No. 10-2627

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wisconsin Interscholastic Athletic Association, and American-HiFi, Inc.

Plaintiffs-Appellees,

v.

Gannett Co., Inc. and Wisconsin Newspaper Association

Defendants-Appellants.

Appeal From a Judgment and Order of the United States District Court for the Western District of Wisconsin, Case No. 09-CV-155-wmc, Hon. William M. Conley Presiding

---

Defendants-Appellants' Brief and Required Short Appendix

Godfrey & Kahn, S.C.
Robert J. Dreps
Monica Santa Maria
One East Main Street
Post Office Box 2719
Madison, Wisconsin 53701-2719
(608) 257-3911
Attorneys for Defendants-Appellants

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The full names of the parties represented as Defendants-Appellants are Gannett Co., Inc. and Wisconsin Newspaper Association.

The names of all law firms whose partners or associates have appeared for these parties in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this Court are: Godfrey & Kahn, S.C.

Neither Gannett Co., Inc. nor Wisconsin Newspaper Association have parent corporations.

JPMorgan Chase & Company, a publicly-traded company, owns approximately 10.2% of Gannett Co., Inc.'s outstanding shares, through its asset management business in J.P. Morgan Investment Management, Inc.

No publicly-traded company owns Wisconsin Newspaper Association's stock; Wisconsin Newspaper Association is a non-stock, unincorporated association.

GODFREY & KAHN, S.C.

By: _s/_____

Robert J. Dreps
Monica Santa Maria
One East Main Street, Suite 500
Post Office Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
rdreps@gklaw.com
msantamaria@gklaw.com
Attorneys for Defendants-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

JURISDICTIONAL STATEMENT

District Court Jurisdiction

Gannett Co., Inc. ("Gannett") is incorporated in Delaware with a principal place of business in Virginia.

The Wisconsin Newspaper Association ("WNA") is an unincorporated association with a principal place of business in Wisconsin. WNA's voting members consist of Wisconsin newspapers.

The Wisconsin Interscholastic Athletic Association ("WIAA") is an unincorporated association with a principal place of business in Wisconsin. WIAA's members are Wisconsin public, private, specialty or charter high schools or middle schools.

American-HiFi, Inc. d/b/a/ When We Were Young Productions ("WWWY") is a Wisconsin corporation with a principal place of business in Wisconsin.

Defendants removed this case from Wisconsin circuit court to the District Court of the Western District of Wisconsin on the basis of federal question jurisdiction, 28 U.S.C. § 1331, arguing that the complaint raised issues of federal law under the Copyright Act of 1976, 17 U.S.C. §§ 101-810 ("Copyright Act"). They answered the complaint, and counterclaimed for declaratory and injunctive relief alleging a deprivation of First and Fourteenth Amendment rights under the Constitution in violation of 42 U.S.C. § 1983 and a violation of their rights under the Copyright Act. Gannett and the WNA sought a declaration of rights under 28 U.S.C. § 2201.

WIAA and WWWY amended their complaint and requested a narrower declaration that WIAA's Internet streaming policies did not violate the defendants' First or

Fourteenth Amendment rights under the Constitution or their rights under any other Constitutional, statutory or legal doctrine.

The parties filed cross-motions for summary judgment and, on June 9, 2010, the District Court entered summary and declaratory judgment for WIAA and WWWY.

Appellate Jurisdiction

This is an appeal from a final judgment entered on June 9, 2010 by the District Court for the Western District of Wisconsin, Case No. 09-CV-155. This Court has jurisdiction over the appeal under 28 U.S.C. §§ 1291, 1294(1).

No motion has been made for a new trial or alteration of the judgment or any other motion that would toll the time within which to appeal.

Defendants timely filed their notice of appeal on July 7, 2010. Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Did WIAA create a designated public forum for media coverage of tournament events?

   District Court answered: No.

2. Are WIAA's Internet streaming policies unconstitutional without regard to forum label?

   District Court answered: No.

3. Do WIAA's streaming license fees violate the First Amendment?

   District Court answered: No.

STATEMENT OF THE CASE

This is a straightforward case about equal treatment of media companies under the First Amendment.

The Post-Crescent, a local newspaper published in Appleton, Wisconsin, Internet streamed four state high school football tournament games in the fall of 2008 and made the video of one of those games available to its sister newspaper, the *Green Bay Press-Gazette,* which posted the video on its own website. WIAA, through its exclusive Internet streaming partner, WWWY, contacted the *Green Bay Press-Gazette* demanding that it either remove the video from its website, or pay WWWY a "rights" fee of $250 or $1,500. Another newspaper that contacted WWWY was quoted the same "rights" fee for streaming and was told that it also would have to surrender the video and its right to market it.

WIAA asserts that its Internet streaming and licensing policies serve the same purpose for it--a state actor--as similar policies used by professional and collegiate sports leagues. It defends its policies on revenue grounds.

The district court erred in at least two ways: by finding that Internet streaming is a nonpublic forum and by concluding that the WIAA's exclusive-rights licensing scheme does not violate the First Amendment.

STATEMENT OF FACTS

Procedural History

WIAA is an unincorporated member-based organization that regulates 25 different high school sports during the regular season and controls the post-season, tournament play in those sports. (Dkt.53, ¶28; Dkt.26, ¶2; Dkt.1, Ex. A, ¶12.) All Wisconsin public high schools, with the exception of some public virtual and charter schools, are WIAA members. (Dkt.26, ¶2) WIAA has stipulated that it is a state actor for the purposes of this litigation. (Dkt.23.)

In December 2008, WIAA initiated this case for declaratory judgment in state court, naming six contractual partners as involuntary plaintiffs: WIAA's Internet-streaming partner, WWWY; WIAA's television-broadcast partners; and WIAA's photography partner[1]. (Dkt.1, Ex. A.)

WIAA sought a sweeping declaration of ownership over all depictions of its sponsored tournaments:

> WHEREFORE, the WIAA requests judgment declaring that it has ownership rights in any transmission, internet stream, photo, image, film, videotape, audiotape, writing, drawing or other depiction or description of any game, game action, game information, or any commercial used [sic] of the same of an athletic event it sponsors, and that it has the right to grant exclusive rights to others. ...

(*Id.* at 5-6) Gannett and WNA ("the newspapers") removed the case to federal court on the basis that it sounded in copyright. (Dkt.1.)

[1] All involuntary plaintiffs, except WWWY, were later dismissed without prejudice. (Dkt.9.)

In their answer and counterclaim, the newspapers alleged that WIAA "has no right to elevate selected media companies over all others by granting them preferential access to tournament events." (Dkt.2, ¶52.) The counterclaim challenged several of WIAA's media policies, including photography, live blogging and Internet streaming. (*Id.*, ¶¶25-48.) The newspapers also specifically challenged WIAA's policy granting WWWY "sole discretion" to determine "[a]ll permissions granted, policies enforced and fees required" to stream public high school athletic events over the Internet. (*Id.*, ¶34.)

WIAA and WWWY jointly answered the newspapers' counterclaim. (Dkt.5.) They later amended their complaint and sought a narrower declaration--no longer implicitly based on copyright theory--that WIAA's exclusive Internet licensing scheme and media policies do not violate the defendants' rights. (Dkt.7, ¶37.) The newspapers answered the amended complaint but did not amend their counterclaim. (Dkt.13.)

WIAA publishes the policies at issue in its Media Policies Reference Guide ("Media Guide"), which is reissued each academic year. (Dkt.26, ¶9.) The principal pleadings in the case were completed by May 2009 and, thus, were based on the policies in the 2008-09 Media Guide. (*See* Dkts.5, 13.) The summary judgment briefing, however, began in January 2010, and addressed the revised policies in the 2009-10 Media Guide. (*See* Dkts.31, 49.) This caused some confusion in the district court. (Appellants' Appendix, pg. 16 ("App."); Dkt.117 at 15.)

WIAA Media Policies[2]

A. Internet streaming & video

WIAA does not prohibit the use of up to two minutes of (delayed) video by an Internet site, nor does it require a rights fee:

> The use of video exceeding **two** minutes by the originating station, publication or Internet site -- other than the exclusive video production rights holder [WWWY]--for any purpose other than highlights on regularly scheduled news or sports broadcasts or on a Web page is prohibited.

(Dkt.26-3 at 12)[3] (emphasis in original.)[4] Live transmissions are prohibited except for the use of a live backdrop of no more than two minutes in length. (*Id*. at 13.) Entities interested in producing live or delayed Internet transmissions of regional and sectional events longer than two minutes must make arrangements with WWWY. (*Id*. at 14.) They may be fined by WWWY if they fail to do so. (*Id.*) The Media Guide does not address how to request permission to stream a state finals event, whether or not the rights are held by WWWY. (*See id* at 14, 17.)

B. Discretion

At the time it commenced this action, WIAA had granted WWWY "sole discretion" over "[a]ll permissions granted, policies enforced and fees required" for streaming

---

[2] WIAA's photography and Internet blogging (play-by-play) policies are not challenged in this appeal.

[3] Pagination to PACER documents, other than those appearing in the Appellants' Appendix, is to the document's original pagination whenever this differs from the automatic pagination inserted by the ECF system. Documents without original pagination are cited by the ECF pagination.

[4] WIAA interprets this to allow any credentialed media to use up to two minutes of video, live or delayed, obtained at tournament events for newscast purposes. *See, e.g.*, Dkt.51, ¶47 (Pls.' Proposed Findings of Fact).

tournament events. (Dkt.26-2 at 16.) The revised policy in the 2009-10 Media Guide states: "All permissions granted, policies enforced and fees required will be at the sole discretion of *the WIAA and* the rights holder." (Dkt.26-3 at 17 (emphasis added).)

