

No. 10-2627

IN THE 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, Inc.,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Wisconsin, No. 3:09-cv-00155-wmc
The Honorable William M. Conley, District Judge, Presiding

BRIEF OF AMICUS CURIAE
BOARD OF REGENTS OF UNIVERSITY OF WISCONSIN SYSTEM
IN SUPPORT OF PLAINTIFFS-APPELLEES IN SUPPORT OF
AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2627

Short Caption: Wisconsin Interscholastic Athletic Association v. Gannett Co., Inc.

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Attorney's Signature: _____ Date: November 9, 2010

Attorney's Printed Name: Jennifer Sloan Lattis

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STATEMENT OF INTEREST¹

The Board of Regents of University of Wisconsin System (“Board of Regents”) is a state agency that manages a wide array of intercollegiate athletic programs. Many of these programs are covered by exclusive agreements with media companies to develop the broadcasting rights for the sporting events in which these programs compete. These agreements are similar in nature to that between the Wisconsin Interscholastic Athletic Association (“WIAA”) and When We Were Young Productions (“WWWYP”). In fact, the Wisconsin Intercollegiate Athletic Conference (“WIAC”) – an athletic conference owned and managed by the Board of Regents – has entered into such an agreement with WWWWYP itself.

Because these broadcasting rights are the intellectual property of the Board of Regents, the Board of Regents has been able to use these rights to: 1) develop a marketable brand; 2) recruit and retain students, student-athletes, and faculty; 3) attract donors and fans; 4) raise revenue to reduce costs passed on to taxpayers, students, and ticketholders; and 5) improve the quality and variety of athletic and academic opportunities for University of Wisconsin System (“UW System”) students.

¹ The parties have consented to the filing of this brief.

When the District Court decided that the WIAA's exclusive licensing agreement with WWYYP did not violate the First Amendment, it explicitly recognized both the legitimacy of the WIAA's similar interests in managing the broadcast rights for its sporting events and the far-reaching consequences of an alternative contrary decision. *Wisconsin Interscholastic Athletic Ass'n v. Gannett, Co.*, --- F. Supp. 2d ---, 2010 WL 2264952, at *16-17 (W.D. Wis. 2010). The Board of Regents believes that, if the District Court's decision is overturned, it may not be able to grant exclusive licenses to develop the broadcast rights to their sporting events. This would make it difficult, if not impossible in some instances, to enter any agreements to broadcast the athletic events of the UW System institutions.

SUMMARY OF ARGUMENT

This is a case about a state actor's right to manage and control its own intellectual property when it is acting in a proprietary capacity. On behalf of the people of Wisconsin, the Board of Regents has invested considerable resources in the UW System institutions to develop varied and successful athletic programs that generate valuable intellectual property. Similarly to the WIAA, the Board of Regents has taken

measures to protect the intellectual property created by its athletic programs.² The broadcast rights to sporting events generate goodwill and revenue by which the Board of Regents can expand and improve their athletic and academic programs.

As the district court so clearly articulated, this is a case about commerce, not the First Amendment. *Wisconsin Interscholastic Athletic Ass'n*, 2010 WL 2264952, at *1. The First Amendment does not protect those who broadcast sporting events without permission and payment. *Zacchini v. Scripps-Howard Broadcasting, Co.*, 433 U.S. 562, 575, 97 S. Ct. 2849, 2857 (1977). Also, even if granting exclusive licenses for broadcasting rights created a free speech forum, neither the WIAA nor the Board of Regents has been granting such licenses in a way that is unreasonable or discriminates by viewpoint. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809-11, 105 S. Ct. 3439, 3452-54 (1985).

² *See, e.g.*, University of Wisconsin – Madison, Office of Trademark Licensing, <http://licensing.wisc.edu/> (last visited Nov. 9, 2010). This is comparable to the way the Board of Regents protects the intellectual property created by other programs of the UW System institutions. *See, e.g.*, University of Wisconsin – Madison, Intellectual Property (IP) Policies and Procedures, <http://www.grad.wisc.edu/research/ip/policies.html> (last visited Nov. 9, 2010).

