Constitutional Law Challenges to Anti-Siphoning Laws in the United States and Australia

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Abstract

Anti-siphoning laws interest professional sport leagues and the public in both the United States and Australia. The article details anti-siphoning regulations in each country, including the *Broadcasting Services Act 1992* (Cth) s 115 and the anti-hoarding amendments thereto, and the ruling in *Home Box Office v. FCC*. Professional sports leagues can challenge anti-siphoning legislation under constitutional law. Freedom of expression protection bars anti-siphoning legislation in the United States under the First Amendment, but not in Australia. Surprisingly, the 'just terms' provision in s 51(xxxi) of the *Australian Constitution* is a more viable option for a professional sports league to recoup financial losses from anti-siphoning rules than is the Fifth Amendment of the United States Constitution.

Introduction

Anti-siphoning rules, government regulations that restrict the amount of professional sports programming that can be shown on pay television, are of great concern to professional sports leagues in the United States and Australia. Such rules jeopardise the financial returns a professional sports league may receive from its transmission rights. Though anti-siphoning regulations currently do not exist in the United States, the Federal Communications Commission (FCC) has enacted them in the past and has evinced a willingness to do so in the future. Australia has anti-siphoning rules that extensively limit the amount of sports programming on cable television. Given the increasing value of pay television rights to popular sporting events, the lawfulness and limits of anti-siphoning laws are of great interest to American and Australian professional sports leagues and the public at large. An examination of the challenges a professional sports league may make against the validity and application of anti-siphoning rules reflects differences in the protection constitutional law provides free expression and private property in the United States and Australia.

Review of Anti-siphoning Regulations

United States

With the growth of cable television in the United States in the late 1960s came concern from members of the public and government that cable television operators would outbid the free-to-air television networks for the rights to popular programs resulting in these programs no longer being available free of charge.[1] Sporting events, it was believed, were in particular danger of being diverted, or siphoned, from networks to cablecasters.[2] The likelihood that specific

[1] See M. Agnes Siedlecki, Note, *Sports Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?*, 53 Ind. L.J. 821, 821 (1978) (discussing the FCC's anti-siphoning rules). 'Siphoning is said to occur when an event or program currently shown on conventional free television is purchased by a cable operator for showing on a subscription cable channel.' *Home Box Office v. FCC*, 567 F.2d 9, 25 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[2] See Siedlecki, *supra* note 1, at 822 (noting reasons for sports anti-siphoning rules); Ira Horowitz, *The*

sporting events (e.g., Super Bowl or World Series) would be siphoned to pay television was thought to be higher than the diversion of non-specific events (e.g. regular season games) because of the greater inelasticity of demand for the former than for the latter.[3]

In response to these concerns, the FCC, in 1975, issued anti-siphoning rules designed to 'prevent "siphoning" of… sports material from conventional broadcast television to pay cable.'[4] Under the rules, a 'specific' event … was denied to pay TV, subscription, or cable, if it had been telecast on conventional TV during any one year of the previous five years. 'Nonspecific' sports events, which could be divided into the four major categories of preseason and regular season home and away games, became available to pay TV on the following basis: (a) if fewer than 25 percent of the events in a given category were broadcast live over conventional TV during that season among the preceding five years in which the most events in that category were telecast, then the number of events available would be the remaining events not telecast during the highwater-mark season; (b) if, however, 25 percent or more of the events in a given category were broadcast live during the highwater-mark season, then only 50 percent of the remaining events may be made available to pay TV. Furthermore, any reduction in the number of conventional telecasts from the highwater-mark figure would require a proportionate reduction in the number of events available to pay TV.[5] In addition to the above restrictions, the FCC also prohibited 'cablecasters from devoting more than 90 percent of their cablecast hours to … sports programs.'[6]

Members of the cable television industry, the Justice Department, and other parties challenged the validity of the anti-siphoning rules.[7] The Court of Appeals in *Home Box Office v. FCC* held that the 'rules exceeded the FCC's jurisdiction over cable television,'[8] were arbitrary and capricious, and unconstitutional under the First Amendment.[9] The court started its analysis by noting that the FCC's 'regulatory authority over cable television [was] not carte blanche.'[10] Rather, the FCC '[could] only exercise authority over cable television to the extent "reasonably ancillary" to the Commission's jurisdiction over broadcast television.'[11] Because the FCC admitted that it had 'no statutory authority to dictate entertainment formats,'[12] the court concluded that the anti-siphoning rules were an *ultra vires* act of the agency.[13] According to the court, '[t]he very essence of the … sports rules [was] to require the permission of the Commission to commence … programming, including program format services, offered to the public.'[14]

Even assuming the FCC's jurisdiction over cable television, the court determined that the anti-siphoning rules were illegal. Upon judicial review of its orders, the Commission was required to demonstrate a 'rational connection between the facts

Implications of Home Box Office for Sports Broadcasts, 23 Antitrust Bull. 743, 753 (1978) (noting the unique characteristics of sporting events).

