

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 the U.S. District Court
for the Western District of Wisconsin
Case No. 09-CV-00155-wmc,
The Honorable William M. Conley, Presiding

**HIGH SCHOOL ASSOCIATIONS' *AMICUS CURIAE* BRIEF
IN SUPPORT OF PLAINTIFFS-APPELLEES AND
IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW**

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DISCLOSURE STATEMENT

Appellate Court No. 10-2627

Short Caption: Wisconsin Interscholastic Athletic Association and American Hi-Fi Inc v. Gannett Co., Inc. and Wisconsin Newspaper Association

1. The full name of every party that the attorney represents in this case:

- Arizona Interscholastic Association, Inc.;
- California Interscholastic Federation;
- Florida High School Athletic Association, Inc.;
- Georgia High School Association;
- Indiana High School Athletic Association, Inc.;
- Michigan High School Athletic Association, Inc.;
- Minnesota State High School League;
- Missouri State High School Activities Association;
- New York State Public High School Athletic Association; and
- Ohio High School Athletic Association.

2. The names of all law firms whose partners or associations have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Stafford Rosenbaum LLP.

3. If the party or amicus is a corporation:

A. Identify all its parent corporations, if any:

The Associations of Arizona, California, Florida, Indiana, Michigan, Minnesota and New York are corporations. None of them has a parent corporation.

B. List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A.

Attorney's Signature: /s/ Barbara A. Neider Date: November 12, 2010

Attorney's Printed Name: Barbara A. Neider

Please indicate if you are *Counsel of Record* for the above-listed parties pursuant to Circuit Rule 3(d). Yes

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TABLE OF CONTENTS

	<i>Page</i>
IDENTITY OF THE AMICI CURIAE, THEIR INTEREST IN THE CASE AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF	
ARGUMENT	4
I. Summary of Argument.	4
II. The Media Policies Developed By The Associations Are Consistent With Their Goal Of Serving Students And Member Schools.	4
A. The Associations Are Focused On Student Athletes And On Providing Services To Member Schools.	5
B. The Associations' Media Policies Are Designed To Help The Associations Achieve Their Goals While Also Permitting The Media To Report On Tournament Competition.....	6
III. The Purpose of Exclusive Licensing Contracts Is To Promote The Associations' Goals, Not To Frustrate Or Discourage Public Discourse.	8
IV. The Ability To Award Exclusive Transmission Rights Is Important To The Ability Of High School Associations To Meet Their Goals.....	10
A. The Associations Operate On A Not-For-Profit Basis And The Services They Provide Are Expensive.	10
B. The Ability To Grant Exclusive Transmission Rights Is An Important Source Of Revenue For The Associations.....	12
C. The Ability To Grant Exclusive Rights Helps Associations Increase Access To Less Popular Sports.....	15
D. The Ability To Grant Exclusive Rights Also Provides Other Benefits To Associations.....	17
CONCLUSION	18
CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)(7)	20
PROOF OF FILING, SERVICE AND ELECTRONIC TRANSMISSION.....	21

TABLE OF AUTHORITIES

Other Authorities

About the MHSAA, Michigan High School Athletic Association, http://www.mhsaa.com/abouttheMHSAA.aspx (last visited Oct. 5, 2010)	2
About Us, Georgia High School Association, http://www.ghsa.net/about-us (last visited Oct. 11, 2010)	2
AIA Constitution & Bylaws, Arizona Interscholastic Association, Inc., http://www.aiaonline.org/about/constitution_bylaws.php (Article 9) (last visited Nov. 9, 2010)	11
Arizona Interscholastic Association, Inc., http://www.aia365.com/ (last visited Nov. 9, 2010)	2
Arizona Interscholastic Association, Inc., http://www.aia365.com// (last visited Nov. 11, 2010)	12
Contacting the Minnesota State High School League, http://www.mshsl.org/mshsl/aboutmshsl.asp?page=3 (last visited Nov. 10, 2010)	11
Georgia High School Association, http://www.ghsa.tv (last visited Nov. 11, 2010)	12
Grand Stadium TV, http://45.GrandStadium.tv (last visited Nov. 11, 2010)	12
Indiana High School Athletic Association, http://www.livestream.com/ihcaa (last visited Nov. 11, 2010)	12
Indiana High School Athletic Association, Inc., 2010-11 Rules for Television, Radio, Cable Broadcasting and Internet Streaming, p. 2, http://www.ihcaa.org/dnn/Media/MediaReleases/201011/tabid/870/ Default.aspx (last visited Nov. 11, 2010)	17
Michigan High School Athletic Association, http://www.mhsaa.tv (last visited Nov. 11, 2010)	12

