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# ANTITRUST LAW—SIGNAL- PENETRATION OR STATION-LOCATION: THE SCOPE OF THE NATIONAL FOOTBALL LEAGUE'S TELEVISION BLACKOUT ANTITRUST EXEMPTION—*WTWV v. National Football League*, 678 F.2d 142 (11th Cir. 1982)

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**ANTITRUST LAW—SIGNAL-PENETRATION OR STATION-LOCATION: THE SCOPE OF THE NATIONAL FOOTBALL LEAGUE'S TELEVISION BLACKOUT ANTITRUST EXEMPTION—*WTWV v. National Football League*, 678 F.2d 142 (11th Cir. 1982).**

**I. INTRODUCTION**

Historically, the scope of the National Football League's (NFL) power to blackout<sup>1</sup> the telecasting of football games within the home territory<sup>2</sup> of a club playing at home had remained unclear under the NFL's antitrust exemption in sections 1291 and 1292 of the United States Code.<sup>3</sup> Sections 1291 and 1292 exempt from section 1 of the Sherman Act<sup>4</sup> certain agreements covering the telecasting of sports

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1. When a telecast is "blacked-out", it cannot be seen on television in all blacked-out areas.

2. The NFL, with minor exceptions, defines a team's "home territory" as "the city in which such club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city. . . ." THE NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BY-LAWS art. IV, § 4.1 (1976).

3. 15 U.S.C. §§ 1291, 1292 (1982). Section 1291 provides for an exemption from antitrust laws agreements covering the telecasting of sports contests:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs . . . sells or otherwise transfers all or any part of the rights of such league's members clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs.

15 U.S.C. § 1291 (1982). Section 1292 excludes from section 1291's antitrust exemption "any joint agreement described in . . . [section 1291] which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing at home." *Id.* § 1292 (1982); *see infra* note 8.

4. 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act, in pertinent part, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ." *Id.* The United States Supreme Court, however, has interpreted section 1 of the Sherman Act to prohibit only "unreasonable" restraints of trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911). In order to determine whether an agreement is an unreasonable restraint of trade a court must examine whether the agreement promotes or suppresses competition. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 68, 69 (1977). Any agreements covering the telecasting of sports contests which are unreasonable restraints of trade are therefore prohibited by section 1 of the Sherman Act unless otherwise exempted by sections 1291 or 1292 of the United States Code. *See* 15 U.S.C. § 1291 (1982). If the NFL were subject to a station location blackout rule, *see infra* note 8 and accompanying text,

contests.<sup>5</sup> While section 1292 permitted any agreement that restricts<sup>6</sup> "televising any games within the home territory of a club . . . on a day when such club is playing at home,"<sup>7</sup> the scope of this provision was ambiguous. It is unclear whether section 1292 permitted the NFL to blackout telecasts of only those stations actually *located* within a team's home territory or if it included those stations whose signal *penetrated* inside the home territory.<sup>8</sup>

In a case of first impression, the United States Court of Appeals for the Eleventh Circuit, in *WTWV v. National Football League*<sup>9</sup> clarified the meaning of section 1292. The court held that the determinative factor in deciding which telecasts of games could be blacked out was whether a television station's signal penetrated inside a team's home territory and not whether the telecasting station was actually located within the territory.<sup>10</sup> The court of appeals, however, ignored evidence that clearly supports a "station-location" interpretation of the blackout rule.<sup>11</sup>

This casenote will focus upon prior case law and the legislative history of sections 1292 and 1293, which will demonstrate that the television blackout rule is a rule based on station location. First, a prior case, *United States v. National Football League*,<sup>12</sup> (NFL '53),

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their blackout of station WTVX would not be exempt from the antitrust laws under sections 1291 and 1292 of the United States Code. WTVX would, therefore, be able to proceed with a trial on the merits to determine if the NFL's blackout of WTVX was an unreasonable restraint of trade under the antitrust laws.

5. 15 U.S.C. §§ 1291, 1292 (1982); see *supra* note 3 and *infra* notes 20, 48 & 53.

6. An agreement that restricts the televising of games will typically be a "blackout".

7. 15 U.S.C. § 1292 (1982).

8. Under a signal penetration interpretation of the blackout rule, section 1292's antitrust exemption does *not* apply to agreements to blackout telecasts of games whose signal is received *outside* a team's 75 mile home territory. It does, however, apply to agreements to blackout telecasts *inside* a team's home territory. *Id.* §§ 1291, 1292 (1982). Contrastingly, under a station location interpretation of the blackout rule, section 1292's antitrust exemption does *not* apply to agreements to blackout stations which are *located* outside a team's 75 mile home territory, but does apply to stations located *inside* a team's home territory. *Id.* Accordingly, blackouts based on a station's location result in the blackout of all stations which are located within the 75 mile home territory of a team. Blackouts based on where a station's signal is received result in the blackout of any station whose signal is received within the 75 mile home territory of a team, regardless of where the station is located. In determining blackout areas state borders are irrelevant; therefore, for example, areas of Connecticut could be blacked-out from receiving telecasts of New York Jets games if those areas were to be affected by the blackout rule. See *id.*

9. 678 F.2d 142 (11th Cir. 1982).

10. *Id.* at 146.

11. *Id.* at 144.

12. 116 F. Supp. 319 (E.D. Pa. 1953).

which indicated that the television blackout exemption originated as a station-location blackout rule,<sup>13</sup> will be reviewed. Second, the court of appeals in *WTWV* neglected to adequately evaluate the legislative history of sections 1291 and 1292, which reveals that Congress intended to codify the blackout rule carved out by Judge Grim in *NFL '53*.<sup>14</sup> This blackout rule will be fully examined.

