

Flag on the Play? The Siphoning Effect on Sports Television

Phillip M. Cox II*

[Introduction](#)

[I. The Sports Broadcasting Act of 1961](#)

[II. A History of Sports Programming and FCC Anti-Siphoning](#)

[A. FCC Actions](#)

[B. Congressional Attempts to Thwart Siphoning of Sports Programming](#)

[III. FCC 1993 Interim and 1994 Final Reports on Sports Programming Migration](#)

[IV. Fair or Foul? What Will be the Call on Sports Siphoning](#)

[A. A Contemporary Game Plan for the Protection of Free Broadcast Sports Programming](#)

[1. Trends in the Business of Sports Television](#)

[2. Opposition by Sports Fans](#)

[3. Congressional Intervention via "Broadcast Guaranteed" Legislation](#)

[Conclusion](#)

"Good afternoon, ladies and gentlemen. Welcome to the first telecast of a sporting event. I'm not sure what it is we're doing here, but I certainly hope it turns out well for you people who are watching."

-Bill Stern, announcing a 1939 baseball game between Columbia and Princeton Universities.[\(note 1\)](#)

Introduction

When pioneer broadcaster Bill Stern apprehensively made that primitive first telecast over half a century ago, sport and television forged a partnership that has become a season ticket for the whole country. Mr. Stern could probably never have imagined back in 1939 that this new medium would someday attract over 133 million people to view a single televised game[\(note 2\)](#) or that broadcasters would eventually pay more than three billion dollars annually for the right to telecast professional and college sporting events.[\(note 3\)](#) A recent national poll estimated that almost 60 percent of American adults watch National Football League (NFL or League) games on television.[\(note 4\)](#) Clearly, Mr. Stern's experiment is working.

But how *are* things currently turning out for the people who are watching? There are growing fears that free, over-the-air sports programming Americans have enjoyed for decades is being "siphoned" away by cable and pay-per-view television.[\(note 5\)](#) In 1992, several members of Congress took steps to ensure that the current free broadcast television system is preserved. These legislators viewed themselves as the champions of free broadcast television[\(note 6\)](#) and have stated that all Americans have a right to sports programming at some undetermined level.[\(note 7\)](#) In Section 26 of the 1992 Cable Act, Congress directed the Federal Communications Commission (FCC or Commission) to "conduct an ongoing study on the carriage of local, regional and national sports programming by broadcast stations, cable programming networks, and pay-per-view services."[\(note 8\)](#) This latest effort is one in a succession of attempts by federal lawmakers to provide Americans a right of free access to televised sporting events.[\(note 9\)](#) Still, questions remain about why legislative protection is necessary to ensure "free" sports programming on television, and ultimately, whether this type of legislation is constitutional under the First Amendment.

This Note examines how the proliferation of cable and pay-per-view television has changed the nature of sports programming. Specifically, this Note considers the so-called "siphoning effect" that cable and pay-per-view television have had on "free" broadcast television sports. Part I explores the impact of the Sports Broadcasting Act of 1961([note 10](#)) and its relation to the siphoning debate. Professional sports teams under this congressionally granted exemption from the antitrust laws may pool and market some of their television rights jointly. Part II reflects on the development of pay cable television and concerns about its effects on sports programming. Prior FCC and congressional attempts at regulation of sports programming on cable television are reviewed. Part III provides a detailed analysis of the FCC's 1993 *Interim Report* and the 1994 *Final Report* on the inquiry into sports programming migration, including their findings, limitations, and implications. This Note concludes that, given current trends and the history of sports broadcasting, legislative or regulatory action should be taken to guarantee that post-season playoff and championship games are available to all Americans regardless of their ability to gain access to or afford cable and pay-per-view television.

I. The Sports Broadcasting Act of 1961

Broadcast television and the revenue it generates are essential to any viable sports league.[\(note 11\)](#) No other sport demonstrates this fact better than professional football. Had it not been for the trials and tribulations of the NFL, there would be no antitrust exemption in professional sports broadcasting.[\(note 12\)](#)

The NFL has not always been thought of as the "crown jewel of all sports programming in the world" that it is today.[\(note 13\)](#) During the first thirty years of its existence, the NFL suffered from unsteady team membership and competition from rival leagues.[\(note 14\)](#) In 1951, the Dumont television network decided to televise five regular-season NFL games and the League's championship.[\(note 15\)](#) Thus began the winning combination of television and pro football. By 1955,[\(note 16\)](#) the Columbia Broadcasting Service (CBS) television network was paying \$1.8 million per year for the rights to certain games.[\(note 17\)](#) The NFL continued to grow, as did television, during the latter part of the 1950s, with each team individually selling its broadcast rights to the networks.[\(note 18\)](#)

At the beginning of the 1960s, the networks were pressed to fill viewer appetites for pro football; the newly formed American Football League (AFL) provided a perfect opportunity to fill this void.[\(note 19\)](#) In what is considered the first big network contract for regular-season sports,[\(note 20\)](#) the AFL signed a league-wide television contract with the American Broadcasting Company (ABC) for the league's first full schedule of games in 1960.[\(note 21\)](#) Not to be outdone by its new rival, the NFL sold a pooled package of its teams' broadcast rights to CBS for the 1961 season.[\(note 22\)](#) These pooled sales agreements soon caught the attention of the Justice Department and in 1961 were found to violate antitrust law.[\(note 23\)](#) The NFL then went to the ultimate rule-making committee for relief-Congress. It took just seventy-two days for Congress to respond to the NFL's request by enacting the Sports Broadcasting Act (Act).[\(note 24\)](#)

Although Congress passed the Act in response to the lobbying efforts of the NFL, the Act created an antitrust exemption that applies to all professional sports leagues. The Act allows teams to pool their individual broadcasting rights when negotiating national television contracts. This power came as an addition to the internal-operation antitrust exemption Major League Baseball (MLB) had held since 1922.[\(note 25\)](#) The idea that a sports league needs viable member teams was as true at the time of the passage of the 1961 Act as it is today. The Act maintains the existence of the league structure and protects teams in smaller television markets by pooling broadcasting rights with teams located in larger, more lucrative television markets in order to assure small-market teams equal shares of television revenues and coverage.[\(note 26\)](#)

