 1983); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1321 (D.Conn. 1977); *Brenner v. World Boxing Council*, 675 F.2d 445, 455 (2d Cir. 1982), *cert. denied*, ____ U.S.____, 74 L.Ed.2d 76 (1982); *Cf.*,

the composers did not use the blanket license to stifle competition in other markets, *i.e.*, individual sales. The Court stated, after observing the separation of the blanket license from the market for individual compositions: "The individual composers and authors have neither agreed not to sell individually in any other market nor used the blanket license to mask price fixing in such other markets." 441 U.S. at 23-24. Similarly, the Court stated that because "composers have numerous markets and numerous incentives to produce, . . . the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel." 441 U.S. at 22, n. 40.

The Court's approach, then, was to determine the reasonable necessity of the integration to market a new, different product and the reasonable necessity of the price restraint to the integration, and additionally to determine whether the integration permitted more than "literal" price fixing, i.e., whether the integration actually had the purpose or effect of suppressing price competition in other markets.

2. *The Court of Appeals' Broadcast Music Analysis.*

The Tenth Circuit followed precisely the same approach as this Court in *Broadcast Music*, but found that the integration was improper because NCAA's controls had virtually destroyed competition in other markets (10th, 13a-14a). The court observed that in *Broadcast Music* copyright holders retained the right to sell individually, and that an unlimited number of blanket licenses could be sold. The individual sales ensured the presence of potential price competition. The court observed that, in contrast, the NCAA plan came at the expense of the product which would otherwise be offered, since other sales which might provide potential price competition had been essentially eliminated (10th, 13a-14a).[28]

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[27] (Continued)

Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F.Supp. 1103, 1116 (D.Neb. 1981), *aff'd*, 665 F.2d 222 (8th Cir. 1981). A similar approach is advocated by well recognized scholars of antitrust law. Sullivan, *Antitrust* 208-209 (1977) (applying two part test to avoid *per se* rule: (a) price restraint must arise inevitably from the integration; (b) arrangement must not dampen price competition market-wide by ending price competition between participants); Ponsoldt, *supra* n 6, at 40 n. 203 and 59-60.

[28] Even in the insignificant number of telecasts allowed outside the NCAA contract, the price has been fixed by a formula derived from sales under the contract. *See n. 8, supra.*

The court also evaluated the effects of the NCAA's marketing integration (but with a scrutiny not subsuming the rule of reason analysis)[29] and determined that the arrangement was one which would always or almost always restrict competition and decrease output. Moreover, the court found that the exclusive nature of the television plan posed substantial risks of vertical foreclosure. Since none of the features of the *Broadcast Music* arrangement which preserved competition were present, the court concluded that the integration itself was improper.

3. *United States v. Topco.*

NCAA apparently does not dispute the district court's finding that its marketing integration has the purpose and effect of suppressing competition in another market. In fact, it readily acknowledges that the alleged justifications for its restraints — *i.e.*, competitive balance, live attendance and series promotion — are tendered solely for the claim that they tend to make the sport more popular and, therefore, more competitive against other television programming.

Not only is this argument inconsistent with *Broadcast Music*, but it is foreclosed by *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), a case which NCAA has ignored throughout this litigation. In *Topco*, this Court held that *per se* rules were formulated precisely because of the inability of courts to "weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector." *Id.* at 609-610. The Court refused to suspend the operation of the *per se* rule "because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." Id. at 610. The Court held, rather, that defendants had "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy." *Id.* at 610-611.[30] The claim that interbrand competition was promoted by a

29 The Tenth Circuit quoted this Court's statement in *Broadcast Music*, 441 U.S. at 19, n. 33, that: "'The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, . . . or else we should apply the rule of reason from the start'" (10th, 7a-8a).

30 Another clear example of NCAA's trading off between different sectors of the economy is its suppression of local and regional telecasts for the benefit of national telecasts.

horizonal combination[31] restricting intrabrand competition was rejected under the *per se* rule. *Id.* at 612.

Topco does not permit NCAA's members to stifle competition among themselves for the sale of television rights, on the hope of increasing competition against third parties, even assuming that college football is in competition with prime-time programming, as NCAA contends. The marketing integration, therefore, is *per se* invalid under both *Topco* and *Broadcast Music*.

4. *NCAA's Procompetitive Justifications.*

Even assuming that NCAA's marketing integration was proper, the television plan would be *per se* illegal because its price and exclusivity restraints are neither effective nor necessary to the achievement of the allegedly procompetitive goals of the integration. *Maricopa County* and *Broadcast Music* clearly establish that application of the *per se* rule can be avoided only by a showing that the restraint is necessary to the attainment of a procompetitive goal. *Maricopa County*, 457 U.S. at 356 n. 33; *Broadcast Music*, 441 U.S. at 19-21.