C. Credentials

WIAA issues credentials to "members of legitimate media outlets and/or Internet sites that have a professional working function (as determined by the WIAA) at WIAA State Tournament venues and events." (*Id* at 3.) Credentials are required to obtain "access to specified locations, venues and events for which the credential was issued," some of which "areas may be restricted for radio, television, news print, Internet sites and photographers." (*Id*.) WIAA does not charge a fee for credentials. (Dkt.39, ¶21.)

> The WIAA reserves the right and sole discretion to revoke and deny future credentials to any media organization in violation of any WIAA media policies, failure to pay rights fees or any other provisions of credentials. Media organizations that violate credential policies are subject to legal liability, as well as all costs incurred in enforcing the terms of these policies, including but not limited to reasonable attorney fees.

(Dkt.26-3 at 2.)

WWWY Contract

In May 2005, WIAA entered into a ten-year contract with WWWY, a video production company, granting it:

> the exclusive right to produce, sell and distribute all WIAA tournament series and championship events for all WIAA sports with the exception of existing [television] contracts as of the date of this contract.

(Dkt.26-5, ¶I(a).) The distribution platforms covered by the contract include on-demand Internet streaming, on-demand DSL/Broadband, cable and satellite video, and live or delayed cable, satellite, and network video, and physical media. (*Id.*, ¶III(a).) The contract calls for video production goals that vary by the level of play: 25% of all regional events, 50% of all sectional events and 100% of all state tournament events (finals). (*Id.*, ¶II(a).)

WIAA also agreed to allow WWWY to act as its agent "in the event that a third party expresses interest in the production, sale, or distribution of any WIAA tournament series or championship event that [WWWY] holds rights to." (*Id.*, ¶II(c).) WIAA and WWWY used several factors to determine the rights fees WWWY charges for permission to stream a game. (Dkt.54, ¶16.) The factors include: the fees charged by other state athletic associations, the value and resources devoted to a production, and the breadth of possible distribution of the production. (*Id.*)

The contract's payment formula allows WWWY to recoup all of its production costs before sharing any revenue with WIAA. (Dkt.26-5, ¶V.) Profits, if any, are to be split equally by WIAA and WWWY. (*Id.*) WWWY has never made a net profit from the contract and its losses preclude any payment to WIAA under the formula. (Dkt.82, ¶¶4-5.) On July 31, 2009, WWWY nonetheless paid $60,000 to WIAA for its 2008-year rights, Dkt.34-8 at 5, stating that it agreed to do so, in part, because of the relationship it has with WIAA, Dkt.82, ¶5. WWWY describes this as an "annual fee," Dkt.55, ¶28, but the parties have not amended their contract to reflect any such agreement.

The contract requires WWWY to provide video production services unrelated to tournament video--for example, taping WIAA's annual meetings and maintaining a web-portal, wiaa.tv, where WIAA-related videos are posted.[5] (Dkt.54, ¶¶8, 9.)

In September 2005, WIAA and WWWY representatives met with the Executive Director of the Wisconsin Association of Public, Educational and Government Access Channels ("WAPC"), Mary Bennin Cardona. (Dkt.78, ¶2.) WAPC is a member organization serving public, education and government access channels ("PEG channels") in Wisconsin. (*Id.*) PEG channels have a long history of producing both regular season and tournament-level public high school sports coverage. (Dkt.78 at 2, ¶2.)

WWWY informed Ms. Bennin Cardona that PEG channels could no longer produce tournament events without entering into an Affiliate Agreement with WWWY. (*Id.*, ¶5.) The agreement required an annual fee, payable to WWWY, and surrender of the master copy of the event to WWWY for sale. (Dkt.78-3 at 1.) WWWY would remit 20% of sales revenue to the PEG channel, and retain the remainder. (*Id.* at 2.)

WWWY explained its business plan to license PEG channels as affiliates to produce the thousands of annual regional, subsectional and sectional tournament events, with some exceptions based on audience interest. (Dkt.78, ¶5.) WIAA intended the exclusivity and affiliate programs to serve as "the vehicle through which [it] could

[5] WWWY sells WIAA tournament videos through a different website, prepfilms.com. (Dkt.46-2.)

monitor compliance with the WIAA's media policies, as WWWY acts as the policing agent for WIAA and ensures quality control." (Dkt.54, ¶13.)

In October 2005, the WAPC Board of Directors voted unanimously against endorsing the affiliate program. (Dkt.78, ¶7.) The Board concluded the affiliate agreement was fundamentally flawed because it asked publicly-funded PEG facilities to use their resources to benefit WWWY, a for-profit company. (Dkt.78-4 at 3.)

WWWY did not exercise its right to live-stream any events until spring 2007. (Dkt.55, ¶20.) During the 2008-09 academic year, its contract covered at least 3,585 WIAA-sponsored tournament events. (*See* Dkt.79, ¶¶13-14.) Of these, 134 (approximately 3.7%) were produced for dissemination by WWWY or its affiliates. (Dkt.54, ¶8.)

WIAA and WWWY submitted expert testimony that WIAA's exclusive rights media policies serve the same purposes as the comparable policies commonly used in college and professional sports. (Dkt.63, ¶¶22-40.)

The Dispute

Public high school sports are funded by taxpayers. (Dkt.43, ¶¶12, 14.) WIAA-member schools bear all incidental costs associated with interscholastic athletics through the regular season, such as athletic fields and gymnasiums, team equipment, coach salaries, travel expenses, entry fees, officials fees and WIAA membership dues. (*Id.*, ¶14.)

Interscholastic athletics are an integral part of students' education. (*Id.*, ¶5.) Some school districts excuse both student-athletes and coaches, and may also excuse student

fans, from classroom attendance so they may attend an interscholastic athletic event. (*Id.*, ¶8.) A district may also expend funds to transport student fans to particularly significant events. (*Id.* ¶9.)

WIAA promotes interscholastic athletics as part of "the total educational process" for participating students, Dkt.34-5 at 14, and describes its tournaments as "events for the entire state to embrace and witness the quality of educational experiences provided by school systems throughout our state." (Dkt.79-3 at 3.) WIAA proclaims that its media policies are intended, in part, to protect the "educational integrity" of tournaments. (Dkt.26-3 at 12.)

News coverage of interscholastic events helps support the community's public interest in, and support for, these events. (Dkt.43, ¶13.) WIAA "recognize[s] and appreciate[s] the interest and promotion generated by media coverage and the recognition given to the achievements of school teams and student-athletes." (Dkt.26-2 at 1.)

Although WIAA regulates both regular- and post-season competition, its media policies apply only to post-season tournament events. (Dkt.26-3 at 1.) They are intended "to inform statewide media of WIAA policies in effect for all levels of State Tournament Series competition and assist members of the media in providing comprehensive coverage to their communities." (*Id.*) WIAA has had "exclusive" television media partners for coverage of some post-season events since 1968. (Dkt.53, ¶10.) WIAA contends that without exclusive media contracts, it would "lose control over the message that was associated with [the] voluntary athletic association." (*Id.*, ¶35.)

Gannett is a media corporation that publishes newspapers across the United States, including 10 daily, and approximately 19 non-daily, newspapers in Wisconsin. (Dkt.26, ¶7.) Two of Gannett's Wisconsin daily newspapers, *The Post-Crescent*, in Appleton, and the *Green Bay Press-Gazette*, both of which are WNA members, are directly involved in the events of this case. *See, e.g.,* Dkt.39-1, ¶¶6,10.

Gannett's Wisconsin newspapers first produced live Internet news coverage in February 2007 when *The Post-Crescent* live-streamed a six-week homicide trial. (Dkt.36, ¶12.) It was the first newspaper in the Gannett family to attempt live streaming of such a complex event. (Dkt.41, ¶7.) It was not until September 2008, however, that Gannett's Wisconsin newspapers acquired a simpler technology that allowed them to live-stream events more regularly. (Dkt.36, ¶13.) This technology enables them to live-stream events wirelessly, using only their own equipment to connect to the Internet and stream the event to their websites. (*Id.*, ¶24.)

The Post-Crescent has produced more than 125 live-streamed events with this technology, including: regular-season public high school sporting events; political debates; interviews with elected officials, candidates for elected office and local health care officials; a 2009 debate between Wisconsin Supreme Court candidates; community events; and annual meetings for organizations such as the YMCA and the United Way. (Dkt.41, ¶¶8-9.) *The Post-Crescent* also produces two online weekly sports programs, Varsity Roundtable (to discuss high school sports) and Football for Lunch (focusing mainly on the Green Bay Packers). (*Id.*, ¶9.)

The Post-Crescent's on-line reporting consists of "deep Web site layering," in which the newspaper provides as much content as possible within a single story file. (Dkt.36, ¶3a.) A story about a homicide, for example, could feature a text story, but could also include links to past coverage, photo galleries, videos, live Internet streaming, live online conversations, public records, and reports from other news organizations. (*Id.*) Internet streaming allows newspapers to reach a much larger audience than print coverage alone, and adds a layer of immediacy and nuance that cannot be duplicated in print. (Dkt.41, ¶7.)

On October 28, November 1 and November 8, 2008, *The Post-Crescent* streamed live over its website four WIAA-sponsored football tournament games involving one or more local schools, without seeking permission from WIAA or WWWY. (Dkt.36, ¶¶16, 18.) The four productions utilized a two-person team on-site to describe the game and provide commentary, supported by a producer in the newspaper office. (*Id.*, ¶17.) For three of the games, *The Post-Crescent* used staff members to announce and comment on the game; for the remaining game, it used another team's coach as commentator. (*Id.*, ¶27.) *The Post-Crescent*'s commentators rely on their experience with the teams during the regular season to inform their commentary. (Dkt.41, ¶16.)