The Act worked relatively well for its first twelve years. Professional sports, especially the NFL, experienced substantial growth under the Act's antitrust protection.[\(note 27\)](#) The overall success of the League included an increased number of sold-out games for many teams. However, under a provision of the Sports Broadcasting Act, the NFL had the power to "black out" or prevent local broadcast of any game that the networks were televising elsewhere in the country.[\(note 28\)](#) Blackouts of such sold-out local games prompted a number of fans to demand that home games be broadcast on a local channel when no stadium tickets were available.[\(note 29\)](#) These cries for a voluntary lift of the blackout ban were ignored by the NFL. The issue went to extremes in late 1972, when President Richard Nixon

made a personal appeal to the League asking for reconsideration of the NFL's position. The League vetoed the "First Fan's" request.[\(note 30\)](#) Within a year, however, Congress ended the NFL's blackout capabilities. Any game that was a part of a pooled telecast and had been sold out seventy-two hours before kickoff could no longer be restricted from local broadcast.[\(note 31\)](#)

Further analysis of the anti-blackout legislation illustrates how Congress reached a particular objective in sports programming. Although anti-blackout legislation was an amendment to the Communications Act of 1934, it limits the scope of the Sports Broadcasting Act without repealing or amending it.[\(note 32\)](#) The legislation is also curious in that every professional sports league has voluntarily adhered to its rules, although they expired in 1975 and are no longer legally binding.[\(note 33\)](#)

It is important to note that the Sports Broadcasting Act uses the term "sponsored telecast."[\(note 34\)](#) The use of this phrase leaves room for the NFL to argue that the Act was not intended to apply to contracts with cable networks.[\(note 35\)](#) In fact, the legislative record shows that there is ample evidence demonstrating the NFL's immediate realization that the Act applied only to "the free telecasting of professional sports and does not cover pay T.V."[\(note 36\)](#) This interpretation, as valid as it may be, has not inhibited the sports leagues from selling pooled telecast rights to many cable networks without legal challenge.[\(note 37\)](#) There is also evidence that this restrictive view of the scope of the Act has changed with the proliferation of cable television. In 1981, Representatives Pete Stark (D-Cal.) and Don Edwards (D-Cal.) introduced a bill to expand the Sports Broadcasting Act to include cable and pay television.[\(note 38\)](#)

II. A History of Sports Programming and FCC Anti-Siphoning Regulation

A. FCC Actions

As early as 1955, the FCC began to examine the consumer benefits of subscription programming.[\(note 39\)](#) The first subscription services, developed in the early 1960s, were only broadcast over UHF band stations.[\(note 40\)](#) However, it was soon apparent that cable television also had the capacity to provide subscription services.[\(note 41\)](#) At the onset of the FCC's inquiries into the emerging technology, the major television networks began voicing fears about subscription television (STV). The networks believed STV would eventually have the economic leverage to siphon sports programming away from free broadcast television.[\(note 42\)](#) In 1968, the apprehension of the networks prompted the FCC to curb what it saw as the potential erosion of the free television sports market.[\(note 43\)](#) The Commission set out strict limitations on the sale of sports programming to pay television operators in order to "protect the present television structure."[\(note 44\)](#) These limits prohibited "specific events" (such as the NCAA men's basketball tournament and the Super Bowl) from being sold to anyone other than broadcast television.[\(note 45\)](#) The FCC restrictions also provided for regulation of pre- and regular-season games.[\(note 46\)](#)

These rules as they applied to pay cable television were vacated by the United States Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc. v. FCC (HBO)*.[\(note 47\)](#) In *HBO*, the court provided a working definition of the "siphoning" phenomenon:

Siphoning is said to occur when an event or program currently shown on conventional free television is purchased by a cable operator for the showing on a subscription cable channel.[\(note 48\)](#) If such a transfer occurs, the Commission believes the program or event will become unavailable for showing on free television system or its showing on free television will be delayed . . . a segment of the American people—those in areas not served by cable or those too poor to afford subscription cable service—could receive delayed access to the program or could be denied access altogether. The ability of the half-million cable subscribers[\(note 49\)](#) thus to preempt the other 70 million television homes is said to arise from the fact that subscribers are willing to pay more to see certain types of features than are advertisers to spread their messages by attaching them to the same features.[\(note 50\)](#)

The court identified three separate grounds for vacating the anti-siphoning rules. First, although the Supreme Court allowed the FCC to regulate cable television through the Communications Act of 1934,[\(note 51\)](#) only those objectives which had been "long established" in broadcast television or had been "congressionally approved" justified any

regulation.[\(note 52\)](#) The court found that the Commission had exceeded its jurisdiction by establishing new and unique rationales which did not stem from a broadcast application.[\(note 53\)](#) Secondly, the court stated that even if the Commission had jurisdiction to promulgate anti-siphoning rules, there was no evidence supporting a need for such rules.[\(note 54\)](#) Finally, the court stated that the First Amendment rights of cable television operators had been violated by the anti-siphoning rules. Although the government could adopt reasonable regulations separating broadcasters and cable providers who compete and interfere with each other for the same audience,[\(note 55\)](#) those regulations must pass scrutiny under the four-part test set out by the Supreme Court in *United States v. O'Brien*.[\(note 56\)](#) Under *O'Brien*, the regulations (1) must fall within the constitutional power of the government, (2) further an "important or substantial governmental interest," (3) be "unrelated to the suppression of free expression," and (4) impose no greater restriction on First Amendment freedoms "than is essential to the furtherance" of the governmental interest.[\(note 57\)](#) When analyzed under this test, the Commission's stated interest was found to be the elimination of "conflict between those with and those without access to pay cable television."[\(note 58\)](#) While the Commission's anti-siphoning rules did fall within the constitutional powers of the government, under *O'Brien* they could not be said to further an important or substantial governmental interest because the record indicated no conflict or controversy between the two groups.[\(note 59\)](#) The Commission's governmental interests were found to be unrelated to the suppression of free expression as required by the third prong of the *O'Brien* test. The incidental restrictions on cable providers' alleged First Amendment freedoms were found to be greater than those that would be essential to the furtherance of the Commission's stated interests.[\(note 60\)](#)

Interestingly, the court's opinion in *HBO* suggested that the anti-siphoning rules could have been upheld had the FCC adequately demonstrated siphoning to be both likely to happen and harmful.[\(note 61\)](#) Thus, it seems any record which properly supports congressional siphoning concerns would allow lawmakers to impose sports programming limits.