Missouri State High School Activities Association, http://www.mshsaa.tv (last visited Nov. 11, 2010).....	12
New York State Interscholastic Broadcast Network, http://www.nysibn.com (last visited Nov. 11, 2010).....	12
Panhandle Broadcasting, http://www.psblive.com (last visited Nov. 11, 2010).....	12
Staff, Florida High School Athletic Association, http://www.fhsaa.org/gov/staff/ (last visited Nov. 10, 2010)).....	11

*IDENTITY OF THE AMICI CURIAE,
THEIR INTEREST IN THE CASE AND
THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF*

Identity of Amici Curiae

The following high school associations (“Associations”) join in this brief:

- (1) Arizona Interscholastic Association, Inc. (“Arizona”);¹
- (2) California Interscholastic Federation (“California”);
- (3) Florida High School Athletic Association, Inc. (“Florida”);
- (4) Georgia High School Association (“Georgia”);
- (5) Indiana High School Athletic Association, Inc. (“Indiana”);
- (6) Michigan High School Athletic Association, Inc. (“Michigan”);
- (7) Minnesota State High School League (“Minnesota”);
- (8) Missouri State High School Activities Association (“Missouri”);
- (9) New York State Public High School Athletic Association (“New York”); and
- (10) Ohio High School Athletic Association (“Ohio”).

Each Association is an association of public and private high schools (and in some cases middle schools) that serves to supplement the overall aims and objectives of secondary schools by organizing, developing, directing and regulating interscholastic activities among member schools.² The Associations,

¹ Arizona participated as *amicus curiae* at the district court level.

² Although the Associations share a significant interest with WIAA in the outcome of this case, they do not concede that each is a "state actor" under state or federal law.

among them, have a membership of more than 6700 schools, which in turn have an enrollment of more than 5.2 million students.

One of the services provided by the Associations to member schools is the coordination and production of state tournaments. These tournaments typically consist of several rounds of play, resulting in the “crowning” of a state champion. State tournament competition has expanded over the years, both in terms of the number of sports and other activities³ covered and the numbers of student athletes/scholars who participate. For example, Arizona conducts annual tournaments in 22 sports. (R.28 (Declaration of Charles C. Schmidt in Support of Motion of Arizona Interscholastic Association, Inc. for Leave to File Amicus Brief and Supporting Declaration), ¶ 21.)⁴ Michigan coordinates tournament events in 28 sports, with more than 300,000 student participants and 1.6 million spectators annually.⁵ California serves more than 736,000 students,⁶ while Minnesota

³ Some of the Associations also coordinate interscholastic competition in academic and fine arts areas, such as music, speech, debate and drama. *See e.g.*, About Us, Georgia High School Association, <http://www.ghsa.net/about-us> (last visited Oct. 11, 2010)

⁴ *See* Arizona Interscholastic Association, Inc., <http://www.aia365.com/> (last visited Nov. 9, 2010).

⁵ *See* About the MHSAA, Michigan High School Athletic Association, <http://www.mhsaa.com/abouttheMHSAA.aspx> (last visited Oct. 5, 2010).