[3] See Horowitz, *supra* note 2, at 756 (discussing the siphoning of specific and non-specific sporting events).

[4] *Home Box Office*, 567 F.2d at 28.

[5] Horowitz, *supra* note 2, at 749-50.

[6] *Home Box Office*, 567 F.2d at 19.

[7] See Siedlecki, *supra* note 1, at 828 (discussing the suit attacking the anti-siphoning rules).

[8] Ibid.

[9] *See Home Box Office*, 567 F.2d at 49. The First Amendment to the U.S. Constitution states: 'Congress shall make no law … abridging the freedom of speech, or the press.'

[10] Ibid. at 26.

[11] Ibid. (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

[12] Ibid. at 31.

[13] See ibid.

[14] Ibid. (quoting Memorandum Opinion and Order, 60 FCC2d 858, 859 (1976)).

found and the choice made.'[15] Because the administrative record lacked evidence supporting the FCC's assertions that sporting events were migrating from free-to-air television to cable television and that persons without access to cable would lose access to sports programming if siphoning were to occur, the court concluded that the anti-siphoning rules were arbitrary and capricious.[16]

Finally, the court decided that the anti-siphoning rules violated the First Amendment rights of cable television operators. Since the anti-siphoning rules regulated the competition between broadcasters and cablecasters for the same audience, the court subjected the regulations to the four-part test set forth in *United States v. O'Brien*.[17] To pass scrutiny under *O'Brien*, the anti-siphoning rules had to '(1) fall within the constitutional power of the government, (2) further an 'important or substantial government 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.'[18] The court concluded that the anti-siphoning rules were within the constitutional power of government and unrelated to the suppression of free expression, since their narrow purpose of protecting the viewing rights of those unable to obtain cable was content neutral.[19] The anti-siphoning rules, however, failed the second and fourth prongs of *O'Brien*. The lack of evidence in the record showing that siphoning was actually occurring made it impossible for the FCC to demonstrate that the anti-siphoning rules furthered an important or substantial government interest.[20] The anti-siphoning rules were 'grossly overbroad' since they precluded cable operators from showing sports events that broadcasters would clearly choose not to telecast.[21]

After *Home Box Office* until 1992, cable networks, and the amount of sports programming they carried, proliferated dramatically.[22] In response to concerns about increased siphoning of sporting events to pay television, Congress in the *Cable Act 1992* ordered the FCC 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.'[23] Pursuant to this mandate, the FCC 'sought information and comment on a number of issues regarding the movement of sports programming from broadcast to cable television'[24] in order 'to determine whether any legislative or regulatory action'[25] was needed in this area.

The FCC found that the 'number of sports events shown on cable television' had dramatically increased since 1980.[26] '[T]his increased cable exposure,' however, had not 'led to a concomitant decrease in the number of sports events shown on broadcast television.'[27] Rather, the data showed that there was 'a tremendous amount of sports programming on broadcast television' which was generally increasing.[28]

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[15] Ibid. at 35 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).
[16] See ibid. at 37, 39 (reviewing the administrative record supporting the anti-siphoning rules).
[17] See ibid. at 47-48; Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 Fed. Comm. L.J. 571, 578 (1995) (discussing *Home Box Office*).
[18] Cox, *supra* note 17, at 578 (quoting *O'Brien*, 391 U.S. at 376-88).
[19] See *Home Box Office*, 567 F.2d at 48-49 (applying *O'Brien*); Cox, *supra* note 17, at 578.
[20] See *Home Box Office*, 567 F.2d at 50.
[21] See ibid.
[22] See Cox, *supra* note 17, at 580.
[23] In re Implementation of Section 26 of the *Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration*, Interim Report, 8 F.C.C.R. 4875 ¶ 1 (1993) quoting *Cable Television Consumer Protection and Competition Act 1992* (hereinafter Anti-siphoning Interim Report).
[24] Ibid. at ¶ 1.
[25] Ibid. at ¶ 3.
[26] Ibid. at ¶ 85.
[27] Ibid.
[28] See In re Implementation of Section 26 of the *Cable Television Consumer Protection and Competition Act of 1992 Inquiry into Sports Programming Migration*, Final Report 9 F.C.C.R. 3440 ¶ 167 (1994) (noting that