Additionally, this casenote will examine two inconsistencies created by the *WTWV* decision. First, the court of appeals' signal-penetration interpretation of section 1292 will be compared with the United States Supreme Court's view that exemptions from the anti-trust laws are to be construed narrowly.<sup>15</sup> Second, the effect of the blackout of the television station in *WTWV*, which will bar the telecasting of football games by stations located *outside* a team's 75 mile home territory, and preclude viewing by persons living outside a team's home territory, will be analyzed since it appears inconsistent with the intent behind the statute.<sup>16</sup>

## II. BACKGROUND

In *WTWV*, the plaintiff television station, WTVX, owned and operated a VHF television station in Fort Pierce, Florida, 120 miles north of Miami.<sup>17</sup> In June, 1980, station WTVX began broadcasting from a new transmitter located 96 miles north of Miami.<sup>18</sup> The new transmitter had a stronger signal enabling reception as far south as Boca Raton.<sup>19</sup> WTVX requested permission to broadcast Miami Dolphins' home games from its new transmitter, but the club refused to authorize the telecasting of any "non-sell out" games.<sup>20</sup> WTVX,

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13. *Id.* at 329.

14. *See infra* notes 23 & 54-59 and accompanying text.

15. *See infra* notes 99-103 and accompanying text.

16. *See infra* notes 104-14 and accompanying text.

17. 678 F.2d at 143.

18. Brief for Appellant at 5, *WTWV v. National Football League*, 678 F.2d 1142 (11th Cir. 1982).

19. *Id.*

20. 678 F.2d at 143. Telecasts of games which are sold out seventy-two hours or more before the game is played cannot be blacked out. 47 U.S.C. § 331 (1976). Since the purpose of television blackouts is to protect fan attendance at home games, once those games are sold out, such protection is no longer necessary. *See infra* note 39.

The television contract that each NFL team has with the networks allows each club the right to refuse to authorize telecasts of its home games, that are not sold out, into its home territory. Brief for Appellee at 1, *WTWV v. National Football League*, 678 F.2d 1142 (11th Cir. 1982). These television contracts constitute the "agreement" that is necessary for section 1 of the Sherman Act to be applicable.

therefore, was unable to televise these games.<sup>21</sup>

WTWV brought suit for damages and injunctive relief, alleging that the Miami Dolphins' refusal to authorize the telecasting of these games constituted a violation of section 1 of the Sherman Act.<sup>22</sup> Defendants, the Miami Dolphins and the NFL, claimed they were permitted under sections 1291 and 1292, to make agreements to sell television rights to telecasts of games even if such agreements were otherwise illegal restraints of trade.<sup>23</sup> The antitrust exemption applied "to any joint agreement . . . which prohibited any person . . . [from] *televising* any games . . . within the home territory of a member club . . . playing a game at home."<sup>24</sup>

WTWV argued that the word "televising" under section 1292 meant where a signal originated, that is, the location of the telecasting station.<sup>25</sup> Since WTWV was located *outside* the Miami Dolphins' 75 mile home territory, the "station-location" interpretation desired by WTWV would allow broadcasts of the Dolphins' home games.<sup>26</sup> The defendants maintained that the word "televising" under section 1292 meant where a signal was received. Because WTVX's signal was received *inside* the Dolphins' 75 mile home territory, this "signal-penetration" interpretation would allow the blackout of Dolphins' home games.<sup>27</sup>

The district court agreed with defendants' interpretation of section 1292 and held, therefore, that "televising" meant where a signal was received.<sup>28</sup> The district court acknowledged that the legislative history of sections 1291 and 1292 was unclear and often conflicting as to whether "televising" was to be interpreted in terms of station-location or signal-penetration.<sup>29</sup> The court, nevertheless, held that congressional inaction toward the NFL practice of allowing black-

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21. Brief for Appellee at 2, *WTWV*.

22. *Id.*; see *supra* note 4.

23. See *supra* notes 3 & 20 and *infra* notes 48 & 53. The attorneys for the NFL in *WTWV* also represented the NFL during congressional hearings on Sections 1291 and 1292 in 1961. During those hearings, Mr. Carothers, an attorney speaking on behalf of the NFL, stated that the blackout rule, as permitted by Judge Grim in *NFL '53*, would, in any other business context, have clearly been a violation of the antitrust laws. *Telecasting of Professional Sports Contests, 1961: Hearings on H.R. 8757 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 87th Cong., 1st Sess. 8 (1961)* (statement of Mr. Carothers, attorney for the NFL) [hereinafter cited as *1961 Hearings*].

24. 15 U.S.C. § 1292 (1982) (emphasis added).

25. 678 F.2d at 143; see *supra* note 8.

26. 678 F.2d at 143.

27. *Id.*

28. *Id.*

29. *Id.* at 144.

outs, based on a signal-penetration interpretation of section 1292 was indicative of congressional acquiescence in such an interpretation.<sup>30</sup>

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's holding.<sup>31</sup> The court of appeals found that despite the lack of clear congressional intent, the purpose of section 1292 was to "preserve the existence of the NFL by shielding its member clubs from a decline in game attendance due to televising games" within a team's home territory.<sup>32</sup>

### III. ANALYSIS

#### A. *The Blackout Rule in its Origin Was Described in Terms of Station-Location*

In *NFL '53* the government filed an action under section 1 of the Sherman Act<sup>33</sup> seeking to enjoin NFL restrictions on television and radio broadcasting.<sup>34</sup> The government argued that the provisions of Article X of the NFL's by-laws were illegal restraints of trade:

Article X of the by-laws of the National Football League provide[d] that no club shall cause or permit a game in which it is engaged to be telecast or broadcast by a station within 75 miles of another League City on the day that the home club of the other city is either playing a game in its home city or is playing away from home and broadcasting or televising its game by use of a station within 75 miles of its home city, unless permission for such broadcast or telecast is obtained from the home club.<sup>35</sup>

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30. *Id.* at 145. The NFL, soon after the enactment of sections 1291 and 1292 in 1961, blacked out stations based on signal-penetration rather than station-location. Between 1961 and 1981, the NFL continued blackouts based on signal-penetration. The district court believed that Congress acquiesced in the NFL's blackout policy because Congress did nothing to stop the NFL from using signal-penetration as a basis for blackouts. *See infra* notes 60-84 and accompanying text.

31. 678 F.2d at 146.