WIAA's policies authorize two credentials for Internet sites, including those of traditional media. (Dkt.26-3 at 4.) The on-site teams that streamed the disputed games gained admission to the press box with WIAA press credentials. (Dkt.36, ¶18.) For each of the four disputed games, the on-site team arrived at the stadium with camera gear in full view, gained admittance to the press box without question and set up their

equipment. (*Id.*, ¶18.) The equipment consisted of a stationary tripod with camera, a laptop, and microphones. (*Id.*)

On October 28, 2008, the *Green Bay Press-Gazette* made available on its website *The Post-Crescent*'s video of one of the four football tournament games referenced above. (Dkt.39, ¶12.) The following day, Tim Eichorst from WWWY emailed the *Green Bay Press-Gazette*'s editor and demanded that the newspaper remove the video from its website or, alternatively, pay a "rights" fee of $250 if the video was produced by a single camera or $1,500 if produced by multiple cameras. (*Id.*) The newspaper refused to pay the fee and removed the video. (*Id.)* Another newspaper that asked WWWY about its terms for Internet streaming was also quoted the $250/$1500 fees, and learned it would also have to surrender its rights to WWWY:

> The entity must also send us a master copy of the game and is prohibited from selling copies of the game to anyone.
>
> WWWY will produce a master DVD from the tape (that is sent) and market the product on prepfilms.com of which [sic] the entity will receive a 20% royalty on gross sales.

(Dkt.42-2 at 2.)

The *Green Bay Press-Gazette* regularly reports on WIAA-sponsored games, both in its print edition and online, and attempts to report on all varsity sports involving local high schools. (Dkt.39, ¶6.) The newspaper's website has a page dedicated solely to high school sports. (*Id.*, ¶10.) Its online archive contains nearly 500 articles and editorials between December 2008 and December 2009 regarding WIAA-recognized teams and events, and its high school sports coverage extends for almost a century. (*Id.*, ¶6.) The

Green Bay Press-Gazette considers a per-event fee of $250 for Internet streaming prohibitively expensive because it covers many local teams at WIAA tournaments throughout the year. (*Id.*, ¶17.)

SUMMARY OF ARGUMENT

The district court erred in determining that Internet streaming of public events sponsored by the WIAA is a nonpublic forum. The forum at issue is the physical space reserved for credentialed media at each tournament venue, which is a designated public forum. The district court also erred in determining that the WIAA's streaming policies granting one private media company the exclusive right to Internet stream tournament events--and standardless discretion to license others--do not violate the First Amendment. Finally, the court erred in upholding WIAA's profit-conscious license fees.

STANDARD OF REVIEW

The Court of Appeals "review[s] a district court's grant of summary judgment *de novo.*" *Love v. Nat'l City Corp. Welfare Benefits Plan*, 574 F.3d 392, 396 (7th Cir. 2009) (citation omitted).

ARGUMENT

Traditionally, public forum analysis determines "when the First Amendment gives an individual or group the right to engage in expressive activity on government property." *Cornelius v. NAACP*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting). Yet it has been criticized by members of the Supreme Court and this Court for more than 25 years. Justice Blackmun recognized in *Cornelius* that the lines between the forum categories "may blur at the edges" and are "really more in the nature of a continuum

than a definite demarcation." *Id.* at 819; *see also United States v. Kokinda*, 497 U.S. 720, 730 (1990) (post office sidewalk "is not a purely nonpublic forum.") He viewed forum labels as "analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity," the most important being whether the proposed expressive activity is "compatible with the normal uses of the property." *Cornelius*. at 820.

Twenty-five years later, forum labels have proliferated and the lines of demarcation have become even more imprecise, leaving it "rather difficult to see what work 'forum analysis' in general does." *Ill. Dunesland Preservation Soc'y v. Ill. Dep't of Natural Resources*, 584 F.3d 719, 724 (7th Cir. 2009), cert. denied, 130 S. Ct. 2367 (2010). This case is a perfect example. The district court lost sight of the compatibility principle that anchors forum analysis amid "a barrage of unhelpful First Amendment jargon." *Id*. at 722. It upheld WIAA's unprecedented assertion of unbridled discretion over permission, conditions and fees for streaming public high school tournament events.

The court's analysis foundered and badly because, like many public forum cases, this one "falls into a crack between the rules." *Gilles v. Blanchard*, 477 F.3d 466, 473 (7th Cir. 2007). The newspapers seek access to public high school tournament venues to stream their coverage of the events over the Internet, a "unique and [no longer] wholly new medium of worldwide human communication." *Reno v. ACLU*, 521 U.S. 844, 850 (1997). While WIAA's media policies grant newspapers the necessary physical access--to public property--they limit newspapers to two minutes of video coverage.

The newspapers challenge the constitutionality of WIAA's sale of "exclusive rights" to stream longer coverage to WWWY, a private company, and its claim of "sole discretion"--with WWWY--to set prices and conditions for licensing others to stream events WWWY declines to produce. While recognizing that these facts present issues of first impression, the district court faulted the newspapers for relying on "general [First Amendment] principles" without "supporting case law." (App.20; Dkt.117 at 19.)

Federal courts are often called upon to apply "the broad principles of the First Amendment to unique forums of expression." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981). The novel factual circumstances here made the absence of specific case law supporting the newspapers' position neither surprising nor problematic. The district court acknowledged the absence of case law directly supporting WIAA's position, as well, App.20, Dkt.117 at 19, but did not find that fact "telling" on the merits of WIAA's claim, even though WIAA as a state actor bears the burden of proof. *Id.; see, e.g., United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

The district court's decision collides with the "general principles" the newspapers rely upon for their right to stream coverage of public high school sports from public property. The Supreme Court has held unconstitutional, on its face, any license system that, like WIAA's, leaves "the determination of who may speak and who may not … to the unbridled discretion of a government official." *Lakewood v. Plain Dealer Publ'g Co.*,

486 U.S. 750, 763 (1988). WIAA defies this principle by asserting "sole discretion," with WWWY, over "[a]ll permissions granted, policies enforced and fees required" for Internet streaming. (Dkt.26-3 at 17.)

The district court endorsed WIAA's explicit assertion of unbridled discretion over licenses for Internet streaming--noting it comprises "one sentence" from the Media Guide--and excused WIAA's noncompliance with this fundamental principle. (App.48; Dkt.117 at 47.) Yet, that "one sentence" is the only one in the Guide addressed to "the determination of who may speak and who may not" utilizing Internet streaming technology at public high school tournaments. *Lakewood*, 486 U.S. at 763.

The district court improperly viewed this as "a case about commerce, not the right to a free press," discounting the newspapers' claims because of their goal, someday, to sell advertising with their streaming coverage of tournament events. (App.2, 46; Dkt.117 at 1, 45.) That error was fundamental and constitutional. A profit motive does not diminish a speaker's constitutional rights and the First Amendment has long "assure[d] the public and the press equal access once government has opened its doors," even in a non-public forum. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring). The district court violated these principles by holding that WIAA's assertion of exclusive rights and unbridled discretion over Internet streaming of tournament events "poses no threat to the rights and values embodied in" the First Amendment. (App.3; Dkt.117 at 2.) To the contrary, it strikes at their heart.

The court recognized WIAA's commercial interests but ignored the newspapers' right of free speech. It got caught up in forum labels and jargon, while losing sight of

First Amendment principles. The whole point of forum analysis has always been to determine "whether the manner of expression [at issue] is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). By granting WWWY exclusive rights to stream coverage, WIAA concedes that this manner of expression is perfectly compatible with the conduct of its tournaments. The district court erred by ignoring this and other First Amendment principles, transforming the public forum doctrine into "a jurisprudence of categories" and converting "what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) ("ISKCON"). The district court should be reversed.

I. WIAA'S INTERNET STREAMING POLICIES FAIL FORUM ANALYSIS AND, THEREFORE, VIOLATE THE FIRST AMENDMENT.

Forum analysis is used "[t]o determine whether a potential speaker has a right to use public property for expressive purposes." *Air Line Pilots Ass'n, Int'l v. Chicago*, 45 F.3d 1144, 1151 (7th Cir. 1995). The Constitution does not guarantee "access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800. Accordingly, courts must first examine the nature of the property to which the speaker seeks access.

> The First Amendment recognizes three distinct types of property. The first category of property is the traditional public forum; this is an area, like a sidewalk or a public park, that has traditionally been used for expressive activity. A

> second category of public property is the designated public forum. These are areas that the government has dedicated to use by the public as places for expressive activity. They may be opened generally for all expressive activity. Or, they may be designated for more limited purposes such as use by certain groups, or discussion of certain subjects. The final category of property, of course, is the nonpublic forum.

Air Line Pilots, 45 F.3d at 1151 (citations omitted).[6] Next, the court must "identify the relevant forum," which is "defined by focusing on 'the access sought by the speaker.'" *Id*., *quoting Cornelius*, 473 U.S. at 801.

The district court erred by failing to properly identify the relevant forum. WIAA intentionally created a designated public forum, which can be either "a place or channel of communication" controlled by the government. 473 U.S. at 802. The newspapers seek access to a place--the designated media areas of tournament venues -- that WIAA has designated for comprehensive coverage of the events. The district court mistakenly defined the relevant forum as Internet streaming, however, which is not a channel of communication controlled by WIAA. (App.29; Dkt.117 at 28.) That error derailed the court's forum analysis from the outset. Before examining that fatal error and its consequences, however, it is essential to establish the constitutional ground on which the case stands.