ARGUMENT

- I. The Board of Regents Is Permitted and Encouraged to Use the Value of Its Property to Support and Sustain Its Athletic Programs.

The Board of Regents actively promotes athletic opportunities and competitiveness for the students of the UW System institutions. The Board of Regents governs the University of Wisconsin System,³ which includes thirteen four-year institutions⁴ and an athletic conference, the WIAC,⁵ that participate in intercollegiate athletics sponsored by the National Collegiate Athletic Association (“NCAA”).⁶ Of its thirteen four-year institutions, three schools participate in NCAA Division I Athletics, UW-Madison in the Big Ten Conference (“Big

³ See Wis. Stat. § 36.09(1). If Defendants-Appellants are arguing in footnote 8 on page 25 of their brief that *Tarkanian* indicates that the University of Wisconsin is not a state actor when it assigns its rights to the Big Ten or complies with NCAA rules, the text of the opinion indicates otherwise. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 183, 109 S. Ct. 454, 457 (1988) (“UNLV is a branch of the University of Nevada, a state-funded institution. The university is organized and operated pursuant to provisions of Nevada's State Constitution, statutes, and regulations. In performing their official functions, the executives of UNLV unquestionably act under color of state law.”).

⁴ University of Wisconsin System, Campuses, <http://www.wisconsin.edu/campuses/> (last visited Nov. 9, 2010).

⁵ Wisconsin Intercollegiate Athletic Conference, <http://www.wiacsports.com/> (last visited Nov. 9, 2010).

⁶ University of Wisconsin Higher Education Location Program, UW 4-Year Campus Athletics Contact Information, <http://www.uwhelp.wisconsin.edu/athletics/contactsuw.aspx> (last visited Nov. 9, 2010).

Ten”),⁷ and UW-Milwaukee⁸ and UW-Green Bay⁹ in the Horizon League. UW-Parkside participates in the Great Lakes Valley Conference in NCAA Division II.¹⁰ The rest of the four-year institutions participate in the WIAC in NCAA Division III.¹¹ The UW System also includes the UW Colleges – thirteen two-year campuses that participate in intercollegiate athletics through the Wisconsin Collegiate Conference.¹²

Not only has the UW System expanded athletic opportunities for their students by fielding a wide variety of men’s and women’s athletic teams, they have also done so in a way that has met with the acclaim of their peers. The Directors’ Cup, a national ranking of the overall quality and variety of Universities’ athletic programs, recently ranked UW-Madison the 19th most successful Division I Athletic Program.¹³

⁷ Big Ten Conference, University of Wisconsin, <http://www.bigten.org/schools/wisc/big10-schools-wisc-body.html> (last visited Nov. 9, 2010).

⁸ Horizon League, Milwaukee, <http://horizonleague.org/milwaukee.html> (last visited Nov. 9, 2010).

⁹ Horizon League, Green Bay, <http://horizonleague.org/green-bay.html> (last visited Nov. 9, 2010).

¹⁰ University of Wisconsin – Parkside Athletics, <http://www.parksiderangers.com/> (last visited Nov. 9, 2010).

¹¹ Wisconsin Intercollegiate Athletic Conference, <http://www.wiacsports.com/> (last visited Nov. 9, 2010).

¹² Wisconsin Collegiate Conference, <http://www.wccathletics.com/> (last visited Nov. 9, 2010).

¹³ UW-Green Bay placed 133rd, and UW-Milwaukee, 173rd, out of 283 teams in the 2009-10 Division I Learfield Sports Directors' Cup. Julie Work, National Association of Collegiate Directors of Athletics, Stanford Claims 2009-10 Division I Learfield Sports Directors’ Cup, (2010), *available at* http://grfx.cstv.com/photos/schools/nacda/sports/directorscup/auto_pdf/d1final.pdf.

