INTRODUCTION

From 1960 through 1981, the National Collegiate Athletic Association (NCAA) controlled the broadcast rights to its members’ football games. These rights were packaged and sold to the highest bidder among the three major over-the-air television networks: ABC, CBS, and NBC. In 1982, the University of Georgia and the University of Oklahoma sought to reclaim control over their broadcast rights and filed suit in federal district court against the NCAA. They alleged that the associations’ network contracts, which included a “recommended” price to be paid for a televised game as well as limitations on the number of games to be televised and designation of the specific games, violated the Sherman Act. Judge Juan C. Burciaga ruled in their favor,¹ and on appeal the U.S. Court of Appeals (Tenth Circuit) supported Judge Burciaga’s decision.² In June 1984, on further appeal, the U.S. Supreme Court³ held the NCAA’s exclusive football telecasting plan to be in violation of Section 1 of the Act. One practical result of the successful suit is that fans can now spend fall Saturdays watching football from

¹ Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association v. National Collegiate Athletic Association, 546 F. Supp. 1276 (1982).
² National Collegiate Athletic Association v. The Board of Regents of the University of Oklahoma, 707 F.2d 1147 (1983).
noon to night (and other nights of the week as well), rather than being restricted to a game or two.

Of particular interest, however, is the Supreme Court’s decision in this case compared with its earlier ASCAP decision. ASCAP involved the blanket licensing of copyrighted music by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Incorporated (BMI), which served as clearinghouses for owners and users. In ASCAP the Court held that “[n]ot all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints.” The Court recognized that a cooperative arrangement might necessitate a price agreement in order to make the product available, and that efficiency-enhancing restraints that reduce transactions costs can be procompetitive. The former implies that a cooperative agreement may require a rule-of-reason assessment of “necessity”; the latter implies that a horizontal restraint may be beneficial to consumers.

In NCAA the Court further held that when the “necessity” assessment fails a rule-of-reason test and the restraint is not welfare enhancing, even without proof of market power a horizontal restraint affecting price is per se illegal. It left open to speculation just how a cooperative lacking market power can adversely impact price, output, and consumer welfare. The Court thus left open to debate and judicial attention whether there exists a general analytical framework for evaluating economic performance and market behavior that does not require a determination of who and what comprise the market. This chapter, in focusing on NCAA, highlights the relevant economic issues and suggests some answers for that debate.

BACKGROUND

Sports telecasts are a long-time television staple. Live collegiate football telecasts on fall Saturday afternoons fill a particularly important niche in television programming. In 1951, the NCAA was paid $1 million by NBC for an eight-date package of games. This fee compared favorably with the $0.7 million paid to the eleven National Football League (NFL) teams and the $4 million paid to the sixteen Major League baseball teams for all of their broadcast rights. By the fall of 1997, through an assortment of conference packages and individual-team arrangements, broadcasters were paying over $100 million to televise college football from the end of August through the New Year. Live college televised football has become a big-money enterprise.

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5 441 U.S. 1, 23 (1979).
6 For detailed discussions of how we have reached this point, see Hochberg and Horowitz (1973, pp. 113–118), Meyers and Horowitz (1995, pp. 687–697 and 700–708), and Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association v. National Collegiate Athletic Association, 546 F. Supp. 1276, 1282–1291 (1982). Along with Broadcasting & Cable magazine, these are the principal sources for the data in this chapter.
The Special Problems of Leagues

Where league sports and money are involved, determining the division of the spoils becomes an imperative. This was true for the NCAA’s early television packages; it is true for the current conference packages; and it holds for all sports leagues—college or professional—in their money-related activities. Groups of teams must therefore set up rules of governance that cover both their off-the-field and on-the-field activities. The interests of individual teams and their fans, however, do not necessarily mirror those of the league as a whole. A tenet of league sports is that fans prefer competitive games and seasons, though not when these are achieved by pervasive mediocrity. Another is that fans want their teams to win and to win often; in college football that means going undefeated. The rules of governance must therefore deal with the related problems of maintaining competitive balance, allowing the members of the league to maximize their joint profits by exploiting whatever market power adheres to the league when the teams operate as a collective, distributing that profit, and dealing with the reality that teams’ markets are almost always disparate in terms of profit potential and that few teams are selfless where money is at issue.