⁶ *See* California Interscholastic Federation, *CIF Status Report to the Governor and Legislature*, <http://www.cifstate.org/governance/cifreport.html> (last visited Oct. 11, 2010).

annually provides more than 200,000 student athletes the opportunity to “go to State.”⁷ Collectively, the Associations represent six of the top ten states in terms of combined (boys and girls) participation in high school sports during 2009.⁸

Amici Curiae’s Interest In The Case

As the number of participants and the number of sports offered by high schools continue to expand, the coordination and production of state tournament contests becomes increasingly expensive. The majority of the Associations offer exclusive contracts for the right to provide live transmissions of tournament events—similar to that which WIAA has with When We Were Young Productions—to help fund the services they provide to member schools. Protecting the proprietary rights of interscholastic associations to control transmission of tournament events they sponsor is essential to the Associations’ ability to achieve their goals of making well-organized competitive opportunities available to high school students. A decision by this court, although not controlling in other circuits, is likely to be viewed as persuasive authority. Accordingly, the Associations seek to contribute to this case as *amici curiae* in order to provide this court with a broader viewpoint than that which WIAA—an

⁷ See About the Minnesota State High School League, <http://www.mshsl.org/mshsl/aboutmshsl.asp?page=1> (last visited Oct. 5, 2010).

⁸ See National Federation of State High School Associations, *High School Sports Participation Tops 7.6 Million, Sets Record*, <http://www.nfhs.org/content.aspx?id=4208> (last visited Sept. 8, 2010).

association that serves only one state—is able to provide. WIAA is not alone.

The issues it faces are the same as those faced by high school associations throughout the country.

Amici Curiae's Authority to File This Brief

Both Appellants and Appellees have consented to the filing of this brief.

ARGUMENT

I. Summary of Argument.

The Associations do not seek to stifle the ability of the press to report on the events high school associations sponsor. The exclusive contracts the Associations offer restrict only the transmission of play-by-play or live coverage of tournament events. The opportunities for *reporting* on the tournament events are not affected. Exclusive contracts, do, however, provide the Associations with an important source of revenue and play an integral role in helping the Associations make opportunities available to students. Permitting associations to utilize exclusive contracts strikes an appropriate balance between the interests of the media and the interests of high school associations across the country.

II. The Media Policies Developed By The Associations Are Consistent With Their Goal Of Serving Students And Member Schools.

The Associations were organized to serve member schools and the students who participate in interscholastic sports and other activities. The Associations have developed media policies that are designed to help them further this goal,

while at the same time permitting members of the media to report on tournament competition.

A. The Associations Are Focused On Student Athletes And On Providing Services To Member Schools.

Although each Association phrases its goals a little differently, they all share the following common themes:

- (1) promoting, extending, managing and administering programs at the regional, sectional and state levels in athletics, speech, music, drama, academics and other extracurricular activities that may be sponsored from time to time by member schools;
- (2) establishing uniform and equitable rules for eligibility and participation;
- (3) providing a means of encouraging a level of cooperation and coordination of activities between member schools that the schools could not achieve individually;
- (4) increasing opportunities for participation for students of member schools by, for example, conducting tournament competition for less-popular sports that are not self-sustaining;
- (5) elevating standards of sportsmanship and encouraging responsible citizenship among students, members schools and fans;

- (6) cultivating cooperation and friendship among member schools and their students;
- (7) protecting youth from exploitation; and
- (8) providing a safe environment for students, coaches, officials and spectators.

State championship competition is a means of achieving these goals. It affords students opportunities to learn skills in the areas of leadership, teamwork, personal integrity and perseverance—all qualities that should serve them well later in life.

B. The Associations' Media Policies Are Designed To Help The Associations Achieve Their Goals While Also Permitting The Media To Report On Tournament Competition.

To help achieve their goals, the Associations establish and enforce policies to ensure that the programs they support contribute toward the entire educational experience provided by member schools. These policies cover topics such as the conditions of the competition, student eligibility, sportsmanship for students and spectators, prohibitions on the use of drugs, alcohol and tobacco and other aspects related to interscholastic competition.