32. *Id.* at 145-46. The purpose of allowing the blackout of telecasts of home games within the home territory of a team on a day when the team is playing at home is to protect teams from declines in attendance and preserve their financial stability. *United States v. National Football League*, 116 F. Supp. 319, 324-25 (E.D. Pa. 1953). *See infra* note 39. The Court of Appeals, therefore, believed that since protection of a team's attendance was the primary objective of allowing blackouts, it must focus on where potential ticket buyers would receive the signal, not where it comes from. Otherwise, "technological advances could undermine completely the purpose of section 1292 if the exemption is applied only to restrictions on stations physically located within the 75-mile radius that is designated home territory." 678 F.2d at 146.

33. *See supra* note 4.

34. 116 F. Supp. at 321.

35. *Id.*

In addition, Article X granted the "[NFL] Commissioner unlimited power to prevent all clubs from televising or broadcasting all of its or their games."<sup>36</sup> The court found a number of these restrictions to be unreasonable restraints of trade.<sup>37</sup> The court, however, in an opinion written by Judge Grim, held that the portion of the NFL's blackout provision which permitted the blackout of telecasts of home games within a team's home territory was a reasonable restraint of trade.<sup>38</sup>

The portion of the NFL blackout rule left intact by *NFL '53*<sup>39</sup> was the rule based on a station-location rather than signal-penetration.<sup>40</sup> The following excerpt of the trial record of *NFL '53* reveals that Judge Grim specifically questioned NFL Commissioner Bell as to whether the NFL blackout rule applied to stations whose signal was transmitted from *outside* the 75 mile home territory of a club:<sup>41</sup>

- Q. This rule may not be so clear in some points. Take this situation: A new UHF television station has just been opened, a very powerful one, just outside the 75-mile limit. The studio is in Reading, within the 75-mile limit, but the transmitter is just outside the 75-mile limit. How do you take a situation of that kind under your rule?
- A. Well if the station was within the 75-mile limit—
- Q. Understand, the studio is but the transmitter is not and it so powerful that I believe it is going to beam right down in Philadelphia.
- A. If it is outside the 75-mile limit—
- Q. What, the studio, or the transmitter?
- A. Where it is sent from.

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36. *Id.* at 321-22.

37. *Id.* at 330. The court upheld the NFL rule which permitted teams to blackout broadcasts of home games within a team's home territory, finding this to be an reasonable restraint of trade under section 1 of the Sherman Act. Unlike blackouts of home games, blackouts of away games could not be justified by a desire to protect home attendance. *Id.* at 327; *see supra* note 33. In addition, the court held that the power of the Football Commissioner to prevent all television and radio broadcasts entirely was similarly illegal under the Sherman Act. 116 F. Supp. at 327.

38. 116 F. Supp. at 326. Professional football is a unique business because, unlike ordinary businessmen, professional teams must not compete too well with each other in a business way; otherwise the weaker teams would fail and the league would eventually collapse. *Id.* at 323. Evidence "shows quite clearly that the telecasting of a home game into a home territory while the home game is being played has an adverse effect on the attendance at the game." *Id.* at 325; *see also supra* note 38 (blackouts of road games within a team's home territory are not justified).

39. THE NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BY-LAWS art. X, § 2(b) (1954).

40. Record at 1814, *NFL '53*.

41. *Id.* at 1813.

Q. The transmitter.

A. Where it is sent from, yes. If it is sent from the transmitter and that is outside the 75-mile limit. That happens, Your Honor, to us, to our New York stations and different stations outside the 75-mile limit. . . . *Now, in my opinion, what we have to do is learn to live with this situation.*<sup>42</sup>

Additional proof that the NFL viewed its blackout rule in terms of station-location was evident in the NFL's direct examination of Dr. Albert F. Murray, a television consulting engineer.<sup>43</sup> Throughout Dr. Murray's testimony on the effects of the NFL blackout rule, he spoke in terms of "television *stations within 75 miles* of a home team."<sup>44</sup> Dr. Murray's station-location interpretation of the NFL blackout rule went unchallenged by NFL attorneys.

Finally, Judge Grim's opinion in *NFL '53* specifically described the NFL blackout rule in terms of a "telecast or broadcast by a *station within 75 miles* of another League city."<sup>45</sup> While this language could be read as adopting either a station-location or a signal-penetration view,<sup>46</sup> the station-location view, in light of Commissioner Bell and Dr. Murray's testimony, is a more logical interpretation.

B. *Section 1292 Codified the Blackout Rule as it Existed in NFL '53*

In 1961, the NFL wished to enter into a joint television pooling contract<sup>47</sup> with a network in order to compete more effectively with

42. *Id.* at 1813-14 (emphasis added) In addition "the general manager of a Lancaster, Pennsylvania television station testified that the Philadelphia Eagles had invoked the 75 mile blackout rule because his station was located just inside the 75 mile line. He further stated that he was told that 'it was unfortunate for [the station] that it *fell one mile within* the 75 mile rule.'" Brief for Appellant at 16 n.18, *WTWV*, (emphasis in original) (quoting the trial transcript of *NFL '53*).

43. See Record at 1603-1676, *NFL '53*.

44. *Id.* at 1625-49 (emphasis added). Dr. Murray testified about a study which showed which NFL teams and stations were affected by NFL blackouts. *Id.* at 1628-50.

45. 116 F. Supp. at 321 (emphasis added).

46. If there is a pause after the word "station", a signal penetration interpretation is suggested; without a pause, station location is suggested.