More than half of the WIAC member institutions placed in the top twenty-five most successful programs in the Division III Directors' Cup.¹⁴

Although the Directors' Cup rankings measure the variety and quality of athletic programs offered by universities, UW System institutions have been highly successful in the most visible college sports. UW-Madison's football program ended the 2009 season ranked sixteenth in the nation, with a 10-3 record and a bowl victory over the University of Miami.¹⁵ The UW-Madison men's basketball program made its twelfth consecutive NCAA tournament appearance in 2010.¹⁶ The WIAC includes the 2009-10 NCAA Division III champions of both football and men's basketball, UW-Whitewater and UW-Stevens Point, respectively. UW-Green Bay and UW-Milwaukee finished the 2009-10 men's basketball season at third and fourth place in the Horizon

¹⁴ UW-La Crosse placed 7th, UW-Stevens Point, 12th, UW-Whitewater, 15th, UW-Eau Claire, 16th, UW-Oshkosh, 23rd, UW-Platteville, 88th, UW-Stout, 103rd, and UW-River Falls, 107th out of 311 teams in the 2009-10 Division III Learfield Sports Directors' Cup. National Association of Collegiate Directors of Athletics, 2009-10 Learfield Sports Directors' Cup, Division III Final Standings (2010), *available at* http://grfx.cstv.com/photos/schools/nacda/sports/directorscup/auto_pdf/d3dcupjun23.pdf.

¹⁵ Brian Lucas, University of Wisconsin Athletics, Wisconsin Football 2009 Season Review 2 (2010), *available at* http://grfx.cstv.com/photos/schools/wis/sports/m-footbl/auto_pdf/2009SeasonRecap.pdf.

¹⁶ Brian Lucas, University of Wisconsin Athletics, Wisconsin 2009-10 Men's Basketball 1 (2010), *available at* http://grfx.cstv.com/photos/schools/wis/sports/m-baskbl/auto_pdf/Final_Notes.pdf.

League,¹⁷ the champion of which, Butler, was the runner-up in the 2010 NCAA tournament.¹⁸

The popularity of these high visibility sports allow UW System institutions to generate the goodwill and revenue necessary to sponsor a wide range of equally successful, but less visible sports. The UW-Madison women's hockey program has won three national titles since 2006,¹⁹ and its women's lightweight rowing team has won five national championships since 2004.²⁰ The UW-La Crosse women's gymnastics team has claimed twelve national titles since 1995, and its men's track team has won eight indoor and six outdoor national championships since 2001.²¹ UW-Parkside's Track and Field team has produced four Olympic racewalkers.²²

¹⁷ Horizon League, 2009-10 Men's Basketball Record Book 1 (2010), *available at* <http://s3.amazonaws.com/hln/sports/recordbooks/2/recordbook.pdf?1286823415>.

¹⁸ Butler Athletics, Men's Basketball 2009-10 Season Final Game Notes 1 (2010), *available at* <http://static.psb.in.com/q/s/lwlwtpls3blsm3/0910MBB-Final.pdf>.

¹⁹ Jacqueline Boscacci, University of Wisconsin Athletics, Wisconsin Women's Hockey 2009-10 Final Release 1 (2010), *available at* http://grfx.cstv.com/photos/schools/wis/sports/w-hockey/auto_pdf/2010_whky_finalrelease.pdf.

²⁰ University of Wisconsin Athletics, No. 1 Wisconsin Lightweight Rowers Head to IRA National Championships, Press Release (June 3, 2010), *available at* <http://www.uwbadgers.com/sports/w-rowinglt/spec-rel/060310aab.html>.

²¹ Wisconsin Intercollegiate Athletic Conference, NCAA Championships, http://www.wiacsports.com/sports/2010/7/23/GEN_0723103641.aspx?tab=ncaachampionships (last visited Nov. 9, 2010).

²² University of Wisconsin – Parkside Athletics, Hall of Fame Members, http://www.parksiderangers.com/sports/2008/9/24/HOF_0924081807.aspx (last visited Nov. 9, 2010).