A. The District Court Sacrificed The Newspapers' Free Speech Rights To WIAA's Commercial Interests.

There is no dispute that the expressive activity at issue--streaming coverage of high school athletic tournaments—"is speech protected by the First Amendment." *Cornelius*,

[6] The newspapers refer to these three categories throughout this brief, rather than the shifting terminology used in some more recent cases. *E.g*., *Ill. Dunesland*, 584 F.3d at 723.

473 U.S. at 797. The district court improperly disparaged this speech interest, however, by adopting WIAA's rhetoric that this case is more about "commerce" than the right to speech and press, and by repeatedly emphasizing the newspaper's commercial interests. (App.2, 3, 28, 46; Dkt.117 at 1, 2, 27, 45.) The law is settled that a speaker's constitutional rights are not diminished by any profit motive, as the newspapers noted when WIAA first made this argument. (Dkt.107 at 1-2); *see Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.")[7]. Indeed, newspapers sell advertising with their news coverage as well, but that does not diminish their First Amendment rights nor the government's obligation not to discriminate in the access it provides to a public forum.

The district court further discounted the newspapers' claim because it believes sports coverage "has little expressive content for purposes of the First Amendment." (App.27-28; Dkt.117 at 26-27.) It viewed the "nonpolitical, nonideological nature of the speech at issue" as somehow incapable of conveying a viewpoint deserving of First Amendment protection. (App.41; Dkt.117 at 40.) With a hint of condescension, the court failed to recognize that the "guarantees for speech and press are not the preserve of

[7] *See Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *Ayres v. City of Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997) ("[T]here is no question that the t-shirts are a medium of expression *prima facie* protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away.").

political expression or comment upon public affairs, essential as those are to healthy government." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

High school tournament coverage *is* inevitably "political," moreover, at least in one sense, because the competitions are government-sponsored events paid for by the public. WIAA promotes interscholastic athletics as part of "the total educational process" for high school students, Dkt.34-5 at 14, and describes its tournaments as "events for the entire state to embrace and witness the quality of educational experiences provided by school systems throughout our state," Dkt.79-3 at 3. Tournament coverage by credentialed media enables taxpayers who cannot attend to measure--or at least appreciate--the return on their substantial investment in high school athletics.

Tournament coverage is not without opportunity for viewpoint discrimination, moreover, contrary to the district court's view. If it were always antiseptic, WIAA would not be concerned about exercising "control over the message that [is] associated with their voluntary athletic association" through exclusive rights agreements. (Dkt.53, ¶35.) Nor would WIAA need to reserve, audaciously, in its media policies "the right to revoke or deny the video, audio or text transmission rights" of anyone whose coverage includes "content or comments considered inappropriate or incompatible with the educational integrity of the tournament." (Dkt.26-3 at 12.) This policy might well cause any prospective licensee to mute its coverage of occurrences--unsportsmanlike conduct by athletes, coaches, students or parents, for example, or even "bad calls" by referees--

that might undermine WIAA's "image." Why so blatantly reserve the right to control content if viewpoint is of no concern?

The court also ignored the newspapers' intention to follow their local teams through the tournaments with streaming coverage. The local perspective *The Post-Crescent* brings to its coverage, through its commentary and by simultaneously combining a variety of reporting technologies, provides a unique "viewpoint" on the competition. The court erred in concluding, in effect, that streaming coverage is fungible and that multiple streams of the same event would be redundant. (App.40; Dkt.117 at 39.) ("Further, the only games the defendants are prohibited from streaming, are games the WWWY is already streaming, so there is no loss of information to the public.") The court ignored the First Amendment's purpose: to encourage the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). In short, neither their profit motive nor the nature of the speech at issue limits the newspapers' First Amendment rights.

The district court protected WIAA's commercial interests at the expense of the newspapers' First Amendment interests. First, the court too readily concluded that "the principal reason WIAA granted" WWWY exclusive streaming rights was "to create and grow an additional source of revenue." (App.3; Dkt.117 at 2.) Their contract does not provide for a "guaranteed, annual payment," as the court mistakenly concluded. (App.44; Dkt.117 at 43.) To the contrary, as written, the contract guarantees no revenue whatsoever--WWWY is required to share revenue with WIAA only after covering its costs, which the plaintiffs say has never occurred. The $60,000 payment the district

court referenced was essentially a gift by WWWY, after the plaintiffs commenced this litigation, even though it owed WIAA nothing under their contract.

WIAA adopted the same media policies as professional sports leagues--expressly so--because it mistakenly believed "it enjoys essentially the same freedom to enter into and maintain exclusive contracts as would any private actor conducting the same business." (Dkt.50 at 10.) It cited one district court opinion to support its view that "a state actor exercising proprietary powers 'shares the same freedoms as, and is subject to no greater limitations than a private firm conducting the selfsame business.'" (*Id.*, quoting *Đ'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1544, (D.R.I. 1986).) Both WIAA and the Delaware court are wrong.

Even when government operates a commercial enterprise in a nonpublic forum, the First Amendment does not allow it "a free hand in deciding whom to admit to its property and on what terms." *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998) ("*Navy Pier*"); *see also Kokinda*, 497 U.S. at 725 ("The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business ...."). Despite this fundamental flaw in WIAA's analysis, the district court endorsed its position and held WIAA's deliberate attempt to emulate professional sports organizations "poses no threat to the rights and values embodied in" the First Amendment. (App.3; Dkt.117 at 2.)

The court upheld WIAA's exclusive streaming policy because it found "there is a long history of licensing exclusive radio and television broadcasts by public, quasi-

public and private entities." (App.30; Dkt.117 at 29.) The court cited no authority holding that a state actor can do this consistent with the First Amendment, however, nor did the court explain its reference to "quasi-public" entities.[8] That private entities may lawfully do so is, of course, not relevant here. The Chicago Bears and the NFL provide neither example nor precedent.

The court was probably referring to two district court opinions WIAA mistakenly claimed upheld exclusive-rights contracts of a state actor against First Amendment challenge. The court cited *KTSP-Taft Television & Radio Co. v. Arizona State Lottery Comm'n*, 646 F. Supp. 300, 311-13 (D. Ariz. 1986), as holding the "state did not violate [the] First Amendment by giving exclusive contract to one television station to broadcast lottery." (App.31; Dkt.117 at 30.) In fact, the contract at issue in *KTSP-Taft* was not exclusive:

> The consideration which the Commission offers broadcasters is not an exclusive contract but that anyone wishing to broadcast the drawing must provide the Commission with equal services and benefits. In effect, anyone who commits to providing to the Commission a weekly broadcast at a definite time, as well as advertising services, will be in no worse a commercial position than their broadcast competitors.

[8] The court may have been referring to college sports organizations, whose practices are described in the report of WIAA's expert witness, James Hoyt. (Dkt.56.) WIAA's collegiate counterpart, however, is not a state actor so its policies need not satisfy the Constitution. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 193-200 (1988). Moreover, Professor Hoyt notes that "[u]niversities in the Big Ten assign their television and broadband rights to the Big Ten Conference, which then enters into exclusive license agreements for the Conference." (Dkt.56, ¶24.) The Big Ten Conference is not a state actor, however, for the reasons stated in the *Tarkanian* decision. WIAA is.

646 F. Supp. at 310. The case does not address, let alone support, a state actor's use of exclusive contracts to generate revenue from media coverage of government-sponsored events.

The district court also adopted WIAA's misinterpretation of *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 86 (D. Conn. 1981), claiming it held a "city did not violate [the] First Amendment by allowing only one media company to broadcast ice skating championships held at Civic Center." (App.31; Dkt.117 at 30.)[9] While this statement is literally true, the court failed to note that it was a private actor, the International Skating Union, not the City of Hartford, that entered into the exclusive television rights contract. 510 F. Supp. at 83. That the city did not violate the First Amendment by agreeing to enforce the private sponsor's restriction as a condition of leasing its arena for the private skating competition does not support WIAA's position. As a state actor, WIAA does not have the same freedom to enter exclusive contracts as the International Skating Union.

There is, in fact, no "long history" of courts endorsing exclusive broadcast licensing by state actors at government-sponsored events. There is no history at all. Moreover, history cannot excuse a constitutional violation in any event. *See Cornelius*, 473 U.S. at 822 (Blackmun, J., dissenting) ("The guarantees of the First Amendment should not turn entirely on either an accident of history or the grace of the Government."). WIAA *is* the Government. Its sole function is to organize interscholastic athletic competitions in a

[9] The court later described the case as "upholding [an] exclusive contract with ABC to broadcast ice skating." (App.41; Dkt.117 at 40.)

variety of sports, for mostly public school students, and state tournaments as the culmination of those efforts. The First Amendment does not allow a state actor to use exclusive contracts to control coverage of its own government functions, no matter how much revenue that might generate.

WIAA has a legitimate interest in raising revenue to cover the costs of organizing tournaments, of course, but all governmental entities need revenue to sustain their operations. They may be able to establish commercial enterprises to compete with private business without violating the Constitution, moreover, but the Constitution does not treat all government commercial enterprises the same. The Constitution would not require WIAA to allow others to compete with its sale of refreshments at tournaments, for example, because "newspapers and soda vendors" do not enjoy equal status on public property. *Lakewood*, 486 U.S. at 761. The First Amendment, by contrast, expressly protects the media from government interference and does not permit WIAA to monopolize streaming coverage of tournament events simply because that is "more lucrative" than allowing credentialed media equal rights to utilize this communications medium. (App.3; Dkt.117 at 2.)