After the *HBO* decision, the Commission was silent on the subject of sports programming until the passage of the 1992 Cable Act. Individual FCC Commissioners, notably James Quello, have expressed opinions on the subject,[\(note 62\)](#) but there has been no official action during the last decade.

B. Congressional Attempts to Thwart Siphoning of Sports Programming

Although Congress granted sports leagues the privilege of operating beyond the scope of antitrust scrutiny, Congress has maintained a healthy skepticism of the leagues and their potential to bypass the over-the-air broadcast networks in search of pay television riches. Over the past three decades, several bills have been introduced in both the House and Senate, by Democrats and Republicans alike, which have attempted to restrain the move of sports programming away from mass-market broadcast television.

Twice during the early 1970s, Congressman Les Aspin (D-Wis.) introduced legislation that would have protected free television by preventing sports teams from selling telecast rights to closed circuit television operators.[\(note 63\)](#) Aspin believed that event after event would move to closed circuit TV, forcing avid fans to pay hundreds of dollars for viewing rights.[\(note 64\)](#) In late 1973, Senator J. Glen Beall (R-Md.) introduced S. 2283, The Preservation of Free Television Act of 1973.[\(note 65\)](#) The Beall Bill not only protected events that were currently being televised, but events that but for pay television and cable would have been available.[\(note 66\)](#) The Bill did not explain what events "would have been available," nor did it define "availability."

After the Supreme Court struck down the FCC's anti-siphoning rules in *HBO*, the issue seemed to lose its urgency for the remainder of the decade. The deregulatory tenor of the 1984 Cable Act meant that a growing cable industry needed programming; thus, the 1980s could be characterized as the golden age of cable sports programming. Congress did little as the cable networks began to proliferate and consume any sporting events they could get their hands on. In this unregulated environment, sports programming became a staple of cable television. With the advent of ESPN and SportsChannel, national cable networks now devoted the whole of their air time to game coverage and sports-related programming. Regional sports cable networks such as PrimeTicket and the Sunshine Network soon joined the national cable networks in telecasting games, which had been dropped by the broadcast networks due to low ratings, or, for the most part, had never been offered.[\(note 67\)](#) The siphoning capabilities of pay-per-view television were also confirmed in the 1980s. By the end of the decade, almost all professional boxing was available exclusively to pay-per-view

audiences.[\(note 68\)](#)

At the end of the 1980s, the effects of cable and pay-per-view television on sports programming regained the attention of Congress. During 1991, the 102d Congress introduced three bills which either limited the protection provided by the Sports Broadcasting Act or restricted the siphoning effect directly by preventing broadcast games from moving to cable and premium cable television.[\(note 69\)](#) In a 1991 bill introduced by Senator John McCain (R-Ariz.), MLB and the NFL would have been required to keep the World Series and the Super Bowl on free broadcast television even if the games were also available on pay-per-view.[\(note 70\)](#) According to Senator McCain, MLB and the NFL league championships are "traditions" which have "always been available to all Americans;" access to them "should not be determined by an income test."[\(note 71\)](#) Representative Gerry Sikorski (D-Minn.) also planned to propose legislation during the 102d Congress. Representative Sikorski's proposals were similar to Senator McCain's in that they only prevented the league championships from migration.[\(note 72\)](#) Describing sports siphoning as "a creeping economic and electronic elitism," Representative Peter H. Kostmayer (D-Pa.) introduced what he called the Fairness to Fans Act.[\(note 73\)](#) This 1991 bill required professional sports leagues to reserve a percentage of their games for free broadcast only.[\(note 74\)](#) Kostmayer saw the need to protect "the average fan, whose area may not be wired for cable or who may not have the extra income to afford premium channels."[\(note 75\)](#)

In recent years, the most vocal advocate for broadcast television sports in Congress has been Representative Edward J. Markey (D-Mass.). Markey served as chairman of the powerful House Subcommittee on Tele-communications and was a principal author of the Cable Television Consumer Protection and Competition Act of 1992.[\(note 76\)](#) He has frequently stated that pay-per-view television deeply troubles him because of concerns for working-class and low-income fans. Calling pay-per-view a "techno-logical grinch" that could steal the Super Bowl, World Series, and other high-profile sporting events out of the living rooms of many Americans,[\(note 77\)](#) Markey proclaimed himself the protector of what he has called a great democratizing force in America-mass market television.[\(note 78\)](#) During a 1993 sports siphoning seminar sponsored by the Federal Communications Bar Association, Representative Markey pledged that Congress will work hard "to protect the public interest."[\(note 79\)](#) Markey characterized professional sports as unique and important parts of both the nation's culture and the cohesiveness of local communities. Calling events such as the Super Bowl and the World Series "shared national events," Markey suggested the leagues should at least repay the fans "with free access to those games,"[\(note 80\)](#) thus hinting at what a Markey anti-siphoning statute might include.

III. FCC 1993 Interim and 1994 Final Reports on Sports Programming Migration

Before passage of the 1992 Cable Act by the House of Representatives, substantial revisions were made to the initial proposed bill.[\(note 81\)](#) One amendment, from Representative Bob McMillen (D-Md.), required the FCC to study the implications of sports program migration to pay-per-view.[\(note 82\)](#) This amendment was accepted, and in its revised form, became Section 26 of the 1992 Cable Act. Section 26 requires the FCC to make a comprehensive study of local, regional, and national sports programs and their carriage on broadcast, cable, and pay-per-view television.[\(note 83\)](#) During its *Notice of Inquiry*, the FCC received comments from members of the sports programming industry: cable networks, broadcast networks, Association of Independent Television Stations (INTV), NFL, National Basketball Association (NBA), National Hockey League (NHL), and MLB. The NCAA and representative colleges also filed comments regarding football and basketball.[\(note 84\)](#) The Commission asked for these comments to focus specifically on sports programming trends demonstrating migration from broadcast stations to cable programming networks or pay-per-view systems. If any trends were detected, the Commission would then ascertain the "economic causes and the economic and social consequences of such trends."[\(note 85\)](#) The Commission clearly spelled out the purpose of gathering this information: "We believe that the information detailed herein will help Congress and the Commission to determine whether any legislative or regulatory action is currently necessary or may become necessary in the future."[\(note 86\)](#)

The situation at present is tied going into halftime. Both the *Interim Report* and *Final Report* found that broadcasters now air more sports programming than ever before but also noted that pay cable television has gained considerable ground. According to ESPN, the big three broadcast networks (ABC, the National Broadcasting Company (NBC), and

