

10-1-1984

# The Deregulation of Televised College Football: *The National Collegiate Athletic Association v. Board Of Regents*

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## Recommended Citation

Ralph Gonzalez, *The Deregulation of Televised College Football: The National Collegiate Athletic Association v. Board Of Regents*, 2 U. Miami Ent. & Sports L. Rev. 79 (1984)  
Available at: <http://repository.law.miami.edu/umeslr/vol2/iss1/5>

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## RECENT DEVELOPMENTS

### THE DEREGULATION OF TELEVISED COLLEGE FOOTBALL: *The National Collegiate Athletic Association v. Board of Regents*

Most colleges and universities in the United States that engage in intercollegiate sports are members of the National Collegiate Athletic Association (NCAA).<sup>1</sup> In 1951 the NCAA established a television committee to develop a television plan for the 1951 football season. This committee exercised complete control over televised college football games and until 1977 its control required the approval of all NCAA members.<sup>2</sup>

In 1977, the television committee obtained approval to control a number of *principles of negotiation*. These principles provided a basis for the NCAA to negotiate with television networks for future television contracts. Since that time, without obtaining approval from its membership, the NCAA negotiated contracts with networks that departed from the previously approved principles.<sup>3</sup>

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1. Board of Regents v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984). The NCAA was founded in 1905 as a vehicle for promoting and organizing intercollegiate athletics on an amateur basis. It establishes policies and rules that govern its members' participation in various sports, and exerts regulatory controls, some economic in nature, over its members. The NCAA has over 800 members. They are classified into separate divisions according to the size of their athletic programs. Division I includes the major college football powers and has 276 members. Division I is further subdivided into Division I-A which consists primarily of the largest institutions and Division I-AA which consists of those institutions with smaller athletic programs. Divisions II and III consist of yet smaller colleges numbering around 500.

2. *Id.* at 1283. From 1952 until 1977 the NCAA Television Committee followed a procedure for approving the television plan which included circulating a questionnaire to all NCAA members to obtain input as to how much control should be exercised by this plan. A leading feature of this process was that every NCAA member voted by a mail referendum to approve or disapprove the plan. *Id.*

3. *Id.* at 1283. Until 1977, television contracts were for one or two years. In 1977, the NCAA signed a four year agreement with the American Broadcasting Company (ABC) granting it exclusive rights to broadcast college football games during the 1978-1981 seasons. The plan under attack in NCAA was adopted in 1981 and granted similar exclusive rights for the 1982-1985 seasons to ABC, the Columbia Broadcasting System (CBS) and Turner Broadcasting System (TBS) (for live cablecast). One feature of the plan allowed each school to appear on television no more than six times during two seasons for a pre-set fee determined by the NCAA. *Id.* at 1291-93.

The College Football Association (CFA), which consists of a number of NCAA football conferences and schools, did not agree with the terms of the television plan that the NCAA adopted in 1981 to cover the 1982 through 1985 seasons.<sup>4</sup> The CFA felt that its members did not have a proportionately adequate voice in developing the television plan because all 800 NCAA members, most of which did not play football, voted.<sup>5</sup> Because of overall dissatisfaction with the NCAA's lack of response to the CFA's concerns, it investigated the possibility of negotiating its own television agreement with one of the networks. On August 8, 1981, the CFA contracted with the National Broadcasting Company (NBC) for the rights to televise football games for the 1982 through 1985 football seasons.<sup>6</sup> The NCAA reacted to the CFA's new contract by announcing that those CFA members choosing to abide by the new NBC TV package would be in violation of NCAA rules and would be disciplined accordingly. On September 8, 1981, the University of Oklahoma and the University of Georgia, both members of the CFA and the NCAA, filed an action in the United States District Court for the Western District of Oklahoma to prevent the NCAA from initiating disciplinary proceedings or otherwise interfering with the CFA's efforts to perform its agreement with NBC. The court granted temporary injunctive relief on September 8, 1981. Ultimately, the CFA/NBC contract was not consummated because most of the CFA members chose to opt out.<sup>7</sup> Dispute continued between the CFA and NCAA subsequent to the injunctive action. At the NCAA special convention, the CFA's concerns remained unresolved.<sup>8</sup>

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4. *Id.* at 1285. The CFA consists of the Big Eight, the Southeastern, the Southwestern, the Atlantic Coast, and the Western Athletic conferences, as well as the major independent football powers like Notre Dame, Pittsburgh, Miami and Florida State. It was their position that each school should appear on television as many times as the market could bear.