For those who have their televisions directly connected to the Internet, there continue to be fewer differences between watching these championship teams through live-streaming or through a television or cable broadcast.²³ Even if there are significant differences in broadcast quality, broadcasters themselves strongly believe that non-exclusive Internet broadcast rights undercut the market value of television broadcast rights. Like the WIAA, the WIAC has entered into an agreement with WWWYP to broadcast its sporting events, including rights to live-stream its events online.²⁴ The exclusivity of this agreement was necessary for WWWYP to market its coverage of WIAC events to Fox Sports, which will broadcast some WIAC events.²⁵

Additionally, the Horizon League teams have entered marketing agreements with the conference to stream their men's and women's basketball games live through the conference website.²⁶ Also, UW-Madison live-streams several of its sporting events through its own

²³ David Pogue, *TV's Future Has Arrived (Almost)*, NY Times, October 6, 2010, at B1, available at <http://www.nytimes.com/2010/10/07/technology/personaltech/07pogue.html>.

²⁴ Wisconsin Intercollegiate Athletic Conference, Television Broadcasts, http://www.wiacsports.com/sports/2010/9/17/GEN_0917104038.aspx?tab=televisionbroadcasts (last visited Nov. 9, 2010).

²⁵ *Id.*

²⁶ Horizon League, Video, <http://www.horizonleaguenetwork.tv/video.html> (last visited Nov. 9, 2010).

website.²⁷ All of this media is designed with the goal of promoting the UW System institutions' athletic programs to a wider audience, growing a committed fan base, and building support for all of the athletic teams.²⁸

The UW System institutions use the popularity and visibility of their athletic programs both to recruit and retain top student-athletes, and as goodwill when recruiting students in general. In the years following the UW-Madison football team's victories in the Rose Bowl in 1994, 1999, and 2000,²⁹ UW-Madison saw its largest increases in applicants for the period between 1989 and 2005.³⁰ Each of those years

²⁷ University of Wisconsin Athletics, InsideBadgerSports.com, <http://www.uwbadgers.com/allaccess/index.html> (last visited Nov. 9, 2010).

²⁸ The Division of Intercollegiate Athletics at the University of Wisconsin-Madison dedicates itself to the mission of providing athletic opportunities to a wide range of students and an environment in which all student-athletes can achieve their academic and competitive goals. The Division strives to provide equitable opportunities for all student-athletes and staff, regardless of gender or ethnic backgrounds. To honor its academic mission and that of the University, the Division supports the educational aspirations, academic progress and general welfare of the student-athlete. In competition, the Division fosters principles of sportsmanship, respect, fair play and athletic excellence. In all of its activities, the Division insists on integrity, ethical conduct and accountability.

University of Wisconsin Athletics, Mission Statement, <http://www.uwbadgers.com/athletic-dept/mission-statement.html> (last visited Nov. 9, 2010).

²⁹ University of Wisconsin Athletics, Barry Alvarez, http://www.uwbadgers.com/genrel/alvarez_barry00.html (last visited Nov. 9, 2010).

³⁰ Academic Planning & Analysis, University of Wisconsin – Madison, Trends in New Freshman Applicants, Admits, and Enrollments in Fall Semesters 1 (2010), *available at* http://apa.wisc.edu/admissions/New_Freshmen_Applicants.pdf.

also saw increased enrollments at higher rates of selectivity.³¹ To this end, the UW System institutions have been using the intellectual property associated with their athletic programs to market their educational programs to prospective and admitted students.³² Also, the UW System institutions use the intellectual property and goodwill created by their athletic programs to help raise private donations to support their athletic programs.³³

The Board of Regents has a legitimate interest in raising revenue. *See Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir. 1998); *Ayres v. City of Chicago*, 125 F.3d 1010, 1015 (7th Cir.1997); *Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Authority*, 745 F.2d 767, 775 (2d Cir. 1984). Through prudent management of its intellectual property, the Board of Regents reduces costs for taxpayers, students, and ticketholders. As a result, the UW-Madison athletics department operates 23 sports teams

³¹ *Id.*

³² *See, e.g.*, University of Wisconsin – Madison, Visitor & Information Programs, <http://vip.wisc.edu/ask-bucky.html> (last visited Nov. 9, 2010); University of Wisconsin – La Crosse, Eagle Orientation, <http://reslife.uwlax.edu/welcome/> (last visited Nov. 9, 2010).