47. 678 F.2d at 144. "[T]he networks were resisting purchasing the television rights of *all* NFL member clubs individually, confronting the NFL with the prospect that a number of its clubs would be unable to obtain any access to television facilities." Brief for Appellee at 11-12, *WTWV*. According to Pete Rozelle, present Commissioner of the NFL, once the 1961 contracts between individual NFL clubs and the networks expired, the networks would only acquire the television rights of a few select clubs for national or quasi-national telecasting. The networks felt "[i]t no longer [made] economic sense for networks to purchase individually the rights of all 14 member clubs of the league for local and regional telecasting." *1961 Hearings, supra* note 23, at 39 (prepared statement



the emerging American Football League, which already had a joint television pooling contract with another network.<sup>48</sup> “[T]he NFL went back to Judge Grim for a determination of whether its joint television pooling contract with the network would violate the court’s earlier decree prohibiting certain League television practices as violations of the federal antitrust laws.”<sup>49</sup> Judge Grim held that, indeed, the television contract violated the 1953 decree.<sup>50</sup> Only seventy-two days later, Congress, as a result of this decision, enacted sections 1291 and 1292, an antitrust exemption which would permit such pooling agreements and allowed certain television blackouts.<sup>51</sup>

Congress, in enacting the television blackout antitrust exemption in section 1292, did not authorize a different blackout practice than the station-location standard of the *NFL ’53* case.<sup>52</sup> Prior to the

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of Pete Rozelle). A joint television pooling contract would require networks to give comparable coverage to games of all NFL teams. Brief for Appellee at 11-12, *WTWV*.

48. 678 F.2d at 144.

49. *Id.* (citing *United States v. National Football League*, 196 F. Supp. 445, 447 (E.D. Pa. 1961)). The decree in *NFL ’53* prohibited the NFL “from directly or indirectly entering into, enforcing, adhering to or furthering any contract . . . having the purpose or effect of restricting areas within which broadcasts or telecasts of games . . . may be made.” *United States v. National Football League*, No. 12808, slip op. (D. Pa. Dec. 28, 1953), reprinted in *1961 Hearings*, *supra* note 23, at 25. This prohibition did not apply, however, to the NFL’s blackout of a team’s home games within the home territory on a day when the home team was playing at home. *Id.*

50. *United States v. National Football League*, 196 F. Supp. 445, 447 (E.D. Pa. 1961). Judge Grim held that the joint television pooling contract restricted individual clubs from determining the areas within which telecasts of games may be made since the pooling contract gave to the network the power to determine which games should be telecast and where the games would be televised. *Id.*

51. *See supra* note 3. The NFL was the only sports league singled out (by Judge Grim’s decree in *NFL ’53*) for prohibitions on joint television contracts. “Meanwhile, other sports leagues, including the directly competing American Football League, continue[d] to enjoy the stability of single network television contracts without challenge by the Department of Justice. . . .” *1961 Hearings*, *supra* note 23, at 6 (statement of Mr. Chairman). Section 1291 was, therefore, enacted to permit such pooling contracts and to equalize treatment between the leagues. *See id.* Section 1291, however, standing alone would have completely nullified the decision by Judge Grim in *NFL ’53* by allowing agreements to blackout telecasts of *road* games within a team’s home territory. Section 1292 was, therefore, necessary to prohibit the blackouts of these road games without removing the blackout privilege for *home* games that was carved out by Judge Grim in *NFL ’53*. *Id.* at 30-31. A possible explanation as to why Congress passed sections 1291 and 1292 only 72 days after the decision in *United States v. National Football League*, 196 F. Supp. 447 (E.D. Pa. 1961), can be evidenced by congressional concern that the NFL was being treated differently from other sports leagues which were allowed to enter into joint television pooling contracts. *See 1961 Hearings*, *supra* note 23, at 6. In addition, Congress did not need much time to pass a telecasting statute because such legislation had been considered since 1958. *See infra* note 55 and accompanying text.

52. In 1963, Representative Stubblefield of Kentucky expressed his concern that the NFL was using Section 1292 as authority for a more restrictive blackout practice that

enactment of section 1291 and 1292, Congress had considered similar television blackout antitrust legislation.<sup>53</sup> In Congressional hearings on these earlier bills, NFL Commissioner Bell testified that the NFL was operating satisfactorily under the blackout rule carved out by Judge Grim in *NFL '53*.<sup>54</sup> Commissioner Bell expressed his desire that the decision in *NFL '53* be codified into subsequent blackout legislation.<sup>55</sup> Commissioner Bell specifically stated that Senate bill 616, which unambiguously described the proposed blackout rule in terms of "telecasting *stations located within* seventy-five miles of the home community of another club . . . would not interfere with . . . the [NFL's] present television . . . arrangements. It would, in fact, apply the rule of Judge Grim's decision to other team sports in addition to football."<sup>56</sup> Congress, therefore, codified into section 1292 a blackout rule which Commissioner Bell stated was based on station location.<sup>57</sup>

Because Commissioner Bell believed the NFL, in 1953, had to live with a situation that a station outside a team's 75 mile home territory would be able transmit its signal inside a team's home territory,<sup>58</sup> the NFL should also accept such an interpretation of the blackout rule in *WTWV*. There is no logical reason to suggest why the blackout rule as it existed in 1953 should be different from the current blackout rule. Under the earlier interpretation, station WTVX, located 96 miles outside Miami, would be allowed to broadcast the Miami Dolphins' home games even though the television

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had been in effect before and after *NFL '53*. Representative Stubblefield felt section 1292 "in no way sought to authorize a more restrictive blackout practice than had previously been applied." 109 CONG. REC. 12,135, 12,136 (1963)(statement of Rep. Stubblefield); see also 1961 Hearings, *supra* note 23, at 31 (showing congressional intent to place into law the *NFL '53* decision). See *infra* notes 62-65 and accompanying text.

53. See *Organized Professional Team Sports, 1959: Hearings on S. 616 and S. 886 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. 1 (1959)* [hereinafter cited as *1959 Hearings*]; *Organized Professional Team Sports, 1958: Hearings on H.R. 10378 and S. 4070 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 85th Cong., 2nd Sess. 389 (1958)* [hereinafter *1958 Hearings*].

54. See *1959 Hearings, supra* note 55, at 31 (statement of Burt Bell, Commissioner of the NFL).

55. *Id.*

56. *Id.* (emphasis added). Commissioner Bell's successor, Pete Rozelle, also testified in the 1961 hearings on blackout legislation, that the NFL was operating satisfactorily under Judge Grim's decision in *NFL '53*. Commissioner Rozelle, however, has never read the *NFL '53* case as adopting a station location approach in determining blackouts. See 1961 Hearings, *supra* note 23, at 28-29 (statement of Pete Rozelle, NFL Commissioner).