'The "marquee" events, such as the Super Bowl … remain[ed] on broadcast television.'[29] In addition, only a nominal fraction of American television households did not have access to pay television sports programming via cable or satellite technology. Hence, 'the consequence of migration [would not be] loss of access to sports programming, but the need to pay a fee to acquire it.'[30] According to the FCC, the cost of subscribing to pay television to acquire sports programming was not likely to be burdensome for the average consumer.[31] Upon final review, the FCC concluded that there was 'no evidence of migration' of sports events from free-to-air to pay television.[32] Thus, the Commission 'discern[ed] no case for additional government intervention in the sports programming market at this time.'[33]

Despite their current absence, anti-siphoning rules may return to the United States. As the number of subscriber-based platforms offering programming increases with advances in technology, more sports events are likely to be shown on pay mediums.[34] Whether significant migration of sports programming from free-to-air networks to pay services will follow these technological innovations is uncertain.[35] The FCC's position is, however, that it 'shall not hesitate to act, consistent with its statutory authority' if 'any significant threat to… access' to sports programming develops.[36]

Australia

The introduction of cable television in Australia in 1995 raised fears about a reduction of sports programming on free-to-air television.[37] In order to prevent the migration of major sporting events to subscription television, the government passed anti-siphoning legislation.[38] Section 115 of the *Broadcasting Services Act 1992* (Cth) (BSA) empowers the Minister for Communications, the Information Economy and the Arts to list sporting events that should be televised free to the general public.[39] As a condition of holding a subscription television license, a licensee must not acquire the rights to televise an event on the anti-siphoning list unless:

the NBA's and NFL's television contracts guarantee the leagues fixed amounts) [hereinafter Anti-siphoning Final Report]. See Cox, *supra* note 17, at 582 (noting that the FCC found that broadcasters aired 'more sports programming than ever before').

[29] Anti-siphoning Final Report, *supra* note 28, at ¶ 167.

[30] Ibid. at ¶ 163.

[31] See ibid. at ¶ 164; Brett T. Goodman, *The Sports Broadcasting Act: As Anachronistic as the Dumont Network?*, 5 Seton Hall J. Sport L. 469, 504-05 (1995).

[32] Anti-siphoning Final Report, *supra* note 28, at ¶ 173.

[33] Ibid. at ¶ 167.

[34] See Anti-siphoning Interim Report, *supra* note 23, at ¶ 80 (discussing the effect of technological advances on sports programming migration).

[35] *See* Horowitz, *supra* note 2, at 766-67 (arguing that the total migration of sports programming to pay television is 'unthinkable'). *But see* Cox, *supra* note 17, at 585 (noting that 'many lawmakers' sense an imminent threat of significant sports programming siphoning).

[36] Anti-siphoning Interim Report, *supra* note 23, at ¶ 180. Whether Congress or the FCC should adopt anti-siphoning rules is a complex issue the resolution of which is beyond the scope of this paper. *See* David M. Van Glish, *The Future of Sports Broadcasting and Pay-Per-View: An Antitrust Analysis*, 1 Sports Law J. 79, 79 (1994) (presenting arguments for and against anti-siphoning rules); Anti-siphoning Final Report, *supra* note 28, at ¶¶ 141-43 (summarising positions of members of the television industry for and against anti-siphoning rules); Horowitz, *supra* note 2, at 768 (concluding that anti-siphoning rules are not needed to obtain an optimal mix of sports programming on free and pay television); but see Cox, *supra* note 17, at 573 (concluding that government action is needed to ensure free access to the most popular sports programming). See also Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 Emory L.J. 463, 464 (1990) (arguing that a professional sports league's packaged sale of broadcast rights to free and pay television firms is an unreasonable restraint of trade in violation of § 1 of the Sherman Act if the agreement reduces overall viewership of the league's contests).

[37] See *Australian Productivity Commission's Draft Report on Broadcasting* 232 (October 1999), discussing basis for anti-siphoning rules in Australia (hereinafter Broadcasting Report).