League members, recognizing their joint interest in establishing rules to limit player remuneration, can usually think of some device such as a reserve clause that binds a player to a team in perpetuity, team salary caps, limited scholarships, and player drafts. But recognizing the profit-generating advantages of collusion, which for the NCAA meant pooling and selling members’ television rights, and having the members cooperate in sharing the wealth while resisting the temptation to cheat or bolt, is something else. Getting the players to accept salary restraints and the government to accept de facto cartelization are also perennial concerns for which “maintaining competitive balance” is a frequent explanation aimed at mollifying the players, the government, and the fans. It may, however, simply be a cover for the exercise of market power.7

The NCAA and Televised Football

Television’s initial growth came on the two coasts in the late 1940s. Participants in the 1951 NCAA convention were aware of the rise in college football attendance between the coasts, where few households could access televised football, and its wane in those areas where television was spreading. They drew the logical, if flawed, inference that live telecasts harm attendance. This led to approval of a virtual moratorium on live telecasts. The NCAA, faced with the rumored threat of an antitrust inquiry, adopted a program of regional telecasts of games that were not always of

7 For the most recent theories of the economics of sports leagues, as well as references to earlier work, see Noll (1995), Quirk and Fort (1992), and Vrooman (1995).
interest to fans in those regions. NBC initially owned the rights, and live attendance continued to decrease. In 1954 the rights moved to ABC, and attendance increased, as it did every year thereafter through 1971. The simple inference that the telecasts aided attendance may also be flawed.

A policy of two-year packages began with a 1960–1961 deal in which ABC’s $6.25 million bid topped NBC’s $5.2 million bid. The games moved to CBS in 1962 and back to NBC in 1964, before finding their permanent home at ABC after it “bid” “15.5 million for the 1966–1967 rights. The word bid is in quotes, since the arrangement was really a marriage of convenience wherein the spouses pledged their troth, while agreeing to a biannual renegotiation of the living arrangements: the package price, the televised-game fees, the number of appearances permitted a team, and so forth.

Congress created an enhancement for the cartelization of television rights when it passed Public Law 87-331 in 1961. The law allows professional teams to pool their rights in order to offer broadcasters a league package giving exclusive television coverage of their games. To deal with the potentially adverse effects of televised NFL games on college and high school football attendance, Congress inserted a stricture that effectively forbade Friday night and Saturday NFL telecasts during the normal high school and collegiate seasons. An indirect result of this stricture was that the two-year prototype package that the NCAA sold to ABC in 1960 guaranteed the network and its sponsors exclusivity over televised football on fall Saturdays. That exclusivity yielded a monopoly that did not go unexploited.

From one perspective, the NCAA was a cartel selling a limited number of games to ABC, thus giving it a virtual monopoly over live televised college football. This was the perspective of the University of Georgia, the University of Oklahoma and many of the other fifty-nine collegiate football powers that made up the College Football Association (CFA). These schools would eventually argue that they were being denied the opportunity to market and broadcast their games independently and that consumers were being denied their preferences through a restraint of trade.

From another perspective, the NCAA and its members had formed a joint venture to produce a television program to compete with other network programs. The NCAA and ABC eventually argued that the joint venture was the most efficient means of ensuring the cooperation of small sellers in the provision of a unique product, the television program “NCAA Football.” The joint venture was their procompetitive sole means of producing a product that could effectively compete with other slightly differentiated products (other television programs). On the assumption that a package of choice NCAA games would be more attractive to networks and sponsors than would any one school’s telecasts, “NCAA

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8 77 Stat. 732.
Football” would enhance rather than restrain competition in the television-program market.

With many marriages the outsider wonders what the partners see in each other and why they stay together. In this case, however, the answers are apparent. The NFL and the neophyte American Football League (AFL) had sold their rights to CBS and to NBC, respectively. ABC needed college football to have any live football coverage. Otherwise, it could suffer both a direct opportunity (profit) loss and the indirect loss associated with the externalities that televised football might have on other network programming, either through promotion of other programs or through a lead-in effect, where perhaps half the viewers do not change stations at a program’s conclusion.

For the NCAA, going with NBC or CBS risked sharing the network’s attention and publicity with professional football, and this could translate into lower ratings that would lower the value of future broadcast rights; the NCAA sought to avoid that risk. The marriage made good sense, and the NCAA remained monogamous through 1981 (even though ABC has televised “Monday Night [NFL] Football” since 1970).

In 1976, the major football-playing schools outside of the Big Ten and Pac Ten conferences formed the CFA. These schools were dissatisfied with their limited telecast-and-revenue opportunities. The CFA’s original intent was to promote the interests of these football powers within the NCAA structure. This intent eventually translated into wanting a bigger voice on television-related issues and a bigger share of a bigger revenue pie.