5. *Id.* Prior to 1971, an annual resolution of the membership was the source of the television committee's authority. In 1971, the NCAA adopted Bylaw 11-3-(aa) which read: "The [Football Television] Committee shall be responsible for the formulation and administration of the Association's football television policy and program, subject to the approval of the membership." *Id.* at 1284.

6. *Id.* at 1286. The contract that the CFA negotiated with NBC was similar to the types of contracts that the NCAA had previously negotiated with other networks. This contract, however, allowed for more appearances on television by each school and called for higher fees to be paid to each school. The contract was approved by a vote of the CFA members on August 21, 1981: 33 members voting in favor, 22 against and 8 not voting.

7. *Id.* at 1286. Few CFA members were willing to commit to this new plan. It appears that the threat of NCAA sanctions was a major consideration in the CFA members' decision not to participate in the NBC contract. The 1981 football season therefore proceeded under the NCAA contract with the ABC and CBS television networks.

8. *Id.* at 1287. At the NCAA's special convention held in December 1981, at the re-

Following a non-jury trial, the district court found that the NCAA exercised monopoly power over the college football television market, that the football controls constituted a horizontal agreement among competitors to fix prices and restrict output, and that the controls constituted a group boycott. Consequently, the court held that the NCAA had violated the Sherman Act.<sup>9</sup> The United States Court of Appeals for the Tenth Circuit affirmed and held that the NCAA television plan constituted illegal per se price-fixing.<sup>10</sup> On certiorari, the Supreme Court of the United States held, *affirmed*: The NCAA's television plan violates section one of the Sherman Act. *National Collegiate Athletic Association v. Board of Regents*, 104 S. Ct. 2948 (1984).

The prohibitions of the Sherman Act (Act), were never stated in precise and clear language.<sup>11</sup> The words of the Act itself shed little light on what the makers intended the Act to cover.<sup>12</sup> If read literally, the Act outlaws every agreement that restrains competition.<sup>13</sup> Such an interpretation would be intolerable because any productive unit, no matter how small, incorporates a tacit agreement to eliminate some competition.<sup>14</sup>

The courts have interpreted the general rule under the Act as

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quest of the CFA to consider a restructuring of the organization, the CFA complained that Division I-A included many schools whose football program were less extensive than those of CFA members. The CFA believed that Division I should be restructured to reduce the numbers of schools in Division I-A (Division I consists of about 276 colleges with major athletic programs, less than 190 of which play football). Several CFA members proposed the creation of a new division composed solely of major football playing schools but this proposal was rejected. A proposal was adopted, however, that reduced the schools in Division I-A from 135 to 95 schools. The annual NCAA convention held in January, 1982, likewise did not satisfy the CFA's complaints. At the annual convention the membership adopted an amendment to the Bylaws that purported to establish the propriety of the NCAA controls and ratified the NCAA proposal for the television package for the 1982 through 1985 football seasons. *Id.*

9. *Id.* at 1276. The court found that free market competition had been restrained in three ways: (1) the NCAA fixed the price for individual telecasts; (2) the exclusive network contracts were equivalent to group boycotts of all other potential broadcasters because the threat of sanctions against its own members constituted a threatened boycott of potential competitors; and (3) that its plan placed an artificial limit on the production of televised college football.

10. *Board of Regents v. National Collegiate Athletic Ass'n*, 707 F.2d 1147 (10th Cir. 1982), *aff'd*, 104 S. Ct. 2948 (1984).

11. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 473 (1940).

12. Section 1 of the Sherman Act reads in part: "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1890).

13. *Id.*

14. See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 1), 74 YALE L. J. 775 (1964), (pt. 2), 75 YALE L. J. 373 (1965).

directed at two types of practices that hurt competition: 1) "[a]greements by which consenting parties remove some or all of the competition existing or likely to exist between themselves" and 2) "practices by which one or more parties injure competitors, and thereby injure the competitive process itself."<sup>15</sup>

From this general principle, the courts developed the concept that certain contracts were, on their face, unreasonably in restraint of trade, or per se illegal.<sup>16</sup> This resulted in court decisions that rendered illegal agreements which otherwise appeared basic to the day-to-day operations of any economy.<sup>17</sup> Per se illegality rests on two foundations. One, that in all but a small percentage of the cases the anticompetitive harm of the practice outweighs any of the benefits; and two, that any judicial attempt to identify cases in which the practice is not harmful will waste time and add uncertainty to the law.<sup>18</sup>

Next came the judicial analysis known as the Rule of Reason.<sup>19</sup> Under this analysis an agreement purportedly in violation of the Sherman Act is examined first from the standpoint of what the parties intended and second as to the effect of the agreement.<sup>20</sup> It has been stated that in a larger sense, there is only one test — the effect of the agreement.<sup>21</sup> Justice Brandeis articulated a clear definition of the Rule of Reason in *Chicago Board of Trade v. United States*:<sup>22</sup>

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition

15. Bork, *supra* note 14, (pt. 1) at 775.

16. 104 S. Ct. at 2962. Although numerous definitions of per se illegality have been put forth since the adoption of the Act, Justice Stevens in *NCAA* deems per se to be applicable "when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct." *Id.*

17. See *United States v. Addyson Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

18. Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L. J. 655, 665 (1978).

19. The earliest articulation of the Rule of Reason was by Justice Peckham in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), where he stated that the Rule of Reason outlawed those agreements whose purpose and effect was to suppress competition in the general market but to uphold those whose elimination of competition was collateral and incidental to another end the parties were pursuing.

20. In *Standard Oil v. United States*, 221 U.S. 1 (1911), Justice White recognized that the Sherman Act prohibited classes of activities broad enough to encompass every conceivable contract and that as a result courts were to perform an economic analysis in order to determine which activities or contracts presented a monopoly. This rule of reason determined whether the statute was violated.

21. Bork, *supra* note 14, (pt. 2) at 388.

22. 246 U.S. 231 (1918).

or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.<sup>23</sup>

Nevertheless, the Act has never been thought to be applicable to nonprofit organizations. Its thrust is purely commercial. The Act seeks to prevent restraints to free competition in business and commercial transactions.<sup>24</sup> Initially, it appeared that the Sherman Act did not apply to the practice of the liberal arts or the learned professions.<sup>25</sup> The United States Court of Appeals for the District of Columbia articulated this "traditionally noncommercial" doctrine in 1970. The court there held that enterprises normally having other than commercial objectives do not invoke antitrust laws, and a circumstance of "incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws."<sup>26</sup> The justification given for allowing the anti-competitive practices of nonprofits is that they correct a market failure and are the least anti-competitive alternative available.<sup>27</sup> Under this doctrine the courts rejected antitrust attacks on a number of nonprofits including the NCAA.<sup>28</sup>

The Supreme Court, however, soon made clear that it did not intend to grant a blanket exemption for nonprofits. In the landmark case of *Goldfarb v. Virginia State Bar*,<sup>29</sup> the Supreme

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23. *Id.* at 238.

24. In *Apex Hosiery*, 310 U.S. 469 (1940), the Court stated that the Act was applicable only to a limited extent to organizations that have noncommercial objectives.

25. If *per se* illegality appeared to be an elusive concept as applied to the business world, it was even more difficult to grapple with when applied to a nonprofit entity. This is especially confusing since the law does not contain a statutory exemption for nonprofits.

