

IN THE MATTER OF

COLLEGE FOOTBALL ASSOCIATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9242. Complaint, Sept. 5, 1990 -- Final Order, June 16, 1994

This final order dismisses the complaint which alleged that the College Football Association (CFA) and Capital Cities/ABC, Inc. illegally restrained competition through agreements which gave ABC exclusive rights to televise certain college football games. The final order to dismiss was due to the Commission's lack of jurisdiction over CFA, citing its not-for-profit nature. Dismissal was also determined to be in the public interest.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondents: *Michael Sibarinm, Winston & Strawn,* Washington, D.C. *Clyde A. Muchmore, Crowe & Dunlevy,* Oklahoma City, OK. *A. Douglas Melamed, James Carr, Randolph D. Moss and David P. Donovan,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

RESPONDENTS

PARAGRAPH 1. Respondent College Football Association ("CFA") is an unincorporated association with its principal place of business at 6668 Gunpark Drive, Boulder, Colorado.

PAR. 2. CFA is an organization whose members include many of the nation's major college-football-playing institutions, and which,

among other things, negotiates and administers the sale of certain college football television rights for its participating members.

PAR. 3. For the year ending December 31, 1989, CFA generated revenue of approximately \$33.75 million from the sale of college football telecast rights.

PAR. 4. Respondent Capital Cities/ABC, Inc. ("Capital Cities") is a corporation organized and existing under the laws of the State of New York with its principal executive offices at 77 West 66th Street, New York, New York.

PAR. 5. Capital Cities is principally engaged in television and radio broadcasting. ABC Television Network, one of the three major over-the-air television networks, is wholly owned by Capital Cities, which also owns 80% of ESPN, a cable sports programming service.

PAR. 6. For the year ending December 31, 1989, Capital Cities had net revenue of \$4.96 billion.

JURISDICTION

PAR. 7. Each of the respondents maintains, and has maintained, a substantial course of business, including the acts or practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

ANTICOMPETITIVE ACTS OR PRACTICES

PAR. 8. Respondent College Football Association, through agreement with and among its members pursuant to which its members have agreed not to compete with each other and the association, has entered into telecast rights agreements with telecasters that restrict competition in the marketing of college football telecasts.

PAR. 9. Respondent CFA and respondent Capital Cities (or entities owned or controlled by Capital Cities) have entered agreements which give Capital Cities exclusive telecast rights to certain college football games and which otherwise restrict competition in the marketing of college football telecasts.

ANTICOMPETITIVE EFFECTS

PAR. 10. By engaging in the acts or practices described in paragraphs eight and nine of this complaint, respondents have

unreasonably restrained competition in the following ways, among others:

(a) Competition among schools in the marketing of college football telecast has been hindered, restrained, foreclosed and frustrated;

(b) Competition among telecasters of college football games has been hindered, restrained, foreclosed and frustrated; and

(c) Consumers have been deprived of the selection of college football games that would have otherwise been televised in a competitive environment.

PAR. 11. The acts or practices of respondents described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

Commisioner Azcuenaga dissenting.*

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
JULY 29, 1991

On this date my orders dismissing the respondents were filed. By Rule 3.24(a)(2) and Rule 3.51(a), the opinions supporting those orders shall be the Initial Decision in this case, wherein, as a matter of law,

The complaint must be dismissed, without prejudice. Order re Motions to Dismiss, Coca-Cola Company of the Southwest, et al., Docket 9215, filed October 25, 1988.

ORDER DISMISSING COLLEGE FOOTBALL ASSOCIATION

I. JURISDICTION OVER CFA

A. *Prologue*

* Commissioner Owen concurs in the issuance of the complaint, except to the extent that it alleges that contractual provisions governing the minimum and maximum number of appearances of a particular member school or conference violate Section 5 of the Federal Trade Commission Act.

College Football Association (“CFA”) moves for summary decision¹ for lack of jurisdiction, asserting that it is organized as a nonprofit association and is not “organized to carry on business for its own profit or that of its members.” 15 U.S.C. 44.

Complaint counsel advance four theories for upholding jurisdiction: (1) CFA carries on business for the profit of its members, (2) the majority of its members are state agencies subject to jurisdiction, (3) CFA operates a business and not a charity, and (4) CFA members seek profits through their telecast activities.

B. *The Statute*

The starting point in determining the scope of the Commission’s jurisdiction must be the language of the statute itself. *United States v. Turkette*, 452 U.S. 576, 580 (1981).²

Section 5(a)(2) of the Act empowers the Commission “to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce.” 15 U.S.C. 45 (a)(2) (1988). Section 4 of the Act defines the term “corporations” as used in the Act to include an association that is “organized to carry on business for its own profit or that of its members.”³ 15 U.S.C. 44 (1988). Thus, under the Act, the Commission has jurisdiction over the CFA only if it is organized “for its own profit or that of its members.”

Traditionally, organizations do not “carry on business for . . . profit” unless they are organized to distribute dividends or other benefits in the nature of dividends to their members or shareholders.⁴ Comment, “Piercing the Nonprofit Corporate Veil,” 66 Marq. L. Rev. 134, 136 (1982). Moreover, an organization does not operate for

¹ If the Commission lacks jurisdiction it cannot render a summary decision but must dismiss the action without prejudice. Factual disputes may be resolved in doing so. *Cf.*, *Prakash v. American University*, 727 F.2d 1174, 1182 (D.C.Cir. 1984); *Narios Corp. v. Nat’l Maritime Union of America*, 236 F. Supp. 657, 659 (E.D. Pa. 1964), *aff’d*, 359 F.2d 853 (3rd Cir.), *cert. denied*, 385 U.S. 900 (1966).

² “The Federal Trade Commission is a creation of Congress, not a creation of judges, contemporary notions of what is wise policy. . . . The question to be answered is ‘not what the [Commission] thinks it should do but what Congress has said it can do.’” *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

³ The provision does not exempt nonprofit associations from operation of the antitrust laws; nonprofit associations are subject to suit in federal court under the Sherman and Clayton Acts. The provision, rather, limits the Commission’s jurisdiction over nonprofit organizations. Complaint counsel bear the burden of “‘affirmatively’” establishing that jurisdiction exists. *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986).

⁴ The author further explained: “That does not mean that [a nonprofit corporation] is prohibited from earning a profit. Rather, it is only the distribution of those earnings as dividends that is prohibited.” (Emphasis added.) 66 Marq. L. Rev. at 136.

profit because it distributes benefits to other nonprofit organizations. The test is whether “any excess of revenue over expenses resulting from the operation . . . is distributed to any private person or company as a profit.” *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F.2d 212, 216 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967) (interpreting the “not operated for profit” language in Robinson-Patman Act).

A corporation is subject to Commission jurisdiction if it directly⁵ or indirectly⁶ pursues profits for itself or its members. The issue is not whether CFA and its members are participating in “commercial”⁷ rather than “charitable”⁸ activities. CFA admits it conducts commercial activities.⁹ And complaint counsel have much evidence of the commercial nature of college football as practiced by CFA’s members. A nonprofit organization, however, does not jeopardize its status by selling or buying property. A nonprofit organization may obtain revenues in excess of expenses. Receipt of income in excesses of expenses, making an organization capable of self-perpetuation or expansion, is not “profit” within meaning of Section 4. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1016 (8th Cir. 1969). Nor does an organization’s nonprofit status depend upon the source of its revenues. The test instead is whether the organization’s funds are properly used for recognized public

⁵ *Ohio Christian College*, 80 FTC 815 (1972), involved an ostensibly nonprofit corporation that directly pursued profits for the individual respondent.

⁶ Cases finding jurisdiction over trade associations that indirectly pursued profits for the private persons or for-profit companies that were their members include *American Medical Ass’n*, 94 FTC 701, 926 (1976), enforced as modified, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982); *Michigan State Medical Soc’y*, 101 FTC 191 (1983); *National Comm’n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) (“NCEN was organized for the profit of the egg industry”); *Nat’l Harness Mfgs’ Assn. v. FTC*, 268 F. 705, 706-10 (6th Cir. 1920) (“persons and concerns engaged in selling at wholesale harness and saddlery goods.”)