[38] *See* ibid.

[39] *See Broadcasting Services Act 1992* (Cth) § 115 (authorising the Minister to create anti-siphoning list).

- a national [public] broadcaster[40] has the right to televise the event; or
- a commercial television network covering greater than 50% of the Australian population has acquired the rights to televise the event.[41]

'In other words, a pay TV operator cannot acquire the right to televise a listed event (even where such rights are limited to televising the event on pay TV) until a national or commercial broadcaster has acquired the right to televise the event.'[42] 'The rights acquired by the subscription licensee must … be rights not greater than the rights of the free-to-air broadcaster to televise the event.'[43] For example, the owner of the transmission rights to a sporting event may not sell a commercial broadcaster the right to televise a one hour highlights package of the event and a cable operator the right to televise the event live.[44] Under the anti-siphoning rules, 'a subscription broadcast licensee can never acquire exclusive rights to a listed event.'[45] Free-to-air broadcasters, however, may acquire exclusive transmission rights to a listed sporting event and then sell the pay television rights to a cable operator.[46]

Pursuant to s 115, the Minister has created a comprehensive list of sporting events.[47] A subscription television licensee may acquire without restriction the rights to any sporting event not on the anti-siphoning list. An event is 'automatically delisted one week after [it] has occurred.'[48] The Minister may also delist an event if 'the national and commercial broadcasters have had "a real opportunity to acquire, on a fair commercial basis, the right to broadcasting the event" and they have not done so "within a reasonable time."'[49]

The Australian anti-siphoning legislation is the subject of much criticism. The anti-siphoning list is arguably too broad since it includes events never before aired on free-to-air television and covers more events than the free-to-air broadcasters can technically, or practically, telecast.[50] According to some commentators, the delisting procedure is so cumbersome that a subscription television licensee cannot complete the process in sufficient time to arrange for the live transmission of a scheduled event.[51] The anti-siphoning rules effectively allow free-to-air broadcasters to prevent the live telecasts of events on pay TV by not purchasing the transmission rights to listed events or acquiring the exclusive transmission rights to a listed event and not selling the pay television rights to a cable operator.[52] Nor do the anti-siphoning provisions 'actively encourage free to air broadcasters to exercise the rights they have acquired.'[53]

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[40] Australia has two public national free-to-air broadcasters, the Australian Broadcasting Company (ABC) and SBS.

[41] Brendan Moylan, *Media Policy and Anti-Siphoning*, (1997) 16(3) Comm. L. Bulletin 16, 17. *See* Broadcasting Services Act Part 6 Sch. 2 Cl. 10(1)(e).

[42] Moylan, *supra* note 41, at 17.

[43] *Nine Network Australia Pty Ltd v. Australian Broadcasting Authority*, 143 A.L.R. 8, 16 (Fed. Ct.) (Lockhart, J.), *aff'd*, (1997) 143 A.L.R. 516 (Full Fed. Ct) (Aust).

[44] *See* ibid. ('The right to televise highlights of a cricket match is not substantially the same as the right to broadcast the match itself.').

[45] Moylan, *supra* note 41, at 17.

[46] See ibid.

[47] See Broadcasting Report, *supra* note 37, at Part F (quoting anti-siphoning list).

[48] Ibid. at 233.

[49] Ibid. (quoting *Broadcasting Services Act 1992* (Cth) § 115(2)).

[50] See Moylan, *supra* note 41, at 19; Malcolm Knox, *Sports Broadcasting*, www.smh.com.au/news/9906/30/sport/sport6.html (visited June 30, 1999) (noting argument of cable operator 'that 5,000 hours of sport were protected by anti-siphoning rules in 1998, yet less than 30 per cent of that was broadcast on free-to-air').

[51] See Broadcasting Report, *supra* note 37, at 233 (discussing criticisms of the anti-siphoning legislation).

[52] See Moylan, *supra* note 41, at 18.