CBS) carried 19 percent more sports programming in 1992 than they did in 1980.[\(note 87\)](#) Broadcasters also enjoy right of first refusal for many professional football, basketball, and baseball games, as well as college football and basketball. However, the ratings on many national broadcasts of these sports have declined in correlation with the increases in the number of games available on cable and pay-per-view.[\(note 88\)](#) Unfortunately for the sports fan without cable television, low ratings have translated into the broadcast networks abandoning programming such as Thursday night NFL games and some of baseball's regular season, while pay services and cable networks subsequently picked them up. INTV urged the Commission to recognize that sports migration is a real problem. According to INTV, the size and the penetration of cable television since the *HBO* case has "substantially" affected the extent of sports programming siphoning.[\(note 89\)](#) INTV asserted that taxpayers have helped finance professional sports teams through construction of new arenas, stadiums, and peripheral infrastructures as well as tax advantages. It also reminded the Commission of the antitrust exemptions professional sports enjoy. As a result, INTV argued, taxpayers should be entitled to reciprocal treatment from professional sports through receiving free over-the-air telecasts.[\(note 90\)](#) INTV also reiterated the argument the major networks had made twenty-five years earlier-cable television could potentially outbid traditional commercial broadcasters because it has a dual revenue stream from advertising and subscriptions.[\(note 91\)](#) The National Cable Television Association (NCTA) argued that cable has expanded and enhanced the level of televised sports that fans are able to receive.[\(note 92\)](#) Sports and teams whose coverage had been abandoned by broadcasters has been picked up by cable operators.[\(note 93\)](#) Time Warner Entertainment Company asserted that developments such as the Fox Network carrying sports programming will likely lead to many sporting events making a move back to broadcast television.[\(note 94\)](#) The NHL agreed with the NCTA. The NHL noted that there has traditionally been little or no interest from the networks in a national contract to broadcast hockey. However, ESPN nationally televised more than twenty-five regular season hockey games and an additional undetermined amount of playoff games during the 1992-93 season.[\(note 95\)](#) MLB cited a "growing reluctance" by broadcast networks to air its games nationally, due to poor ratings.[\(note 96\)](#) Many of the commentators representing collegiate athletics stated that cable carriage has been particularly beneficial to them and to other amateur sports.[\(note 97\)](#) The NCTA contended that Congress did not intend to preserve all sports programming for broadcasters, or to "protect individual broadcasters from a competitive video marketplace."[\(note 98\)](#) Both reports contradicted this, by pointing out that it has been a longstanding policy of the Commission to keep widely popular sporting events available to the public on over-the-air television.[\(note 99\)](#)

While it can be said that cable and pay-per-view have added to the amount of regular season sports programming, it has not been without a cost. The FCC's study showed that every sport's audience was fragmented by cable or pay-per-view television, which led, in most instances, to significantly lower ratings and in the case of such sports as baseball, to increasing abandonment by the broadcast networks.[\(note 100\)](#) In its *Final Report*, the FCC acknowledged the sparseness of sports programming siphoning, but said it would continue to monitor the availability of sports programming. If any significant threat to that availability developed, the Commission made a strong promise: "We shall not hesitate to act, consistent with our statutory authority."[\(note 101\)](#)

IV. Fair or Foul? What Will be the Call on Sports Siphoning?

The FCC's June 9, 1994 *Final Report* to Congress on the issue of sports programming migration, reflected the findings of the 1993 *Interim Report*. The main reason for this repetition is that three of the four professional leagues included in the study have recently contracted with the broadcast networks to limit regular season game siphoning for the next three years.[\(note 102\)](#) Regardless of the conclusions the FCC's *Final Report* provides, many lawmakers realize that free television and American viewers are imminently threatened by cable television and pay-per-view.[\(note 103\)](#)

For example, on November 30, 1993, just five months after the release of the *Interim Report*, FCC Commissioner James Quello predicted that the government would continue to resist a shift in sports programming from over-the-air to pay TV. Citing the long-term profit potential of pay-per-view as being too overwhelming for sports leagues to resist, Commissioner Quello stated that he did not believe Congress or the FCC would "tolerate pay-per-view siphoning from free TV major sports."[\(note 104\)](#) Others think that the sports leagues have responsibilities to the fans and at the very least the fans should be rewarded for their support. As technology advances, trends indicate that more and more sports programming will be offered on alternative media.[\(note 105\)](#) Those who see a need to preserve free market TV are therefore likely to push for guarantees that protect all Americans' access to sports programming.

A. A Contemporary Game Plan for the Protection of Free Broadcast Sports Programming

Federal legislation which specifically guarantees that select playoff and championship games are available on free broadcast television may be necessary to assure that all fans have access to these shared national events. There are a number of corroborating factors that support this assertion.

1. Trends in the Business of Sports Television

The sports league/broadcasting partnership can at the very least be considered volatile. The once lucrative combination has been besieged with a host of problems which ultimately could drive team owners to place even the most popular sports programming onto premium cable channels or pay-per-view. During the latter part of the 1980s, ABC, CBS, and NBC began to see marked losses in overall audience share, from 75 percent in 1984 to about 60 percent in 1990, as the cable industry grew.[\(note 106\)](#) CBS saw professional sports, perennially the most popular programming in all of television, as their best goal-line defense and began to purchase the rights to big sports with little regard to cost.[\(note 107\)](#) The other networks decided to borrow a page from the CBS playbook, and bidding wars for football, basketball, and baseball telecast rights ensued. Expenditures for broadcast rights reached unprecedented levels and created a glut of sports programming which further fragmented the audience. With cable networks carrying all three major sports for the first time, less audience to offer for each game, and more games than ever to sell, the sports advertising market pushed advertising rates lower than they had been in years.[\(note 108\)](#) Sports programming, which had been touted as the turnaround solution for struggling broadcast networks, translated into extraordinary record revenue losses. CBS lost nearly \$400 million on its baseball contract alone and all three networks jointly lost \$300 million on NFL broadcast rights.[\(note 109\)](#) Losses of these proportions caused the networks to demand partial refunds on previous contracts[\(note 110\)](#) and precipitated the creation of "The Baseball Network," a joint national broadcasting venture in which MLB, ABC, and NBC share the ratings risks as well as the broadcast revenues.[\(note 111\)](#) Financial estimates predicted that this arrangement would provide the league with less than half the ad revenue generated during the 1993 season.[\(note 112\)](#) Faced with meeting player payrolls that are twice a team's total broadcast revenues, the "National Pastime" could be caught in an economic double play.[\(note 113\)](#) After the season was canceled in August 1994, baseball owners were forced to refund \$95 million to advertisers.[\(note 114\)](#) Pay-per-view league championship games or even a pay-per-view World Series, in light of this current situation, do not seem as implausible as they once did. The NFL faced similar threats from the networks claiming to have reassessed the viability of professional football in light of previous contracts.[\(note 115\)](#) The prospect of broadcasters being unwilling to bid on the NFL was suspended by leverage the NFL gained from the Fox Network.[\(note 116\)](#) Reminiscent of the strategy CBS employed a few years earlier, Fox believes that the NFL will be a network builder, and agreed to pay the League \$1.58 billion for the broadcasting rights to National Football Conference (NFC) games for four years. However, with Fox's losses estimated at over \$150 million a year, this network switch could be shortlived if Fox refuses to absorb the crushing losses.[\(note 117\)](#) Thus, as the broadcast networks become unable to afford the licensing fees the League demands, pay-per-view becomes a lucrative option.