With its most recent ABC contract expiring in 1981, the NCAA began to consider seriously a “bigamy” option under which it would sell broadcast rights to both CBS and ABC. The joint contracts would yield $59 million in 1982 (up from $31 million in the previous four-year deal), rising to $72 million in 1985 for twenty-eight annual exposures (up from 24) to be equally divided between the networks. The choice of games selected for television would be coordinated so as to minimize the possibilities of simultaneous telecasts or having the networks get into a bidding war over any one game. At any given time, then, one network would monopolize live televised college football.

The only major over-the-air network without college football was NBC, so an NBC-CFA marriage was a natural. In August 1981 the CFA members ratified a contract with NBC that mirrored the earlier ABC-NCAA contracts, while yielding a higher income per CFA member than would the NCAA’s two-network scheme.

This turn of events led the NCAA to threaten schools that went along with the CFA; the threats ranged from reprimands to expulsion. The Universities of Georgia and Oklahoma went to the courts and requested and were granted injunctive relief to prevent the NCAA from initiating disciplinary proceedings or from otherwise interfering with the agreement. Nevertheless, most CFA schools (28 of which initially either voted against the
contract or abstained) were unwilling to go ahead with the plan, notwithstanding the NCAA’s compliance with the injunction, and the NBC-CFA deal was off. But the CFA’s battle to wrest its member’s television rights out of the hands of the NCAA and return them to the schools had just begun, since the Universities of Georgia and Oklahoma were prepared to pursue fully their antitrust lawsuit against the NCAA.

THE ALLEGED ANTICOMPETITIVE ACTS AND THEIR ECONOMIC CONSEQUENCES

The ABC-NCAA contracts for 1978–1979 and 1980–1981 gave ABC exclusive network rights to college football. In 1978, for example, ABC was permitted twenty-three exposures (national plus regional telecasts) for a minimum aggregate fee of $29 million, and ABC was permitted twenty-two commercial minutes per telecast. The 1982–1985 network contracts were not substantively different, except in terms of the dollar amounts and CBS’s participation. Exclusivity was maintained. The NCAA also contracted with TBS for exclusive live cablecasts for 1982–1983. These third-choice games would be carried on Thursday or Saturday evenings so as not to compete with the ABC or CBS telecasts. Again, exclusivity, at least in a given time slot, was preserved.

In principle, the fee paid to teams playing in a televised game was negotiable. Further, a school could elect not to televise its games, and/or it could take advantage of an “exception telecast” clause for any particular game that a network wanted, or it could simply strike out on its own and disregard the NCAA plan. In practice, however, negotiations never took place, and none of these options was feasible.

The District Court found that “[T]his so-called right to negotiate was clearly illusory.”9 By virtue of the NCAA contract, ABC was a monopsonist in the market for live broadcast rights for live college football games. The suppliers of a game that ABC wanted could either turn down the recommended fee or take it. The game would be played in any event. Since ABC wanted only the most attractive games, most of these games would have been sellouts by the time their being televised was announced. Thus, even had the participants believed that televising a game would harm actual attendance, the telecast would not ordinarily affect the ticket revenues. The only monetary loss would be in the parking lot and at the concession stands, and a sizable fraction of the potential attendance would have to stay home for this loss to exceed a fee of $250,000.

The “exception telecast” clause was not a viable option. A local broadcaster would be unwilling to outbid ABC for the right to broadcast to a market with relatively few television homes. The go-it-alone option

entailed two insuperable complications: it takes two to play a game, and any attempt to go it alone would meet with sanctions and retribution from the NCAA. The risks simply overwhelmed the expected rewards.

The plaintiffs (the Universities of Georgia and Oklahoma) saw in all of this two principal ways in which the competitive market was being superseded and the Sherman Act violated. First, by controlling its members’ broadcast rights, the NCAA created a monopoly that (a) fixed the prices for televised games, (b) limited the number of telecasts, and (c) destroyed competition. Although approximately sixty games a year were telecast under the prevailing contract, even more would be telecast and viewer preferences would play a greater role if individual schools were free to televise their games.

Second, the controls effected two types of group boycott: (a) a threatened horizontal boycott of any school attempting to go it alone, ensuring an NCAA monopoly over televised college football; and (b) a vertical boycott of competitive networks and local broadcasters who were unable to bid for games that ABC did not want, which enhanced ABC’s position in the television broadcast market vis-à-vis other broadcasters.