26. *Marjorie Webster Jr. College, Inc. v. Middle States Ass'n. of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir. 1970).

27. Note, *Antitrust and Non-Profit Entities*, 94 HARV. L. REV. 802 (1981).

28. In *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975), the court rejected an anti-trust challenge by an athlete negatively affected by eligibility rules. The court reasoned that these rules were designed to promote amateurism and that the resulting restraint on trade was incidental to this legitimate goal.

29. 421 U.S. 773 (1975).

Court refused to exempt learned professions from the antitrust laws. The Court held that price fixing by the Bar Association was illegal under the Sherman Act. It stated that "the nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act" where anticompetitive activities or practices are alleged.<sup>30</sup> The essence of *Goldfarb* is that anti-competitive activities are subject to antitrust actions regardless of the context in which they occur.<sup>31</sup>

Shortly thereafter, in *Hennessey v. NCAA*,<sup>32</sup> the court rejected a challenge to an NCAA Constitution Bylaw that restricted the number of assistant football coaches a school could hire. *Hennessey* was significant because the court refused to grant a blanket exemption to the NCAA. It chose instead to hold the Sherman Act applicable and then apply the Rule of Reason.

A succession of significant cases marked the Court's new direction in its analysis of nonprofits. In *National Society of Professional Engineers v. United States*,<sup>33</sup> the Court held as per se illegal an engineering association's canon of ethics that prohibited competitive bidding by its members. The *Society* had claimed that competitive bidding would tempt engineers to do inferior work that would threaten public health and safety.<sup>34</sup> The Court stated that the ban on competitive bidding prevented a potential customer from price shopping in the open market.<sup>35</sup> The Court went on to argue that the Rule of Reason does not open the field of antitrust inquiry to any argument in favor of a challenged restraint.<sup>36</sup> Instead, it focuses directly on the challenged restraint's impact on competitive conditions.<sup>37</sup>

In *Broadcast Music, Inc. v. CBS*,<sup>38</sup> the Court held that an ASCAP<sup>39</sup> blanket license for use of copyrighted musical compositions did not constitute price fixing forbidden by the Sherman Act.<sup>40</sup> An

30. *Id.* at 787.

31. *Id.* Justice Burger left open the possibility, however, that other anti-competitive practices by a learned profession might not be deemed illegal if they survived the Rule of Reason analysis.

32. 564 F.2d 1136 (5th Cir. 1977).

33. 435 U.S. 679 (1978).

34. *Id.* at 693.

35. *Id.* at 695.

36. *Id.* at 688.

37. *Id.*

38. 441 U.S. 1 (1979).

39. American Society of Composers, Authors and Publishers.

40. ASCAP and Broadcast Music, Inc. acted as clearinghouses for copyright owners and sold blanket licenses in which they gave licensees the right to perform any of the musical compositions of the owners in return for a fee.

arrangement by which copyright clearing houses sold performance rights to their entire libraries on a blanket rather than individual basis did not warrant condemnation on a per se basis. Individual licensing would have allowed competition between copyright owners. Licensing on a blanket basis yielded substantial efficiencies that could otherwise not be realized. The blanket license was to some extent a different product because potential buyers of the music could still deal directly with the individual composer and negotiate a better rate.

In *Arizona v. Maricopa County Medical Soc'y.*,<sup>41</sup> the Court held that maximum fee agreements, even within the context of a nonprofit association, are per se illegal under the Sherman Act because they constitute price fixing. The Court stated that for the sake of efficiency, courts have invalidated some agreements that a full scale investigation might have proved to be reasonable.<sup>42</sup>

These three cases, together, laid the foundation for the state of the antitrust laws as applied to nonprofits at the time of the NCAA decision. It was essentially that although no across-the-board statutory or judicial exemptions were granted,<sup>43</sup> nonprofits were generally thought to come under the Act, but their anti-competitive activities could be justified under a Rule of Reason analysis.<sup>44</sup> NCAA is significant because it stands for the proposition that if a nonprofit entity enters the market place and conducts activities that in any other context would be those of a business for profit, the Sherman Act will be applied to it in the same manner as it would be applied to a private profit-making entity.