57. See *supra* notes 54-58 and accompanying text.

58. See *supra* note 43 and accompanying text.

signal was received inside the Miami Dolphins' 75 mile home territory.<sup>59</sup>

### C. *Expansion of the Blackout Rule Beyond Station Location*

Between enactment of section 1292 in 1961 and the decision in *WTWV*, it remained unclear whether Congress interpreted the section 1292 blackout rule as being based on station-location or signal-penetration.<sup>60</sup> For example, in 1963, only two years after the enactment of section 1292, there was congressional concern that the NFL was acting beyond the scope of the antitrust exemption it had been given for certain blackouts under section 1292. Frank A. Stubblefield, United States Representative from the State of Kentucky, speaking to the Senate Subcommittee on Antitrust and Monopoly, voiced his concern that the NFL was expanding the area in which they were allowed to blackout games by using signal-penetration rather than station-location.<sup>61</sup> Representative Stubblefield believed that section 1292 prohibited blackouts based on signal penetration.<sup>62</sup>

[T]here is the clearest congressional intention not to permit any joint agreements which restrict or black out the telecast of professional sport events except within a certain defined and limited area. . . . [T]hese protected areas which may be blacked out should be confined to distances measured by the *location of a television station within 75 miles of the home city* of the professional team. . . .<sup>63</sup>

A year later, in 1964, Representative Stubblefield again stated his concern with regard to the NFL's blackout of stations located more than 75 miles from a team's home city.<sup>64</sup> Of particular concern to Representative Stubblefield was the NFL's blackout of the Paducah, Kentucky area, though the television station that broadcast the St. Louis Cardinals home games to Paducah was 180 miles from St. Louis.<sup>65</sup> The NFL was blacking out Paducah because the signal of

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59. *See supra* text accompanying notes 17-21.

60. *See infra* notes 63-87 and accompanying text.

61. 109 CONG. REC. 12135, 12136 (1963)(statement of Rep. Stubblefield).

62. *Id.*

63. *Id.* (emphasis added).

64. *Professional Sports Antitrust Bill 1964: Hearings on S. 2391 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 77-79 (1964) (statement of Frank A. Stubblefield, Representative from the State of Kentucky) [hereinafter cited as *1964 Hearings*].

65. *Id.* at 78.

The city of Paducah is serviced by a CBS affiliate that is not located in Kentucky. . . . [The CBS affiliate] is at Cape Girardeau, Mo., about 95 miles from

the station which broadcast to Paducah could also be received within the St. Louis Cardinal 75-mile home territory.<sup>66</sup> Representative Stubblefield believed "that the . . . prevailing, and proper NFL blackout practice [was] one that blacked out only T.V. stations laying within 75 miles of the home city. . . . [T]he NFL continue[d] to seek to extend the blackout area to advance its home gate receipts and . . . to reap further profits from paid, closed-circuit telecasts of those games."<sup>67</sup>

Because Representative Stubblefield believed section 1292 merely codified the station location blackout rule carved out by Judge Grim in *NFL '53*<sup>68</sup> he believed the NFL's signal-penetration interpretation of section 1292 was too broad.<sup>69</sup> Accordingly, Representative Stubblefield thought section 1292 should be changed to read specifically in terms of station location.<sup>70</sup>

In response to Representative Stubblefield's concern that the NFL had expanded its blackout procedures, the Senate Judiciary Committee questioned NFL Commissioner Pete Rozelle.<sup>71</sup> Commissioner Rozelle believed the blackout of Paducah was permissible because the signal of the station could also be received within the St. Louis Cardinals' 75 mile home territory.<sup>72</sup> Rozelle agreed that sec-

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St. Louis. . . . This station has one of the strongest signals in the country and a very strong transmitter. It televises right into the suburbs of St. Louis.

*Id.* at 114-15 (testimony of Commissioner Pete Rozelle).

66. *Id.* at 78 (statement of Rep. Stubblefield); *see infra* note 74 and accompanying text.

67. *1964 Hearings, supra* note 66, at 78. Representative Stubblefield believed that although the NFL had probably not applied their new and expanded signal penetration blackout practice to most American cities, it was likely to become the NFL's future policy. *Id.*

68. *See supra* notes 54-60 and accompanying text.

69. *See supra* text accompanying notes 63-69.

70. *See 1964 Hearings, supra* note 66, at 79. By trying to change section 1292 so that it would read specifically in terms of station location, Representative Stubblefield was not saying that section 1292 was intended in 1961 to be a signal penetration rule. Rather, section 1292 was originally intended to codify the station location rule of *NFL '53*, but the NFL's departure from the station location rule necessitated the change suggested by Representative Stubblefield. *Id.* Even if Congress interpreted section 1292 as a signal penetration rule at any time *after* its passage in 1961, statutes are nevertheless to be construed by courts with reference to circumstances existing at the time of passage. *United States v. Wise*, 370 U.S. 405, 411 (1962); *see also infra* note 86 and accompanying text (failure to amend a statute does not necessarily mean congressional adoption of a statutory interpretation). Congress, therefore, would always have to interpret section 1292 in reference to the time of its passage in 1961, thereby viewing the rule as codifying the blackout rule of *NFL '53*. *See supra* notes 54-60 and accompanying text.

71. *1964 Hearings, supra* note 66, at 113-19. Pete Rozelle succeeded Burt Bell as Commissioner of the NFL.

72. *Id.* at 115; *see supra* note 67.

tion 1292 codified the blackout rule carved out by Judge Grim in *NFL '53*.<sup>73</sup> Rozelle, however, misinterpreted *NFL '53* as adopting a blackout rule based on signal-penetration rather than station-location.<sup>74</sup> Rozelle, therefore, believed that the NFL could black out Paducah.<sup>75</sup> Despite Representative Stubblefield's concern that the NFL was expanding its blackout practice,<sup>76</sup> Congress did not change section 1292 in 1964 to read in specific terms of station-location.<sup>77</sup>

In 1978, Congress again examined whether the NFL's signal-penetration interpretation of section 1292 was proper.<sup>78</sup> The House of Representatives actually passed an extension of the 72 hour sell-out blackout rule<sup>79</sup> in express terms of station-location,<sup>80</sup> but the final version of the bill passed by Congress merely extended the existing legislation.<sup>81</sup>

Post-1961 events clearly demonstrated congressional interest in the fact that the NFL was blacking out stations based on signal-penetration rather than station-location.<sup>82</sup> The failure of Congress to change section 1292, however, did not mean that it had adopted the

73. *1964 Hearings*, *supra* note 66, at 114.