Price Fixing

Recognizing that price fixing harms consumers, whether the fixed prices are “reasonable” or not, the courts have made blatant price fixing a per se violation of Section 1 of the Sherman Act, which prohibits every agreement that restrains trade. The per se approach, however, has not been sacrosanct. All business agreements, with or without a written contract, imply some restraint of trade. A franchiser, say, may literally restrain trade and fix prices, but these practices could be sound and efficient procedures that benefit consumers. Thus, the courts have occasionally accepted a rule-of-reason defense against allegations of an illegal price-fixing restraint. The restraint is reasonable if its effect is to promote competition. The restraint is unreasonable if competition is not enhanced.

Since defendants always have the option to attempt a rule-of-reason defense, at first blush the per se illegality of price fixing would seem to be rather meaningless. Precisely the opposite is true, however, because most illegal restraints fall into various categories of “naked restraints” that stifle competition.

In NCAA the trial court had to decide the following: Should the negoti-
ating procedure for determining the price for a televised game be considered “price fixing”? If so, was the procedure “reasonable” in that it enhanced, rather than stifled, competition?

**Monopoly Power and Output Restraints**

The “monopolization” language of Section 2 of the Sherman Act led the Supreme Court in an early case to focus on intent, “because knowledge of intent may help the court to interpret facts and to predict consequences.”14 The determining factor is whether the actions are part of normal business practices, or whether their intent was to drive and exclude competitors from the market.15 Defendants cannot argue that “because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition.”16 The concern is that the firm acquiring a monopoly will supply lower quantities and charge higher prices than would result under competition.

In NCAA the trial court had to decide the following: Did the NCAA’s control of college football television constitute monopolization or the attempt to monopolize? If so, was this its intent? Finally, if the NCAA had monopoly power, could it limit output, and drive and exclude competitors from the market in violation of sections 1 and 2?

**Group Boycott**

Group boycotts are agreements among one group of traders to refuse to deal with others, and are per se Section 1 violations. A group boycott raises some difficult economic issues, because any decision to purchase solely from one seller implies a decision to not do business with any other(s).17 Thus, the rule of reason has historically come into play in all but the most straightforward situations.

Rule-of-reason considerations are particularly germane where exclusive dealing is involved. If the NCAA’s football package is viewed as the not-otherwise-available product of a joint venture, then its sale to the highest bidder merits rule-of-reason consideration. The reasonableness of any restrictions aimed at enhancing the product’s ability to compete in the television-program market, and subsequent attempts to enforce the restrictions, must also be considered. If the NCAA is viewed as a cartel seeking to control televised college football, the applicability of the rule of reason is not as clear.

In NCAA the trial court had to decide the following: First, did the

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


17 For an especially interesting discussion, see Posner (1976, pp. 207–211).
NCAA’s television contracts constitute a per se illegal vertical boycott of broadcasters denied access to college football? Next, if schools that were refusing to cooperate with the NCAA were to be disciplined and denied television appearances, was this a per se illegal horizontal boycott? Finally, even if these actions were not illegal per se, would they fail a rule-of-reason test?

MARKET DEFINITION

Anticompetitive behavior must occur someplace and with respect to a particular product or service. In antitrust parlance these are the relevant geographic and product markets, and their determination is the problem of market definition. In NCAA it was readily agreed that the relevant geographic market was the entire United States. The relevant product market, however, became a matter of intense dispute. The plaintiffs proposed “college football television” as the relevant product; the defendant proposed “all television programming.” Everybody agreed that the games had value only because they allowed sponsors to reach a select set of viewers. Thus the broadcasters’ demand for college football is a derived demand stemming from sponsor’s demands.

If the plaintiffs’ product-market definition is accepted, the NCAA as the sole provider of televised college-football games was certainly a monopolist. Only the rule of reason and/or the NCAA’s status as a voluntary association of not-for-profit academic institutions could save its football policy from being in violation of the Sherman Act. If the defendant’s definition is accepted, the NCAA was the provider of perhaps 84 hours of programming a year out of about 7300 hours of total programming. The NCAA was thus comparable to the facilitator of a small joint venture selling a slightly differentiated product in an imperfectly competitive market in which it lacked market power.