In NCAA, the Court reasoned that an analysis must be carried out under both the per se rules and the Rule of Reason. To that end, the Court did not find that the television plan was illegal per

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41. 457 U.S. 332 (1982). Two medical societies in Arizona established nonprofit foundations for promoting a *fee-for-service* practice. Among other things, the foundations set the maximum fees that participating doctors agreed to accept as payment in full for their services.

42. *Id.* at 344.

43. Congress can and has exempted a number of the industries from the full reach of the Sherman Act. *E.g.*, Capper-Volstead Act, 7 U.S.C. §§ 291 and 292 (1922) (agricultural cooperatives); McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013 (1945) (insurance); Telecasting of Professional Sports Contests Act, 15 U.S.C. §§ 1291-1295 (1966) (football, etc.); 15 U.S.C. § 1801 (1970) (Newspaper joint operating agreements); Reed-Bulwinkle Act, 49 U.S.C. § 5b (1978) (rail and motor carrier rate-fixing bureaus).

44. In *Warner-Amex Cable Communications, Inc. v. ABC*, 499 F. Supp. 537 (S.D. Ohio 1980), the court rejected a request for a preliminary injunction against the NCAA regulation restricting the number of college football telecasts. Although the court found the existence of a horizontal agreement to restrict output, it refused to find it to be illegal per se because it occurred in other than a commercial setting.



se. The Court observed that this case involved an industry in which some horizontal restraints on competition were essential if college football was to be available at all.<sup>45</sup>

The Court conducted a three part analysis based on market power,<sup>46</sup> the pro-competitive justification for the restrictive activity, and the possibility of achieving the same objective through a less restrictive means. The Court established the market power of the NCAA with respect to its product; it rejected the NCAA's argument that it could not otherwise obtain competitive prices for its games because broadcasters would seek less expensive alternatives.<sup>47</sup> The Court concluded that the television plan operated as a restraint on the free market and that the NCAA must justify its anti-competitive behavior under the Rule of Reason.<sup>48</sup>

The Court then determined that the NCAA plan produced no pro-competitive efficiencies. It found that unlike *Broadcast Music*, where the joint selling arrangements assisted in the marketing of broadcast rights in a competitive market, the NCAA plan only acts to stifle competition because it does not permit the individual school and other broadcasters to negotiate openly for the sale of the product. The Court then concluded that no pro-competitive justification exists and that the plan operates to raise price and reduce output, ignoring consumer preference.<sup>49</sup> The NCAA Court distinguished *Broadcast Music* because in that case, in addition to the joint selling arrangements, the composers and the potential buyers were free to negotiate in the open market. The Court relied on *Professional Engineers* to reject the NCAA's argument that the plan protected live attendance at games. The Court rejected this argument because it rests on a premise that competition is unreasonable — something which the Rule of Reason cannot support.<sup>50</sup>

Finally, the Court asserted that if, as the NCAA claimed, one

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45. 104 S. Ct. at 2961.

46. *Id.* at 2965. The Court analyzed market power despite its assertion that absence of market power is not sufficient justification for a restriction on price or output.

47. *Id.* The Court agreed with the district court in finding that college football attracts its own unique audience and that competition would be unable to offer other programs to attract this audience.

48. *Id.*

49. Hochberg & Horowitz, *Broadcasting and CATV: The Beauty and the Bane of Major College Football*, 38 LAW & CONTEMP. PROBS. 112 (1973). In 1972, fewer than 50 of 3,000 college games played were available for home viewing. No more than 19 games were telecast in most viewing areas. Viewer choice was restricted to games chosen for them. *Id.* at 112. The author concluded that the NCAA plan resulted in higher broadcast revenue for most colleges and eliminated competition between rival telecasts. *Id.* at 127.