The courts below carefully considered — and flatly rejected — the justifications proffered by NCAA on the grounds that they were not procompetitive, and that the restraints were not necessary or effective to achieve the alleged goals.

As to competitive balance, the district court held that without NCAA's controls, many more games involving many more schools would have been broadcast, particularly at the local and regional levels (D.C., 59a, 66a, 91a, 114a, 118a-119a). The Tenth Circuit, relying upon this finding, held that "[t]his would have the effect of equalizing revenues" (10th, 21a). The record shows that without NCAA's controls, television appearances would be spread among the smaller schools who presently cannot command national attention, but would command local and regional attention (A. 548; 583-84; 607-608), where the demand is higher (A. 584). This, as the Tenth Circuit observed, would spread revenues, which is NCAA's purported objective. *See also* Statement, paragraphs 5 and 6.

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[31] Such practices by traders holding *vertical* relationships escape *per se* scrutiny under *Continental T.V., Inc. v. GTE Sylvania Inc.*, 422 U.S. 36 (1977), which NCAA mistakenly cites as applicable in this horizontal case.

Similarly, the district court found that NCAA's controls have no effect on gate attendance (D.C., 68a, 107a, 115a), a finding supported by the record (A. 514-16; 582-83; 609-12), and one that the Tenth Circuit noted and did not overturn (10th, 10a, n. 8).[32] The district court further held that NCAA's *purpose* is not to protect gate attendance (D.C., 69a-70a). Moreover, the court of appeals, far from conceding that increased attendance is procompetitive, as NCAA claims (Br. at 26), held that it was "at best competitively neutral" (10th, 10a), because it would promote live attendance by restricting the availability of other options. *See also* Statement, at paragraphs 7 and 8.

NCAA's "series promotion" justification also suffers from fatal defects. The most serious of these flaws is the fact that there is simply no real "series" to promote. The "product" offered by NCAA is not substantially different from the product that could be offered by individual schools in the absence of the NCAA controls (D.C., 89a; 10th, 12a, n. 13).[33] NCAA has no role in the staging, or even scheduling, of football contests. Nor does it offer anything comparable to the blanket license in *Broadcast Music*. In *Broadcast Music*, the blanket license took the place of "thousands of individual negotiations, a virtual impossibility," 441 U.S. at 20, and thus "made a market in which individual composers are inherently unable to compete fully effectively." *Id.* at 22-23. In contrast, it is entirely

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32 NCAA asserts that the lower courts' findings are inconsistent with legislative history to a congressional antitrust exemption granted to professional sports leagues (Br. at 26-27). Adjudicative facts are judicially noticed only under the prescriptions of Rule 201, Fed. R. Evid. The exemption could have been, but was not extended to college television pooling arrangements. If NCAA desires such an exemption, it must apply to Congress. *Maricopa County, supra*, 457 U.S. at 354-55. NCAA has not yet done so because of its acknowledged belief that Congress would not respond favorably (A. 422-24).

33 NCAA argues that the contract permits networks to purchase an inventory of games and make a last minute selection before televising. This result does not derive from the exclusivity of the contract, the restraint at the source of NCAA's *per se* violations, and in any event can be achieved by purchasing a first right of refusal from the individual colleges. NCAA also argues its restraints are necessary for sufficient promotion of college football. Assuming the unwarranted premise that only a network has the ability to promote its programming, this is a problem to be resolved by the ingenuity of free competition. Joint promotion efforts in other industries have been very successful, e.g., for milk, beef and franchises.

practical for a telecaster to negotiate with each individual school, and even obtain access to a repertory of games before the season (n. 33). That the schools are able to "compete fully effectively" with NCAA's package is demonstrated by NCAA's express purpose and proclaimed need to suppress such competition. In fact, the only distinguishing features of the NCAA "product" are its exclusivity and its price and output restrictions — the very anticompetitive restraints that are challenged here.