2. Opposition by Sports Fans

Perennially, the games that make up the playoffs, especially the championship games, are the most popular television programs of any type throughout the country.[\(note 118\)](#) These games have, without fail, always been available on advertising-supported, over-the-air broadcast television, and Americans are accustomed to receiving these events without a direct charge. Many fans feel they have a right to view these games. Some researchers have even stated that losing these games to pay television could damage the psyche of the sports fan. William Beausay, a clinical psychologist who heads the Academy of Sports Psychology, classifies the phenomenon as a form of rejection. "You take a guy who has been faithful for years, always watching his favorite team, a firm supporter, and suddenly he can't see it without paying additional money, it's like saying, 'We don't want you.' Nobody takes that lightly."[\(note 119\)](#) This resentment would likely manifest itself by some viewers simply tuning out, but others might be encouraged to take action. Instances of fans being infuriated by pay-per-view plans are common.[\(note 120\)](#) If enough fans become

agitated, a response similar to that which happened when the NFL refused to broadcast sold-out home game could occur; fans might eventually force the leagues to capitulate and lift the blackouts.

3. Congressional Intervention via "Broadcast Guaranteed" Legislation

Although past congressional attempts at passing anti-siphoning and fan-protection legislation have not succeeded, the anticipated growth in the pay-per-view market could provide the appropriate climate for another attempt.[\(note 121\)](#) The immediate and negative response that the NFL received when it expressed its desire to experiment with pay-per-view at the end of the 1993 season serves as a prime example of congressional sensitivity toward sports programming.[\(note 122\)](#) Congressional opposition to pay-per-view sports is not likely to manifest itself in wholesale abandonment of the Sports Broadcasting Act, or the strict interpretive enforcement of the Act's language because it has generally thought to have led to a greater number of games being telecast.[\(note 123\)](#) But legislation in the form of a rule that would ensure a national over-the-air broadcast television outlet for playoff/championship sporting events (congressionally designated as "nationally shared events"), directed at sports teams and leagues rather than at the media that purchase telecasting rights, would certainly be a moderate position compared to bills that have been introduced in the past. What member of Congress would not want to be identified with saving the Super Bowl? Given the current levels of concern and scrutiny, it is possible that congressional endorsement of a bill that required sports leagues to guarantee over-the-air broadcasts of designated post-season games will succeed. The anti-blackout legislation Congress passed in the 1970s provides the best example of how broadcast-guaranteed legislation could be enacted as an amendment to the Communications Act. Such legislation would complement the Sports Broadcasting Act without repealing or amending it and avoid the House and Senate Judiciary committees, which have been reluctant to revise the Sports Broadcasting Act.[\(note 124\)](#)

If Congress's intent is to ensure over-the-air access to post-season sporting events for the nation's fans, its current motivations and restrictions will have to withstand the *O'Brien* test as it was applied in the *HBO* decision. Amending either the Sports Broadcasting or the Communications Acts would certainly fall within the powers of Congress, thus satisfying the first prong of *O'Brien*. The court in *HBO* found the elimination of "conflict between those with and those without access to pay cable television" to be a less than substantial government interest as required by *O'Brien*'s second prong.[\(note 125\)](#) However, if Congress were to characterize certain sporting events as "shared national events," assuring all Americans access to these events could conceivably be deemed to further an important or substantial governmental interest necessary for *O'Brien* compliance. The third section of the *O'Brien* test would demand that any "broadcast guarantee" bill be unrelated to the suppression of free expression. The stated interests of many in Congress have been to protect free broadcast television as a democratizing force and the preservation of lower-income America's access to shared national events. But as then-Chief Justice Wald stated in *Century Communications Co. v. FCC*, "speculative fears alone have never been held to justify trenching on First Amendment liberties."[\(note 126\)](#) Congress realized this when it added Section 26 to the 1992 Cable Act. The *Final Report*, submitted to Congress in the summer of 1994, could provide some of the required substantive verifications under *O'Brien*. In addition, rules that directly apply to sports leagues and teams rather than the cable and pay-per-view operators themselves would be unrelated to the suppression of the free expression of either media.

Probably the most difficult prong of the *O'Brien* test to justify is the fourth, the requirement that the incidental restriction of any First Amendment freedoms be "no greater than is essential to the furtherance" of the governmental interest.[\(note 127\)](#) Clearly, the congressional interest in making available post-season playoff and championship games to all Americans would affect only a handful of contests. A guarantee to the American people that these games will be available on over-the-air broadcasts would not prohibit the leagues from offering sophisticated, value-added pay-per-view broadcasts of the same events or regular season contests. In reality, a broadcast guarantee would serve to protect a First Amendment listener, not restrict the rights of a First Amendment speaker. With such an extremely narrowly tailored goal, a congressional rationale for the protection of free playoff and championship broadcasts could pass constitutional scrutiny.