The plaintiffs argued that college-football telecasts were unique, because most were provided on Saturday afternoons, their direct competition came only from grade-B movies and children’s programs, and unlike prime-time television series that have residual value through eventual syndication in reruns, any game is a perishable good that has limited appeal once it has been played. The football audience was unique because of its age and income patterns compared with those of the audiences of other programs, including other sports telecasts.

The defendant countered that the buyers in the market are the sponsors, the sellers are the networks, the product being sold is commercial spots, and all commercial spots are fungible, with any differences attributable to demographics and the free market. By establishing portfolios of programs, sponsors showed that one program was substitutable for another. On average, a football sponsor allocated only 5.18 percent of its net-
work advertising budget to NCAA football, indicating that the typical advertiser *must* be freely substituting other forms of programming; in essence, college football television is not unique!

The trial court noted, however, that while NCAA football accounted for only 0.44 percent of the total network programming time, the sponsors that spent over 5 percent of their budgets on it paid 2.5 times more per viewer to reach the football audience than it would cost to sponsor other network programs. The court inferred that college football television had “extraordinary appeal to advertisers,” and that “[I]t is clear that in the minds of both the network and the advertisers, there is no close substitute for college football.”18 This finding meant that the (legal) ball game was essentially over.

THE NCAA’S DEFENSE

Rather than concede defeat, the NCAA argued that any anticompetitive acts were committed by the broadcasters, that its behavior comprised democratically chosen acts that had only the best on-the-field and off-the-field procompetitive intentions, and that any perceived restraints were ancillary to an overall regulatory scheme for collegiate athletics. Put otherwise, any acts for which the NCAA was directly accountable would pass a rule-of-reason test. The NCAA further argued that the plaintiffs had failed to demonstrate literal price fixing. If the problem was that its “recommended” prices were uniformly imposed, then ABC as the buyer was the price fixer. Moreover, televising sixty choice games a year is scarcely an output restriction. The NCAA defended its controls as designed to protect gate receipts, especially at smaller schools. These controls were just part of a general regulatory scheme aimed at preserving competitive balance and amateurism in collegiate athletics and protecting the health and well-being of the athletes.19 Finally, the NCAA contended that the plaintiffs did not suffer antitrust injury.

THE DISTRICT COURT’S DECISION

The trial court dismissed the arguments that prices were not being fixed and that the plaintiffs did not suffer antitrust injury. It noted that there was no question that open bidding would have yielded much more than the


19 For over a century colleges have found a way to support their student-athletes (Dealy, 1990). As television has become a very big revenue-generating business for a larger number of schools, their problem has become one of preserving it as a cash cow. Universities have an interest in preserving collegiate football as an amateur sport in that it permits them to place a ceiling on player “salaries.”
$400,000 paid for a game between Oklahoma and Southern California that was carried by over 200 ABC affiliates, and much less than the $400,000 paid for a game between The Citadel and Appalachian State that was carried by four affiliates. The court found no merit in the arguments that ABC was responsible for any price fixing and that the NCAA would no longer recommend prices. The court did find merit in the plaintiffs’ contentions that more games would have been telecast and viewer preferences better served without the restrictions. It also held that it was unrealistic to expect a school to bolt the NCAA or ignore its threats. The NCAA’s argument that it lacked market power fell under the weight of evidence that it could manipulate the college-football television market and that it did so by excluding competition, restricting output, and dictating price.

As regards any deleterious effects of telecasts on attendance, the court dismissed the NCAA’s studies as either outdated or flawed. That the NCAA permitted ten additional telecasts under the new pact and that games of the widest possible interest were always televised suggested to the court that the NCAA did not really believe its own arguments. As regards preserving competitive balance, the court viewed the tendency of the same schools to dominate in the wire-service polls year after year as suggesting that the controls were ineffective. Beyond that, the NCAA had other means of achieving all of its eminently commendable goals without resorting to additional television controls.

In particular, the court found as follows: (1) The NCAA exercised monopoly power in the relevant market of live college-football telecasts in the United States; (2) the NCAA-network contracts constituted per se illegal price-fixing agreements that restricted output; and (3) the NCAA had organized a group boycott via (a) a refusal to deal with any broadcaster with whom it had not been uniquely tied (vertical) and (b) threatened sanctions against any member that failed to adhere to its television plans (horizontal). The NCAA-network contracts were thus enjoined.

THE NCAA FIGHTS BACK

The NCAA did not go down without a fight. It first appealed the district court decision to the U.S. Tenth Circuit Court of Appeals.