The true purpose of NCAA's restraints is, as its highest officials admitted, to raise prices by restricting output (*supra*, Prop. I); NCAA's claim to other purposes is disingenuous. NCAA's argument really is that it forbids its members from freely dealing in the television market — (a) in order to force the one or two buyers of its television package to eventually telecast the games of less prominent football schools, and (b) to promote gate attendance at less prominent football schools — with the result of equalizing revenues, and thereby the competitive strength of the football programs of its members. But it is obvious, as the Tenth Circuit pointed out, that adequate athletic funding — and thus, the competitive balance which NCAA claims to seek — could be accomplished (assuming it is a proper goal) without doing violence to the marketplace, simply by requiring the televised schools to pay part of their compensation to non-televised schools (10th, 21a).

Finally, NCAA's argument that its exclusive contracts, combined with price-fixing, are necessary to the survival of college football is contrary to experience of other college sports — notably basketball — in the free television market. The district court found the example of college basketball television to be an indicium of the improbability of NCAA's claims of devastation for football television in a free market (D.C., 47a-48a, 76a). The record supports this finding (A. 487, 497-499; Tr. 532-535). In fact, the testimony showed that college basketball has flourished in the free television market. College basketball has not only experienced continuing increases in television exposure, but consequent increases in popularity, revenues, prestige and gate attendance, without the benefit of having an exclusive bargaining agent or limitation on telecasts (A. 498-99).

5. *Burden and Standard of Proof.*

Despite overwhelming contrary evidence and the adverse findings of both lower courts, NCAA continues to tender the same so-called "plausible procompetitive justifications" for its television controls. Realizing, perhaps, that this Court will not simply ignore the factual determinations of the courts below,[34] NCAA has proffered two theories for challenging these findings.

First, NCAA argues that both the district court and the court of appeals improperly placed on it the burden of proving the effectiveness and necessity of its restraints to achieve the efficiencies of the marketing integration. The allocation of the burden of proof is, however, irrelevant in the context of this case. Neither of the lower courts reserved any doubt as to its factual conclusions, rendering any misallocation of the burden of persuasion of no consequence.[35] The NCAA's contention that it offered the only evidence on some issues is both inaccurate and irrelevant. It is inaccurate because respondents

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[34] Where both lower courts concurrently find certain facts, this Court will refuse to review those findings "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This rule is independent of, and more stringent than the "clearly erroneous" standard, as shown in the Court's cases. *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Williams Mfg. Co. v. United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker v. Schofield*, 243 U.S. 114, 118 (1917).

[35] The allocation of the burden of proof is only important where a court is unable to decide whether a factual proposition is true or false. *E.g.*, McCormick, *Evidence* §336, p. 784 (1972); 9 Wigmore, *Evidence* §2845, pp. 285-87 (1981). Both opinions below are strongly worded denunciations of NCAA's controls, containing numerous and sufficient affirmative findings: (D.C., 69a-70a) (NCAA's controls not intended to protect gate attendance); (D.C., 70a, 110a) (NCAA's noncommercial regulations sufficient for furthering athletic competitive balance); (D.C., 109a) (controls are much more far reaching than necessary to achieve competitive balance, and any contribution to competitive balance "is overwhelmed by the violence which the controls inflict on the free market economy."); (D.C., 112a) (*purpose* of NCAA's controls is to enhance prices by fixing them and restricting output); (10th, 14a-15a) (The television plan suppresses product diversity, restricts output, poses substantial risks of cartelization and vertical foreclosure, distorts prices more than necessary to promote marketing efficiencies, and impermissibly forecloses competition by combination of virtually all actual or potential producers of commercially salable intercollegiate football.)

offered evidence on all disputed issues.[36] It is irrelevant because the NCAA's own witnesses and exhibits supplied ample support for many of the lower courts' findings.[37]

Even if a different allocation of the burden of proof would be dispositive in this case, placement of the burden on NCAA was entirely proper. An antitrust plaintiff, in order to obtain the benefit of the *per se* rule, has the burden of proving that the defendant has engaged in economic conduct of the type traditionally condemned under the rule. On this question, the plaintiff has the burden of persuasion. However, once *per se* illegal conduct is established, the defendant may escape *per se* condemnation only by showing substantial justifications of the kind discussed and found in *Broadcast Music* that make imposition of the *per se* rule improper (an affirmative defense). The burden of persuasion is placed on the defendant only in this latter instance. The sports cases cited in note 27 *supra*, show that this is where the burden has been placed in judicial practice.