[53] Broadcasting Report, *supra* note 37, at 233. *See Sportsvision Australia Pty Ltd v. Tallgen Pty Ltd*, (1998) 44 NSWLR 103 (NSW Sup. Ct.) (Bryson, J.) (Aust) (unreported) www.austlii.edu.au/au/cases/nsw/supreme_ct/1998/221.html (noting that the anti-siphoning laws do not

The Australian government has enacted 'anti-hoarding' amendments to the BSA to respond to this last criticism.[54] The anti-hoarding amendments require commercial broadcasters to offer to the national public broadcasters the right to purchase, for a nominal charge, the free-to-air rights to an event they do not plan to transmit live.[55] According to the Minister, the purpose of the anti-hoarding amendments is to 'encourage free to air broadcasters to be more realistic when acquiring broadcasting rights to major sporting events.'[56] The effectiveness of these provisions at preserving the live transmission of sporting events of national interest is questionable.[57] The national public broadcasters need not accept the commercial broadcasters' offer and free-to-air broadcasters are not required to sell any pay television rights they hold to cable operators.[58] Thus, the anti-hoarding amendments 'cannot guarantee that events will be shown live.'[59]

The Australian anti-siphoning legislation expires on December 31, 2004.[60] Nevertheless, the present rules may not survive until then. The anti-competitive nature of the current legislation is generating many calls for reform. 'The anti-siphoning provisions are a direct limitation on competition between free to air and subscription broadcasters – that is, they give the commercial broadcasters a competitive advantage over the subscription broadcasters.'[61] Advocates for reform argue that a more equitable and effective means of achieving the purpose behind the anti-siphoning rules is to preclude free-to-air and subscription broadcasters from negotiating contracts that exclude the other form of broadcasting. The Australian government is currently considering this proposal.[62]

Constitutional Law Challenges a Professional Sports League May Assert Against Anti-siphoning Rules

In both the United States and Australia, an important consideration for a professional sports league is whether to air its contests on free-to-air and/or pay television. A professional sports league's programming decision depends on many factors such as the estimated audience size for its telecasts, anticipated revenues from advertisers and pay television subscribers, and the impact its programming decision has on consumers' attitudes toward the league.[63] If anti-siphoning rules preclude a professional sports league from implementing its preferred programming strategy, then it may consider challenging the legality of these regulations. Like for other governmental regulations of private actions, constitutional law provides the only meaningful legal grounds upon which to attack the validity and application of anti-siphoning laws.

compel a commercial broadcaster to televise an event to which it owns transmission rights).

[54] See *Broadcasting Services Amendment Bill (No.1) 1999*, www.aph.gov.au (hereinafter Anti-hoarding Amendments).

[55] See ibid. § 146A.

[56] Media Release, 'Better coverage of sport on television', www.dcita.gov.au/nsapi-graphics (visited July 19, 1999) (quoting Senator Richard Alston, Minister for Communications, the Information Economy and the Arts).

[57] *See* Broadcasting Report, *supra* note 37, at 233.

[58] See ibid. But see Joanne Court, *Media Policy and Anti-Siphoning Part Two*, (1997) 16(4) Communications L. Bulletin 16, 18 (arguing that an economically rational free-to-air broadcaster would on-sell any pay TV rights to a sports event it was not showing).

[59] Broadcasting Report, *supra* note 37, at 233.

[60] See Rory Sutton, 'The flawed philosophy of anti-siphoning', (1994) 14(1) *Comm. Bulletin* 1 ('[T]he anti-siphoning rules are designed to apply for ten years only'); 'Anti-siphoning rules for pay TV and sport', www.dcita.gov.au/nsapi-graphics (visited July 19, 1999) (quoting anti-siphoning list expiration provisions).

[61] Broadcasting Report, *supra* note 37, at 233.

[62] See ibid. at 234 (noting that the Commission is 'inclined' to recommend anti-siphoning legislation reform); 'Plan to pull plug on anti-siphoning, Sport Review', www.smh.com.au/news/9912/03/sport/sport17.html (visited Dec. 3, 1999) ('A Federal Government task force has recommended the eventual relaxation of anti-siphoning laws to allow major sports to be shown only on pay television.').

[63] See Siedlecki, *supra* note 1, at 824 (explaining the pricing strategies for broadcasters and cable operators); Horowitz, *supra* note 2, at 753 (discussing

Constitutional Law Challenges in the United States

Assuming the absence of jurisdictional and evidentiary defects similar to those found in *Home Box Office*, a professional sports league has to resort to constitutional law to challenge anti-siphoning rules. In particular, a professional sports league may assert that anti-siphoning rules violate its First Amendment rights to free speech. A professional sports league may argue that anti-siphoning rules specifically regulating sports programming are content-based regulations and thus 'presumptively unconstitutional and subject to strict scrutiny.'[64] In the alternative, a professional sports league may argue that anti-siphoning rules do not pass muster under the content neutral test of *O'Brien*. The FCC believes that *O'Brien* provides the correct First Amendment standard in this context.[65] Given the precedent of *Home Box Office* and the FCC's position, the *O'Brien* test is the First Amendment hurdle anti-siphoning rules must clear.[66]