The Court of Appeals

A 2-to-1 majority accepted the plaintiffs’ relevant-market definition, which in essence compelled the finding that “the plan on its face suppresses product diversity and restricts output . . . and constitutes per se illegal price-fixing.”20 It also rejected the rule-of-reason defense, observ-

20 707 F.2d 1147, 1156 (1983).
ing that the anticompetitive aspects of the cartel arrangement outweighed any off-the-field procompetitive gains and that these gains in any case could be attained without impinging on the free market.

The Court of Appeals did not accept the trial court’s group-boycott conclusions. As to the vertical boycott, the exclusivity aspect sought to raise the value of a network contract, but any network could bid. The fact that only one network was a successful bidder does not constitute a boycott or “an attempt by competitors at one level to foreclose competition by traders at the same level.”21 The court also held that the NCAA’s power of expulsion did not by itself constitute a boycott, as it was not a naked attempt to exclude competition. This power was an enforcement mechanism within the purview of a voluntary association’s activities.

When all was said and done, the plaintiffs still won the day.

The Supreme Court

The NCAA’s last resort was an appeal to the Supreme Court, where it lost 7 to 2. The majority concurred with the earlier courts that the television plan restricted output, restrained the free market, and kept the schools from responding to consumer preferences. The dissenters accepted the NCAA’s argument that its regulatory activities were essentially noneconomic, that its purposes and goals were notable and worthy, and that its television controls made sufficiently important contributions toward achieving these noble ends “to offset any minimal anticompetitive effects. . . .”22

A key finding of the Court majority was that the restraints were not per se illegal price fixing. Rather, it held that the NCAA and its members market a product, televised college football, that requires the preservation of on-the-field competition. This product differs from the seemingly comparable products offered by professional leagues, and its unique character widens the choice of both sports fans and student-athletes. No school is likely to adopt unilaterally the restraints required to preserve that unique character. Thus, the product can only be provided by mutual agreement, which implies that some horizontal restraints may be necessary and hence that any alleged antitrust violation requires a rule-of-reason analysis. The critical issues are whether the restraints are necessary to achieve a legitimate procompetitive goal.23 This followed the Court’s line of argument in ASCAP, where a majority opinion noted that individual compositions and the aggregating service offered through ASCAP’s blanket licenses made

21 707 F.2d 1147, 1161 (1983).
23 The Court made clear that its welfare considerations extended to that of student-athletes and the preservation of collegiate amateur athletics. This extension implies that the broader terms community or societal welfare are more appropriate descriptors of the Court’s concern than is the narrower and more common term consumer welfare. This concern further suggests the need to worry about the effects of a horizontal constraint on labor—the amateur athletes of the business world.
up a whole that is “truly greater than the sum of its parts.” This whole is “to some extent, a different product” that is sold in a market “in which individual composers are inherently unable to compete effectively.” In such a market, even an arrangement that affects price might be reasonable and not per se illegal, because it might be necessary to the provision of the product. The ASCAP decision did not imply that the blanket-license arrangements did not violate the antitrust laws, “only” that the arrangements required a rule-of-reason assessment.

The NCAA, however, lacked an affirmative defense that would justify either the higher prices, lower outputs, and restricted viewer choice effected by its television plan, or the market power it acquired through its control of all television rights. The Court specifically noted that by allowing choice games to be telecast in competition with less attractive nontelevised games, the NCAA was undermining its argument that the plan sought to protect attendance. Moreover, the Sherman Act does not intend to inhibit such competition. The Court concluded that the plan restricted only some schools’ broadcast revenues; there was no evidence that it promoted greater equality than could be achieved by restrictions on other revenue sources, such as ticket prices.

Ultimately, the majority turned to “the District Court’s unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan” and concluded that “[T]he finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any [such] legitimate purpose.” Most critically, the Court purposefully remarked that the “absence of proof of market power does not justify a naked restriction on price or output” and that such a restriction “requires some competitive justification even in the absence of a detailed market analysis.” In essence, the related issues of market definition and market power that have so often dogged Sherman Act litigation might henceforth be finessed when a restraint lacks “a plausible efficiency justification” (Muris, 1989, p. 861).

The majority, however, also asserted that (1) the trial court’s detailed analysis showed that as a factual matter the NCAA did have the market power to glean supracompetitive prices in the college-football television market and that (2) the trial court had employed the correct market-definition test and had drawn the correct inferences as to both the appropriate market and the NCAA’s market power from that test. Accordingly, the justices were not prepared to dismiss these inferences completely when evaluating the competitive effects of the NCAA’s horizontal restraints.