74. *Id.* at 114-19.

75. *Id.* at 114-15. According to Rozelle

[t]he facts of television are simply this: That the location of the studio or even the location of the transmitters are not the key factors in determining the impact on attendance of the telecasts from that station. A transmitter can be set up 76 miles from a city and beam right into that city. . . .

*Id.* at 116. Yet Commissioner Bell, Rozelle's predecessor, clearly testified in *NFL '53* that the NFL had to live with the fact that a station 76 miles away could transmit into a team's home territory. See *supra* notes 41-43 and accompanying text. Subsequently, in 1958, Commissioner Bell testified the NFL was operating satisfactorily under *NFL '53*. See *supra* note 56 and accompanying text. Similarly, in 1961, Commissioner Rozelle, felt that the NFL continued to operate satisfactorily under the *NFL '53* decision. See *1961 Hearings*, *supra* note 23, at 28-29. Therefore, since both Rozelle and Bell believed they were operating satisfactorily under *NFL '53*, Rozelle must have been unaware that Bell believed station location was the interpretation of the blackout rule under *NFL '53*.

76. See *supra* notes 63-74 and accompanying text.

77. See *infra* notes 84-87 and accompanying text.

78. H.R. 11070, 94th Cong., 1st Sess., 121 Cong. Rec. 40,648 (1975).

79. See *supra* note 20. The sports 72 hour antiblackout law was set to expire on December 31, 1975.

80. H.R. 11070, 94th Cong., 1st Sess., 121 Cong. Rec. 40,645 (1975).

81. 47 U.S.C. § 331 (1976)(repealed 1973).

It was only after Conferees were appointed by Congress that the League agreed to continue voluntarily observing the practice of lifting blackouts for sold-out games in order to ward off a permanent enactment of this concept. . . . Thus, it can hardly be said that Congress 'refused' in 1975 to adopt a station location standard.

Brief for Appellant at 24, *WTWV* (emphasis in original).

82. See *supra* notes 60-83 and accompanying text.

NFL's signal-penetration interpretation. The Supreme Court, in *Girouard v. United States*,<sup>83</sup> warned that "[i]t [was] at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."<sup>84</sup> "Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of an interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change."<sup>85</sup>

Similarly, in litigation concerning the blackout rule prior to *WTWV*, courts did not specifically address the station-location/signal-penetration question.<sup>86</sup> Instead, courts assumed that the NFL's signal-penetration rule was correct.<sup>87</sup> These cases should not be determinative resolving the correct interpretation of the NFL blackout rule.

#### D. *College Football's Blackout Rule*

Section 1293,<sup>88</sup> enacted at the same time and as part of the same statute as section 1292, granted blackout protection to college football.<sup>89</sup> It mandates, during certain times,<sup>90</sup> the blackout of professional football games by "any telecasting station located within

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83. 328 U.S. 61 (1946).

84. *Id.* at 69. Congressional silence could, however, be considered as one factor in determining congressional intent. See *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

85. *United States v. Wise*, 370 U.S. 405, 411 (1962)(emphasis added). There are two inferences that can be drawn from Congressional failure to change section 1292. The first is that section 1292 was a signal-penetration rule when enacted. Congressional failure to change the rule to read in specific terms of station-location would, therefore, mean that Congress has accepted a signal-penetration rule. The second is that section 1292 was a station-location rule when enacted and there was, therefore, no reason to change the rule to read specifically in terms of station-location. *Id.*

86. For example, in *Hertel v. City of Pontiac*, 470 F. Supp. 603 (E.D. Mich. 1979), the plaintiffs challenged the constitutionality of the NFL's blackout rule, asserting that the rule violates their right to equal protection under the United States and Michigan Constitutions. *Id.* at 604. The district court, without specifically examining the station-location/signal-penetration issue, held that the 75 mile blackout rule was rationally related to the profitable operation of Detroit's Silverdome during the N.F.L.'s Superbowl. *Id.* at 606. Similarly, in *Blaich v. National Football League*, 212 F. Supp. 319, 320 (S.D.N.Y. 1962), which involved a challenge to the blackout of the 1962 NFL championship game, the propriety of the NFL's signal-penetration interpretation was not at issue.

87. See *supra* note 88.

88. 15 U.S.C. § 1293 (1982).

89. *Id.*

90. Section 1293 allows blackouts of professional football games "on any Friday after six o'clock post meridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December. . . ." *Id.*

seventy-five miles" of a college football game site.<sup>91</sup>

In enacting the section 1293 blackout rule, Congress believed that NFL games, if telecast into areas in which college football games were being played, would have an adverse affect upon the attendance and gate receipts of college games.<sup>92</sup> The specific provisions of sections 1292 and 1293 therefore, differ: Section 1292 protects attendance at NFL games from interference from *other NFL* telecasts, while section 1293 protects attendance at *college* games from interference from NFL telecasts. The purpose of both sections 1292 and 1293, however, is the same: the protection of attendance at football games.<sup>93</sup> There is nothing in the legislative history of sections 1292 and 1293 that suggests why the NFL, under a signal-penetration blackout rule, should be afforded a more restrictive blackout rule<sup>94</sup> than college football's station-location rule.<sup>95</sup> There is no sound reason for them to differ. Because section 1293 specifically reads in terms of "station-location," section 1292's station-location/signal-penetration ambiguity should be resolved, therefore, in favor of a station-location interpretation. As a result, both sections 1292 and 1293 would be consistent and provide for blackout rules based on station-location.<sup>96</sup>

#### E. Exemptions from the Antitrust Laws

Consistent with the argument that the station-location language of section 1293 should be read into section 1292 is the doctrine that exemptions from the antitrust laws should be narrowly construed.<sup>97</sup>

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91. *Id.* (emphasis added). The NFL, however, has rarely scheduled football games at the same time as college football games (typically Saturday afternoons). *See 1961 Hearings, supra* note 23, at 36-37.