⁷ That was the issue in *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) where the NCAA unsuccessfully asserted “that it is outside the ambit of the antitrust laws.” *Id.* at 1148. In *Hennessey* the question was whether the NCAA was engaged in “commercial” activity, since NCAA argued that the Sherman Act was intended for the business world, and not for noncommercial aspects of activities which are educational. *Id.* at 1148. The CFA does not assert an exemption from the antitrust laws.

⁸ “Charity” is only one of many recognized nonprofit activities under the federal income tax, 26 U.S.C. 501(c)(3), or under general law of nonprofit organizations, including educational, athletic, political, religious, social, and others. B.R. Hopkins, *The Law of Tax Exempt Organizations* (5th Ed. 1987) at p. 55; 19 Fletcher Cyc. Corp. Section 2:21 at p. 28.

⁹ “Business” can be carried on by nonprofit or for-profit organizations. 1 Fletcher Cyc. Corp. Section 68.05 at p. 920. Section 4 of the FTC Act assumes that an organization beyond the Commission’s jurisdiction may conduct business activity; the statute neutrally refers to an association organized to “carry on business.” The distinguishing factor is whether it does so “for its own profit or that of its members.”

purposes, rather than distributed to private persons or for-profit companies.

C. Jurisdictional Theories

1. Commercial activity theory

Complaint counsel argue that a nonprofit corporation is subject to the Commission's jurisdiction if it "is essentially a commercial enterprise." They rely on *American Medical Ass'n v. FTC*, 638 F.2d 443, 448 (2d Cir. 1980), *aff'd* by an equally divided Court, 455 U.S. 676 (1982) ("AMA"). But that case concerned whether individual, profit-seeking doctors obtained pecuniary benefits through the activities of their professional association.¹⁰

Complaint counsel also blend the jurisdictional requirement that respondent's activities affect commerce (Section 5) with the separate jurisdictional requirement that respondent must be organized for profit (Section 4). The Commission's enforcement power extends only to organizations engaged in conduct "in or affecting commerce." 15 U.S.C. 45(a)(2) (1988). Similarly, Section 1 of the Sherman Act applies only to contracts, combinations, and conspiracies "in restraint of trade or commerce." 15 U.S.C. 1 (1988). Complaint counsel argue that their test, "whether an organization is a commercial enterprise," is the same as whether an organization is "engaged in commerce" under Section 1 of the Sherman Act. Opposition at 13, n.11.¹¹ They rely on *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) and *NCAA v. Board of Regents of Oklahoma University*, 468 U.S. 85 (1984). Both cases considered whether the conduct in question constituted "trade or commerce" under the Sherman Act. Neither case addressed the separate "for profit" requirement of the FTC Act.

All parties agree that the controlling case on this jurisdictional issue is *Community Blood Bank of Kansas City v. FTC*, 405 F.2d 1011 (8th Cir. 1969), where the nonprofit corporation, Community Blood Bank, competed against two for-profit blood banks for the same customers. The Commission found that "Community and the

¹⁰ The pecuniary benefit went to AMA members who were "engaged in the profit motivated private practice of medicine. . ." 94 FTC at 926.

¹¹ This would read the "for profit" requirement of Section 4 out of the Act. Yet, Congress undoubtedly intended the Section 4 requirement to have independent meaning. *United States v. Menasche*, 348 U.S. 528, 538 (1955).

hospitals perform their functions in much the same manner as commercial entities¹² such as the commercial blood bank and ‘for-profit’ hospitals, and receive compensation for goods supplied and services rendered.” 70 FTC at 909. The Community Blood Bank employed “method[s] [that] had the practical effect of insuring that hospitals [with two exceptions] would use only blood supplied through Community.” *Id.* at 824. Nevertheless, the Eighth Circuit held that the Commission did not have jurisdiction, and it expressly ruled that the fact that Community and the for-profit blood banks functioned in the same manner and competed against each other was irrelevant. 405 F.2d at 1019.

The court held that the fact “‘that Community Blood Bank conducts its affairs in a businesslike fashion and makes profits on the sale of blood . . . is certainly of no relevance here.’” 405 F.2d at 1019 (quoting Commissioner Elman’s dissenting opinion). The court ruled that the commercial source of the income was immaterial, explaining:

A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation, and not distributed to members or shareholders, it surely does not cease to be a nonprofit corporation merely because it has income, or keeps its books and records . . . in much the same manner as commercial enterprises.

Id. at 1019-1020.¹³

The “commercial activity” test also finds no support in *Iowa State University of Science and Technology v. United States*, 500 F.2d 508 (Ct.Cl. 1974). In that case, the court held that a commercial television station owned by a state university constituted an “unrelated

¹² In *Community Blood Bank*, “both the Area Hospital Association and Community were organized to carry on business in the broadest sense;” “[t]hey had permanent paid staff [and] a place of business;” they “kept records and files, collected dues, or fees;” and Community “bought supplies for the processing of blood [and] maintained an elaborate laboratory and storage facilities.” 70 FTC at 863-864. Community’s contracts with the hospitals were “couched in terms of . . . commercial transaction[s]”; “Community paid donors \$15 per unit” while charging “the hospital a \$25 responsibility fee and a \$9 processing fee, or \$34”; “Community . . . actually secured a gross profit on several of its operations”; and “the return on its entire operation was sufficiently in excess of total expenses so that it was able to repay some of the loans which were made to it at the time of its organization.” *Id.* at 764-765, 836, 864.

¹³ After the Community Blood Bank case was decided, the Commission sought to amend Section 4 of the Act. Congress rejected the proposed amendment. H.R. Rep. No. 95-339, 95th Cong., 1st Sess. 120 (1976).

business” within the meaning of Section 511 of the Internal Revenue Code. The court explained:

Income accruing to an educational institution exempt from taxation under Internal Revenue Code Section 501(c)(3) is taxable if the income is generated by the operation of an unrelated trade or business. To be taxable, the activity in question must be (1) a trade or business, (2) regularly carried on, and (3) not substantially related, other than through the production of income, to the purpose for which the institution was granted exemption under Section 501. Treas. Reg. Section 1.513-1(a)(2).

Id. at 516. Section 511, and the court's holding in Iowa State University, however, bear no relation to the question whether the Commission may assert jurisdiction over the CFA.

College football television revenues are not unrelated business income under Section 511 and the Iowa State University case. Internal Revenue Service rulings hold that the CFA's sale of college football telecast rights does not constitute an “unrelated business.”¹⁴

Complaint counsel argue that the Iowa State University case establishes that it is the “source” of the funds received, and not their “destination,” that determines whether the Commission has jurisdiction over an association under Section 4 of the FTC Act.¹⁵ The “source” of the income standard that was applied in the Iowa State University case is tied directly to the language that Congress used in creating the unrelated business tax,¹⁶ and has nothing to do with the

¹⁴ Revenue rulings relied upon by the CFA stress that “[t]he broadcasting of the organization's . . . regulated athletic events promotes the various amateur sports, fosters widespread public interest in the benefits of its nationwide amateur athletic program, and encourages public participation.” Rev. Rul. 89-295, 1980-2 C.B. 194, 195.

¹⁵ Before 1951 the Internal Revenue Code exempted from income tax corporations organized and operated exclusively for charitable purposes, and some courts held that colleges could obtain exempt income by owning for-profit corporations, engaged solely in business, the profit from which went exclusively to the nonprofit college, because it was the use of the income which indicated the nonprofit purpose, *e.g.*, *C.F. Mueller Co. v. Comm. of Internal Revenue*, 190 F.2d 120 (3rd Cir. 1951) (New York University Law School obtained exempt income from a company making and selling spaghetti.) Noticing the loss of tax and the impact on for-profit companies by such tax exempt competitors, Congress then imposed a new tax on the institutions' “unrelated business taxable income.” Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 Columbia L.R. 1430, 1432-34 (1980). The new statute shifted the focus from the use of the income, *C.F. Mueller Co.*, 190 F.2d at 121, to the method of procuring the funds. *Iowa State University*, 500 F.2d at 518-19. Thereafter, the “source” of the income was the important consideration in determining the exemption. . . .” *Id.*

¹⁶ Some courts used the source of income test to tax such commercial organizations even before the feeder exclusion was added by the Revenue Act of 1950, *e.g.*, *University Hill Foundation v. C.I.R.*, 446 F.2d 701, 703-04 (9th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). The unrelated business income amendment eliminated any doubt.