NCAA relies upon employment discrimination law to illustrate proper application of the burden of proof in this case. NCAA has, however, chosen the wrong analogy. The case on which NCAA relies, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), involved a denial that discrimination had taken place at all. The proper analogy is to those cases where *per se* offensive discriminatory conduct is established, but the defendant attempts to justify the proscribed conduct on the basis of a Bona Fide Occupational Qualification ("BFOQ"), which is an affirmative defense. *See*

[36] In the Brief in Opposition NCAA was challenged to identify disputed issues upon which it offered the only evidence. NCAA cites a single example in its brief, n. 9, asserting that "[t]he only evidence about the effects of TV on live attendance" was offered by NCAA, with one exception which NCAA deprecates for relying on the undergraduate thesis of an athlete. NCAA is mistaken. At least three of respondents' witnesses addressed and countered NCAA's gate attendance argument (A. 514-16, 582-83, 609-612) and additional support for the courts' findings came from cross examination of defendant's own economist (A. 742-45).

[37] The district court reached many of its findings based upon testimony of NCAA witnesses (*e.g.*, D.C., 57a, 73a, 75a, 90a-91a, 120a).

Harriss v. Pan American World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980).[38]

NCAA's second challenge to the courts' findings is that both courts improperly required it to prove that its restraints were "necessary." NCAA contends that it is impossible to prove absolute necessity, that the proper test should be "reasonable necessity," and that "reasonable necessity" simply means "helpful" or "beneficial" (Br. at 32, n. 17). Again, NCAA is simply setting up a straw man. Absolute necessity has never been required under antitrust law, and there is no indication in the record that the lower courts applied any such test. In fact, in light of the district court's findings that the restraints were not even effective to produce the alleged goal, there can be no question as to "reasonable necessity."[39] Moreover, NCAA is wrong in asserting that "reasonably necessary" means nothing more than "helpful" or "beneficial." *See* numerous authorities cited in note 27, *supra* and accompanying text discussing and quoting from *Broadcast Music*.

NCAA's challenges to the findings of the lower courts must thus be rejected. The evidence clearly establishes that the restraints in NCAA's television plan are neither reasonably necessary nor effective in achieving any procompetitive goals of the integration. The restraints, therefore, are *per se* violations of the Sherman Act.

III. NCAA'S RESTRAINTS HAVE PROPERLY FAILED RULE OF REASON ANALYSIS

Most of NCAA's efforts are directed toward seeking the rule of reason analysis its plan has already received and failed. Both lower courts identified specifically the anticompetitive effects of NCAA's restraints, considered them in detail, and balanced them against

[38] *See also Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 549 (9th Cir. 1983); *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1016 (11th Cir. 1982); *Roberts v. Union Co.*, 487 F.2d 387, 389 (6th Cir. 1973).

[39] Similarly, since the Tenth Circuit found the *marketing integration* "so fraught with anticompetitive potential that it must be considered invalid *per se*", it never reached the question of the reasonable necessity of the restraints. (10th, 13a and n. 14). The court's prior determination as to the burden of proving the effectiveness and necessity of NCAA's restraints (10th, 11a n. 9) was applied only in assessing NCAA's argument that the restraints were ancillary to its *rule-making* integration — an argument abandoned here.

NCAA's alleged procompetitive benefits. The findings of each court are summarized in the Statement, *supra*, in paragraphs 13 and 14.

NCAA's contention that "the burden question affects the whole case" is a desperate attempt to challenge what it recognizes to be unshakable factual findings of the lower courts. Both courts clearly found that respondents satisfied their burden on rule of reason analysis. The district court never held that the burden of proof should be on NCAA; indeed, it made no reference at all to burden of proof. The whole burden of proof issue was first devised by NCAA in the court of appeals, based on phraseology of the district court relating to some of its findings. The Tenth Circuit expressly restricted its holding allocating the burden of proof to NCAA to the same area it found the trial court applied it: the consideration of "whether to apply *per se* or rule of reason analysis to admitted price restraints that the defendant attempts to justify as properly ancillary to a legitimate integration" (10th, 11a n. 9).[40]

As to a rule of reason analysis as such, NCAA contents itself with two brief paragraphs (Br. at 48-49) devoted to reciting alleged benefits dependent on facts contrary to the record and the lower courts' findings (*supra* at 27-29). NCAA does not deny the existence of the serious anticompetitive effects found by the lower courts. Nor does it deny that the lower courts balanced NCAA's purported procompetitive justifications against these effects.[41] Indeed, NCAA's argument is devoid of discussion or analysis undertaking this balancing or challenging that undertaken by the lower courts.

[40] NCAA's argument that it is "difficult to resist the conclusion that the Tenth Circuit imposed the burden on the NCAA throughout the case, no matter what it said it was doing" (Br. at 32) is a challenge to the integrity and candor of the court of appeals. There is no reason to believe that the Tenth Circuit, while explicitly stating it was applying one standard, secretly applied another. Moreover, rather than proving that the Tenth Circuit imposed the burden of proof on NCAA under the rule of reason standard, the fact that it reached the same findings of fact under both tests suggests that the allocation of the burden was not dispositive in its *per se* analysis.