B. The District Court Incorrectly Defined The Forum.

The first step in forum analysis is to define the relevant forum, focusing "on the access sought by the speaker." *Cornelius*, 473 U.S. at 801. Following that reasoning, the district court concluded that, because the newspapers seek "access to 'a particular means of communication'--transmitting the game over the internet," Internet streaming is the relevant forum. (App.29; Dkt.117 at 28, *quoting* 473 U.S. at 801.) The court

considered Internet streaming at tournament venues "a newly-created forum" analogous to the federal employee charity drive at issue in *Cornelius*. (*Id.*) This was error.

Internet streaming is, of course, a "particular means of communication," *id.* at 801, but unlike the charity drive addressed in *Cornelius*, the medium was not created and is not controlled by the Government. It is not, properly defined, the relevant forum. Writing, whether in newsprint or posted to the Internet, also is a "particular means of communication," along with radio and television broadcasting, cable transmissions and play-by-play blogging--all of which WIAA authorizes credentialed media to use in reporting from tournament venues. By the district court's reasoning, each of these "particular means of communication" is a separate, nonpublic forum equally subject to WIAA's sole discretion and control.

The court's analysis leaves WIAA free to designate an exclusive partner for each medium in order "to create another source of revenue for WIAA." (App.36; Dkt.117 at 35.) Forum analysis then becomes a self-fulfilling progression--WIAA's commercial interest strongly suggests a nonpublic forum, *id.* at 26, "an exclusive contract always is more lucrative than one that would allow all media companies" equal rights, *id.* at 33, WIAA's commercial interest is not based on viewpoint, *id.* at 37-40, and, accordingly, exclusivity is reasonable and constitutional. Neither WIAA's historic practice of allowing print reporters equal access and rights, nor even a motive to retaliate against newspapers for their counterclaims in this action, would stand in the way of WIAA's designation of an exclusive newspaper for tournament reporting under the district

court's analysis. *See, e.g., Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1299 (7th Cir. 1996).

But that cannot be right. Surely this outcome would violate the First Amendment, especially if WIAA used its authority to control the "message" conveyed from tournament venues through exclusive contracts covering each "particular means of communication," just as it now does with Internet streaming. Message control may be perfectly appropriate under "government speech" principles when applied to a government-created and controlled outlet like wiaa.tv. *See, e.g., Ill. Dunesland*, 584 F.3d at 724. Yet the practice would violate the First Amendment if applied to control media coverage of government-sponsored events. The First Amendment does not allow the government to control media coverage of itself.

The case law does not permit this outcome, however, because neither Internet streaming nor any of the other means of communication WIAA allows from tournament venues is a government-created forum. This case is not analogous to *Cornelius*, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (teacher mailboxes); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) ("AETC") (political debate), or any of the advertising space cases on which the district court relied. *See, e.g., Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004); *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552 (8th Cir. 1986). Internet streaming is no more a government-created forum than is newspaper publishing.

This case instead is like *ISKCON* and *Navy Pier*, where the speaker already had access to the government property at issue but was restricted, impermissibly, as to

which "particular means of communication" were allowed on that property. The government's intent carries less weight in public property forum cases than in government-created forum cases, as Justice Blackmun noted in his *Cornelius* dissent and Justice Kennedy echoed in *Kokinda*:

> If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of government property and is customary use by the public may control the case.
>
> ...
>
> Viewed in this light, the demand for recognition of heightened First Amendment protection has more force [in government property cases] than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose, as was thought true with teachers' mailboxes in *Perry* ... or the [charity drive] in *Cornelius*.

Kokinda, 497 U.S. at 738 (Kennedy, J., concurring) (citations omitted).

The "objective characteristics" of WIAA tournament venues are, of course, perfectly compatible with equal access for reporting the events by a variety of methods, subject only to equally applied time, place and manner restrictions. WIAA's Media Guide confirms just that. Indeed, many tournament venues are specifically designed to facilitate media coverage. (*See* Dkt.26-3 at 3.)

C. WIAA Created A Designated Public Forum For Media Coverage Of Tournament Events.

The newspapers contend WIAA intentionally created a designated public forum by opening designated areas of tournament venues to the media for coverage of the events. WIAA grants all "legitimate news gathering media representatives" access to these

areas to enable them to "provid[e] comprehensive coverage to their communities." (Dkt.26-3 at 1.) Precisely. Applying forum terminology, WIAA has designated tournament media areas as "a place ... for use by certain speakers ... for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802.

The district court misstated the newspapers' argument in this respect, responding that "the government does not create a public forum simply by allowing the public in." (App.22; Dkt.117 at 21.) WIAA created a designated public forum for credentialed media, not the general public. The newspapers simply noted that tournament venues--public high school students competing in public venues--are generally open to the media *and* the public. The forum at issue is the physical space set aside for credentialed media within tournament venues, not the spectator areas. It is irrelevant that WIAA does not invite the public to attend tournaments "for the purpose of fostering debate." (App.21; Dkt. 117 at 20.)

Nor does WIAA's "proprietary capacity" carry much weight in the analysis. (App.22-25; Dkt. 117 at 21-24.) Indeed, the labels "proprietary" and "regulatory" capacity are precisely the kind of jargon that only confuses forum analysis. *See, e.g., Ill. Dunesland*, 584 F.3d at 723; *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543 (1985) (noting the Supreme Court's "inability to give principled content to the distinction between 'governmental' and 'proprietary'" as the reason for discarding it after 40 years as the standard for intergovernmental tax immunity). There is no clear line of demarcation between these capacities in this case because WIAA's media policies

serve both commercial and regulatory purposes.[10] They are used to make money, in other words, and control speech.

Nor do the tournaments themselves principally serve a commercial purpose, contrary to the district court's view. (*E.g.*, App.2; Dkt.117 at 1.) The principal purpose of all interscholastic athletics, including tournaments, is educational, or they would not justify the large expenditure of public funds for equipment, coaches and facilities, much less the time they take from academics. WIAA concedes this, by asserting the power to revoke the credentials of "any media or Internet sites" that include "content or comments considered inappropriate or incompatible with the *educational integrity* of the tournament…." (Dkt.26-3 at 12) (emphasis added.)

Even when the government pursues a purely commercial purpose, moreover, the First Amendment does not allow it to restrict expressive activity that does not interfere with the forum's purpose, even though allowing the activity may impact revenue. *See, e.g., ISCKON*, *Navy Pier* (allowing leafleting on government property devoted to commercial purposes).

This is not a case "where the principal function of the property would be disrupted by [the] expressive activity" at issue. *Cornelius,* 473 U.S. at 804. Quite the contrary, the WIAA expressly invites the media to provide "comprehensive coverage" of tournament events and sets aside space specifically for that purpose. WIAA should be bound by that official policy. As a state actor, WIAA's written policies are equivalent to

[10] WIAA claims exclusivity not only generates revenue, serving its proprietary interests, but also serves its regulatory interest in monitoring compliance with WIAA's media policies. (Dkt.54, ¶ 13.)

ordinances in a municipal speech case. *See Entm't Software Ass'n v. Chicago Transit Auth.*, 696 F. Supp. 2d 934, 938 n.1 (N.D. Ill. 2010). WIAA's "ordinances" intentionally designate the media area of every tournament venue as a forum for comprehensive coverage of the competition by credentialed media.

The Media Guide goes on, of course, to segregate the media by reporting method, imposing different restrictions for each--presumably based on WIAA's revenue interest. That apparently is the sole reason for the distinctions, moreover, not the fact that "[e]ach medium of expression ... may present its own problems" warranting different restrictions. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). Yet, neither the plaintiffs nor the district court have found any authority holding a state actor can restrict *how* the media cover a government-sponsored event, consistent with the First Amendment, except through reasonable time, place and manner restrictions applied even-handedly to all. There is none.

The district court also erred in its assumption that there are no "cases in which a court determined that the government created a public forum when principally acting as a proprietor." (App.26; Dkt.117 at 25.) In fact, the newspapers cited two: *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985), and *Entm't Software*. (*See* Dkt.76 at 8.)

This Court found that the Chicago Transit Authority had created a designated public forum for advertising in *Planned Parenthood* because the CTA had no consistently enforced standards for accepting ads on its property. 767 F.2d at 1232. The court in *Entm't Software* found that this remains true nearly twenty-five years later. 696 F. Supp.

2d at 946. Just as the CTA had "open[ed] its message space to a wide variety of protected speech" in *Planned Parenthood*, 767 F.2d at 1228, WIAA grants credentialed media general access to tournament venues to provide comprehensive coverage of public high school sports. Having done so, the First Amendment does not allow WIAA to discriminate among the media it has invited based on reporting method.

Finally, the district court placed great weight on its conclusion that "WIAA could not have intended to create unlimited media access for streaming tournament games because it would be impossible to do so" at some venues. (App.30; Dkt.117 at 29.) This is both factually and legally incorrect.

WIAA does, in fact, invite all credentialed media to use their video equipment at every tournament venue, since all are allowed to record and use up to two minutes of video highlights on their web sites or news broadcasts. (Dkt.26-3 at 12.) This policy certainly authorizes recording the entire event, moreover, since one cannot be certain when a "highlight" might occur, to provide the most interesting two minutes of video. WIAA's restriction on the length of video reports by credentialed media—like its prohibition of streaming entire events without WWWY's permission—cannot be justified by insufficient physical space at tournament venues.