Like WIAA, the Associations also have developed media policies relating to media coverage of the events they sponsor. The media policies vary from state to state, but they all share certain basic components. The Associations' media policies typically require members of the media to obtain a media credential from

the Association before access to an Association-sponsored event is allowed. (*See, e.g.*, R.28, Exhibit A, ¶ 1.) Media credentials are issued to legitimate media outlets—newspapers, radio stations, television stations and the like. Credentials are not typically issued to those who wish to make use of still photographs for strictly commercial purposes (e.g., selling mugs, t-shirts and the like with images of teams or individual student-athletes) or to recruiters looking for prospects for college teams. (*See, e.g.*, R.28, ¶¶ 7-8 and Ex. A.) Members of the media who are issued credentials usually are required to remain in designated areas, both for their own safety and for the safety of all participants, including athletes, officials, coaches and spectators. (*See, e.g.*, R.28, ¶ 28.) Often, there are space limitations which, in turn, limit the number of television or video cameras that can safely be granted access to transmission booths or other designated viewing areas.

Media policies developed by the Associations also retain for the Associations the exclusive right to transmit at least the finals of tournament competition on a live basis, absent rights granted in accordance with written agreements with the Associations.⁹ All of the Associations charge a fee for the right to transmit an event in progress, either on television or via internet streaming. The vast majority of the Associations grant transmission rights to third parties on

⁹ Arizona's media policy, for example, which was adopted in 2008 with input from Gannett Co., Inc. (one of the defendants in this case), contains such a limitation. (*See* R. 28, ¶ 7 and Ex. A.)

an exclusive basis. This is particularly common for state tournament finals.

Those Associations that do not currently use exclusive agreements for transmission rights plan to do so in the near future.

The Associations' media policies also share commonality with respect to what they do *not* do. Importantly, none of the media policies restrict *reporting* on Association-sponsored events. All of the Associations (even those who grant exclusive transmission rights) also permit bona fide news organizations to use at least limited video footage of a game (typically between 2 to 5 minutes) or of interviews conducted at an event for news broadcasts, dedicated highlight shows, coach's shows or other athletic activity-specific shows. (See e.g. R.28, Ex. A, ¶ 3.) Game footage of limited duration may also serve as the background of a live news broadcast. Typical restrictions thus are limited to the live transmission via television or over the Internet.

Given the absence of any restrictions on reporting, and the fact that the Associations' media policies limit only extended transmission of live game action, the policies strike an appropriate and reasonable balance between the interests of the media and the interests of the Associations.

III. The Purpose of Exclusive Licensing Contracts Is To Promote The Associations' Goals, Not To Frustrate Or Discourage Public Discourse.

Associations enter into exclusive contracts to help them achieve their goals of promoting safe participation in high school athletics and, in particular, state

tournament competitions. Fees are charged based on the type of transmission (e.g., football finals, volleyball sectionals) and on the likely viewership, not on the basis of a particular ideology or philosophical viewpoint the Associations seek to promote.¹⁰ Thus, fees are determined based on market forces—what are third parties willing to pay and what extra services are they willing to provide in exchange for exclusive transmission rights? The market drives the process.

Similarly, the Associations produce and sponsor tournament events for their educational and athletic value, not for the purpose of creating an expressive forum for the spectators or for media organizations. The focus is not on either promoting or discouraging public discourse, but on the students served by the Associations and the benefits they will derive from experiencing the “thrill of victory or the agony of defeat.”