FTC Act. The Internal Revenue Code defines “unrelated business taxable income” to mean “the gross income derived by any organization from any unrelated trade or business.” 26 U.S.C. 512(a)(1) (1988). (Emphasis Added.) Section 4 of the FTC Act, in contrast, asks whether the association “is organized to carry on business for its own profit or that of its members.”¹⁷ 15 U.S.C. 44 (1988). And, as shown above, an association is “organized to carry on business for . . . profit” only if it can distribute the excess of revenue over expenses to shareholders or other private interests. The cases decided under Section 4 hold that the relevant test is “how [the organization] disposed of [its] profits.” *Ohio Christian College*, 80 FTC at 848; *Community Blood Bank*, 405 F.2d at 1019.

Commercial activity by CFA or its members does not constitute carrying on business for profit under the statute.

2. State school theory

Complaint counsel argue that the Commission has jurisdiction over the CFA because many of its members are state instrumentalities -- and thus “persons” -- which receive pecuniary benefits from the CFA. They argue that cases like *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), and *City of Minneapolis*, 105 FTC 304 (1985), show that the Commission has jurisdiction over state agencies as ‘persons’ acting in a proprietary capacity. They do not allege that the state schools distribute any part of the telecast funds to individuals or firms who seek monetary gain. Rather, they concede that the “state schools act in the public interest and do not distribute revenue to shareholders. . .” Opposition at 27.

Complaint counsel argue that action against the CFA is more efficient than action against CFA’s members. Opposition at 24-25. Jurisdiction, however, is a question of adjudicative power, not of convenience. *Finley v. United States*, 490 U.S. 545 (1989). Nor does the AMA case support the argument. In AMA a trade association was subject to the Commission’s jurisdiction because it operates to generate profits for private, profit seeking members. 94 FTC at 983. Here, the television revenues go, not for the profit of its members, but

¹⁷ A literal reading of the statute would seem to mean that Commission jurisdiction is based solely on a nonprofit association’s organizational purpose, and not its operation. It is uncontested that CFA is organized as a nonprofit association.

through CFA to the members to be used for tax exempt public purposes of education and amateur athletics.

Moreover, the Eighth Circuit in *Community Blood Bank* held that the Commission lacked jurisdiction over the Kansas City Area Hospital Association because the Association -- like the CFA -- was not organized for profit. The court reached that result, even though 12 of the Association's members were "instrumentalities of federal, state, county, or local governments," 70 FTC at 767.¹⁸

3. Piercing the corporate veil

Complaint counsel argue that "the CFA is not truly a charitable enterprise," and they maintain that they seek "to pierce the nonprofit veil of the enterprise." They also promise to pierce the corporate veil of the state schools and show that their football programs are businesses. Tr. 109.¹⁹

These arguments are essentially the same as the commercial activity theory. But even if it were alleged that profits are being dispersed to profit seeking entities,²⁰ respondents have credibly asserted the lack of such evidence (findings 7 and 10, *infra*), and complaint counsel have offered no evidence in support. This action cannot continue based on possibility. In this situation, a party opposing a motion for summary judgment "must come forward with concrete evidence indicating the existence of a genuine issue of material fact," *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 1495 (D.C. Cir. 1984), and cannot rest on "conclusory allegations," *De Leon v. St. Joseph Hosp., Inc.*, 871 F.2d 1229, 1236 (4th Cir), *cert. denied*, 110 S. Ct. 87 (1989).

D. CFA's Nonprofit Purposes

Federal tax law recognizes several proper nonprofit purposes, including, charitable, educational, scientific, religious, literary, and

¹⁸ Here, CFA's 66 member colleges include three federal, 14 private and 49 state institutions. Appendix to CFA's Motion for Summary Judgment, March 19, 1991.

¹⁹ Even if they could prove that college football is a commercial enterprise, the jurisdictional test is whether the revenues are going to private individuals directly or as dividends.

²⁰ Complaint counsel argue that some coaches receive high salaries. In order to show that the CFA schools are operating their football programs "for profit" within the meaning of Section 4 of the FTC Act, complaint counsel would have to show, that their athletic programs are actually run by the coaches in order to generate profits for themselves -- paid out as dividends disguised as phony salaries. Complaint counsel do not allege, however, that any private person or for-profit company is receiving such disguised "profits" from the CFA or the colleges.

promoting amateur sports competition. 26 U.S.C. 501(c)(3). CFA promotes both amateur sports competition and education.

1. Amateur athletic competition

College football and television exposure of college football have nonprofit purposes. In 1976, Congress amended Section 501(c)(3) to include as a proper nonprofit purpose "fostering national or international amateur sports competition." P.L. 94-455, Section 1313, 1976 U.S. Code Cong. & Ad. News (90 Stat.) Vol. 1, p. 1730. Inclusion of amateur sports competition within Section 501(c)(3) rendered pursuit of this purpose -- by itself -- a sufficient basis upon which to confer nonprofit, tax exempt status. 26 CFR 1.501(c)(3)-1(d)(1)(iii).

CFA, through its television contracts and other programs fosters intercollegiate football and that in itself is a proper nonprofit purpose.²¹

2. Educational purpose

CFA promotes educational purposes. Congress and the IRS have already determined that athletics has value to education and that football television has value to athletics.

The Senate and House Committee Reports constituting the legislative history of the "unrelated income" tax laws state:

Athletic activities of schools are substantially related to their educational functions. For example, a university would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students from other schools.

S. Rep. No. 2375, 81st Cong., 2nd Sess. (1950) at 29; H. Rep. No. 2319, 81st Cong., 2nd Sess. (1950) at 37.

Internal Revenue Rulings state that an athletic organization's sale of telecasting rights of an athletic event is not an unrelated trade or business under IRC Section 513 (the unrelated business income statute), and that a university's television contracts, whether through an athletic association or otherwise, are related to its exempt purpose

²¹ CFA's organizational documents show that its purpose fosters national amateur sports competition (App. Tab 4, p.1, Art. II). Complaint counsel apparently concede this point. "([S]tate schools act in the public interest and do not distribute revenue. . . .") Opposition Brief at p. 27.

within the meaning of Section 513. See the Revenue Rulings attached as Exhibits "B," "C," and "D" to CFA's Supplemental Brief, Rev. Rul. 80-296, 80-295, and 80-294, respectively. In Private Letter Rulings, the IRS scrutinized whether a large university which was a member of a national athletic association realized unrelated income from the sale, by the athletic association, of the telecasting rights for the university's football games.²² The IRS explained some of the purposes served by public exposure of a football game:

For example, an audience for a game may contribute importantly to the education of the student-athlete in the development of his/her physical and inner strength and to the education of the student body and the community-at-large in heightening interests in and knowledge about the participating schools. In regard to the student-athlete, the knowledge that an event is being observed heightens its significance, which raises the levels of both competitive effort and enjoyment. Attending the game enhances student interest in education generally and in the institution because such interest is whetted by exposure to a school's athletic activities. Moreover, the games (and the opportunity to observe them) foster those feelings of identification, loyalty, and participation typical of a well-rounded educational experience.²³

95 IRS Letter Rulings, CCH Reports 7851002, Dec. 26, 1978.

The CFA's television rights to college football games, with the proceeds going to the schools to help support their athletic programs,²⁴ have a nonprofit educational purpose.

3. CFA's nonprofit status

In determining whether an organization is carrying on business for "profit," the Commission and the courts defer to an IRS determination that the organization qualifies as tax exempt under Section 501(c)(3). The reason for this respect is in *American Medical Ass'n*,

²² IRS Private Letter Rulings 7851002, 7851005, and 7851006, 95 IRS Letter Rulings, CCH Reports, Dec. 26, 1978.

²³ While private letter rulings do not have precedential value, the rationale makes sense, and the Revenue Rulings attached to CFA's Supplemental Brief, which incorporate the same holdings, represent the official position of the Internal Revenue Service. 26 CFR 601, Section 601.601. They are entitled to "great deference." *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1411-12 (2d Cir. 1985).

²⁴ Football television revenues on the average comprise one-fifth of one percent of a university's total expenditures, and about 5% of a university athletic department's expenditures. Exhibit A to CFA's Reply filed May 17, 1991. CFA does not pay the television revenues directly to any athletic department of its members. It remits the revenues to the college or university, or for some institutions, to the regional athletic conference of which the member is a participant, which then distributes the revenues to the conference's members, CFA Submission of July 25, 1991.