Conclusion

Although the "crown jewels" of sports programming currently remain available without direct charge to the viewer,

subscription and pay-per-view entrepreneurs are quick to point out the profitability of a pay-per-view Super Bowl or World Series. [\(note 128\)](#) If professional sports' desire to sell telecast rights to the highest bidder continues, regardless of its effect on the fan, no game can be said to be free from the threat of pay-per-view. In fact, the solitary factor that has kept pay-per-view at bay thus far has been vocal resistance by fans and members of Congress. In the absence of pressure, it is doubtful that given a choice between immense pay-per-view dollars or fans' preferences, the leagues would choose the latter. The baseball and hockey strikes of 1994 and 1995 demonstrate how little influence the fans have on the business of sports. This is why it is essential, as the professional sports leagues devalue the individual fan, for the government to ensure at least minimum access. Assuring that playoff and championship games are protected for all Americans would accomplish this objective. But why should such programming be given preferential attention? The road to an answer may lie south.

U.S. Highway 1, the only direct route from Miami to Key West, Florida, is arguably one of the busiest stretches of roadway in the country. Millions of people crowd its six lanes from the early morning until well past dark; the thoroughfare is even jammed on Christmas and Thanksgiving days. But one day each year, this artery is virtually vehicle free. That day is Super Bowl Sunday. Only something as universal as sports could bring the vast ethnic, cultural, and social diversity of a city like Miami together, all participating in the same activity, watching the big game on television. Hispanic, African American, Anglo, male, female, wealthy, and welfare alike all become "sports fans" for a day and tune in.

"Big-time" televised sports, with all its triviality and commercialism, is truly one element of contemporary American society that transcends our prejudices, fears, and resentments. Allowing Americans to be excluded from this shared national experience, one of the last of its kind, would eliminate a tradition that has contributed to understanding and acceptance.

Notes

- B.A. (telecommunications) Indiana University-Bloomington, 1989; candidate for J.D. Indiana University-Bloomington, May 1995. The Author wishes to thank Bloomington *Herald-Times* Sports Editor Bob Hammel for his insight, advice, and excellent coverage of Indiana University basketball. [Return to text](#)
1. [Lee Green](#), *Sportswit* 48 (1984). [Return to text](#)
 2. This event is the Super Bowl. In fact, Super Bowls account for 9 of the top 10 most watched television programs, including the most watched television program in history. Barry Horn, *A State of Frenzy; Cowboys-Oilers Super Bowl Would Wow Texans, of Course, but It'll Suit Others, Too*, *Dallas Morning News*, Jan. 16, 1994, at 1A. [Return to text](#)
 3. *In re* Implementation of Section 26 of the Cable TV Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration, *Interim Report*, 8 FCC Rcd. 4875, app. C (1993) [hereinafter *Sports Programming Interim Report*]. [Return to text](#)
 4. Jerry Greene, *Loss of Both NFL and Baseball Gives CBS Sports a Black Eye*, *Orlando Sentinel*, Dec. 24, 1993, at B11. [Return to text](#)
 5. *See Sports Programming Interim Report*, *supra* note 3, paras. 14-15. [Return to text](#)
 6. "[M]y job is to preserve free over-the-air television," said Rep. Edward Markey (D-Mass.) at an address to the Federal Communications Bar Association Sports Siphoning Seminar on the role of Congress in sports programming. *Free Agent Frenzies; Markey Says His Job is to Protect the Fan and Free TV Sports*, *Comm. Daily*, Sept. 29, 1993, at 3 [hereinafter *Protect the Fan*]. [Return to text](#)
 7. "I can't precisely tell what the obligations of sports leagues are, but I know when they have crossed the line and are not living up to their responsibilities." *Id.* [Return to text](#)

8. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. 521 (Supp. V 1993)). [Return to text](#)
9. Robert Alan Garrett & Philip R. Hochberg, *Sports Broadcasting and the Law*, 59 Ind. L.J. 155, 185 (1983). [Return to text](#)
10. Sports Broadcasting Act of 1961, 15 U.S.C. 1291 (1988). [Return to text](#)
11. Paul C. Weiler & Gary R. Roberts, *Sports and the Law* 478 (1993). [Return to text](#)
12. Dean A. Rosen, *Back to the Future Again: An Oblique Look at the Sports Broadcasting Act of 1961*, Ent. L. Rep., Oct. 1991, at 3, 3. [Return to text](#)
13. Michael Fitzpatrick, *Fox Football Rights Win Seen Buoying Network*, Reuter Asia-Pacific Business Report, Dec. 20, 1993, available in LEXIS, News Library, Wires File (quoting Fox Broadcasting Co. Chairman Rupert Murdoch describing the NFL's National Football Conference franchise broadcast rights for which his network paid \$1.58 billion over a four-year period). [Return to text](#)
14. American Football League v. National Football League, 323 F.2d 124, 125 (4th Cir. 1963). [Return to text](#)
15. United States Football League v. National Football League, 842 F.2d 1335, 1346 (2d Cir. 1988). [Return to text](#)
16. *See Nightline* (ABC television broadcast, Dec. 20, 1993) [hereinafter *Nightline*]. [Return to text](#)
17. *United States Football League*, 842 F.2d at 1346. [Return to text](#)
18. *Id.* [Return to text](#)
19. Rosen, *supra* note 12, at 3. [Return to text](#)
20. *See* American Football League v. National Football League, 323 F.2d 124 (4th Cir. 1963). [Return to text](#)
21. *Id.* at 126. [Return to text](#)
22. Rosen, *supra* note 12, at 3. [Return to text](#)
23. United States v. National Football League, 196 F. Supp. 445, 446 (E.D. Pa. 1961). [Return to text](#)
24. *See generally* Sports Broadcasting Act of 1961, 15 U.S.C. 1291 (1988); *National Football League*, 196 F. Supp. at 445. [Return to text](#)
25. "The business [of] giving exhibitions of baseball, which are purely state affairs" was found not to be interstate commerce subject to antitrust actions. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 208 (1922). [Return to text](#)
26. Rosen, *supra* note 12, at 4. [Return to text](#)
27. *Id.* at 3. [Return to text](#)
28. Sports Broadcasting Act of 1961, 15 U.S.C. 1291(2) (1988); Rosen, *supra* note 12, at 4. [Return to text](#)
29. Rosen, *supra* note 12, at 5. [Return to text](#)
30. *Id.* [Return to text](#)
31. Communications Act of 1934, ch. 652, 331, 48 Stat. 1064, amended by Act of Sept. 14, 1973, Pub. L. No. 93-