[41] Such a balancing was undertaken by both courts. Statement, ¶¶ 13, 14. There can be no doubt on this, in view of explicit holdings illustrating this balancing. *E.g.*, "The court concludes that whatever marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy" (D.C., 109a).

Instead, NCAA devotes its fourth question presented to the contention that the lower courts erred in failing to see the value of competition for NCAA's package, vis a vis "spot competition" for each of its members' telecasting rights. NCAA misapprehends the nature of the competition which has been suppressed, and which the Sherman Act protects. The competition at issue is competition among *sellers*, not among *buyers* to purchase from a cartel. It is the competition among sellers which NCAA has destroyed by organizing and policing a horizontal exclusive dealing arrangement.[42] Competition among buyers to purchase from a monopolist does not impair the monopoly.

Moreover, nothing in the lower courts' opinions or respondents' contentions challenges the validity of vertical long term contracts like those sustained in the cases NCAA relies upon.[43]

NCAA's only remaining defense on rule of reason is its assertion that the lower courts' conclusions depend on the assumption that NCAA has market power (Br. at 9, 33-34). If the determination of the market was correct, then, NCAA recognizes it has no tenable position as to rule of reason analysis. The converse is not true. The court of appeals observed that even were the market too narrowly drawn, NCAA's total control over college football television, a uniquely attractive commodity from the perspective of broadcasters, compelled a finding of market power sufficient for rule of reason analysis (10th, 20a).

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42 Indeed, it was the action of NCAA in using its sanctioning power to squelch competition from the CFA's competing package which immediately led to this action.

43 NCAA claims to have missed our point in distinguishing the cases it cites in its note 33. *See* Br. in Opp. at 30, n. 32. As our parenthetical explanations show, the distinction is between vertical agreements by single sellers and single buyers, and horizontal agreements of sellers (such as vendors of the telecasting rights for college football games), a distinction which continually eludes NCAA in its argument. *Affiliated Capital Corp. v. Houston*, 700 F.2d 226, 236, *reh'g granted*, 714 F.2d 25 (5th Cir. 1983) can be profitably compared to *Omega Satellite Products Co. v. Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982), cited by NCAA in its note 33, to exemplify the distinction. *See also Com-Tel, Inc. v. Du Kane Corp.*, 669 F.2d 404, 409 (6th Cir. 1982).

IV. THE TRIAL COURT PROPERLY DETERMINED THE RELEVANT MARKET

In order to prevail on the market power question, NCAA faces the "almost insurmountable burden" of upsetting the lower courts' findings. *International Boxing Club v. United States*, 358 U.S. 242, 252 (1959).

The circumscription of a relevant market must derive from an inquiry into what "commodities are reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 395 (1956). To test for this "reasonable interchangeability", the courts examine a number of factors, which are well summarized in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), and include (1) public recognition of the market as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors. Clearly embraced within these criteria are cross elasticity of supply (factors 3 and 7) and cross elasticity of demand (factors 4 and 6).

Cross elasticity of demand was considered in *Du Pont, id.* at 400, and explained as a test for great sensitivity of demand to "slight" fluctuations in price.[44] The question is therefore not, as NCAA casts it, whether once prices are raised high enough, other products will be substituted. "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n. 31 (1953).

Even cross elasticity of demand has been held not a sufficiently narrow test in itself for several reasons. One is that it may "generate more than one broadly defined relevant product market." 3 Von Kalinowski, *Antitrust Laws and Trade Regulation* §18.02[1] p. 18-27, using for illustration *United States v. Continental Can Co.*, 378

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[44] Both courts and economists have emphasized the necessity of assessing substitutability as a function of the most minute price changes. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 742 (1977) (framing proper test as sensitivity to one percent change in price); Sullivan, *Antitrust* 53-55 (1977); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 940 n. 8 (1981). *See also* testimony of Horowitz (A. 593-94).