50. 435 U.S. at 696.

of the goals of the television plan was to promote balance among teams, there were other restrictions which the NCAA already imposed that were better suited to this goal and less restrictive of competition.<sup>51</sup> The Court noted that no other NCAA sponsored sport contained a similar restriction.<sup>52</sup> In other major sports, for example basketball, a balance has been maintained without resort to such restriction.<sup>53</sup>

The Court concluded that the district court was correct in its finding that many more games would be televised in an open market situation.<sup>54</sup> It added that the restrictions of the plan were not consistent with the role of the NCAA to promote college sports and that the NCAA plan "restricted rather than enhanced the place of intercollegiate athletics in the nation's life."<sup>55</sup>

Justice White's persuasive dissent noted that the majority's analysis focused too intensely on the business aspects of the case and neglected the fact that the NCAA and its members are non-profit institutions of higher learning.<sup>56</sup> He argued that the purpose of the regulation was to prevent the powerful institutions from becoming even more powerful at the expense of lesser known schools.<sup>57</sup> In his analysis however, he glossed over the economic implications of the NCAA plan. Justice White's different view of the record would accord legitimacy to the NCAA's argument that the television plan promoted balanced competition.<sup>58</sup> Relying on *Goldfarb*, Justice White argued that:

The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members, and these noneconomic goals 'may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'<sup>59</sup>

Justice White stressed that the noneconomic goals sought by colleges and universities differ fundamentally from those pursued by engineers, lawyers, and doctors.<sup>60</sup> He argued that any anti-compet-

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51. 104 S. Ct. at 2970.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 2971.

56. *Id.* at 2972.

57. *Id.*

58. *Id.* at 2979.

59. *Id.* at 2978.

60. *Id.*

itive practices resulting from the television plan are offset by the broader more noble goal of having athletics "supplement rather than inhibit educational achievement."<sup>61</sup>

His strongest argument is that the NCAA has no monopoly power against other types of entertainment because, if the quality of the games declined, viewers would turn to some other form of entertainment.<sup>62</sup> He concluded that the NCAA's product belongs in the broader category of *general entertainment* rather than in the unique category of college football.

The Court's decision rested on an economic analysis, applying the Rule of Reason to a nonprofit organization. While recognizing that in this context neither party was operating like a nonprofit entity,<sup>63</sup> it did not articulate any new method for applying the Sherman Act to nonprofits. It merely continued in the tradition of the Rule of Reason analysis. The phrasing of the holding supports the district court's finding that by imposing production limits on their product and restricting the independence of its members to negotiate independently, the NCAA achieved an artificially high price for its product.<sup>64</sup> The Court reaffirmed that in a free market economy, which is the hallmark of this nation's ideology, products are best marketed in a non-restrictive competitive arena. In applying this decision to other instances involving nonprofits, attorneys and courts must be mindful that the attack on the challenged activities came from within the organization itself. It is questionable whether the Court would have reached a similar result had the plaintiff been one of the television networks.

Ralph Gonzalez

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61. *Id.* at 2979.

62. *Id.* at 2977.

63. Although NCAA members are nonprofit institutions, they engage in activities with respect to televised football that are for the most part indistinguishable from those of their profit-seeking competitors. Note, *supra* note 18. The district court noted that the plaintiffs were not "seek[ing] money damages in lieu of profits they could realize under reduced competition". 546 F. Supp. at 1303. Rather, they sought to "increase their profits in a truly competitive situation". *Id.* In this sense, the plaintiffs had profit as a motive for their actions and the NCAA sought to frustrate their goals.

64. Taaffe, *A Supremely Unsettling Smorgasbord*, 65 SPORTS ILLUSTRATED, Sept. 5, 1984, at 151. During the 1983 football season, ABC and CBS, under the NCAA television plan, paid \$62.5 million for the rights to televise college football. In 1984, under the "der-regulated" system, they planned to pay approximately \$20 million.