

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

**WISCONSIN INTERSCHOLASTIC ATHLETIC
ASSOCIATION, AMERICAN-HIFI, INC.**

Plaintiffs,

Case No. 09-cv-0155

v.

**GANNETT CO., INC., and
WISCONSIN NEWSPAPER ASSOCIATION, INC.,**

Defendants.

EXPERT REPORT OF JAMES L. HOYT, Ph.D.

I. INTRODUCTION

1. I have been asked by attorneys for the Wisconsin Interscholastic Athletic Association (“WIAA”) to examine the WIAA’s policies related to the internet transmission of its WIAA Tournament events. My opinion is limited to the WIAA’s policies related to transmission via internet of WIAA Tournament events, defined herein. I expect I may provide testimony at trial that conveys the opinions as set forth in this report. My compensation for these and other future activities, including testifying at deposition and trial, is \$250 per hour. My compensation is not in any way dependent on the outcome of this litigation.

II. MATERIALS RELIED UPON

2. In forming the opinions presented in this report, I have studied the WIAA’s media policies related to internet transmission of WIAA events and the WIAA Senior Handbook, excerpts of which are attached as Exhibits C-F to this report, and the pleadings filed in this case. In addition to the materials cited in this report, a complete list of materials I relied upon in reaching the opinions expressed in this report is attached as Exhibit A to this report.

III. PRIOR TESTIMONY

3. I have not testified as an expert in the past four years.

IV. BACKGROUND AND EXPERIENCE

4. I received a B.S. in journalism from the University of Wisconsin, Madison ("UW") in 1965, a M.S. in Journalism and Mass Communication also from the UW in 1967, and a Ph.D. from the UW in Mass Communication in 1970. I am currently a Professor Emeritus at the UW School of Journalism and Mass Communication, where I have been on faculty since 1973. During my time at the UW, I have served as, *inter alia*, Director and Associate Director of the UW School of Journalism and Mass Communication. I also served as Head of the school's Broadcast News Sequence. Prior to joining the UW faculty, I was an assistant professor at Indiana University from 1970-73, where I held a joint appointment in the department of journalism and the department of telecommunication.

5. I have held a number of administrative positions at the UW, including Chair of the UW Athletic Board from 1991 to 2000, and I was a Member of the UW Athletic Board from 1990 to 2000. I was also a Member of the UW Athletic Department Committee on Broadcast Exclusivity in 1989, which was tasked with developing and implementing a policy for exclusive radio broadcast rights for UW athletics, in particular football and men's basketball.

6. Specific to intercollegiate athletics, I served as the UW NCAA Faculty Athletics Representative from 1991-2000, as a Member of the NCAA Core Course Review Committee from 1996-2000, and as a Member of the NCAA Legislative Review Committee from 1994-98. I was also a Member of the NCAA Certification site visit team at three different universities. Within the Big Ten Conference, I served as the UW Faculty Athletics Representative from 1991-2000, the Co-Chair of the Joint Group Executive Committee from 1997-99, and on the Rules and Legislation Committee from 1993-2000. Finally, within the Western Collegiate Hockey

Association, I served as Chair of the Executive Committee from 1995-97 and on the Television Committee from 1992-99.

7. In addition to my experience in academia and educational administration, I have served as a reporter, producer, and editor to a number of broadcast news organizations. Between 1965 and 1967, I was a part-time reporter for WTMJ-TV Milwaukee, and a part-time sports anchor for Badger Sports on WHA-TV Madison. As a part of my work with WTMJ-TV, I was responsible for reporting on athletic events such as UW football, basketball, and track and field. For WHA-TV Madison, my responsibilities also included independent contract work covering the WIAA State Boy's basketball tournament. During the summer of 1971, I worked as a full-time law enforcement reporter for the *Daily Herald-Telegram* in Bloomington, Indiana. During the summer of 1972, I was a full-time news producer/editor for NBC News in Washington, D.C., during which time I worked with such persons as David Brinkley, Garrick Utley, Carl Stern, and Bill Monroe. I later continued my work with NBC News as a consultant for The Today Show and for NBC Nightly News with Tom Brokaw.