94 FTC 701, 989-990 (1979), where the Commission distinguished Community Blood Bank. The Commission explained that the respondents' inability to qualify under Section 501(c)(3) set them apart from the KCAHA. The Commission stated that failure to qualify under Section 501(c)(3) did not lead inexorably to the conclusion that there was jurisdiction:

Of course, failure to qualify as tax exempt under Section 501(c)(3) does not by itself necessarily mean that a respondent is within the reach of Section 4 of the FTC Act, since, as we have discussed supra, the pecuniary benefit of its activities to its members must constitute a substantial part of its activities under Section 4.

94 FTC at 990 and n.17. Thus, while an IRS determination that an organization does not qualify as tax exempt under Section 501(c)(3) necessitates further inquiry under the Commission's "substantiality" test, an IRS determination "that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded." 94 FTC at 990.²⁵

4. Distribution of funds to nonprofit members

The money CFA pays to its members does not represent a distribution of profits. A distribution of funds by one nonprofit organization to another nonprofit organization is permitted, *National Foundation v. United States*, 13 Cl.Ct. 486, 492 (Cl.Ct. 1987). Since CFA's members are nonprofit organizations, CFA may distribute revenues to them without losing its own nonprofit status.

II. FINDINGS OF FACT

Complaint counsel have failed to raise disputed issues of fact that could support a finding of jurisdiction. All of the facts placed in issue by complaint counsel concern whether the CFA is involved in

²⁵ The importance of tax exempt status in determining whether an organization is nonprofit is also reflected in other cases. In *Ohio Christian College*, 80 FTC 815, 848 (1972), in taking jurisdiction over an educational corporation the Commission relied upon a similar case where the IRS "found that because of the lax financial dealings with the founders of the school, it was not in fact an exempt corporation." 80 FTC at 848. In *Community Blood Bank*, the court found that the corporations were organized under Missouri's not-for-profit corporation law, that 43 of 45 of the corporate respondents, members were also organized under nonprofit corporation laws or were instrumentalities of federal, state, county or local governments, and that: "All satisfied the requirements of the federal law entitling them to exemption from federal income tax liability." 405 F.2d at 1020, n.16.

“commercial” activity.²⁶ However, this question bears no relevance to the jurisdictional test set out in the Federal Trade Commission Act. The factual disputes alleged by complaint counsel are, as a matter of law, not material to the jurisdictional issue.

CFA’s motion for summary decision is supported by evidence demonstrating that neither it nor its members operate for profit.²⁷ The facts relating to the lack of subject matter jurisdiction in this case are genuinely undisputed, or are immaterial to the issue. Specifically, there is no genuine dispute that:

- (1) CFA is organized and operated as a nonprofit association;²⁸
- (2) CFA’s tax exempt status under Section 501(c)(3) has been recognized by the IRS. Admitted, Opposition Brief filed Apr. 22, 1991 at p. 31, paragraph 2;
- (3) CFA’s directors and officers are not paid, and CFA’s staff, including its executive director, are paid salaries to compensate for services rendered;²⁹

²⁶ An order on March 28, 1991, directed that complaint counsel set forth “a statement of facts as to which, it is contended, there exists a genuine issue necessary to be litigated.” Order re Summary Decision Motions. Complaint counsel replied that the “CFA’s organizational objectives include acting in the economic interests of the big-time football programs of its members,” that the “CFA . . . is essentially a commercial enterprise,” that the “CFA has at least one paid official,” that “most of the members with [the] CFA are state instrumentalities,” that “[t]elevision football is the major CFA function,” that CFA members use revenues received from the CFA “to enhance the athletic programs of [the] CFA members,” and that “Mr. Neinas does not explain [in his affidavit] the destination of . . . \$2,955,500 that [the] CFA received from its television contracts.” Opposition at 31-33. Even if true, these allegations would not support jurisdiction.

²⁷ CFA provided additional support in a Supplemental Brief, with accompanying exhibits, filed on April 5, 1991. Appendix A to that Brief demonstrates that the CFA does not retain net earnings from year-to-year and does not distribute earnings to any individual or for-profit organization. The appendices to CFA’s Motion for Summary Decision show that no member of the CFA is a for-profit organization.

²⁸ Neinas Tr. (Tab 2) attached to Appendix to CFA’s Motion for Summary Decision, at 7-8; Tab 3 paragraphs 2 and 3; Tab 4, p. 1 Art. II.

Money from the sale of television rights is used to sustain college football programs and promote amateur athletic competition, a recognized public purpose for nonprofit status. Complaint counsel rely on the affidavit of a professor at Indiana University who asserts that CFA is a commercial enterprise. The affidavit does not raise a factual dispute. CFA agrees that the sale of its members’ television rights is a business activity. That, however, is not relevant to the question of whether the activity is carried on for profit.

²⁹ Tab 73, Neinas Aff’d., paragraph 2. Complaint counsel asserts that the payment of a salary to CFA’s Executive Director, Charles M. Neinas, is the payment of revenues to “officer.” Opposition Brief at p. 8, n.7. The officers of the CFA are described in its Articles of Association, Tab. 4, p. 4, Art. V, paragraph 4. They consist of a chairman and a secretary/treasurer, neither of whom is paid a salary. Tab. 73, Neinas Affid., paragraph 2. Mr. Neinas is employed as executive director of the CFA, not as an officer. *Id.*, paragraphs 1 and 2. Moreover, there is no prohibition of a nonprofit organization paying reasonable compensation for services rendered by an officer. *E.g.*, 1 Fletcher Cyc. Corp. Section 68.05 at p.919. CFA’s articles accordingly permit such payments. Tab 4, P.6, Art. IX, paragraph 1. What is prohibited is net earnings inuring to private interests.

(4) CFA's audited financial statements show that the proportion of cumulative television revenues used to pay salaries and employee benefits has been a fraction of 1%;³⁰

(5) CFA's members all are organized under applicable nonprofit laws or as state or federal instrumentalities;³¹

(6) Television football has become a major function of CFA, enhancing the quality of its members football programs and sustaining viewer interest in such programs;³²

(7) The television revenues earned by the sale of CFA's members, football telecasting rights are used by the institutions for their proper non-profit purposes, including sustaining their athletic programs;³³

(8) CFA negotiates and signs the television contracts, receives the revenues, and makes payments to the membership. All CFA members receive "participation pool" payments and those which are actually televised receive appearance or rights fees. (Admitted, Opposition Response Brief, p. 33, paragraph 8.);

(9) CFA is obligated to pay the rights fees within 90 days after a game has been played, and makes the participation payments in June following the football season in which the games are played, investing the funds in the interim in conservative investments. (Admitted, Opposition Response Brief, p. 33, paragraph 9.);

(10) The earnings on investments of television revenues are used to pay CFA's administrative expenses for the television plan; CFA attempts to pay all of the television revenues to its members and is largely successful in doing so; and³⁴

³⁰ The salaries and benefits are included in the audited financial statements, CFA's Supplemental Brief, Ex. A, within the itemization column for "expenses."

³¹ It is undisputed that all of CFA's members are tax exempt. As to whether CFA's members are nonprofit, the dispute is not factual (complaint counsel's Opposition, filed Apr. 22, 1991 at pp. 31-32, paragraph 5). The state institutions are promoting the same public interests as the private ones, and many have obtained Section 501(c)(3) status, solely as a convenience. See IRS letters under Tabs 29, 32, 34, 40, 43, 51, 59, 60, 61, 63, 64 and 70. Donations to the state institutions for their public purpose functions are deductible as "charitable contribution" under IRC Section 170(c). See IRS letters under Tabs 24, 25, 27, 29, 30, 32, 34, 36, 37, 56, 58, 64, and 65.

³² Tab 2, Neinas Tr. at 25-29, 32, 175-79, 216-17; Ex. K to complaint counsel's Opposition, at p. 215.

³³ Tab 2, Neinas Tr. at 214-15. Television revenues enhance the educational programs of CFA members as well as their amateur athletic competitors, regardless of their commercial source, *supra*.