³³ *See*, University of Wisconsin Athletics, Development, <http://www.uwbadgers.com/badger-fund/> (last visited Nov. 9, 2010); University of Wisconsin – Green Bay Athletics, Phoenix Fund, http://www.greenbayphoenix.com/SportSelect.dbml?DB_OEM_ID=22500&KEY=&SPID=69622&SPSID=582055 (last visited Nov. 9, 2010); University of Wisconsin – La Crosse Athletics, L-Club, http://www.uwlathletics.com/sports/2009/10/6/GEN_1006094127.aspx?tab=l-club (last visited Nov. 9, 2010).

without receiving any revenue from tax dollars.³⁴ Indeed, UW-Madison has one of only 14 athletic departments in the NCAA Division I Football Bowl Subdivision that did not receive a university subsidy for operating expenses in the 2008-09 school year,³⁵ although the median subsidy for such programs is approximately \$10 million.³⁶ Rather, the revenue generated by the Big Ten Network provides significant funding to university libraries and to need-based scholarships for non-athletes at UW-Madison.³⁷

UW-Madison's undergraduate tuition was the second lowest for public universities in the Big Ten in the 2008-09 school year,³⁸ and all the UW System institutions maintain undergraduate tuition rates that

³⁴ University of Wisconsin Athletics, Development, <http://www.uwbadgers.com/badger-fund/> (last visited Nov. 9, 2010).

³⁵ Daniel L. Fulks, Nat'l Collegiate Athletic Ass'n, Revenues and Expenses, 2004 – 2009, NCAA Division I Intercollegiate Athletics Programs Report 13 (2010), *available at* http://www.ncaapublications.com/productdownloads/REV_EXP_2010.pdf (“A total of 14 FBS athletics programs reported positive net generated revenues in 2009, down from 25 in 2008 and 2007.”); University of Wisconsin Athletics, 2009-10 Annual Report 48 (2010), *available at* <http://viewer.zmags.com/publication/85a3caf8#/85a3caf8/50>.

³⁶ Daniel L. Fulks, Nat'l Collegiate Athletic Ass'n, Revenues and Expenses, 2004 – 2009, NCAA Division I Intercollegiate Athletics Programs Report 12 (2010), *available at* http://www.ncaapublications.com/productdownloads/REV_EXP_2010.pdf (“The median negative net generated revenue for all schools, representing expenses in excess of generated revenues, moved from \$8,089,000 in 2008 to \$10,164,000 in 2009. This is a 25.7 percent increase in losses from 2008, which is significantly greater than the previous year's increase of only seven percent.”).

³⁷ University of Wisconsin Athletics, Big Ten Network Deal Funds Financial Aid, Libraries, Athletics, Press Release (Nov. 16, 2007), *available at* <http://www.uwbadgers.com/genrel/111607aab.html>.

³⁸ Wisconsin Legislative Fiscal Bureau, Information Paper 37, University of Wisconsin Tuition 20 (2009), *available at* http://www.legis.state.wi.us/lfb/informationalpapers/37_UW_tuition.pdf, at page 20.

are lower than the average for comparable public institutions in the Midwest.³⁹ Finally, UW-Madison has been able to keep its ticket prices low relative to the other Big Ten schools.⁴⁰ UW-Madison's football program has consistently been in the bottom four teams in the Big Ten for ticket prices, while being in the top four teams in the Big Ten in wins and losses, and bowl appearances and victories.⁴¹

This effective fiscal management is made possible by the management of exclusive multi-media contracts and licensing, which together provide for over a third of the UW-Madison athletic department's operating budget.⁴² The contracts with the Big Ten and Badger Sports Properties, a division of Learfield Communications, Inc., who manage all of the broadcast and multimedia rights for UW-Madison athletics, would not be possible if UW-Madison were not able to grant those contracts on an exclusive basis. (Dkt. 34-3, ¶25.)