The anti-siphoning rules at issue in *Home Box Office* failed the second and fourth prongs of *O'Brien*.[67] The court in that case, however, intimated that sufficient evidence of sports programming migration would provide the government an important and substantial interest for enacting anti-siphoning rules.[68] Hence, assuming an adequate record for future regulations, a professional sports league's First Amendment challenge to anti-siphoning rules hinges substantially on the fourth prong of *O'Brien*. That is, a professional sports league has to show that the anti-siphoning rules, as applied to it, are more restrictive than what is essential to further the government's interest in providing sports programming to those unable to afford pay television. To make this showing, a professional sports league may point to the unlikelihood of a competing free-to-air broadcaster airing its sporting contests.[69] Arguably, the application of anti-siphoning rules to a professional sports league 'curtail[s] the flow of programming to those served by cable and willing to pay for it, with a consequent loss of diversity and unnecessary restriction of … First Amendment rights.'[70]

If unsuccessful in using the First Amendment to block application of anti-siphoning rules, a professional sports league may seek to recoup any financial losses these regulations cause by asserting a regulatory takings claim under the Fifth Amendment. A professional sports league has property rights, including federal copyrights, to the accounts and descriptions of its games as well as in the telecasts of the games it produces.[71] The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation.'[72] By forcing a professional sports league to provide free access to its programming, the government arguably violates the Fifth Amendment.[73]

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considerations for airing sports event on free or pay television).

[64] Anti-siphoning Final Report, *supra* note 28, at ¶ 140 n.211.

[65] See ibid.

[66] See Siedlecki, *supra* note 1, at 834 (positing that '[a]ny new sports anti-siphoning legislation ... will have to meet' O'Brien). A complete exegesis of the proper First Amendment standard under which to analyse any future anti-siphoning rules must await enactment of such rules and their particular application to a professional sports league.

[67] See *Home Box Office*, 567 F.2d at 49, 50.

[68] See ibid. at 49-50.

[69] See ibid. at 50.

[70] Ibid.

[71] See *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490, 494 (W.D. Pa. 1938) (holding that a sports club has property rights in the 'news, reports, descriptions, or accounts' of its games).

[72] Paul W. Garnett, *Forward-Looking Costing Methodologies and the Supreme Court's Takings Clause Jurisprudence*, 7 CommLaw Conspectus 119, 120 (1999) (quoting U.S. Const. amend. V).

[73] See Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 Md. L. Rev. 57, 137 (1997) (noting that a proposed federal law that would require a professional sports club relocating to a new city to reserve its trademarks for the club subsequently locating in the former host city raises 'an intriguing Takings Clause issue').

A professional sports league's success on a Fifth Amendment claim depends on the effect the anti-siphoning rules have on the return on its business and the future direction of regulatory takings jurisprudence. To date, the Supreme Court has not extended to holders of personal property rights the same takings protection it has to holders of real property rights.[74] Under present law, a holder of a personal property right is not likely to succeed on a takings claim unless it can show that the government regulation deprives it of all economic benefit from the property.[75] A professional sports league is likely to have difficulty satisfying this test. Future anti-siphoning rules are unlikely to prohibit a professional sports league from showing any games on pay mediums. Even with a prohibition on all pay television telecasts, a professional sports league receives an economic benefit from airing its games on free-to-air television. Unless the Supreme Court increases Fifth Amendment takings protection for holders of personal property rights, a professional sports league faces a tough task in recouping from the government financial losses caused by anti-siphoning rules.

Constitutional Law Challenges in Australia

The *Australian Constitution* differs from its American counterpart in that it does not have an express 'Bill of Rights',[76] and the protection of individual freedoms from government regulation is not as great in

[74] See Garnett, *supra* note 72, at 121 (noting that the Supreme Court has not applied in the non-land use context the 'most recent tests for confiscatory regulations – essential nexus and rough proportionality,' which provide increased protection of property rights); Mitten & Burton, *supra* note 73, at 137 (noting that holders of personal property rights receive less takings protection than holders of real property rights). *See also* John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 Envtl. L. Rep. 10682, 10682 (1999) (noting that the Supreme Court has limited the 'rough proportionality' test to the exactions context).