³⁴ Neinas Tr. at 182-83. CFA has distributed 98% of the revenues remaining after production costs for its previous contracts with CBS and ESPN. Tab 73, Neinas Aff'd., paragraph 4. The remaining 2% is held in escrow until CFA's final expenses are determined; none of the net revenues are retained by the CFA. Tab 73, Neinas Aff'd., paragraph 4.

(11) Of the revenues obtained under the television contracts, CFA retains only that portion of gross revenues necessary to pay its administrative expenses relating to administration of the television plan and contracts.³⁵

What quarrels exist or are purported to exist with respect to these basic facts are not material to resolution of the jurisdictional issue.

III. CONCLUSIONS OF LAW

1. Section 5(a)(2) of the FTC Act limits the jurisdiction of the Commission to “persons, partnerships, or corporations,” 15 U.S.C. 45(a)(2).

2. Section 4 of the FTC Act defines “corporation” for purposes of Section 5(a)(2) to include an association “which is organized to carry on business for its own profit or that of its members.” 15 U.S.C. 44.

3. CFA is organized and operated as a nonprofit association under 26 U.S.C. 501(c)(3), Internal Revenue Code (“IRC”). CFA’s tax-exempt status under IRC Section 501(c)(3) has been recognized by the Internal Revenue Service (“IRS”).

4. A nonprofit organization is exempt under Section 4 and Section 5 of the FTC Act unless the organization is only ostensibly organized not-for-profit, and is actually used as a vehicle to obtain profit. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969). *Cf. FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied*, 426 U.S. 919, 49 L.Ed.2d 372 (1976).

5. “Profit” within the meaning of Section 4 of the FTC Act does not include the use by a nonprofit organization of net revenues for its own self-perpetuation or expansion. *Community Blood Bank*, 405 F.2d at 1016.

6. A determination by the IRS, that a respondent organized and operated for purposes recognized as conferring nonprofit status under Section 501(c)(3) should not be disregarded. *American Medical Ass’n, et al.*, 94 FTC 701, 989-990 (1979), *aff’d sub. nom., American Medical Ass’n v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided court*, 455 U.S. 676, 71 L.Ed.2d 546 (1982).

³⁵ Tab 73, Neinas *Aff’d.*, paragraphs 3-5; Tab 2, Neinas *Tr.* at 182-83.

7. The television contracts here promote the purposes for which CPA has been conferred tax-exempt status under IRC Section 501(c)(3), including the fostering of national amateur sports competition. Rev.Rul. 80-296, 1980-2 C.B. 195; Rev.Rul. 80-295, 1980-2 C.B. 194; Rev.Rul. 80-294, 1980-2 C.B. 187. (Exhibits B-D to CFA's Supplemental Brief filed Apr. 5, 1991.)

8. CPA does not carry on business for its own profit within the meaning of Section 4 of the FTC Act.

9. CFA's members are comprised of (a) federal instrumentalities, (b) state public educational institutions, and (c) private nonprofit educational institutions.

10. Federal instrumentalities are nonprofit, tax-exempt organizations. IRC, Section 115(2). State educational institutions are also nonprofit, tax-exempt organizations. IRC Section 115(1).

11. CFA's members which are private organizations are all nonprofit, tax-exempt organizations under Section 501(c)(3).

12. A nonprofit organization may distribute revenues to and for the benefit of other nonprofit organizations while retaining its nonprofit status. Rev.Rul. 67-149, 1967-1 C.B. 133; *National Foundation, Inc. v. United States*, 13 Cl.Ct. 486 (1987).

13. That a nonprofit organization has as members "persons" within the meaning of Section 5 of the FTC Act is insufficient to confer jurisdiction over the organization under Section 4 of the FTC Act. In *Community Blood Bank*, of the 43 member hospitals of KCAHA, 12 were instrumentalities of federal, state, or local governments and 2 were organized as proprietary corporations. 70 FTC at 767.

14. CFA is not organized and does not carry on business for the profit of its members, and has no members which are organized or operated for-profit.

ORDER

College Football Association is a nonprofit association which does not carry on business for its own profit or that of its members, within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44. The complaint against the CFA must therefore be dismissed for lack of jurisdiction by the Commission over the CFA.

ORDER DISMISSING CAPITAL CITIES/ABC, INC.

This case involves the sale of college football telecast rights by College Football Association to Capital Cities/ABC, Inc. An order has been entered dismissing College Football Association on the grounds that it is not organized for its own profit or that of its members, and therefore is not subject to Commission jurisdiction. Respondent Capital Cities also now seeks dismissal.

Where public rights are involved one party to a contract may be sued without joining the other. *Pepsi Co., Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973). Here, however, the restriction on the Commission's power to proceed against CFA should not be circumvented by seeking to enjoin the other party to the arrangement.¹ A jurisdictional limitation should not be attacked collaterally:²

the distinction made in the Act between corporations acting for profit and nonprofit corporations would be erased if all the Commission had to do, in order to obtain jurisdiction, was to name the officers, directors and other personnel of a nonprofit corporation as the respondents.³

Complaint counsel argues that "there is a separate and distinct monopolization count against Capital Cities for buying multiple college football telecast packages." Complaint counsel's nonbinding statement filed Oct. 26, 1990, briefly refers to a theory of violation by Capital Cities involving its aggregating exclusive college football telecast "packages" and gaining anticompetitive advantage over competing telecasters.⁴ The complaint, however, lacks allegations of monopoly power or purpose, or any reference to a theory of violation by Capital Cities separate from the arrangement with CFA.

The complaint must be dismissed, without prejudice, to allow the Commission to consider whether to proceed against Capital Cities

¹ Cf. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1022 (8th Cir. 1969) ("the Commission is not entitled to acquire jurisdiction otherwise lacking over the nonprofit by indirection, that is, by enforcing its order against the pathologists, administrators or key employees of the corporation"); *Ohio Christian College*, 80 FTC 815, 844-45 (1972) ("to circumvent a legislative restriction of the Commission's authority over certain classes of companies by issuing orders against all individual officers, agents, directors or trustees would be contrary to the intent of Congress").

² *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc.*, 632 F.2d 680, 692-93 (7th Cir. 1980)

³ *Community Blood Bank*, 405 F.2d at 1021 (quoting from Commissioner Elman's dissenting opinion).

⁴ This theory is on page 27 of the nonbinding statement and is attached as an appendix.

alone. *Capital Records Distributing Corp.*, 58 FTC 1170, 1173 (1961).

APPENDIX

This is page 27 of the nonbinding statement.

telecasters, enlarge its own college football audience, and increase the price of advertising during college football.³⁷

The network and time period exclusivity provisions obviously prevent other telecasters from competing with ABC and ESPN for viewers and advertising revenues.³⁸ Additionally, by purchasing the exclusive CFA package (and adding it to the exclusive Big Ten/Pac-10 package it already held), Capital Cities recognized that it would be able to reduce the number of college football network exposures, thus decreasing the available time for advertising and giving it the ability to charge college football advertisers a significant premium.³⁹

OPINION OF THE COMMISSION

BY STEIGER, *Chairman*:

I. INTRODUCTION

On September 5, 1990, the Federal Trade Commission issued an administrative complaint alleging, *inter alia*, that respondents College Football Association ("CFA") and Capital Cities/ABC, Inc. ("Capital Cities") had unreasonably restrained competition in the marketing of college football telecasts and among telecasters of college football games. Administrative litigation ensued. Both CFA and Capital Cities filed motions to dismiss for lack of jurisdiction

³⁷ The evidence will show that the benefits that Capital Cities receives from its participation in the exclusive CFA agreements is not unintended: Capital Cities has continually sought college football exclusives for both ABC and ESPN. This conduct -- Capital Cities' seeking (and obtaining) the collective agreement of CFA schools to refuse to deal with other networks and to restrict their dealings with all other networks and to restrict their dealings with all other telecasters -- amounts to the activities of a boycott ringleader. *Klor's*, *supra* note 36 (one retailer received agreements from multiple suppliers that they would boycott a competing retailer).

³⁸ Moreover, the restrictions are beneficial to ABC in that, if the network's affiliates wish to show a CFA game at the time ABC is telecasting a CFA game, they must show the ABC game because no competing CFA game may be telecast during that period. Affiliates are thus deterred from preempting the network programming.