History has shown that the granting of exclusive licenses for the live transmission of tournament events does not stifle reporting. Associations that use exclusive contracts have not cut back on the standard media access they have always made available for tournament events. They still grant media credentials to newspapers, radio stations, television stations and other members of the media who wish to report on the events. Newspapers can still publish their stories, report

¹⁰ The Associations do not promote a particular ideology or philosophical viewpoint. Rather, they promote high school athletics and activities with the inherent ideals of leadership, team work, sportsmanship and physical fitness which accompany participation in these organized, competitive activities.

on scores, track statistics, interview players and coaches and publish still photographs taken at the events. Televisions stations can still use video clips either as a backdrop for reports or as part of a highlight presentation. Photographers may still take photographs and use them in connection with news stories. The only limitation that exclusive contracts create is on the live and, in some instances, delayed transmission of entire state tournament contests.

IV. The Ability To Award Exclusive Transmission Rights Is Important To The Ability Of High School Associations To Meet Their Goals.

Exclusive contracts governing the right to transmit tournament events coordinated and produced by the Associations are a valuable tool in achieving the Associations' goals.

A. *The Associations Operate On A Not-For-Profit Basis And The Services They Provide Are Expensive.*

The Associations are voluntary associations, made up of member schools that choose to join to obtain the benefits of the Associations' services. All of the Associations are operated on a not-for-profit basis. They are not funded by state or federal subsidies, but instead must rely on their own initiative and ingenuity to find ways to fund their operations. The most typical sources of revenue are member dues (for the Associations that charge dues), entry fees (for the

Associations that charge them), ticket sales at tournament events, licensing fees for transmission of tournament events and merchandise sales.¹¹

Revenues from tournaments constitute the majority of the revenue the Associations are able to generate. Revenues are used to cover the costs the Associations incur in coordinating and producing tournaments and, in some cases, to directly assist member schools in covering the travel and other costs related to the schools' participation in those contests. In all instances, revenues are used to provide services, not to pay profits.

Coordinating tournament play in the ever-increasing number of activities in which member schools participate is expensive. All of the Associations have a full-time staff.¹² The Associations also have to cover the expenses associated directly with conducting tournament events. This includes expenses for rental of facilities, promotion of the tournaments, security personnel, credentialing, scheduling, site preparation, hiring and coordinating officials, communications, cleaning, insurance, and other related items. Given the large numbers of student athletes that are involved and the large numbers of sports that are covered,

¹¹ See, e. g., AIA Constitution & Bylaws, Arizona Interscholastic Association, Inc., http://www.aiaonline.org/about/constitution_bylaws.php (Article 9) (last visited Nov. 9, 2010).

¹² Minnesota, for example, has a staff of 24 (see Contacting the Minnesota State High School League, <http://www.mshsl.org/mshsl/aboutmshsl.asp?page=3> (last visited Nov. 10, 2010)). Florida has a 27-person staff. (See Staff, Florida High School Athletic Association, <http://www.fhsaa.org/gov/staff/> (last visited Nov. 10, 2010)).

coordinating and producing tournament play requires significant amounts of money.

B. The Ability To Grant Exclusive Transmission Rights Is An Important Source Of Revenue For The Associations.

The Associations rely on their ability to license the transmission of the tournament events they coordinate and produce as a means of raising additional revenue to fund their operations.

In recent years, many of the Associations have begun transmitting tournament games via live Internet streaming on websites they have created or for

which they have contracted.¹³ Some of these websites also permit on-demand streaming, which gives those who could not watch the game “live” the opportunity to watch it when their schedule permits. In addition to streaming tournament games, some of the websites are used to permit schools to stream regular-season events if they wish to do so.

The Associations that have created websites or contracted for website services have found them to be popular both with students and their fans. Arizona’s website, for example, has been heavily utilized. Three months after it was launched (in September 2009), the website had recorded 1.6 million streams. (*Id.*, ¶ 13.) This sort of popularity has helped transform the Associations’ websites into a significant source of revenue, given the Associations’ ability to sell sponsorships and advertising space on their websites. Arizona, for example,