Even WIAA acknowledges this is a concern only in "some" venues. (Dkt.83, ¶4.) Since the record shows that 96% of tournament events are not streamed over the Internet by anyone, limited physical space certainly is not a significant concern. It cannot be used to contradict WIAA's explicit policy granting access to all credentialed media that wish to record the events on video. In those venues where limited space is a

concern, moreover, the Constitution requires WIAA to address it through reasonable time, place and manner restrictions. *E.g., Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 644 (1981) ("Space in the fairgrounds is rented to all comers in a nondiscrimatory fashion on a first-come, first-served basis...."). In short, the record confirms that WIAA intentionally created a designated public forum for comprehensive media coverage of public high school tournament events.

WIAA's exclusive rights policy over Internet streaming is unconstitutional in a designated public forum.

> If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.

AETC, 523 U.S. at 677. WIAA does not contend its exclusive Internet streaming policy serves a compelling government interest or that it is narrowly tailored to serve that interest. This Court should reject WIAA's argument that its policy is a constitutional time, place or manner restriction. (Dkt.50 at 25-33.) Time, place and manner restrictions are applied in public fora where, by definition, *all* speakers have a right of equal access. The central premise of this principle, therefore, is that the restrictions apply "evenhandedly to all," *Heffron*, 452 U.S. at 649, and address a concern unrelated to viewpoint. By definition, a policy granting one speaker preferential rights cannot qualify.

The Court should find that the newspapers and WWWY are in the same class for purposes of forum analysis: both seek access to tournament venues to stream coverage over the Internet. It makes no difference that WWWY has contracted to provide

additional services to WIAA in exchange for exclusive streaming rights or acts as its agent in establishing and operating wiaa.tv. (App.37-38; Dkt.117 at 36-37.) The Constitution does not allow WIAA to bargain away the newspapers' right of equal access to a designated public forum in exchange for services.

The newspapers object to WIAA's grant of exclusive rights to WWWY, but they do not want to use WIAA's trademark or gain access to wiaa.tv. WIAA is free to trade those benefits for the limited services WWWY provides under their contract. Allowing equal access for Internet streaming of tournament events furthers WIAA's stated purpose for opening them to credentialed media to provide comprehensive coverage to their communities. Accordingly, WIAA may not "pick and choose" among those media that wish to do so. *See Perry*, 460 U.S. at 55.

II. WIAA'S STREAMING POLICIES ARE UNCONSTITUTIONAL WITHOUT REGARD TO FORUM LABEL.

WIAA's Internet streaming policies are unconstitutional even if the media area of a tournament venue is classified as a nonpublic forum. The district court held the policies satisfied First Amendment standards for speech restrictions in a nonpublic forum because they are viewpoint neutral and further WIAA's commercial interest in raising revenue to support the tournaments. (App.31-38; Dkt.117 at 30-37.) The court failed to recognize, however, that the absence of *any* written standards governing permission, conditions or fees precludes a finding that WIAA's streaming policies are reasonable or viewpoint neutral. Indeed, WIAA's explicit assertion of "sole discretion" over tournament coverage by this reporting method plainly violates established law.

WIAA's commercial interests are insufficient to justify restrictions on Internet streaming from tournament venues, moreover, even if it had promulgated viewpoint-neutral standards governing their use. The First Amendment does not allow a state actor to prohibit or restrict expressive activity on public property that is perfectly compatible with its use of that property, simply to raise revenue, and it certainly does not allow the Government to assume absolute control over all use of a communications medium to report on its events. The Court should find WIAA's Internet streaming policies unconstitutional without regard to forum label.

A. WIAA's Explicit Claim Of Sole Discretion Over Streaming Policies Violates The First Amendment.

WIAA's Media Guide specifies the price and policies governing use of most authorized means of reporting public high school tournament events. For example, the Media Guide specifies the applicable price and policies for radio coverage, including viewpoint-neutral "Audio Transmission Priority Criteria" for allocating limited space at tournament venues that cannot accommodate all interested broadcasters. (Dkt.26-3 at 13-14, 17.) Those interested in providing Internet streaming coverage from tournament venues, by contrast, are directed to "make arrangements with When We Were Young Productions (608) 849-3200 to inquire about ... permission prior to the date of the contest." (*Id.* at 14.) The Media Guide states no price or other requirements for obtaining permission to stream tournament events. Potential licensees are instead explicitly told that "[a]ll permissions granted, policies enforced and fees required will be at the sole discretion of the WIAA and" WWWY. (*Id.* at 17.)

The absence of written standards governing permission and policies for Internet streaming precludes a finding of reasonableness or viewpoint neutrality:

> [The] standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Lakewood, 486 U.S. at 758. That is the case here--no standards. By contrast, a reviewing court could easily determine whether a radio broadcaster, denied access to a tournament venue ostensibly because of insufficient space, was actually a victim of viewpoint discrimination. It need only consider whether WIAA followed its own "Audio Transmission Priority Criteria." The failure to adopt and publish similar rules for Internet streaming is, at the very least, unreasonable, even in a nonpublic forum.

WIAA did not merely neglect to adopt written policies for Internet streaming, moreover, nor adopt vague standards that arguably allow it too much flexibility. *MacDonald v. City of Chicago*, 243 F.3d 1021, 1028-29 (7th Cir. 2001). Quite the contrary, WIAA's official policy is to exercise "sole discretion," with WWWY, over permission, policies and fees for Internet streaming. WIAA's streaming policies do not "allegedly vest[] unbridled discretion in a government official over whether to permit or deny expressive activity," *Lakewood*, 486 U.S. at 755, they explicitly do so. WIAA's official policy is to have no written standards governing public high school tournament coverage by Internet streaming. This affirmative defiance of established First

Amendment requirements, especially when contrasted with the objective standards adopted for radio broadcasters, is unconstitutional on its face.

1. WIAA's Internet streaming policies are facially invalid.

WIAA's assertion of "sole discretion" over "all permissions granted, policies enforced and fees required" for Internet streaming is unconstitutional on its face.

> It is well established that where a statute or ordinance vests the government with virtually unlimited authority to grant or deny a permit, that law violates the First Amendment's guarantee of free speech.

MacDonald, 243 F.3d at 1026. The Supreme Court applies two factors to determine when a licensing system is subject to facial challenge. First, the regulation must give the state actor "substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Lakewood*, 486 U.S. at 759. The Court in *Lakewood* found that the newsrack ordinance at issue satisfied this factor because it required that newspapers apply annually for a permit, creating a risk of censorship by allowing the licensor to measure the content of speech previously uttered before deciding to grant or deny a subsequent application. *Id.* at 759-60. WIAA's streaming policy also satisfies this factor by requiring application for permission to stream before each public high school tournament.

The challenged regulation also must "have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Id.* at 759. The Court distinguished in this respect laws of general application, like those requiring building permits, not aimed directly at

expression and presenting little opportunity for censorship, from those laws "directed narrowly and specifically at expression or conduct commonly associated with expression," like the city's newsrack ordinance. *Id*. at 760-61. WIAA's Internet streaming policy easily satisfies this factor, as well, because it is directed narrowly and specifically at speech at and about government-sponsored tournament events.

WIAA's media policies plainly implicate the censorship concerns that justify a facial challenge, "even if the discretion and power are never actually abused." *Id.* at 757. The very existence of unbridled discretion is a prior restraint because of the risk that the applicant may self-censor his or her speech to please the licensor. Self-censorship is an injury that is "immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *Id*. Where the power is exercised, moreover, the existence of unbridled discretion renders it difficult to differentiate on judicial review between a legitimate denial of access and an "illegitimate abuse of censorial power." *Id.* at 758.

The district court sidestepped these issues by adopting WIAA's position that its streaming policy, in context, means only that WIAA and WWWY jointly exercise "'sole discretion' to determine whether an applicant has complied with" the Media Guide's detailed reporting standards. (App.48-49; Dkt.117 at 47-48.) This interpretation ignores the policy's unambiguous language:

> All parties interested in the production and distribution of any ... event via video transmission will be required to obtain rights from the WIAA and current production and distribution rights holder as outlined above.

...

> All permissions granted, policies enforced and fees required will be at the sole discretion of the WIAA and the rights holder. Detailed information regarding policies and fees are available upon request from [WWWY] (608) 849-3200.

(Dkt.26-3 at 17.) WIAA's benign interpretation ignores the final sentence, which acknowledges that the policies and fees required for permission to stream coverage are *not* set forth in the Media Guide. They are only available from WWWY, the media are told, and they are subject to change at "the sole discretion of" WWWY and WIAA. *Id.*[11]

WIAA cannot deny that it exercises unbridled discretion over Internet streaming of public high school tournament events. Unbridled discretion exists where "it simply cannot be said that there are any narrowly drawn, reasonable and definite standards guiding the hand" of the policy's administrator. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992) (citations and interior quotation omitted) (invalidating ordinance granting county administrator discretion, up to $1,000, over the fee required for parade permits). The precise dangers the Court decried in *Forsyth County* are inherent in WIAA's streaming policy:

> The decision how much to charge for police protection or administrative time--or even whether to charge at all--is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging

[11] The argument also ignores and renders superfluous the Guide's explicit reservation of the "right and sole discretion to revoke ... credentials [of] any media organization in violation of any WIAA policies." (Dkt.26-3 at 2.)

> others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

Id. at 133.

WIAA claims it applied objective factors in setting fees, but there are no "narrowly drawn, reasonable and definite standards" requiring it to do so.[12] *Id*. at 132-33. WIAA's post-hoc rationalization cannot cure the violation. "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Id*. at 133 n.10.