³⁹ Indeed, by aggregating the exclusive CFA package with previously acquired packages, Capital Cities can gain an anticompetitive advantage over competing telecasters. See *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1302-03 (9th cir. 1982) (a single innocuous contract may belong to a pattern of contractual relations that significantly restrain trade in the relevant market). *cert. denied*, 459 U.S. 1009 (1982).

based on the assertion that CFA is a nonprofit association which does not carry on business for its own profit or that of its members. After oral argument, on November 13, 1990, Administrative Law Judge James P. Timony denied both motions. PC Tr. 110-11.¹ In a subsequent written order, the Administrative Law Judge explained that CFA's motion raised a "close question" that could not be decided "in the absence of a record." Order re CFA's Motion to Dismiss at 1, 3 (December 27, 1990).

Following nine months of discovery,² CFA and ABC filed renewed motions for summary decision and/or to dismiss based on CFA's nonprofit status. On July 29, 1991, the Administrative Law Judge issued an Initial Decision finding that the Commission lacked jurisdiction over CFA and ordered that the complaint against CFA be dismissed without prejudice. On that same date, Judge Timony further ordered that the complaint against Capital Cities be dismissed without prejudice, to allow the Commission to consider whether to proceed against Capital Cities alone. Complaint counsel have appealed from these orders. For the reasons set forth below, the complaint as to CFA is dismissed for lack of jurisdiction. Under the circumstances of this litigation, we find it in the public interest to dismiss the complaint against CFA with prejudice, and the complaint as to Capital Cities is dismissed without prejudice.

As discussed more fully *infra* in Section III, respondent CFA is an unincorporated association of 66 colleges and universities. It is formally organized under its articles as a nonprofit association. It is treated as exempt from federal income taxation under Internal Revenue Code Section 501(c)(3), 26 U.S.C. 501(c)(3). All of CFA's members are organized under state nonprofit laws or as state or federal instrumentalities. CFA negotiates and signs contracts for televising college football games involving its members. It distrib-

¹ The following abbreviations are used in this opinion:

ID	Initial Decision
IDF	Initial Decision finding number
PC Tr.	Transcript of prehearing conference (November 13, 1990)
OA Tr.	Transcript of Commission oral argument (January 30, 1992)
CCAB	Complaint Counsel's Appeal Brief
CFAB	Brief of Appellee College Football Association
CCRB	Complaint Counsel's Reply Brief

² Depositions of 41 witnesses were conducted and over 4,000 pages of transcripts--in addition to interrogatory responses and document productions--were generated. Although discovery was substantial, it was not complete at the time of the Initial Decision.

utes the revenues derived from these contracts to its members after deducting a portion to cover its administrative expenses.

Respondent Capital Cities owns the ABC Television Network and 80% of ESPN, a national cable television network. Answer of Capital Cities/ABC, Inc. (October 19, 1990) (admitting allegations in paragraph five of complaint). ABC and ESPN have entered contracts with CFA to telecast certain games of its members during the 1991 through 1995 college football seasons. *Id.* (admitting certain allegations in paragraph nine of complaint); Appendix to CFA's Motion for Summary Decision (March 1991), Tab 73, Neinas Affidavit at paragraph 3.

The Initial Decision concludes that CFA is not subject to the Commission's jurisdiction because it is not organized and does not carry on business either for its own profit or for the profit of its members. Complaint counsel challenge both of these conclusions. They argue that CFA is essentially a commercial entity and that the Administrative Law Judge erroneously assessed CFA's status by formulating a faulty legal standard, according undue deference to the determinations of the Internal Revenue Service, and failing to resolve factual disputes in favor of complaint counsel, as required by summary decision law. They also argue that under governing precedents CFA is organized for the profit of its members regardless of whether those members are within the Commission's jurisdiction. Moreover, complaint counsel contend that the Commission's jurisdiction over approximately three-fourths of CFA's members (the state colleges and universities) as "persons" under the Federal Trade Commission Act provides a further basis for the Commission's jurisdiction over CFA. We address these contentions below.³

The parties below moved for summary decision, and the case was presented, briefed, and argued on that basis. Federal courts have held that the standard for summary judgment may be appropriately used in deciding a jurisdictional issue, once there has been some discov-

³ The Administrative Law Judge also determined that the complaint against Capital Cities should be dismissed without prejudice "to allow the Commission to consider whether to proceed against Capital Cities alone." Order Dismissing Capital Cities/ABC, Inc. at 2 (July 29, 1991). Capital Cities argues that the Administrative Law Judge's order should be affirmed but concedes that the Commission is "free to initiate a case solely against Capital Cities on the basis of an investigation that is focused upon Capital Cities and addresses the necessary elements in such a case, and after Capital Cities has had an opportunity to address the issues that would be raised by such a case." Answering Brief of Capital Cities/ABC, Inc. at 53-54. In view of its disposition of the jurisdictional arguments raised with respect to CFA, the Commission has determined to dismiss the complaint against Capital Cities without prejudice.

ery. *Ball v. Metallurgie Hoboken-Overpelt. S.A.*, 902 F.2d 194, 196-98 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990). Thus, the Commission's analogous rules for summary decision will be used in deciding this appeal.

II. THE LEGAL STANDARD

The jurisdictional inquiry is governed by two sections of the Federal Trade Commission Act. Section 5 of that Act, as amended, 15 U.S.C. 45, provides:

The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

The term "*corporation*" is defined in Section 4, as amended, 15 U.S.C. 44:

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

The statute does not define the phrase "organized to carry on business for . . . profit." The legislative history provides no direct guidance.

The Initial Decision defines this phrase with a single-pronged test based on the destination of the income. It finds that CFA's income is never distributed to private individuals or for-profit corporations and treats this as determinative. Thus, the Initial Decision states:

Nor does an organization's nonprofit status depend upon the source of its revenues. The test instead is whether the organization's funds are properly used for recognized public purposes, rather than distributed to private persons or for-profit companies.

ID at 4. It elaborates:

an association is "organized to carry on business for . . . profit" only if it can distribute the excess of revenue over expenses to shareholders or other private interests.

Id. at 7 (emphasis in original).

We find the Initial Decision's definition too narrow. While we agree that the distribution of funds to private persons or for-profit companies as opposed to their use for "recognized public purposes" is one basis for finding an entity to be "organized to carry on business for . . . profit," we conclude that the source of the income provides another basis for such a finding. At least when a corporation has entered the mainstream of commercial activity,⁴ an adequate nexus is required between its activities and its alleged public purposes if the corporation is to qualify for Section 4's not-for-profit exemption.⁵

This broader, two-pronged definition looks to the totality of the circumstances. A corporation both engages in operations and reaps the fruits of those activities. The Initial Decision focuses solely on the distribution of the latter, disregarding the corporation's activities themselves. Such a limited focus surely is unjustified from the perspective of antitrust enforcement: the role of a corporation in the competitive process appears as closely linked to the character of its activities as to the nature of the recipients of its revenues. Nor does such limited focus appear justified from the perspective of the allegedly not-for-profit corporation: as discussed below in connection with the Internal Revenue Code, when Congress has clearly delimited the circumstances for according advantages to not-for-profit entities, it has mandated attention to the relationship between their activities and their professed public purposes.

The two-pronged test is suggested first by the case law. The primary judicial analysis of Section 4's for-profit standard is presented in the opinion of the United States Court of Appeals for the Eighth Circuit in *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). That court rejected a Commission ruling that a corporation lacking capital stock or shares of capital is organized to carry on business for its own profit when it receives fees, prices or dues and is not prohibited by its charter from

⁴ We do not deal here with the situation where an organization engages in occasional or isolated ventures outside the scope of its public purposes. Rather, the inquiry before us involves evaluation of CFA's systematic and pervasive operations in marketing college football telecast rights.