U.S. 441 (1964), where this Court held glass and metal containers to be in a relevant market while recognizing they constituted *separate* markets also. 378 U.S. at 456.[45] A second reason for looking beyond elasticity of demand is that every monopolist faces an elastic demand at its profit-maximizing output and price, so that there is bound to be some substitution of other products for its own when it is maximizing profits, even if it has great market power.[46] The courts of appeals have steadfastly recognized the necessity for examining the *Brown Shoe* criteria for relevant markets, or "submarkets", in sports as well as other cases.[47] The courts have determined that a relevant market can be found where as few as any three of the *Brown Shoe* tests are satisfied.[48]

Both lower courts considered these factors in detail in determining the relevant market (Statement, ¶15), and their findings are abundantly supported by the testimony of respondents' economists (A. 589-605; 500-503, 510-513).[49] Both lower courts concluded that for telecasters (the buyers), there is no reasonably interchangeable substitute for college football telecasting rights (the product), which is sold exclusively through NCAA's member institutions (the sellers).

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45 NCAA cites *Continental Can* for the proposition that cans and bottles are in a single market, ignoring the fact that each also comprises a separate market.

46 The court of appeals recognized this (10th, 19a). *See also* Landes and Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 961, 977-78 (1981).

47 *E.g.*, *North American Soccer League v. NFL*, 670 F.2d 1249, 1260 (2d Cir. 1982), *cert. denied*, ____U.S.____, 74 L.Ed.2d 639 (1982); *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1393 (5th Cir. 1983); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299-1300 (9th Cir. 1982), *cert. denied*, ____U.S.____, 74 L.Ed.2d 400 (1982); *Borden, Inc. v. FTC*, 674 F.2d 498, 509-510 (6th Cir. 1982), *vacated on other grounds*, ____ U.S.____, 77 L.Ed.2d 1298 (1983).

48 *E.g.*, *Abex Corp. v. FTC*, 420 F.2d 928, 931-32 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970); *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 226-27 (D.C. Cir. 1962).

49 The district court's findings show that it was particularly persuaded by the careful analysis and thorough testimony of Dr. Ira Horowitz (A.589-605). The lower courts emphasized in their analysis the one fact upon which there was a consensus by all witnesses,

NCAA, far from disputing these findings of the lower courts, concedes them (Br. at 38), even to the extent of acknowledging that "networks must show college football" (Br. at 33). Though NCAA never mentions the case, *Brown Shoe*, read together with NCAA's concessions, leaves little if any room for NCAA to dispute that college football television comprises at least a relevant submarket.

The foundation of virtually every argument by which NCAA seeks to escape application of the Sherman Act is its market power analysis, found in Proposition III C, that "The NCAA Lacks Power Because Advertisers Can Switch." All of NCAA's analysis that follows remains dependent upon the proposition that only power over advertisers should be considered, and that the buyers of the product, the telecasters, should be ignored. This proposition is the foundation of NCAA's entire market power argument, yet it stands unsupported by authority, contrary to the evidence, and rejected by both lower courts.

The court of appeals, the district court, the Justice Department, and the respondents have all consistently analyzed the market question in terms of the needs of telecasters, who are the buyers of college football telecasting rights. NCAA insists that we must disregard entirely the transaction between the buyers and sellers of football television rights, and look down the chain to a transaction involving a remote buyer and a derived product, commercial time. NCAA does not cite a single example from the annals of antitrust jurisprudence where a court or commentator has suggested disregarding the immediate buyers, in favor of ascertaining a seller's market power over remote buyers of a product, even where the product is identical to that originally sold. Here, of course, the product is very different. NCAA sells only telecasting rights to football games. The telecaster who purchases the rights invests substantial human and technological resources to create a television program, so it can sell a different product (commercial time) to advertisers.

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[49] (Continued)

i.e., that the audience attracted to college football games (vis a vis other sports and non-sports entertainment) have unique and very desirable demographic characteristics (D.C., 77a, 75a; 10th, 18a; A. 582; 601-605; 730, 732; 777-78; Tr. 357-62; 516-18, 520). Even NCAA's economist acknowledged that a program supplier that expands or improves the demographic characteristics of the audience would exercise market power (A. 730).

Advertisers do not purchase NCAA members' telecasting rights, nor are networks the only potential purchasers of these rights. Broadcasters and cablecasters of all varieties have an interest in purchasing the rights, and for reasons that may go beyond or be totally unrelated to the needs of advertisers.

Networks may purchase college sports programming to improve their image, and thus increase consistent patronage to the network, regardless of the specific needs of advertisers (A. 793). The lower courts found that for networks, there is no substitute for college football, that they need college football to offer on Saturday afternoon, that CBS "went dark" for one-half the broadcast time opposite ABC on Saturday afternoons when ABC had exclusive rights to televise college football, and that ABC was even willing to suffer a net loss to televise college football for the intangible benefits it received from being affiliated with the sport (Statement, ¶ 15). NCAA's own media expert, Paul Klein, provided substantial testimony supporting these findings (A. 792-795).