The Court's reasoning in *Lakewood* resonates in this case:

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion.

[12] Moreover, to the extent those factors are largely subjective, profit-based considerations, *see* Dkt.54, ¶16, nothing precludes WIAA from arbitrarily changing its fees.

Lakewood, 486 U.S. at 763-64 (citations omitted). This is precisely what WIAA has done--authorized Internet streaming of tournament events by WWWY, but not by others without permission and without any objective, binding standards in granting permission and setting conditions or fees. WIAA's explicit claim of unbridled discretion, delegated at that to WWWY, to decide who can reach the vast potential Internet audience with streaming coverage is unconstitutional.

2. Established practice cannot excuse WIAA's explicit assertion of unbridled discretion.

The district court erred in upholding WIAA's bald assertion of unbridled discretion over Internet streaming simply because "plaintiffs have never rejected a request to produce an event that WWWY declined." (App.49; Dkt.117 at 48.) The newspapers bring a facial challenge to WIAA's streaming policy and "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas ...." *Lakewood*, 486 U.S. at 757, *quoting Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

The court ignored record evidence that WIAA's license scheme inhibits streaming coverage. The record shows that newspapers, and at least some PEG channels that would otherwise participate, object to paying money or surrendering their work product to WWWY. This undoubtedly explains why, despite their contract's lofty coverage goals, only 134 of the 3,585 tournament events subject to the exclusive contract in 2008-09 were streamed by WWWY or its licensees. Applications for a license to stream coverage are few and far between.

This undisputed evidence that WIAA's streaming policies suppress speech far outweighs the fact that WWWY has never explicitly refused to license an applicant. The refusal to participate in a license scheme that claims unbridled discretion over permission, conditions and fees represents the ultimate in self-censorship, one of the precise dangers the unbridled discretion doctrine is intended to prevent.

The district court and WIAA simply ignored WWWY's requirement that licensees surrender a master copy of--and the right to market--their work. WIAA told the district court that the newspapers are "free to transmit games via internet streaming by paying a fee," Dkt.86 at 14, and never acknowledged WWWY's additional condition. This "additional," unwritten condition reflects another of the precise dangers the Supreme Court cited in holding a municipal newsrack ordinance unconstitutional on its face. 486 U.S. at 772 ("We hold those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable,' to be unconstitutional.").

The Supreme Court has never excused a state actor's failure to adopt written licensing standards based on a "well-established practice" of constitutional application, despite recognizing that theoretical possibility. *Id.* at 770. This Court did so in *Stokes v. City of Madison*, 930 F.2d 1163, 1170 (7th Cir. 1991), upholding an ordinance granting administrators discretion to allow sound amplification on State Street Mall during otherwise restricted hours, without specifying criteria, because the city had never denied a permit request. The district court relied on similar cases from other

jurisdictions, App.49-50, Dkt.117 at 48-49, but no court has ever relied on this principle to endorse an explicit claim of unbridled discretion over permissions, conditions and fees to speak on public property, much less to report on government-sponsored events.

WIAA's explicit assertion of unbridled discretion presents a greater threat to First Amendment values than a licensing system with vague or unstated criteria. A "well-established practice" of constitutional application might sufficiently clarify vague or unstated criteria to satisfy the First Amendment. 486 U.S. at 770. To uphold WIAA's explicit assertion of unbridled discretion over Internet streaming on the same grounds, by contrast, would contradict the doctrine's essential purpose to ensure that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, [does not] intimidate[] parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757. WIAA's official policy of unbridled discretion is unconstitutional on its face.

B. Commercial Interests Alone Cannot Justify Speech Restrictions, Even In A Nonpublic Forum.

The district court found WIAA's streaming policies reasonable because exclusivity generates revenue, which it found was "the forum's primary purpose." (App.36; Dkt.117 at 35.) This is incorrect both because the court misidentified the relevant forum as Internet streaming, which is not a government-created forum that WIAA has any right to control, and because the WIAA cannot show that allowing credentialed media equal rights to stream coverage would otherwise be incompatible with tournament competition. Indeed, the very notion that the forum's purpose is to raise revenue

collides with WIAA's noble and repeated assertion that high school athletics are part of public education.

A finding of "strict incompatibility" is not required to justify speech restrictions in a nonpublic forum, as the district court noted, App.36, Dkt.117 at 35, *quoting Cornelius*, 473 U.S. at 808, nor does the law require affirmative evidence "that the proposed use may disrupt the property's intended function," *Perry*, 460 U.S. at 52 n.12. But the Supreme Court has consistently "required some explanation as to why certain speech is inconsistent with the intended use of the forum" at issue and, therefore, subject to limitation. *ISKCON*, 505 U.S. at 691-92 (O'Connor, J., concurring).

> In *Kokinda*, for example, we upheld a regulation banning solicitation on postal property in part because the Postal Services' 30-year history of regulation of solicitation in post offices demonstrated that permitting solicitation interfered with its postal mission. Similarly, in *Cornelius*, we held that it was reasonable to exclude political advocacy groups from a fundraising campaign targeted at federal employees in part because "the record amply supported an inference" that the participation of those groups would have jeopardized the success of the campaign.

Id. at 692 (O'Connor, J., concurring) (citations omitted). Here, the record shows that allowing all credentialed media to stream events on equal terms would not interfere with the conduct of athletic competitions and, moreover, would further the WIAA's expressed goal to facilitate "comprehensive coverage" of the events. (Dkt.26-3 at 1.)

Nearly all public forum cases are narrowly decided, many by plurality decisions, as in *ISKCON*. Justice O'Connor's controlling decision in that case upheld a ban on solicitation within airports, as the Court had previously done on post office property in

Kokinda, because "[f]ace-to-face solicitation is incompatible with the airport's functioning in a way that other permitted activities are not." *ISKCON*, 505 U.S. at 689. The airport authority had not explained how leafleting would be similarly incompatible with the airport property's functions, however, so Justice O'Connor concluded it must be allowed. This Court applied the same reasoning in *Navy Pier*, holding that, even in a nonpublic forum, the government cannot restrict nondisruptive expressive activities like leafleting solely to advance its own commercial interests. 150 F.3d at 702-03.

This case does not involve a "multipurpose environment," as Justice O'Connor described the airport/shopping mall at issue in *ISKCON*, 505 U.S. at 689, nor the amusement park/meeting/entertainment center found in *Navy Pier*. Like those cases, however, the Government here contends--and the district court held--that it can restrict the newspaper's speech rights in order to protect its selfish commercial interests simply by labeling tournament venues a nonpublic forum. They are wrong, however, because this label "does not mean that the government can restrict speech in whatever way it likes." *Id*. at 687. Strict scrutiny is not the only standard under which WIAA's absolute control of Internet streaming is unconstitutional.

The First Amendment requires WIAA to grant credentialed media equal rights to stream coverage of tournament events, despite any impact on its commercial interests, for the same reason it required equal opportunities to distribute leaflets on the government property at issue in *ISKCON* and *Navy Pier*. The government could not show in those cases that leafleting was "inconsistent with the intended use" of the property, *ISKCON*, 505 U.S. at 692, even though the property was "essentially a

commercial enterprise." *Navy Pier*, 150 F.3d at 698. WIAA's media policies similarly demonstrate that streaming coverage is not inconsistent with the conduct of its public high school tournament events.

The district court suggested, without citation to authority, that WWWY's exclusive rights contract is constitutional because WIAA could have "chose[n] to reserve the exclusive right to stream for *itself*." (App.37; Dkt.117 at 36 (emphasis in original).) This goes too far. The First Amendment does not allow a state actor to prohibit media coverage of events it sponsors and has opened to the public. If WIAA could do so for Internet streaming, moreover, nothing in the court's analysis would prevent it from doing the same with every other communications medium.

Indeed, the government speech doctrine the district court invokes would free WIAA from First Amendment scrutiny almost entirely, a proposition even WIAA has not argued. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) . That is constitutional only "where the application of forum analysis would lead almost inexorably to closing of the forum." *Id*. at 1138. This doctrine does not apply here.

WIAA has opened public high school tournament events to media coverage for over 100 years and relied on forum analysis to support its own summary judgment motion. Under those principles, WIAA cannot assume exclusive control of Internet coverage because the record shows equal opportunities would not interfere with the tournaments' educational or athletic purposes. WIAA did not create the Internet as "a nontraditional forum to accommodate speech for a special purpose," as in *Perry* or *Cornelius*. *See Kokinda*, 497 U.S. at 738, (Kennedy, J., concurring). WIAA can

constitutionally restrict its use to cover tournament events only through time, place and manner restrictions applied evenhandedly to all. *Id*. at 738-39.

Finally, the district court's claim that WIAA's policy has no "effect on the diversity of views expressed about WIAA's events," App.40-41, Dkt.117 at 39-40, contradicts the record, which shows that 96% of those events are not streamed by anyone. Sports coverage is *not* fungible, and it is undisputed that WIAA's policies deter newspapers from following their local public high school teams through the tournaments with streaming coverage. (Dkt.39, ¶17.)

WIAA has argued that this is of no consequence because it allows newspapers to perform what it considers "their expected journalistic functions, i.e. to fully describe, explain, and analyze newsworthy events." (Dkt.50 at 24.) But the First Amendment prohibits governmental "intrusion in to the function of editors." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Indeed, Gannett editors, at least, now consider multi-media coverage, including Internet streaming, a vital part of their journalistic functions. (*E.g.*, Dkt.41, ¶¶6-7.) The First Amendment does not allow WIAA to say otherwise, regardless of forum label, and use exclusive contracts to restrict newspapers' use of this worldwide communications medium at tournament events.