⁵ Although the definition of "corporation" in Section 4 literally focuses on how a corporation is "organized," the standard has been interpreted consistently to encompass considerations involving an entity's operation as well as its formal organizational status. See, e.g., *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1018-19 (8th Cir. 1969) ("we do not mean to hold or even suggest that the charter of a corporation and its statutory source are alone controlling the reality of their being in law and in fact charitable organizations places them beyond the reach of the Act"). CFA concedes that "the test of FTC jurisdiction is whether the defendant is organized and operated as a not-for-profit corporation as that term is commonly understood." CFAB at 10 (emphasis added).

devoting any excess of its income over expenditures to its own use, *i.e.*, for its own self-perpetuation or expansion. The court concluded that the test to be applied in determining whether a non-stock corporation, no less than a corporation having capital stock, is exempt “is whether it engages in business for profit within the traditional and generally accepted meaning of that word.” *Id.* at 1017 (emphasis in original). The court then expressly held:

[U]nder Section 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital which are organized for and actually engaged in business for only charitable purposes, and do not derive any “profit” for themselves or their members within the meaning of the word “profit” as attributed to corporations having shares of capital.

Id. at 1022 (emphasis added). The court thus established a two-pronged test looking both to the source of the income, *i.e.*, to whether the corporation is “organized for and actually engaged in business for only charitable purposes,” and to the destination of the income, *i.e.*, to whether either the corporation or its members derive a profit.

A similar two-pronged standard is clearly articulated in the analogous body of federal law which governs treatment of not-for-profit organizations under the Internal Revenue Code. The Commission has long recognized that “[w]hile the terms employed in other statutes and the interpretation adopted by other agencies are not controlling, the treatment of exemptions for nonprofit corporations by other branches of the Federal Government is helpful.” *Ohio Christian College*, 80 FTC 815, 848 (1972). *See American Medical Ass’n*, 94 FTC 701, 990 (1979) (finding an entity’s tax-exempt status “certainly one factor to be considered” and observing that “a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded”), enforced as modified, 638 F.2d 443 (2d Cir. 1980), *aff’d* by an equally divided court, 455 U.S. 676 (1982) (“AMA”). The Internal Revenue Code delineates the circumstances under which Congress, at least in one context, has been willing to exempt not-for-profit organizations from the burdens of federal laws.

Section 501(c)(3) of the Internal Revenue Code provides an exemption from income taxation for;

[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety,

literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . .

26 U.S.C. 501(c)(3). The two-pronged test is clear: an entity qualifies for tax-exempt status if (1) it is “organized and operated exclusively” for one of the enumerated exempt purposes and (2) no part of its net earnings “inures to the benefit of any private shareholder or individual.” The first standard focuses on the source of the income, examining the organization for an adequate nexus between its activities and exempt purposes.⁶ The second standard focuses on the destination of the income, ensuring that no earnings are distributed for private gain.⁷

The courts struggled in applying the not-for-profit exemption to entities operated like CFA, which engage in commercial activities but “feed” their net earnings to exempt institutions. Initially, the courts split on the taxability of such entities.⁸ Appellate courts in some circuits applied a destination-of-income test, exempting a “feeder organization” from taxation if its income was distributed exclusively for charitable purposes even though the organization’s primary or sole activity consisted of purely commercial operations. *See, e.g., C.F. Mueller Co. v. Commissioner*, 190 F.2d 120 (3d Cir. 1951); *Roche’s Beach, Inc. v. Commissioner*, 96 F.2d 776 (2d Cir. 1938). Appellate courts in other circuits looked to the source of the income, finding that when the activities in which the feeder organization itself engaged were of a non-exempt nature, the feeder organization was subject to taxation. *See, e.g., Ralph H. Eaton Found. v. Commissioner*, 219 F.2d 527 (9th Cir. 1955); *United States v. Community*

⁶ “An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3).” 26 CFR 1.501(c)(3)-1(c)(1) (emphasis in original).

⁷ This bifurcation was already a feature of federal tax law in 1913, when the income tax was imposed by the same Congress which the following year enacted the Federal Trade Commission Act. *See* Tariff Act of October 3, 1913, Section II.G. (a) (exempting from income taxation corporations and associations “organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual”).

⁸ Reviewing the precedents, the United States Court of Appeals for the Fourth Circuit concluded that “both the decisions reached on the facts and the views expressed in the opinions are so varied and so divergent, that they cannot readily be reconciled.” *United States v. Community Services, Inc.*, 189 F.2d 421, 428 (4th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952).

Services, Inc., 189 F.2d 421 (4th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952); *cf. Squire v. Students Book Corp.* 191 F.2d. 1018, 1020 (9th Cir. 1951) (observing that “resolution of the case before us does not depend wholly on the ultimate destination of the taxpayer’s profits,” finding that the business of a campus book store “bears a close and intimate relationship to the functioning of the College itself,” and holding that the enterprise was tax-exempt without expressly choosing between source-of-income and destination-of-income tests).

The debate was finally settled, not by the courts, but by Congress. The Revenue Act of 1950 amended the Internal Revenue Code to make it clear that both the source of income and the destination of income were relevant. The feeder organization amendment, as currently codified in Section 502(a) of the Internal Revenue Code, provides:

An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt from taxation under section 501 on the ground that all of its profits are payable to one or more organizations exempt from taxation under section 501.

26 U.S.C. 502 (a).⁹ Pursuant to the feeder organization amendment, the mere fact that an organization distributes all of its profits to exempt organizations does not confer an exemption. If the feeder organization itself operates “for the primary purpose of carrying on a trade or business for profit,” it is subject to taxation. As observed by the United States Court of Appeals for the Ninth Circuit:

Without exception, [the courts of appeals which have considered the feeder organization amendment] concluded that in [adopting that amendment] the Congress intended to require courts to adopt the source-of-income test previously followed by this circuit, rather than the destination-of-income test that had been followed in other circuits.

University Hill Found. v. Commissioner, 446 F.2d 701, 706 (9th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

In the same Revenue Act of 1950, Congress further amended the Code by imposing a tax on the unrelated business income of exempt

⁹ Section 502(b) of the Code, as amended in 1969, provides exceptions for businesses deriving certain rents; businesses in which substantially all the work is performed without compensation; and businesses which sell merchandise received as gifts or contributions.

organizations.¹⁰ As currently codified, the unrelated business income rule taxes organizations otherwise exempt under Section 501(c), as well as state colleges and universities, to the extent of their unrelated business taxable income. 26 U.S.C. 511.¹¹ “Unrelated business taxable income” refers to gross income from “any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption” 26 U.S.C. 512-13.¹² “The effect of the 1950 legislation was to abandon the preexisting doctrine that the destination of income (*i.e.* for the exempt Iowa State) was more important than its source (*i.e.* a commercial enterprise such as WOI-TV).” *Iowa State Univ. of Science & Technology v. United States*, 500 F.2d 508, 518-19 (Ct. Cl. 1974) (holding Iowa State University taxable under the unrelated business income rule on the income earned by its wholly-owned commercial television station).

The guidance from federal tax law is clear. Congress has sought to protect and support specific categories of not-for-profit organizations by freeing them from tax liabilities but only so long as (1) no part of their net earnings inures to the benefit of any private shareholder or individual and (2) the activities which generate the income--whether conducted by a feeder organization or by the exempt entity itself--are in furtherance of exempt purposes. The test is two-pronged and requires an adequate nexus between the entity's operations and recognized public purposes.

Indeed, CFA repeatedly acknowledged at oral argument that a two-pronged test, looking to both the destination and the source of income, was appropriate. Discussing a hypothetical situation where a collection of schools purchased the stock of General Motors, counsel for CFA argued:

¹⁰ Whereas the feeder organization amendment deals with separate organizations which feed profits to exempt entities, the unrelated business income rule deals with certain income earned by the exempt entities themselves. The separate, feeder organizations are declared non-exempt. In contrast, the unrelated business income rule maintains the entities' tax-exempt status, but subjects their unrelated business income to taxation. See *University Hill*, 446 F.2d at 707 n.4.

¹¹ 26 U.S.C. 512 confines the tax to income derived from unrelated trade or business “regularly carried on.”

¹² As explained by Internal Revenue Service regulations: The presence of [the unrelated business income rule's “substantial relationship”] requirement necessitates an examination of the relationship between the business activities which generate the particular income in question--the activities, that is, of producing or distributing the goods or performing the services involved--and the accomplishment of the organization's exempt purposes. 26 CFR 1.513-1(d)(1).

Well the point there would be that General Motors, the corporation, does not act in a public purpose, it manufactures cars. And therefore you don't get to the question of what happens to its profits. And so the argument there would be that the Commission could reach General Motors because it doesn't operate -- because that distinct corporation doesn't operate in a public purpose.