The justices may have reasoned (implicitly) as follows. Standard tele-

24 441 U.S. 1, 21–22 (1979).
vision fare and fall Saturday football telecasts are at best distant substitutes for prospective sponsors and are not at all substitutable for viewers as a group. Let us accept, *arguendo*, that “NFL Football” and Saturday telecasts of “NCAA Football” are perfect substitutes for both sponsors and fans, and that sponsors consider any other televised sports to be imperfect substitutes for fall football. Even then, it is not credible to accept that by preventing individual schools from televising their games, the NCAA had not succeeded in reducing the number of telecasts and increasing their price, while restricting viewer choice. A more credible view is that this was the specific intent of the restraints. Finally, as in *ASCAP*, “NCAA Football” could have been made available through the NCAA’s nonexclusive control of the rights. The product just could not command as high a price in whatever market is defined and regardless of the NCAA’s power in that market. The only proviso is that the market must have some economic validity.

THE AFTERMATH

*NCAA* effected major economic changes in college football telecasting and provided legal reaffirmation of the usefulness of the rule of reason in assessing horizontal restraints.

Televised College Football

When the Court ended the NCAA’s control over college-football telecasts, it replaced a monopoly with as many as 100 separate sellers—the Division I football-playing schools—who could compete for the custom of numerous buyers, led by the three major over-the-air networks and trailed by various national and regional cable systems, as well as local broadcasters. The plaintiffs’ economic experts had testified, and their attorneys had argued, that such competition would expand consumer choice, increase output, and reduce price. Whether the plaintiffs really believed that they would be the ones to lose television revenues in a competitive market is another matter.

Since 1984 the market has certainly worked with respect to output and viewer choice. Saturday television audiences have typically had a menu of college football games from which to choose. The market has also worked with respect to the impact on price, perhaps to the unpleasant surprise of the plaintiffs, as can be seen in the following figures:28 After the Supreme Court decision in the spring of 1984, the CFA and ABC agreed on a $12 million package to be put in place that fall. The CFA also agreed to a $9.2 million pact with ESPN. CBS paid $10 million for Big

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28 See Greenspan (1988) for an extensive discussion of the initial economic effects of *NCAA*.
Ten and Pac Ten games, and TBS got twelve Southeastern Conference (SEC) games for $6 million. The $37.2 million total is only slightly more than half of the $67 million that the NCAA contracts with ABC and CBS alone would have yielded. By 1985, the Big Ten, Pac Ten, and Atlantic Coast (ACC) conferences had all signed with CBS for two-year packages worth a total of about $12 million per year. Given the time to work things out, ABC and its new bedfellows, the CFA, agreed on a two-year package worth about $16 million per year for twenty-one games a year. ESPN contributed an additional $12.5 million to the CFA for a seventeen-game season. Thus, the major purchasers paid a total of around $40 million for major college-football telecasts—less than half the $90 million (or more) that the original NCAA contracts with ABC, CBS, and TBS would have yielded in 1985. Moreover, the market has continued to work through the late 1980s. From 1987 through 1990, ABC (Big Ten and Pac Ten), CBS (CFA), and ESPN (CFA) paid about $45 million for collegiate football, thereby paying less money while giving football fans a wider choice of games to watch.

As an ironic footnote to NCAA, when a pair of non-CFA members playing CFA teams were denied the right to televise those games, they brought charges against the CFA that were comparable to those that the CFA had brought against the NCAA. And they won, despite the fact that the CFA’s television controls were not nearly as tight as those of the NCAA. A subsequent suit against the CFA was nevertheless dismissed in Judge Burciaga’s court. In 1990, however, the Federal Trade Commission brought a complaint against the CFA and Capital Cities/ABC under Section 5 of the Federal Trade Commission Act, but the case was dismissed in 1994. The CFA may have avoided a sack as a result of a ruling that as a nonprofit organization it was exempt from FTC regulation. What it was unable to avoid, however, was the realignment of teams and conferences due to the lure of higher television revenues that had initially led to NCAA.