NCAA supplies no reason why the networks should be disregarded, other than the observation that the network demand is influenced by what it can in turn sell to advertisers. This is true for every purchaser of raw materials or wholesale products, but has never led a court to disregard these purchasers in favor of the exclusive consideration of transactions involving a remote buyer. The needs of the remote purchaser are of course still relevant in analyzing the sales transaction at issue, as both respondents' experts and the courts recognized, but they are no reason to disregard it.

Moreover, advertisers are not involved at all in a significant and growing segment of the television industry. Subscription and pay-per-view television involve direct payments by viewers and no advertising at all.[50] NCAA's media expert Klein, in his description of the television industry (Tr. 1262-68), described this form of telecasting as "a blossoming, growing thing" which is starting to overtake

[50] Subscription television is purchased by the viewer for a flat fee, and carries no advertising. HBO is an example (Tr., 1264). Pay-per-view permits the telecaster to sell a *particular* program, such as a sports event. It is described by NCAA media expert Klein as "the extension of the theater, the extension of the stadium". The viewer pays for the specific show he sees (Tr. 1265-66).

network broadcasting (Tr. 1268-71). John Mohr, vice president of sports programming for a national subscription television service, "ON TV", testified that the viewers' greatest demand of its sports programming was in local and regional markets, and that sports programming was critical to the existence of subscription television (Tr. 515). Because of NCAA's restrictions, however, subscription television's college football programming was seriously stifled (A. 580-82; Tr. 513, 520-531). Thus, NCAA is mistaken in its assertion that "viewers aren't doing the paying" (Br. at 38).

Even granting all of NCAA's implicit assumptions, (1) that advertisers must ultimately buy the telecasting rights, (2) that the needs of networks are perfectly reflected by the needs of advertisers, and (3) that NCAA has not restricted viewership, only diverted viewers from numerous local games to a few national games, suppression of diversity remains as a harmful reduction of output. NCAA's media expert Klein testified at trial that television viewership does not increase much as the number of available channels increases, and does not increase at all beyond four channels (Tr. 1250). If NCAA is correct, an agreement by the eight telecasters in a market that only four would be on the air at a time would not restrict output as NCAA defines it at all (viewership would be the same), and would share some of NCAA's benefits of "successful competition," lower costs and higher profits. Similarly, if all bus manufacturers were to agree to manufacture fewer buses, and if this were to result in fewer bus routes but no fewer bus riders (and therefore no fare increase), NCAA would claim output had not been suppressed, and that new efficiencies had been created — since fewer buses were doing the job of many, saving gas, repair expenses, and overhead. The inconvenience and restriction of choices of riders, and the demise of smaller bus companies would be irrelevant.

International Boxing Club v. United States, 358 U.S. 242 (1959), is controlling. There, promoters of championship heavyweight boxing contests obtained exclusive rights in the promotion, broadcasting and televising of professional world championship boxing contests. The promoters' argument to this Court was much less ambitious than NCAA's: "Appellants launch a vigorous attack on the finding that the relevant market is the promotion of *championship* boxing contests in contrast to *all* professional boxing events." 358 U.S. at 249. The Court rejected the argument on the ground that "championship boxing is the 'cream' of the boxing business, and . . . is a sufficiently separate market of the trade or commerce to constitute the relevant market for Sherman Act purposes." 358 U.S. at 252.[51]

That championship boxing was a market apart from other boxing was premised on the lower courts' aggregation of indicia of special popularity of championship events, such as television ratings. Exactly the same kind of data was utilized in the opinion of the district court here. Yet it is these kinds of factors which NCAA contends must be "adjusted" out of college football before comparing it to potential substitutes to determine whether there is market power (Br. at 42-43).

Almost all of NCAA's arguments and studies relate to the purchase of commercial time by advertisers, rather than the sale of football rights to telecasters. However, NCAA does address the increases in the 1982-85 contract price per television exposure, arguing (Br. at 44) that the district court erred in failing to account for inflation when it analyzed those prices. The district court was evaluating future prices, for which the consumer price index was not available, and it acknowledged that "some of the difference is to be expected as a product of inflation," while observing that "the sums to be paid by CBS and ABC are truly extraordinary"[52] (D.C., 77a, 123a). NCAA's account of the price-per-exposure in "real dollars" is both inaccurate and unsupported by its references to the record. Using 1970 dollars (as NCAA purports to do), the price-per-exposure is $576,694.22 in 1977, $750,840.39 in 1978, $551,674.02 in 1981, and $849,136.22 in 1982.[53] The percentages of increase in "real dollars" for the last two years where new (multi-year) contracts were

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51 The Court cited its former decision in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), where it found a relevant market for first run movies, vis a vis all motion pictures, in the largest cities of the nation. *International Boxing*, 358 U.S. at 251-52.