¹³ Arizona’s website is Arizona Interscholastic Association, Inc., <http://www.aia365.com/> (last visited Nov. 11, 2010). Florida contracts for web access through Panhandle Broadcasting, <http://www.psblive.com> (last visited Nov. 11, 2010). Georgia’s website is Georgia High School Association, <http://www.ghsa.tv> (last visited Nov. 11, 2010). Indiana’s is Live Stream, Indiana High School Athletic Association, <http://www.livestream.com/ihsaa> (last visited Nov. 11, 2010). Michigan’s is Michigan High School Athletic Association, <http://www.mhsaa.tv> (last visited Nov. 11, 2010). Missouri’s is Missouri State High School Activities Association, <http://www.mshsaa.tv> (last visited Nov. 11, 2010). New York’s is New York State Interscholastic Broadcast Network, <http://www.nysibn.com> (last visited Nov. 11, 2010). Minnesota contracts with a local television station that in turn contracts with Grand Stadium TV, <http://45.GrandStadium.tv> (last visited Nov. 11, 2010) to provide a live webcast for the State Championship Series of games covered by the contract.

generated close to \$150,000 in revenue from its website during the first year it was up and running. (*Id.*, ¶ 12.)

In addition to maintaining their own websites for the live streaming of events, many of the Associations have contracted with third parties for the rights to exclusive television broadcasting of certain Association-sponsored events, typically state tournament semi-finals and finals. Arizona, for example, contracted with Cox Broadcasting, an Arizona broadcasting company, for the rights to television broadcasting of certain AIA-sponsored athletic events. Arizona obtained considerable compensation from Cox, both in cash and in kind, in exchange for receiving an exclusive contract. (*Id.*, ¶ 12.)¹⁴

The Associations' experience has confirmed what is intuitively obvious: Exclusivity is what makes the transmission rights valuable. If Associations cannot offer transmission rights to third parties on an exclusive basis the value of those rights will be diminished significantly. In addition, as noted above, exclusive contracts allow the Associations to attract sponsors and corporate partners who are interested in the exposure they can get in connection with exclusive transmission of tournament events on the Associations' websites. The value of these

¹⁴ Although Arizona's contract with Cox expired in mid-2009, it continues to explore the possibility of granting television broadcasting rights for its tournament games. (R.28, ¶ 17.)

sponsorships will be diminished if sponsors cannot be assured of the higher viewership that accompanies exclusive transmission rights. (*Id.*, ¶ 19.)

Based on past experience, the Associations believe that their ability to stream events over the Internet on an exclusive basis and their ability to license Internet and television transmission rights to third parties on an exclusive basis will be an increasing source of revenue into the future.

If the Associations' ability to generate revenue through the use of exclusive transmission rights is taken away, they will be forced either to cut back on the services they offer, such as tournaments in less popular sports and tickets at reasonable prices, or find other sources of revenue. Forgoing tournaments or cancelling programs deprives students of the opportunity to participate in state tournament competition and to obtain the benefits associated with organized team and individual competitions. Raising ticket prices discourages fans (both students and non-students) from attending the events in person and from supporting the student-participants.

C. The Ability To Grant Exclusive Rights Helps Associations Increase Access To Less Popular Sports.

The revenue generated in connection with exclusive transmission rights for tournament events (particularly for the more popular sports) is important not only because it offsets the costs of producing the tournaments, but also because it helps subsidize tournament competition in less popular sports, the cost of which could

not be covered by ticket sales (or even transmission rights), given the relatively small following that these sports typically have. The Associations' ability to subsidize less popular sports with revenues from exclusive contracts involving the more popular sports thus helps the Associations increase the opportunities for participation for students in member schools.

The value associated with exclusive transmission rights also has allowed the Associations to negotiate with those to whom exclusive transmission rights are granted to obtain live or tape-delayed transmissions for less popular sports. A third party may offer, for example, to transmit girls' volleyball if it receives the exclusive right to transmit football and basketball state tournaments. Thus, Arizona was able to obtain from Cox Broadcasting a commitment to televise less popular tournament events, like volleyball matches and softball games, in exchange for exclusive rights to transmit tournament games in more popular sports. These sports otherwise would have received no live video coverage at all. (R. 28, ¶ 14.) Arizona, which retains the exclusive right to transmit athletic contests live on its own website, has the ability to present live-streaming of tournament games in 22 sports through funds obtained from its sponsors and advertisers. (*Id.*, ¶ 21.)