. . . the question is are you a nonprofit organization or not. General Motors is not because manufacturing cars is not a public purpose.

OA Tr. at 39-40. Emphasizing the two-pronged nature of the test, CFA counsel explained:

Well, you have to show that first you operate -- that you're organized to carry out a public purpose, such as education or amateur athletics. Then we also have to show -- or they have to disprove, since it's their burden -- that the money doesn't come into private pockets.

And that's what these hypotheticals keep illustrating. The General Motors hypothetical shows not a public purpose. Therefore, even if the money doesn't get to private pockets, it's still not non-profit.

Id. at 53 (emphasis added).

We agree with CFA counsel on this point. The not-for profit jurisdictional exemption under Section 4 requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests.

III. IS CFA ORGANIZED TO CARRY ON BUSINESS FOR ITS OWN PROFIT?

CFA is formally organized as a nonprofit association. Its basic operation involves funneling its revenues, apart from administrative expenses and salaries, to its members. Thus the Initial Decision found:¹³

1. CFA is formally organized as a nonprofit association. IDF 1.

¹³ The Initial Decision makes reference to "findings of fact," and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), requires "findings as to the facts." Of course, in a case resolved through summary decision, findings of fact are appropriate only to the extent that the facts are not subject to genuine dispute. We understand the Administrative Law Judge to have used the term in this fashion. If, instead, it had been necessary to resolve disputed factual issues concerning the jurisdictional questions at hand, relevant discovery, at a minimum, should have been completed.

2. CFA has been recognized by the Internal Revenue Service as tax-exempt under Section 501(c)(3). IDF 2.¹⁴

3. CFA's officers and directors are not paid. Its staff, including its executive director, is compensated for services rendered. Audited financial statements show that CFA's salaries and employee benefits have amounted to less than 1% of its cumulative television revenues. IDF 3-4.

4. CFA negotiates and signs television contracts, receives the revenues, and makes payments to its members. All of CPA's members receive "participation pool" payments, and those whose football games are actually televised receive rights fees. CFA is obligated to pay the rights fees within 90 days after a game is played. CFA makes the participation pool payments in June following the football season, investing the funds in the interim in conservative investments. The earnings on investments are used to pay CFA's administrative expenses for the television plan. None of the net revenues is retained by CFA. IDF 8-10.

5. CFA's members are all organized under applicable nonprofit laws or as state or federal instrumentalities. IDF 5. CFA's private university members are all tax-exempt organizations under Section 501(c)(3). ID at 17.

6. Revenues earned by the sale of football telecasting rights are used by the CFA members for sustaining their athletic programs and/or for educational purposes. See IDF 7.¹⁵

Complaint counsel have not challenged any of these findings on appeal.¹⁶ From these facts -- and assuming for present purposes no

¹⁴ Although complaint counsel do not challenge the accuracy of this finding, they do question its continued reliability. Thus, they note that the last of the exemption review letters issued to CFA is dated August 8, 1984, and they observe that the first of CFA's television contracts was not implemented until the 1984 football season. However, CFA had entered a television contract as early as August 8, 1981. Appendix to CFA's Motion for Summary Decision (March 1991), Tab 2, Neinas Tr. at 39. Although that contract was never implemented, *id.* at 40, it is undisputed that a subsequent contract, which was implemented, was entered before the last exemption review letter was issued -- the football season had simply not begun. CFAB at 11 n.10. Perhaps more important, complaint counsel concede that CFA's television revenues have remained tax-exempt since 1984. OA Tr. 70.

¹⁵ The Initial Decision's specific finding was that CFA's revenues "are used by the institutions for their proper nonprofit purposes, including sustaining their athletic programs . . ." IDF 7. Complaint counsel deny the accuracy of this finding, insofar as it suggests that the revenues devoted to sustaining university athletic programs are used for proper non-profit purposes. Issues pertaining to the university members' use of the revenues received from CFA are discussed *infra* at Section IV.B.

¹⁶ In opposing summary disposition by the Administrative Law Judge, complaint counsel denied CFA's assertion that it retains only that portion of its gross television revenue necessary to pay its administrative expenses. However, complaint counsel concede on appeal that 95-98% of CFA's revenue in excess of expenses is distributed to its members. CCRB at 18 n.15.

misapplication of the funds by the colleges and universities -- it would appear that CFA satisfies a destination-of-income test in that no part of its revenues inures to the benefit of private individuals or for-profit business entities.

Rather than challenging the facts relied upon in the Initial Decision, complaint counsel have proffered legal arguments directed primarily toward demonstrating that CFA has not satisfied the second standard, focusing on the source of income. In addition, complaint counsel cite Commission Rule 3.24(a)(2), 16 CFR 3.24(a)(2), for the proposition that summary decision is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to such decision as a matter of law," and argue that unresolved factual disputes material to their theories render this case inappropriate for summary disposition.

Complaint Counsel argue first that CFA's predominant activity--selling telecast rights--is purely commercial activity and that this renders CFA subject to Commission jurisdiction. They contend that the Initial Decision failed to consider the evidence showing the business nature of CFA's telecast activities and to resolve conflicts in the evidence in their favor, as is required under the summary decision standard.

However, concerning whether CFA engages in commercial activity, there does not appear to be any genuine issue as to a material fact: CFA concedes that it engages in large-scale commercial activity from which it generates substantial revenue. *See* CFA's Motion for Summary Decision at 34 (March 1991). ("CFA does not dispute, and stipulates for purposes of this motion, that it is engaged in selling college football telecast rights, that those telecast sales activities are a substantial part of CFA's overall activities, and that the sales activities generate millions of dollars of pecuniary revenue to CFA's members") (emphasis in original); CFA's Reply to Complaint Counsel's Response to CFA's Jurisdictional Motion at 21 n.26 (May 17, 1991) ("CFA agrees that the sale of its members' television rights is a business activity"). Both the commercial nature of CFA's activities and the business source of its revenues are admitted; only the legal implications deriving from the commercial nature of its activities are in dispute.

A properly defined source-of-income test does not equate commercial activity, even when large-scale and systematic, with the

statutory requirement of organization to carry on business for profit. Community Blood Bank made it clear that commercial activity by itself does not subject an entity to the Commission's jurisdiction. There the court rejected the Commission's claim of jurisdiction over a blood bank, notwithstanding the Commission's finding that the blood bank "perform[ed its] functions in much the same manner as... the commercial blood bank and ... receive[d] compensation for goods supplied and services rendered." *Community Blood Bank of the Kansas City Area, Inc.*, 70 FTC 728, 909 (1966).¹⁷ The court quoted with approval the dissenting remarks of Commissioner Elman:

The majority opinion points out that Community Blood Bank conducts its affairs in a businesslike fashion and makes profits on the sale of blood, but that is certainly of no relevance here.

Community Blood Bank, 405 F.2d at 1019, quoting 70 FTC at 950.¹⁸ Similarly, the Internal Revenue Code subjects an exempt entity to taxation not on all business income, but only on unrelated business income, *viz.*, income from business activities "not substantially related" to the purpose or function constituting the basis for the entity's exemption. 26 U.S.C. 511-13. In like fashion, something more than mere commercial activity is needed to subject CFA to Commission jurisdiction under the source-of-income test. As explained *supra* in Section II, the appropriate evaluation depends on the presence or absence of an adequate nexus between CFA's activities and its recognized public purposes.

Complaint counsel argue next that there is in fact no nexus between CFA's television contracting activities and recognized public purposes or that, at a minimum, there are material facts in dispute concerning this question, making summary decision improper. CFA responds that it serves two public purposes--promotion of education and fostering of amateur sports competition. It argues

¹⁷ Community acquired its blood for \$15 and charged hospitals a replacement fee of \$25 plus a processing fee of \$9. 70 FTC at 763-64 (Initial Decision).

¹⁸ Complaint counsel argue that the judicial decisions in *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n*, 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984), as well as representations by CFA members in that litigation, establish the for-profit nature of television rights marketing activities similar to those engaged in by CFA. However, the issues underlying the cited materials--whether the NCAA's television restrictions could escape *per se* condemnation or could be justified under the rule of reason as ancillary to legitimate purposes or as generating procompetitive efficiencies--are inapposite to whether CFA is organized to carry on business for profit for purposes of jurisdiction under the Federal Trade Commission Act.