[75] See Garnett, *supra* note 72, at 121 (noting that the Supreme Court has upheld regulated rates for common carrier rates that only provide a 'meagre return') (quoting *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 605 (1943)). See also *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ('[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim').

[76] See Peter Hanks, *Constitutional Law in Australia*, 2nd ed., 1996, p.495 (discussing rights and freedoms in Australian constitutional law).

Australia as it is in the United States.[77] For example, freedom of expression receives less protection in Australia than it does in the United States. In Australia, free speech generally extends only to 'freedom for Australian citizens to communicate on political and economic matters.'[78] A professional sports league, therefore, is not likely to be able to mount a significant challenge to the validity of Australian anti-siphoning legislation on freedom of expression grounds.

The *Australian Constitution* contains 'five individual rights clauses.'[79] One of these is contained in s 51(xxxi) which 'authorises the Commonwealth Parliament to make laws with respect to "[t]he acquisition of property on just terms from any State or person in respect of which the Parliament has power to make laws".'[80] Though it grants 'the Commonwealth Parliament with a legislative power of acquiring property,' s 51(xxxi) also 'provides the individual … affected with a protection against governmental interferences with his proprietary rights without just recompense'.[81] The Australian 'High Court has taken the view' that s 51(xxxi) generally applies to 'any Commonwealth law for the acquisition of property.'[82]

Section 51(xxxi) provides a professional sports league with a possible means to challenge the application of the Australian anti-siphoning laws.[83] Whether the anti-siphoning rules constitute an acquisition of a professional sports league's transmission rights on unjust terms is an issue of first impression in Australia. The anti-hoarding legislation states that the amendments have 'no effect to the extent' that they contravene s 51(xxxi) by authorising the acquisition of property other than on just terms.[84] Though recognising the possibility of an infringement of s 51(xxxi), the commentary to the anti-hoarding amendments concludes that resolution of this issue is for the courts.[85]

A professional sports league would appear to have a viable claim under s 51(xxxi) against the anti-siphoning laws. 'The concept of "property" under s 51(31) is very broad.'[86] The section extends 'to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action.'[87] The transmission rights to a professional sports league's sporting event in any medium are 'property' under this interpretation of the term.[88]

'[T]he acquisition of property referred to in s 51(xxxi) need not be an acquisition by the Commonwealth Government – that is, if a law of the Commonwealth

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[77] See ibid. at 495 (noting that the Australian Commonwealth Constitution provides less protection for fundamental freedoms than the American Constitution).
[78] Ibid. at 545.
[79] Ibid. at 496.
[80] Ibid. at 499 (quoting Commonwealth of Australia Constitution Act § 51(xxxi)).
[81] *Bank of New South Wales v. Commonwealth*, (1948) 76 C.L.R. 1, 349-50 (Dixon, J.) (High Ct.) (Aust).
[82] Hanks, *supra* note 76, at 500. Exceptions to the reach of § 51(xxxi) exist, but they are not relevant here. See ibid.
[83] See Media Release of Senator Richard Alston, 'Rugby League to remain on free to air television', www.dcita.gov.au/nsapi-graphics (visited July 19, 1999) (announcing that the anti-siphoning list includes the matches of News Corporation's Super League as well as any future league resulting from the merger of Super League and the ARL).
[84] Anti-Hoarding Amendments, *supra* note 54, § 146F(5).
[85] See Bills Digest No.6 1998-99, *Broadcasting Services Amendment Bill 1998,* www.aph.gov.au/library/pubs/bd/1998-99/99bd006.htm (visited March 7, 2000).
[86] Denis O'Brien, *The One That Almost Got Away – The Constitutional Guarantee of Just Terms*, (1994) 5 Public L.R. 7, 7.
[87] *Minister of State for the Army v. Dalziel*, (1944) 68 C.L.R. 261, 290 (High Ct.) (Starke, J.) (Aust). *See Georgiadis v. Australian & Overseas Telecommunications Comm'n*, (1994) 179 C.L.R. 297 (High Ct.) (Aust) (affirming that choses in action are 'property' for purposes of § 51(xxxi)).
[88] See Nick Mulcahy & Matt Rubenstein, Ballpark Figures: *The Real Cost of Sports Broadcasting Rights*, Gilbert & Tobin Publications 1, 3 www.gtlaw.com.au/pubs/ballpark.html (April 1998)

is a law with respect to the acquisition of property for a Commonwealth purpose, then the law is subject to the "just terms" requirement.'[89] 'It is immaterial whether the acquisition is to be made by the Commonwealth or by some body authorised to acquire the property by the Commonwealth.'[90] For an acquisition to occur, an interest in property must pass from the property holder to the Commonwealth or another person.[91]