III. WIAA'S STREAMING LICENSE FEE VIOLATES THE FIRST AMENDMENT.

WIAA's license fee for streaming tournament coverage is unconstitutional because it bears no relation to WIAA's cost of administering its media policies. The government "may not impose a charge for the enjoyment of a right granted by the Federal

Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). WIAA's fee is "a license tax--a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." *Id.*

> The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint. For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

Follett v. McCormick, 321 U.S. 573, 577 (1944) (citations omitted, *quoting Murdock*, 319 U.S. at 112). The fee is unconstitutional because it is imposed solely on credentialed media for streaming coverage of government-sponsored, public events.

While there are exceptions to this principle, none applies here. First, imposing general taxes like sales, income or property taxes on the media, along with other businesses, is constitutional. *See, e.g., Arsberry v. Illinois*, 244 F.3d 558, 564 (7th Cir. 2001) (*see* App.45, Dkt.117 at 44). WIAA cannot claim this exception because its streaming license fee is not part of a general tax. The Constitution also permits "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 387 (1990); *see Stokes*, 930 F.2d at 1172. The newspapers certainly do not consider $250 a nominal fee, however, and WIAA did not even consider its costs of administering its media policies in setting the amount.[13] Rather, streaming fees are intended and used as general revenue to offset WIAA's expenses in organizing public interscholastic athletics and tournaments--its sole governmental functions.

[13] The additional requirement to surrender work product for sale by WWWY also is not "nominal."

Finally, some courts have held the First Amendment also permits a profit-conscious fee for retail space used to sell newspapers in airports or train stations. *See Gannett Satellite Info. Network v. Metropolitan Transp. Auth.*, 745 F.2d 767, 773-74 (2nd Cir. 1984); *Atlanta Journal & Constitution v. Atlanta Dep't of Aviation*, 322 F.3d 1298, 1308-11 (11th Cir. 2003). The Eleventh Circuit carefully considered this issue, *en banc*, and concluded that airport newsrack fees need not be limited solely to recovery of administrative costs:

> [T]hese fees are part of the general scheme of the Airport to "tax" those vendors who are granted space in the facility. Every vendor, no matter the type of goods sold, must remit to the Airport compensation for the granted right of access to the Airport's customers.

322 F.3d at 1310. WIAA cannot claim this exemption either, however, because credentialed media are not "vendors" at tournament events. They are invited to report the events to those who cannot attend, not to sell anything to spectators. Selling access and the right to stream coverage of government-sponsored, public events threatens First Amendment values far more than restricting the right to place newspaper vending machines on public property, even though both are protected speech activities.

The district court apparently relied on this exception in concluding that the First Amendment authorizes charging profit-conscious fees "for the privilege of using a facility leased by WIAA so that they may stream the game on their own websites with the intent of generating advertising dollars." (App.46; Dkt.117 at 45, *citing Gannett Satellite*, 745 F.2d at 775.) Yet, the newspapers' commercial goals are no more relevant here than were the plaintiffs' in *Murdock* and *Follett*. Nor is there any basis for the court's conclusion that WIAA does not direct streaming fees "at the press generally,"

id., since only credentialed media can be licensed. Regardless of forum label, moreover, the access newspapers seeks for streaming coverage is a matter of constitutional right, not privilege.

The newspapers concede WIAA's right to charge a nominal fee for the space reserved for credentialed media at tournament venues and for the cost of administering its media policies.[14] License fees based on these factors would treat newspaper, PEG channel and radio broadcast crews the same, however, since WIAA allows two credentials at state-level events for each. Their coverage is subject to the same time, place and manner restrictions. Yet, WIAA charges newspapers and other website operators substantially more for a streaming license than it charges radio broadcasters or PEG channels for what the district court called "the privilege of using a facility leased by WIAA" to cover tournament events. (App.46; Dkt.117 at 45.)

This Court should hold WIAA's profit-conscious fee structure unconstitutional under the *Murdock* line of cases because it bears no relation to WIAA's costs of providing space to credentialed media and administering its media policies. As the Supreme Court recognized, "[i]t is one thing to impose a tax on the income or property of a [newspaper]. It is quite another thing to exact a tax from [it] for the privilege of delivering" streaming coverage of government-sponsored, public events. *Murdock*, 319 U.S. at 112. The record shows WIAA's profit-conscious fee for streaming coverage

[14] The newspapers have never claimed the right to "stream [events] over the internet at no charge." (App.28; Dkt.117 at 27.)

"tends to suppress [its] exercise." The fees are justified by no recognized exception and, therefore, they are unconstitutional.

CONCLUSION

When the Court reads these briefs, to prepare for argument and a decision, Wisconsin probably will be in the middle of a rite of early spring: the state high school basketball tournament. Young men and young women, mostly public high school students, will be playing in public buildings, coached by public employees, using equipment paid for by the public, as part of a program of public education. Yet the district court's decisions permits a state actor, WIAA , to give a for-profit corporation the exclusive authority to license and approve Internet streaming of these tournaments, without any standards for guidance.

WIAA is not shy about the right it asserts--no different, it maintains, than the right asserted without contention by professional sports teams to control and license media coverage. Yet WIAA is not the National Football League, and the public high school facilities across the state where the tournament is played bear no resemblance--legal or otherwise--to the home of the Chicago Bears. WIAA can no more license exclusive Internet rights, or dictate the coverage of high school sports, than it could prohibit a newspaper from covering the games from a press box. Yet that is precisely what it maintains in this declaratory judgment action and precisely what the district court endorsed. The district court should be reversed and directed to enter judgment declaring the WIAA's Internet streaming policies are unconstitutional.

Dated this 5th day of October, 2010.

GODFREY & KAHN, S.C.

By: __s/_____

Robert J. Dreps
Monica Santa Maria
One East Main Street, Suite 500
Post Office Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
rdreps@gklaw.com
msantamaria@gklaw.com

Attorneys for Defendants-Appellants

RULE 32 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules set forth in Fed. R. App. P. 32 and Circuit Rule 32 for a brief produced with proportionally spaced type-face. This brief was produced in Microsoft Word 2003 format, and its length as set forth by the word processing system used to prepare the brief is 13,811 words including headings, footnotes and quotations, but excluding the Circuit Rule 26.1 Corporate Disclosure Statement, Table of Contents, Table of Authorities, and any certificates of counsel.

Dated: October 5, 2010

s/

Robert J. Dreps
Attorney for Defendants-Appellants

CERTIFICATION PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 30 AND CIRCUIT RULE 30(a) AND (b)

I, Robert J. Dreps, counsel for Defendant-Appellant Gannett Co., Inc. and Defendant-Appellant Wisconsin Newspaper Association, hereby certify that all the materials required by Federal Rule of Appellate Procedure 30 and Circuit Rule 30(a) and (b) are included in this appendix. All such materials are not available in digital format. Those materials required by parts (a) and (b) are bound with the Brief and Required Short Appendix for the Defendants-Appellants.

Dated: October 5, 2010

s/_____
Robert J. Dreps
Attorney for Defendants-Appellants

CERTIFICATION PURSUANT TO CIRCUIT RULE 31(e)

I hereby certify that the Brief supplied to the Court is in a non-scanned PDF format and that a portion of the Appendix, App. 1, is not available as a non-scanned PDF format.

Dated: October 5, 2010.

s/_____
Robert J. Dreps
Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE AND FILING BY MAIL

Wisconsin Interscholastic Athletic Association, et al. v.
Gannett Co., Inc., et al.
Appeal No. 10-2627

I, Matthew P. Veldran, a paralegal employed with the law firm of Godfrey & Kahn, S.C., hereby certify under penalties of perjury that on October 5, 2010 I caused two hard copies of the following document: DEFENDANTS-APPELLANTS' BRIEF AND REQUIRED SHORT APPENDIX to be served by hand delivery on the following persons listed below and an electronic copy of the same brief to be served via email on the persons on the same day:

John S. Skilton
Autumn Nero
Jeff J. Bowen
Sarah C. Walkenhorst
Perkins Coie LLP
One East Main St., Ste. 201
Madison, WI 53703-5118
jskilton@perkinscoie.com
jbowen@perkinscoie.com
anero@perkinscoie.com
swalkenhorst@perkinscoie.com
Counsel for Wisconsin Interscholastic Athletic Association and American-HiFi, Inc.

and

I hereby certify under penalties of perjury that on October 5, 2010, I caused two hard copies of the following document: DEFENDANTS-APPELLANTS' BRIEF AND REQUIRED SHORT APPENDIX to be served via First Class U.S. Mail on the following persons listed below and an electronic copy of the same brief to be served via email on the persons on the same day:

Jennifer S. Walther
Mawicke & Goisman, S.C.
1509 N. Prospect Ave.
Milwaukee, WI 53202-2323
jwalther@dmgr.com

Gerald M. O'Brien
Anderson O'Brien Bertz Skrenes & Golla
1257 Main Street
P.O. Box 228
Stevens Point, WI 54481-0228
gmo@andlaw.com

Counsel for Wisconsin Interscholastic Athletic Association

I also certify that on October 5, 2010, pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B), I mailed to the Clerk by Federal Express, postage prepaid, the original and fifteen copies of DEFENDANTS-APPELLANTS' BRIEF AND REQUIRED SHORT APPENDIX.

s/
Matthew P. Veldran

TABLE OF CONTENTS FOR SHORT APPENDIX

Document ..... **Page**

5227979_3