In 1990, Notre Dame bolted the CFA and signed a five-year, $30-million contract with NBC for the exclusive rights to its home games. Over the next few years a number of football powerhouses altered their conference memberships and formed new alliances, or relinquished their independent status to join a conference, in pursuit of higher television revenues. Between over-the-air and cable conference packages, as well as through the sale of individual games on a pay-per-view basis, it is no longer unusual for even a medium-level Division I school to appear

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29 *Regents of the University of California v. American Broadcasting Co.*, 747 F.2d 511 (9th Cir. 1984).


regularly on television and earn millions of dollars in television rights. In 1996, ABC/ESPN alone televised over 150 games, and scores of other games were televised by CBS and various regional syndicators such as Jefferson Pilot. Nonetheless, the total that broadcasters pay for those rights is unlikely to be as great as would have obtained under an NCAA cartel, and not every school has profited. Viewer choice has in any event been expanded, and in June 1997 the CFA closed up shop, with the future of televised college football bright and secured.

**Horizontal Restraints and the Rule of Reason**

The future of the rule of reason is no less bright. In NCAA the Supreme Court reaffirmed its ASCAP view that agreement among competitors and horizontal restraints might under some circumstances be a necessary part of doing business in a competitive market. Offering an otherwise unavailable product to that market is an important case in point. The Court also reaffirmed that such agreements might be procompetitive, enhance efficiency, and benefit consumers, in which case they would pass a rule-of-reason test and not be considered per se illegal. Wholesale buying cooperatives and service networks are subsequent exemplars. Thus, the Court reaffirmed the need initially to apply a rule-of-reason analysis in assessing the merits of particular acts and agreements.

A horizontal restraint fails a rule-of-reason test if it is not essential to the conduct of business and if an alternative arrangement that is less likely to affect consumer welfare adversely is available. Passing this test is mandatory. A horizontal restraint also fails a rule-of-reason test if its likely result is a higher price; that is, if it is exclusionary and denies buyers acceptable and competitive lower-cost options. Passing this test, too, is mandatory. A horizontal restraint also fails a rule-of-reason test if it lacks clear transactions cost benefits that make the cooperative enterprise more efficient than any one of its components, or if it lacks the potential to enhance consumer welfare in some other way. Passing this test is not mandatory because the restraint’s effects might be neutral. Still, a passing grade helps to justify the restraint and place it in a more favorable light.

The Court went further in stating that once a market-restraining act or agreement fails a rule-of-reason test, a definitive determination of the relevant market and/or market power is unnecessary: the restraint is per se illegal. The Court, however, did not declare all cooperative agreements that are not efficiency enhancing, or procompetitive, or essential to the provision

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34 Rubin (1990) discussed the role of transactions costs in managing business organizations, particularly in the context of antitrust and related issues.
of a good to be illegal per se. Thus, by implication, the Court had in mind agreements that are clearly anticompetitive and likely to effect higher prices, lower outputs, and restricted consumer choice in some market, and are thereby likely to impact consumer welfare adversely. But an anticompetitive act cannot have an anticompetitive consequence without individual market power or concerted behavior. Thus, by further implication, the Court had in mind only those restraints that adversely affect some market in which the cooperating parties doubtless have some market power. Only in this case is an explicit market definition and the coincident need to gauge market power unnecessary. Thus, the rule of reason is alive and well. So, too, are traditional antitrust market analysis and the concept of per se illegality.

And the sports leagues’ rules of governance continue to result in disagreements among the teams, and between the teams and players, who do not hesitate to rely on external courts to resolve their internal conflicts. For example, teams have turned to the courts in both their successful35 and their unsuccessful36 attempts to relocate their franchises without league approval, and the leagues have relied on the courts in an effort to enforce the restraints that are imposed on individual members in marketing their products and services.37 Players and coaches have also gone to court in an effort to minimize the restraints placed on their freedom of movement or other conditions of employment.38 In McNeil et al. v. NFL the issue was whether the restraint was “reasonably necessary.” More recently, a circuit court of appeals observed that a restraint might affect the labor market without having any anticompetitive effect on the product market.39 Indeed, even as this is being written in the fall of 1997, Major League Soccer, which is organized as a single entity, allegedly to help generate public interest in soccer in the United States, is being sued by ten of its players on the grounds that it eliminates competitive bidding; it was established as a monopoly!40 The sports beat goes on.

REFERENCES

Greenspan, David. “College Football’s Biggest Fumble: The Economic Impact of the

35 Los Angeles Memorial Coliseum v. National Football League, 726 F.2d 1381 (9th Cir. 1984),
36 National Basketball Association v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987),
40 In United States Football League v. National Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986), the NFL was held to be a monopoly in violation of Section 2, but one with which the USFL had aspired to merge.