92. *See 1961 Hearings, supra* note 23, at 36-37.

93. *See supra* note 39 and accompanying text.

94. *See supra* note 8.

95. The NFL contends that "when different forms of words are used by the same party at the same time, different meanings are intended." Brief for Appellee at 27, *WTWV*. The NFL, therefore, believes that the difference in language between sections 1292 and 1293 shows that Congress intended different meanings for the two blackout rules. The NFL, however, has never suggested any reason as to why professional football should receive a more restrictive blackout rule than college football. *But see* Brief for Appellee at 28 n.20, *WTWV* (since section 1293 was an amendment proposed by the National Collegiate Athletic Association and adopted without change by Congress it has not the slightest bearing on congressional intent).

96. The argument that the station-location language of section 1293 should be read into section 1292 is strengthened in light of the legislative history showing that section 1292 codified the station-location blackout rule carved out by Judge Grim in *NFL '53*. *See supra* notes 23 & 54-60 and accompanying text.

97. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979);

"This doctrine is not limited to implicit exemptions from the anti-trust laws, but applies with equal force to express statutory exemptions."<sup>98</sup>

One construction of the section 1292 blackout rule is that it is based on station-location; the other possible construction is that it is based on signal-penetration.<sup>99</sup> The narrower of the two constructions is the one that yields the least anticompetitive blackout rule. Because the signal-penetration rule results in a larger blackout area than the station-location rule, it is more anticompetitive.<sup>100</sup> The narrowest construction of the section 1292 antitrust exemption is the station-location rule.<sup>101</sup>

#### F. *A Signal-Penetration Interpretation: Enlarged Blackout Areas*

The decision in *WTWV* to interpret section 1292 as a station-penetration rule will result in prohibiting telecasts to people who live *outside* the 75 mile home territory. For example, if a station like

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Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 11 (1975). Under an antitrust exemption Congress permits, for a particular reason, conduct that is otherwise an illegal restraint of trade. *See supra* notes 4 & 38. By construing an exemption narrowly the anticompetitive effect of a particular conduct is, therefore, minimized. The NFL argued that the proper statutory construction of section 1292 is not a relevant issue because section 1292 was never the source of the NFL and the Dolphin's right to blackout games. Brief for Appellee at 25, *WTWV*. The NFL believed that section 1292 "is at most a confirmation, and an inadvertent one at that, of the rights of [NFL] clubs regarding home telecasts. It is not an antitrust exemption. It was neither needed nor intended to resolve any antitrust problem." *Id.* The NFL's argument that principles of statutory construction were not applicable because section 1292 is not the source of their blackout right is confusing. Section 1292 explicitly reads that "[t]he first sentence of section 1291 [the antitrust provisions of section 1 of the Sherman Act] shall not apply to any joint agreement. . . ." 15 U.S.C. § 1292 (1982). Section 1292 is by its language an antitrust exemption; the NFL's argument that that section is not an exemption was, therefore, baseless. As a result, the NFL's argument that principles of statutory construction are not determinative was unfounded. Reply Brief for Appellant at 15 n.23, *WTWV*.

98. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). In *Royal Drug* the Supreme Court construed exemptions under the McCarran-Ferguson Act narrowly in deciding whether pharmacies were in violation of section 1 of the Sherman Act. *Id.*; *see also* *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973) (the Supreme Court rejected broad reading of an antitrust exemption as conflicting with the view that exemptions from antitrust laws are to be narrowly construed).

99. *See supra* note 8.

100. *Id.* As the area subjected to a blackout is increased, a station must telecast to fewer persons, thereby increasing the anticompetitive effect of the blackout rule.

101. A narrow construction of section 1292, by yielding the less anticompetitive station location blackout rule, reflects Supreme Court policy that the "antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).



WTVX is blacked out because its telecasts are received within a team's 75 mile home territory, then people who receive the telecasts *outside* the 75 mile home territory will be similarly affected.<sup>102</sup> The antitrust exemption of section 1292, however, should not apply to blackouts outside a team's home territory.<sup>103</sup> Under a signal-penetration rule then, when a signal is received both inside *and* outside a team's home territory, section 1292 would be interpreted as allowing *both* a blackout within the 75 mile home territory and a telecast outside of that area at the same time.<sup>104</sup>

The problem of the overprotective blackout that results from a signal-penetration rule could be eliminated if a station was able to limit the reception range of its telecasts by reducing its transmitter power. The Code of Federal Regulations, however, prohibits such reductions.<sup>105</sup> In pertinent part, the regulations require that "the aural and visual transmitter output power of a T.V. station . . . must be maintained as near as practicable to the authorized powers and may not be less than 80% nor more than 110% of authorized powers."<sup>106</sup> A television station, therefore, is prohibited from reducing its transmitter output power in an attempt to telecast only *outside* a team's 75 mile home territory, while maintaining a blackout *inside* a team's 75 mile home territory.<sup>107</sup> In other words, in *WTWV*, station WTVX must maintain its signal strength as near as practicable to its authorized transmitter power and must remain within 80%-110% of authorized power.<sup>108</sup> WTVX, accordingly, cannot reduce its signal

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102. The decision in *WTWV* raises a hypothetical situation not unlike the one posed to Commissioner Bell by Judge Grim in *NFL '53*. See *supra* notes 40-41 and accompanying text. For example, if a station's telecast can be received just 5 miles within a team's 75 mile protected home territory and is also received 200 miles *outside* a team's 75 mile protected home territory, the *entire* 205 mile reception area can be blacked out under the signal-penetration interpretation adopted in *WTWV*.