- 107, 87 Stat. 350. Under 2 of the 1973 amendment, this provision expired Dec. 31, 1975. Rosen, *supra* note 12, at 5. [Return to text](#)
32. Rosen, *supra* note 12, at 5. [Return to text](#)
33. Garrett & Hochberg, *supra* note 9, at 192. [Return to text](#)
34. 15 U.S.C. 1291 (1988). [Return to text](#)
35. See Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts With Cable Networks*, 39 *Emory L.J.* 463, 468-71 (1990). [Return to text](#)
36. *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Subcomm. on Antitrust (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 36 (1961). [Return to text](#)
37. See Ross, *supra* note 35, at 469-71. [Return to text](#)
38. H.R. 823, 97th Cong., 1st Sess. (1981). [Return to text](#)
39. *In re* Amendment of Part 73 of the Commission's Rules and Regs. (Radio Brdcast. Services) to Provide for Subscription TV Service, *Fourth Report and Order*, 15 F.C.C.2d 466, para. 1 (1968) [hereinafter *Subscription TV Service Report*]. [Return to text](#)
40. *Id.* para. 4. [Return to text](#)
41. *Id.* paras. 361-68. [Return to text](#)
42. The CBS network paid \$19 million for the right to broadcast the NFL in 1968. The networks felt that \$19 million was near the limit of what free TV could pay. *Id.* para. 104. In 1993 the CBS network made an offer to pay \$295 million a year for the rights to the National Football Conference (NFC). Larry Stewart, *CBS' Downfall: Fox's Money, NBC's Agreement*, *L.A. Times*, Dec. 24, 1993, at C3. [Return to text](#)
43. See *In re* Amendment of Part 76, Subpart G, of the Commission's Rules and Regulations Pertaining to the Cablecasting of Programs, *First Report and Order*, 52 F.C.C.2d 1 (1975); Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, *Memorandum Opinion and Order*, 23 F.C.C.2d 825 (1970); *Subscription TV Service Report*, *supra* note 39. [Return to text](#)
44. *Subscription TV Service Report*, *supra* note 39, para. 284. [Return to text](#)
45. *Id.* para. 290. [Return to text](#)
46. *Id.* para. 288. [Return to text](#)
47. *HBO*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). [Return to text](#)
48. *Id.* at 25 (footnote added). Subscription cable channels are channels that are purchased in addition to basic cable service, i.e., HBO. Because of the reasons previously cited, such as limited access to cable in rural areas and expense of the service, basic cable itself is considered to potentially "siphon" sports programming from free broadcast television. [Return to text](#)
49. *Id.* (footnote added). In 1994, this number has jumped to nearly one million subscribers nationwide or around 65% penetration of cable into homes with television. 140 *Cong. Rec.* M5231 (daily ed. June 28, 1994) (statement of Rep. Markey). [Return to text](#)
50. *HBO*, 567 F.2d at 25. [Return to text](#)

51. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 651-53 (1972). [Return to text](#)
52. *HBO*, 567 F.2d at 25-26. [Return to text](#)
53. *Id.* at 34-48. [Return to text](#)
54. *Id.* at 48-60. [Return to text](#)
55. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 386 (1969). [Return to text](#)
56. *O'Brien*, 391 U.S. 367 (1968). [Return to text](#)
57. *Id.* at 376-88. [Return to text](#)
58. *HBO*, 567 F.2d at 15. [Return to text](#)
59. *Id.* at 31-37. [Return to text](#)
60. *Id.* [Return to text](#)
61. *Id.* [Return to text](#)
62. Paul Harris & Dennis Wharton, *Green Light Seen For Telco-Cabler Bill*, *Variety*, Dec. 13, 1993, at 30, 30 (warning that the FCC should not tolerate pay-per-view siphoning). [Return to text](#)
63. See H.R. 2239, 93d Cong., 1st Sess. (1973); H.R. 15620, 92d Cong., 2d Sess. (1972); Philip R. Hochberg, *Congress Kicks a Field Goal: The Legislative Attack in the 93d Congress on Sports Broadcasting Practices*, 27 *Fed. Comm. B.J.* 27, 56 (1974). [Return to text](#)
64. 119 *Cong. Rec.* E275 (1973). [Return to text](#)
65. S. 2283, 93d Cong., 1st Sess. (1973). [Return to text](#)
66. *Id.* 2. [Return to text](#)
67. *Sports Programming Interim Report*, *supra* note 3, paras. 78-82. [Return to text](#)
68. Doug Carlson, *Satellite TV Police Coming to Take Your Pro Sports Away*, *Tampa Trib.*, Dec. 2, 1994, at 7. Professional boxing, which has migrated to pay-per-view, has striking similarities to league championship games like the Super Bowl or World Series. Both types of events normally receive large amounts of media coverage and have some type of championship title at stake. This tends to attract additional viewers who do not follow the sport regularly. [Return to text](#)
69. Rosen, *supra* note 12, at 3. [Return to text](#)
70. 137 *Cong. Rec.* S5515 (daily ed. May 8, 1991) (statement of Sen. McCain). [Return to text](#)
71. *Id.* [Return to text](#)
72. Joseph Tybor, *Lawmakers Ready to Block Big-Time Sports From Moving to Pay-TV*, *Chi. Trib.*, Oct. 28, 1991, at C1. [Return to text](#)
73. 137 *Cong. Rec.* H5671 (daily ed. July 23, 1991) (statement of Rep. Kostmayer). [Return to text](#)
74. H.R. 2976, 102d Cong., 1st Sess. (1991). [Return to text](#)