Generating revenue from broadcasting is not limited to UW-Madison. UW-Green Bay has been able to use Internet streaming to generate revenue, by charging fans modest fees to watch its most

³⁹ *Id.* at 21.

⁴⁰ *See, e.g.*, University of Wisconsin Athletics, On Wisconsin! 2008-09 Annual Report 30 (2009), available at http://grfx.cstv.com/photos/schools/wis/genrel/auto_pdf/report_11409.pdf.

⁴¹ *Id.*

⁴² *Id.*

popular sporting events online.⁴³ Also, if the Board of Regents' other athletic programs, such as the WIAC, can begin to generate wider interest in their programs and sporting events, the broadcasting rights for these sports may begin to generate revenue for the program in the future.⁴⁴

As live-streaming sporting events through the Internet continues to grow in both popularity and profitability, managing those broadcast rights will be vitally important for university athletic programs. Exclusive Internet broadcast rights will be necessary both to attract media organizations that can create broader exposure for athletic events, and to recapture revenue to support those programs in the future.

II. Licensing the Broadcast of Sporting Events in Their Entirety Does Not Implicate the First Amendment.

The central issue of this case has already been decided by the Supreme Court. A broadcast of an entire performance or exhibition without paying royalties is not protected by the First Amendment.

⁴³ University of Wisconsin – Green Bay Athletics, Video Subscriptions, https://www.nmnathletics.com/PremiumVideo.dbml?DB_OEM_ID=22500 (last visited Nov. 9, 2010).

⁴⁴ *See*, Wisconsin Intercollegiate Athletic Conference, Television Broadcasts, http://www.wiacsports.com/sports/2010/9/17/GEN_0917104038.aspx?tab=televisionbroadcasts (last visited Nov. 9, 2010).

Zacchini, 433 U.S. at 575, 97 S. Ct. at 2857. In *Zacchini*, the Supreme Court found no conflict between recognizing property rights in a performance, and the ability of a free press to report entertainment news. *Zacchini*, 433 U.S. at 578, 97 S. Ct. at 2859.

It is well-recognized that state actors can own and license intellectual property. *See, e.g.*, 17 U.S.C. § 105 The act of granting exclusive broadcast licenses is consistent with the legitimate purposes of generating positive publicity and revenue to fund and improve program operations. *See Chicago Acorn*, 150 F.3d at 702; *Ayres*, 125 F.3d at 1015; *Gannett Satellite Information Network, Inc.*, 745 F.2d at 775. The ability to license the broadcast rights to their sporting events allows the WIAA and the Board of Regents to act prudently on behalf of the public to safeguard the value of their intellectual property. *See Ohio State University v. Thomas*, Slip Op. No. 2:10-cv-753, 2010 WL 3447848, at *13 (S.D. Ohio 2010) (granting an injunction against the unauthorized use by a sports blog of registered public university trademarks).

Traditional “forum” analysis may not apply to cases where the government is acting in a proprietary capacity.⁴⁵ However, the defendants-appellants in this case seem to confuse the “forum” to which they are seeking to gain access. *See Pleasant Grove City, Utah v. Sumnum*, --- U.S. ----, 129 S. Ct. 1125, 1137 (2009) (explaining the importance of distinguishing permanent monuments and temporary displays in the same park for the purposes of forum analysis). Like the WIAA, the UW System institutions’ athletic programs are not preventing the media from attending or watching their sporting events, taking photographs for news reporting, or using video clips to illustrate