Applying these principles to the present discussion, a professional sports league may argue that the anti-siphoning laws force it to pass the free-to-air television rights to its matches to commercial broadcasters. The anti-siphoning regulations serve a Commonwealth purpose.[92] The anti-siphoning rules effectively require a professional sports league to transfer its free-to-air television rights to the commercial broadcaster that offers the highest bid. The anti-siphoning laws implicitly prohibit a professional sports league from selling or using its pay television rights to a sporting event until after it sells the free-to-air rights.[93]

The 'central limiting factor' in s 51(xxxi) is the requirement of 'just terms':[94]

> In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by the government … are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is fully compensation for what is lost, the terms cannot be found to be just.[95]

The generally accepted principle is that:

> [T] he terms provided should reflect the property's market value – "the price which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of acquisition."[96]

'However, the property's particular value to the former owner must be taken into account.'[97] The terms of the acquisition may need to include compensation for loss that flows from the transfer of property from the original owner (e.g. loss of goodwill).[98]

Satisfying the 'just terms' element of s 51(xxxi) requires a professional sports league to show that the anti-siphoning laws reduce the return it receives from its pay television rights. The government is likely to argue that the property acquired under the anti-siphoning laws is the free-to-air transmission rights to the listed sporting event. A professional sports league arguably receives market value for these rights from the commercial broadcaster that submits the best offer to buy them. This argument is not persuasive. A showing by a professional sports league that a greater return is possible from showing league contests exclusively on pay television than from adhering to

(noting that the broadcasting rights to a sporting event are 'purely contractual' under Australia law).

[89] Hanks, *supra* note 76, at 505.

[90] Ibid. (quoting *P J Magennis Pty Ltd v. Commonwealth*, (1949) 80 C.L.R. 382, 423 (Williams, J.) (High Ct.) (Aust)).

[91] See ibid. at 508 (citing *Georgiadis*, 179 C.L.R. 297).

[92] Broadcasting Report, *supra* note 37, at 234.

[93] See ibid.

[94] Hanks, *supra* note 76, at 511.

[95] *Georgiadis*, 179 C.L.R. at 310-11 (Brennan, J.).

[96] Hanks, *supra* note 76, at 512 (quoting *Nelungaloo v. Commonwealth*, (1948) 75 C.L.R. 495, 507 (Williams, J.) (High Ct.) (Aust)).

[97] Ibid.

the anti-siphoning laws supports a claim that it sacrifices its property for less than its worth. Also, any differential between the return from maintaining exclusive transmission rights and selling free-to-air television rights and retaining pay television rights is another possible measure of the loss a professional sports league suffers from the anti-siphoning laws.[99]

Surprisingly, a just terms claim provides a professional sports league with a stronger challenge to the anti-siphoning rules in Australia than a regulatory takings claim does against anti-siphoning regulation in the United States. The anti-siphoning law context, therefore, provides an interesting example of where a provision of the *Australian Constitution* provides greater protection for individual freedoms than does a corresponding provision in the United States Constitution.

Conclusion

In both the United States and Australia, commercial forces are pushing more professional sports telecasts on pay television. The national government of each country has responded to public demand for the preservation of professional sports league contests on free-to-air television by passing anti-siphoning laws. Anti-siphoning laws arguably harm professional sports leagues by hampering their freedom of expression and reducing the revenues they receive from the sale of their transmission rights. Constitutional law provides a professional sports league with an effective means to challenge anti-siphoning regulations. In the United States, the First Amendment gives a professional sports league a basis upon which to charge the invalidity of anti-siphoning laws. In Australia, a professional sports league, while unable to challenge the constitutionality of the legislation, can use a 'just terms' action to recover monetary losses caused by anti-siphoning laws. Anti-siphoning regulation, therefore, is an interesting arena in which to view the interaction of public law legislation with the personal protections of constitutional democracies.

[98] See ibid.

[99] See Sutton, *supra* note 60, at 1 (querying whether the owner of a listed sporting event may seek from the government any loss profits caused by the Australian anti-siphoning laws).