52 "Extraordinary" is also the term used by ABC, sole purchaser of NCAA football for the sixteen consecutive years preceding the 1982-85 contract, to describe the price increases (A. 430).

53 Figures based on Urban Wage Earners and Clerical Workers annual averages for all items, Consumer Price Index.

negotiated, i.e., 1977 to 1978, and 1981 to 1982, were 30% and 54%, respectively.[54] NCAA cannot attribute these price increases, in real dollars, in the last two periods where new contracts were made, to "catching up on inflation", since inflation is factored out.[55]

The remainder of NCAA's analysis is devoted to its lonely pursuit of the question of whether NCAA has market power over advertisers, with whom it does not even deal. Whether it does or not is irrelevant, since it is already established that it does have such power over telecasters, with whom it has contracts which will yield more than 250 million dollars.

But even NCAA's contention that it has no market power over advertisers depends on overturning factual findings against it. The district court, assuming *arguendo* that only market power over advertisers mattered, concluded NCAA possessed such power (D.C., 75a). In its analysis for market power over advertisers, NCAA's tests were largely admitted at trial to have little probative value. For example, the argument that advertisers spend most of their money elsewhere (Br. at 41) says nothing at all about whether the 5% they do spend on NCAA football fulfills a particular need not satisfied elsewhere. Failure to have "captive buyers" negates the existence of one particular species of market power, but does not disprove it generally (A. 738-39). Similarly, while dissimilar price movements negate the inference that products are in separate markets, similar movements do not show that products are in the same market (A. 734-35). And failure of advertising prices per minute to fall from 1960 to 1981 with increases of advertising time could depend on so many variables that it was admitted to have little reliability as a market indicator (A. 733-34).

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[54] Even using NCAA's inaccurate figures, there was a 48% increase in "real dollars" from 1981 to 1982. NCAA does not give the real dollars figure for 1977.

[55] NCAA offers alternative figures dependent upon its theory, criticized *supra*, that only market power over advertisers is important. These figures for the "real price per 1,000 viewers as a measure of price changes over time" (Br. at 45) were not offered by NCAA at trial, and are not supported by its references to the record. Further, a *failure* to exhibit price increases would not show a lack of market power, since NCAA has always monopolized the market, and thus priced at supracompetitive levels (D.C., 118a-119a; 10th, 19a).

V. NCAA IS A MONOPOLIST

Since the relevant market was properly defined, NCAA has violated §2 of the Sherman Act. The district court found such a violation. The Tenth Circuit neither affirmed nor overturned it, but in any event, respondents may defend the judgment on any ground which the law and the record permit *(supra* n. 9). As both lower courts observed, NCAA made no attempt to deny that if college football television is a relevant market, it is a monopolist (D.C., 124a-125a; 10th, 20a n.16). NCAA is a monopolist because it possesses monopoly power in a relevant market, and has willfully acquired or maintained that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Thus, NCAA could not prevail even if it were correct in contending that it should be treated as a single entity, because its members' combination has created a monopoly. *Cf., United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) (Combinations forming joint ventures pose the same kinds of risks as mergers).[56]

CONCLUSION

The decision of the Tenth Circuit, upholding the district court, should be affirmed.

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[56] NCAA claims to be puzzled about some features of this case which do not accord with its economic theories, such as the "litigation posture of the parties in this case" and the district court's finding of both monopolization by NCAA and the existence of a monopsony by the selected purchaser of NCAA members' television rights. The explanation for both questions is the same. NCAA's purchasers are very pleased to have exclusive rights to televise college football (A. 530). The Association of Independent Television Stations, Inc., representing ninety-seven independent television broadcast stations, amicus curiae here, is not so pleased. NCAA's controls create monopoly by aggregating the bargaining strength of its members to deal with the purchasers; they create monopsony in the further negotiation of individual rights fees, by the exclusivity requirement (A. 497; 616-17; 667-71; 761-63; 418-421). This is why the rights fees are always the same. To discard exclusivity (and thus the monopsony), leaves both NCAA and its purchaser with competition in the marketplace and destroys the monopoly as well.

Respectfully submitted,

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