103. See *supra* note 8.

104. A station-location interpretation would eliminate this inconsistency by focusing on the location of a station instead of where a signal is received. If a station is located within a team's home territory, it is blacked out; if it is located outside, the telecast is allowed.

105. Telecommunications, 47 C.F.R. § 73.1560 (1982). The Federal Communications Commission regulates television transmitter output power.

106. *Id.* A Broadcast station could operate at reduced power but only in the event that it became *technically* impossible to operate with the authorized power. Such reduced power operation could not exceed 30 days without specific authority from the FCC *Id.*

107. A reduction of transmitter power would only be feasible when a station was located outside a team's 75 mile home territory and its signal was received inside a team's 75 mile home territory. This was the situation in *WTWV*.

108. For example, in *In re Violation by Lee Enterprises, Inc.*, 27 F.C.C.2d 887 (1970), CBS gave television station KGLO permission to carry the November 22, 1970

strength to restrict a football telecast to those areas outside the 75 mile home territory of the Miami Dolphins.

In light of the decision in *WTWV* to permit blackouts based on signal-penetration, *WTVX* must either ask the Federal Communications Commission to permanently reduce its signal strength or retain its current signal strength<sup>109</sup> and be subject to a complete blackout by the NFL of the Miami Dolphins' non-sold out home games.<sup>110</sup> Alternatively, the problem of the enlarged blackouts that result from a signal-penetration interpretation could be resolved if Congress amended the Code of Federal Regulations to allow reductions in transmitter power for sports telecasts. Although such an amendment would not resolve the inherent ambiguity of section 1292, it would minimize the impact of the decision in *WTWV* by allowing telecasts into areas *outside* of a team's 75 mile home territory only, and not *within* the home territory. Otherwise, the effect of the decision in *WTWV* is that even if Congress intended section 1292 to be a signal-penetration rule, television viewers outside a team's 75 mile home territory are precluded from viewing. There was no intention by Congress or by Judge Grim in *NFL '53* to allow the blackout rule to have such an expansive meaning.<sup>111</sup>

#### IV. CONCLUSION

The United States Court of Appeals for the Eleventh Circuit's decision in *WTWV* to interpret the section 1292 telecast blackout antitrust exemption as a signal-penetration rule rather than a station-location rule<sup>112</sup> is inconsistent with the station-location blackout rule carved out by Judge Grim in *NFL '53* and codified in section 1292.<sup>113</sup>

A signal-penetration interpretation of section 1292 is also

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Green Bay Packer-Minnesota Viking game with the understanding that KGLO would reduce its power by 20% in order to limit the fringe areas receiving the signal. KGLO reduced its signal strength to 80% of its authorized power during the broadcast of the game without notifying or requesting authority from the FCC. The FCC held that KGLO's reduction of power was impermissible. *Id.* at 888.

109. *WTVX* could, therefore, go back to its old signal strength which did not penetrate within the 75 mile home territory. *See supra* notes 18-19 and accompanying text.

110. *See supra* note 103 and accompanying text. The FCC could change 47 C.F.R. § 73.1560 (1982) and allow temporary reductions in power for football telecasts. Such a change would minimize the impact of the decision in *WTWV* by allowing telecasts to areas outside a team's 75 mile home territory.

111. *See supra* notes 34-87 and accompanying text.

112. 678 F.2d at 146; *see supra* text accompanying notes 9-10.

113. *See supra* notes 34-61 and accompanying text.

clearly inconsistent with the specific station-location language of the college football blackout rule<sup>114</sup> that was enacted at the same time and as part of the same statute.<sup>115</sup> There has been no reason suggested for why the NFL should have a more restrictive blackout rule than does college football.<sup>116</sup>

Additionally, a signal-penetration interpretation of section 1292 conflicts with the United States Supreme Court's policy that antitrust exemptions are to be narrowly construed<sup>117</sup> for the purposes of the antitrust laws to be safeguarded.<sup>118</sup>

Finally, the effect of the *WTWV* decision will be to blackout areas *outside* a team's 75 mile protected home territory.<sup>119</sup>

If Congress is satisfied with the decision in *WTWV* it has two choices. First, Congress can leave section 1292 intact with the hope that if other circuits decide the signal-penetration/station-location question, they will decide that signal-penetration is the correct interpretation.<sup>120</sup> Alternatively, Congress could change section 1292 to state specifically signal-penetration as the applicable rule.

If Congress believes that the court in *WTWV* has misread section 1292 as being a rule based on signal-penetration rather than the station-location rule developed by Judge Grim in *NFL '53*, section 1292 could be amended to include specifically a station-location rule. A change to a station-location rule would not eliminate the NFL's antitrust exemption for blackouts, but merely limit its scope by allowing a blackout of only those stations located *within* a team's 75 mile home territory.<sup>121</sup> Amending section 1292 to provide for a station-location rule would also eliminate the ambiguity of the statute as it now exists, thereby making it consistent with the college football

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114. See *supra* notes 90-98 and accompanying text.

115. See *supra* note 3 and text accompanying notes 90-93.

116. See *supra* note 97.

117. See *supra* notes 99-103 and accompanying text.

118. See *supra* note 103.

119. See *supra* notes 104-13 and accompanying text.

120. Other circuits could decide that station-location and not signal-penetration is the correct interpretation. The result, of course, would be different blackout rules in different circuits.

121. Nothing in *NFL '53* or the legislative history of Section 1292 suggests that the purpose of the blackout rule was to ensure sellouts of all NFL games. See *supra* notes 33-38 and accompanying text. While blackouts to some extent protect a team's attendance, other variables such as the caliber of the home and visiting team and weather conditions can often be more significant in effecting attendance. Report and Order, Nos. 20988, 21284, 79 F.C.C. 2d 663 (1980), *petition to set aside denied*, *Malrite T.V. of New York v. F.C.C.*, 652 F.2d 1140, 1150 (2d Cir. 1981). There is, therefore, no reason to currently afford the NFL a greater blackout privilege than Judge Grim felt was necessary for a financially troubled NFL in *NFL '53*.

blackout rule in section 1293.<sup>122</sup>

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122. *See supra* notes 90-98 and accompanying text.