⁴⁵ *See Pleasant Grove City, Utah v. Sumnum*, --- U.S. ----, 129 S. Ct. 1125, 1132-34 (2009) (not applying forum analysis to a donated monument); *Illinois Dunesland Preservation Society v. Illinois Dept. of Natural Resources*, 584 F.3d 719, 724 (7th Cir. 2009) (“Indeed it is rather difficult to see what work “forum analysis” in general does. It is obvious both that every public site of private expression has to be regulated to some extent and that the character of permitted regulation will vary with the differences among the different types of site.”); *Gilles v. Blanchard*, 477 F.3d 466, 473 (7th Cir. 2007) (“The difficulty with using the ‘forum’ template to resolve this case—a difficulty that is common enough where rules are concerned—is that the present case falls into a crack between the rules.”) Other publicly funded activities involving the media, such as public television, public libraries, the National Endowment for the Arts, and a college art gallery were held not to be forums for the purposes of the First Amendment. *U.S. v. American Library Ass’n, Inc.*, 539 U.S. 194, 205, 123 S. Ct. 2297, 2304 (2003) (plurality opinion) (A public library is not a forum for First Amendment purposes.); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 586, 118 S. Ct. 2168, 2178 (1998) (The NEA’s grant of artistic discretion means it is not a forum.); *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672-675, 118 S. Ct. 1633, 1649-40 (1998) (Public television is not a forum, unless it invites political candidates to express their opinions in a debate, when it becomes a nonpublic forum.); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714 (1974) (Bus advertising space is not a forum); *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625 (7th Cir. 1985) (A college art gallery is not a forum.).

game highlights. Rather, the defendants-appellants are claiming the sporting events' broadcast rights are a forum in themselves, requiring state actors to allow the defendants-appellants to broadcast sporting events in their entirety without getting permission or paying licensing fees. *Cf. Zacchini*, 433 U.S. at 575, 97 S. Ct. at 2857; *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 86 (D. Conn. 1981).

Even if granting exclusive licenses for broadcasting sporting events with private vendors created a free speech forum, the methods chosen by the WIAA and the Board of Regents to grant those licenses are both reasonable in light of the purpose of the forum and do not demonstrate any prohibited viewpoint discrimination. *See Cornelius*, 473 U.S. at 809-11, 105 S. Ct. at 3452-54. Like the WIAA, the Board of Regents has also not demonstrated any viewpoint discrimination in the past or any intent to discriminate by viewpoint in the future. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49, 103 S. Ct. 948, 957 (1983); *Greer v. Spock*, 424 U.S. 828, 838, 96 S. Ct. 1211, 1218 (1976). Rather, the WIAA, the Board of Regents, and the UW System institutions have solely entered licensing agreements with media entities that have offered to provide the maximum exposure and revenue for their sporting events and programs. (Dkt. 34-3, ¶25.)

Both the Board of Regents and the WIAA have a legitimate interest in raising revenue and creating goodwill through exclusive broadcast licenses. *See Chicago Acorn*, 150 F.3d at 702; *Ayres*, 125 F.3d at 1015; *Gannett Satellite Information Network, Inc.*, 745 F.2d at 775. As live-streaming sporting events over the Internet grows in profitability and popularity, developing those broadcast rights will become more important. Although the media continue to have access to sporting events, media organizations must seek permission and pay for a license to broadcast sporting events in their entirety. *Zacchini*, 433 U.S. at 575, 97 S. Ct. at 2857. Both the Board of Regents and the WIAA have acted reasonably and without viewpoint discrimination in granting those licenses. *See Cornelius*, 473 U.S. at 809-11, 105 S. Ct. at 3452-54.

CONCLUSION

For the reasons set forth above, the right of the WIAA and the Board of Regents to grant exclusive licenses for its intellectual property does not violate any provisions of the First Amendment and the judgment of the District Court should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief contains 3872 words in compliance with the 7000-word limit imposed on amicus briefs by Rule 29(d) of the Federal Rules of Appellate Procedure.

I further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(5)-(6) of the Federal Rules of Appellate Procedure and Seventh Circuit Rule 32(a)-(b). This brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in 13-point Century Schoolbook for the main text and 11-point Century Schoolbook for footnotes.

I further verify that an electronic version of this brief has been provided on a disc to this Court, pursuant to Circuit Rule 31(e), and that the disc uploaded is virus free.

Dated: November 9, 2010

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CERTIFICATE OF SERVICE

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