75. 137 Cong. Rec. H5671, *supra* note 73. [Return to text](#)
76. Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 Fed. Comm. L.J. 1, 1 (1993). [Return to text](#)
77. Tybor, *supra* note 72, at C1. [Return to text](#)
78. *Protect the Fan*, *supra* note 6, at 3. [Return to text](#)
79. *Id.* [Return to text](#)
80. *Id.* [Return to text](#)
81. *See, e.g., Bashing Cable; House Unit Substantially Revises Cable Bill*, Comm. Daily, June 18, 1992, at 1. [Return to text](#)
82. *Id.* [Return to text](#)
83. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. 521 (Supp. V 1993)). [Return to text](#)
84. *Sports Programming Interim Report*, *supra* note 3, app. B. [Return to text](#)
85. *Id.* app. A (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. 521 (Supp. V 1993))). [Return to text](#)
86. *Id.* para. 3. [Return to text](#)
87. Joe Flint, *Broadcasters, Cable Clash Over Sports Siphoning*, Broadcasting & Cable, Apr. 5, 1993, at 40, 40. [Return to text](#)
88. This policy, known as "broadcasters first" has been predicted to continue, especially at the national level. *Id.* at 40. [Return to text](#)
89. *Sports Programming Interim Report*, *supra* note 3, para. 84. [Return to text](#)
90. *Id.* para. 2. [Return to text](#)
91. *See* Garrett & Hochberg, *supra* note 9, at 185. [Return to text](#)
92. Flint, *supra* note 87. [Return to text](#)
93. *Id.* at 40. [Return to text](#)
94. *In re* Implementation of Section 26 of the Cable TV Consumer Protection and Competition Act of 1992, *Final Report*, 9 FCC Rcd. 3440, para. 9 (1994) [hereinafter *Inquiry into Migration Report*]. [Return to text](#)
95. *Id.* para. 99. [Return to text](#)
96. *Id.* paras. 28-31. Low ratings from preceding seasons were the main cause for reluctance on the part of networks to air baseball nationally. Ratings for nationally televised baseball declined from a high of 8.7% in 1982 to a low of 3.4% in 1992. *Sports Programming Interim Report*, *supra* note 3, para. 44. [Return to text](#)
97. *Sports Programming Interim Report*, *supra* note 3, para. 54. The University of Pittsburgh (Pitt) is an excellent example. Since ESPN began televising college football, Pitt has made 22 national appearances, which would not have occurred otherwise. Further, the Pitt basketball team has averaged four or five live appearances each year

- to ESPN's national audience. *Id.* [Return to text](#)
98. *Congress Didn't Intend to Preserve all Sports Programming*, Television Dig., Apr. 19, 1993, at 3, 3 [hereinafter *Sports Programming*]. [Return to text](#)
99. *Sports Programming Interim Report*, *supra* note 3, para. 85. [Return to text](#)
100. *See id.* [Return to text](#)
101. *Inquiry into Migration Report*, *supra* note 94, para. 9. [Return to text](#)
102. In 1993, the NFL signed record-breaking multi-year deals with both the Fox Network (\$1.58 billion over four years) and NBC (\$651 million over three years). Leonard Shapiro, *And the Fourth Shall Be First: How Fox Stalked the NFL and Bagged TV Deal*, Wash. Post, Dec. 26, 1993, at D1. The NBA signed a \$750 million deal with NBC in 1993 over four years with a provision for profit sharing. Joe Menzer, *No MJ? No Problem for the Hot NBA*, Basketball Dig., Jan. 1994, at 14, 14. Major League Baseball, in 1993, signed a six-year partnership with NBC and ABC that has no set dollar amount. *NFL's Television Deal With Fox Stuns Many Baseball Owners*, St. Louis Post-Dispatch, Dec. 26, 1993, at 5H [hereinafter *Deal With Fox*]. [Return to text](#)
103. *See Nightline*, *supra* note 16. [Return to text](#)
104. Harris & Wharton, *supra* note 62, at 30. [Return to text](#)
105. *See generally Sports Programming Interim Report*, *supra* note 3, app. C (indicating a steady increase in the number of cable networks offering sport programming and the number of games being cablecast). [Return to text](#)
106. Loland Montgomery, *Tisch's Trump Cards*, Fin. World, Apr. 27, 1993, at 36, 36. [Return to text](#)
107. *Id.* [Return to text](#)
108. Joe Flint, *Economy, Ad Ban Threats Depress Sports*, Broadcasting, Nov. 25, 1991, at 40, 40, 44. [Return to text](#)
109. *Deal With Fox*, *supra* note 102, at 5H. [Return to text](#)
110. *See* Michael K. Ozanian et al., *Big Leagues, Bad Business*, Fin. World, July 7, 1992, at 34, 34. [Return to text](#)
111. Ken Fidlin, *Baseball Whiffs as NFL, NBA Cash In*, Fin. Post (Toronto), Dec. 22, 1993, at 39. [Return to text](#)
112. *Id.* [Return to text](#)
113. *Id.* [Return to text](#)
114. *See ABC World News Tonight* (ABC television broadcast, Dec. 15, 1994). [Return to text](#)
115. *See* Eric Schmukler, *A Goal Line Stand; NBC's Dick Ebersol Says He'll Drop the NFL if Rights Fees Don't Fall in Coming Negotiations. Is His Play a Stunt, Red Dog or Blown Coverage?*, Mediaweek, Nov. 8, 1993, at 18. [Return to text](#)
116. In doing so, Fox ironically outbid CBS for the rights to NFC games, the same games that CBS had lost \$300 million on over the last three seasons. This ended 38 years of NFC games on CBS. John Freeman, *Murdoch Pulls Big Coup by Copping NFL Rights*, San Diego Union-Trib., Dec. 27, 1993, at E9. [Return to text](#)
117. *Sports Programming*, *supra* note 98, at 3. [Return to text](#)
118. Greene, *supra* note 4, at B11; Horn, *supra* note 2 at 1A. [Return to text](#)

119. Tybor, *supra* note 72, at C1. [Return to text](#)
120. For example, in 1991, the Philadelphia Phillies were thinking of moving their opening day game to pay-per-view. The negative feedback from fans caused the club to abandon the pay-per-view option for the entire season. Keith St. Clair, *Congress Tops List of Toughest and Most Influential Critics*, Wash. Times, May 10, 1991, at D3. [Return to text](#)
121. See Lloyd Covens, *Sports Via Satellite: Competitive Appraisal; Satellite Broadcasting of Sports*, Satellite Comm., Sept. 1991, at 41. [Return to text](#)
122. Senator Arlen Specter (R-Pa.), upon learning of the NFL pay-per-view plans, sent a letter to League Commissioner Paul Tagliabue stating, "I do not believe it is appropriate for the NFL to have pay-per-view as long as the league enjoys antitrust exemptions." St. Clair, *supra* note 120, at D3. [Return to text](#)
123. *Sports Programming Interim Report*, *supra* note 3, para. 82. [Return to text](#)
124. Rosen, *supra* note 12, at 4. [Return to text](#)
125. HBO, Inc. v. FCC, 567 F.2d 9, 15 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). [Return to text](#)
126. *Century Communications*, 835 F.2d 292, 302 (D.C. Cir. 1987). [Return to text](#)
127. *United States v. O'Brien*, 391 U.S. 367 (1968). [Return to text](#)
128. Steve Nidetz et al., *PPV: Monster or Mint?*, Hous. Chron., Nov. 24, 1991, at 14. [Return to text](#)