Absent an exclusive arrangement, live transmission of tournament play for less-popular sports would be unlikely given the limited audience and limited revenues that could be generated from such transmission.

D. The Ability To Grant Exclusive Rights Also Provides Other Benefits To Associations.

Experience has shown that Associations offering exclusive transmission rights also are able to use the exclusive nature of those rights to obtain additional in-kind consideration, such as promotional spots encouraging viewership of and attendance at the games, production services, air time for public service announcements, coverage of post-game award ceremonies, highlight tapes, on-line archives, and post-game transmissions of events. (*See id.*, ¶ 14.) In the Associations' experience, a third party is unlikely to offer this consideration if it is not guaranteed the exclusive right to transmit the events on a live basis. By contrast, a third party that could transmit the events live, for free and on a non-exclusive basis, would have no incentive to devote its resources to these extra services.

An Association's ability to choose who would be the recipient of exclusive transmission rights also has permitted Associations to place reasonable restrictions on the advertising that would be shown during the transmission of the events. Arizona, for example, was able to regulate the advertising that would be shown on its own website or in connection with exclusive television broadcasts to ensure

that it did not promote alcohol, gambling, tobacco or any adult entertainment products or services. (*Id.*, ¶ 15.) Other Associations have been able to do the same.¹⁵

Finally, exclusive contracts help the Associations ensure the physical safety of participants by limiting the number of personnel and the amount and location of equipment needed for live transmission. Limiting the number of entities that can transmit events on a live basis is consistent with the goal of providing a safe environment for all those participating in the production and viewing of tournament events.

CONCLUSION

WIAA is not unique in its desire to retain the right to enter into exclusive contracts for the transmission of tournament events. Associations across the country are in a similar position and are concerned about how this case will affect their own operations. Exclusive licensing agreements do not have the purpose or effect of promoting or discouraging public discourse or of interfering with the media's right to report on association-sponsored events. The right to license the transmission of association-sponsored tournament events is an important source of revenue for associations, which provide valuable services to member schools.

¹⁵ See e. g. Indiana High School Athletic Association, Inc., 2010-11 Rules for Television, Radio, Cable Broadcasting and Internet Streaming, p. 2, <http://www.ihsaa.org/dnn/Media/MediaReleases/201011/tabid/870/Default.aspx> (last visited Nov. 11, 2010).

Allowing associations such as WIAA to continue to grant exclusive rights for the live transmission of tournament events strikes a reasonable and appropriate balance between the legitimate interests of both the media and high school associations.

Dated: November 12, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)(7)

I hereby certify that the High School Association's *Amicus Curiae* Brief in Support of Plaintiffs-Appellees and in Support of Affirmance of the Judgment Below complies with the rules for *amicus* briefs in Fed. R. App. P. 29(d) and 32(a)(7) and Circuit Rule 32. The brief has been prepared in a proportionally spaced typeface, 13 point font. The brief contains 3,857 words, as calculated by the Microsoft Word Tools word count function.

Dated: November 12, 2010.

/s/ Barbara A. Neider
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PROOF OF FILING, SERVICE AND ELECTRONIC TRANSMISSION

I hereby certify that I caused the original and 14 copies of the Brief of *Amicus Curiae* High School Associations in Support of Plaintiffs-Appellees and in Support of Affirmance of the Judgment Below to be mailed to the Clerk of Court by Federal Express on today's date.

I further certify that on today's date, I caused a digital, searchable PDF version of the brief to be transmitted to the Clerk of Court via the Internet.

I further certify that I caused two hard copies and one electronic copy of the brief to be served on the persons listed below via First Class U.S. Mail and via email on today's date:

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