8. I have served as a consultant to all of the then NBC owned broadcast news stations, which were WNBC-TV, New York; WMAQ-TV, Chicago; WRC-TV, Washington; KNBC-TV, Los Angeles; and WKYC-TV, Cleveland. In addition, I have consulted for a number of local stations including WTMJ-TV, Milwaukee; WMTV, Madison; KCAU-TV, Sioux City; WTRF-TV, Wheeling; WHOI-TV, Peoria; WSAW-TV, Wausau; KOSA-TV, Odessa, TX; and WAOW-TV, Wausau. As a part of these consulting activities, I conducted audience research addressing the station's overall newscasts, including news, weather, and sports.

9. A copy of my curriculum vitae is attached as Exhibit B to this report. As detailed therein, I have published numerous articles and authored book chapters on broadcast news writing, mass

media, and cameras in the courtroom. I have at least thirty-five years experience teaching news gathering and mass media. I have been the recipient of numerous honors, including induction into the Wisconsin Broadcasters Hall of Fame in 2007, was named the International Radio and Television Society's Frank Stanton Fellow in 2001, and have been listed annually in Who's Who in America since 1986. In addition, in 1989 I was selected to participate in the Leadership Institute for Journalism Education, underwritten by Gannett Co., at the Freedom Forum Center for Media Studies at Columbia University.

IV. LEGAL STANDARDS AND SCOPE OF OPINIONS

10. I do not purport to be an expert in First Amendment law. However, I do believe I am an expert in the real world of practical mass media, including accommodations, compromises, and resolutions that various forms of news media, including print and broadcast media, regularly and routinely make in order to facilitate, permit, protect and, maximize news gathering and news reporting.

11. In preparation of this report, I have discussed with counsel for the WIAA the applicable legal standards to a First Amendment claim. My understanding of these standards is addressed below.

12. It is my understanding from review of the pleadings in this case that the Wisconsin Newspaper Association and Gannett Co. (collectively "Gannett") have asserted that the WIAA's policies related to internet streaming of its state tournament sporting events violate its rights under the First Amendment of the United States Constitution. In order to prevail on this contention, I understand that Gannett must prove, among other things, both that the WIAA is a "state actor" and that the WIAA events take place in what is referred to by courts as a "public forum." I understand that the WIAA disputes both of these issues.

13. It is also my understanding, however, that the First Amendment allows “state actors” to place reasonable “time, place, and manner” restrictions on speech within “a public forum,” provided that such restrictions are “narrowly tailored” to serve a significant government interest and leave open sufficient alternative channels to communicate the information at issue. The opinions expressed herein are intended to address these issues in the context of the facts of this case as I understand them.

V. WIAA MEDIA POLICIES

14. I have reviewed the 2008-09 and 2009-10 WIAA Senior High School Handbooks and the 2008-09 WIAA Media Policies and Reference Guide, in particular the policies related to internet transmission of WIAA tournament events. In addition, I have spoken with Todd Clark, Director of Communications for the WIAA, regarding these policies. My understanding of the WIAA and its internet transmission policies is based on these discussions, the pleadings in this case, and the handbooks I have reviewed, and is detailed in the following paragraphs.

15. The WIAA is an unincorporated, nonprofit organization of member schools located in the State of Wisconsin whose purpose is to organize, develop, direct, and control an interscholastic athletic program that promotes competitive, educational and financial opportunities for member schools. Ex. C (2008-09 Senior Student Handbook at 3, 14). These opportunities include participation in post-season WIAA-sponsored, controlled, and funded sports tournaments, which are separate from regular season games. Affidavit of Todd C. Clark (“Clark Aff.”) ¶ 3.

16. Both the WIAA 2008-09 and 2009-10 Senior High School Handbook include Spectator/Crowd Conduct Policies. Exs. C (2008-09 Senior High School Handbook at 48-51) & D (2009-10 Senior High School Handbook at 48-49). The 2008-09 Senior Handbook also contains Radio and Television Broadcast Policies, which relate only to the WIAA State Tournament series events, i.e., regional, sectional, and state level tournament events. Ex. C

(2008-09 Senior High School Handbook at 50-51). According to these policies, television and cable broadcasters must request permission to broadcast games. Ex. C (2008-09 Senior High School Handbook at 51). Similarly, the 2009-10 Senior High School Handbook contains Video Transmission Policies, which apply to broadcast, cable, and Web stream during the WIAA State Tournament Series. Ex. D (2009-10 Senior High School Handbook at 51). These policies prohibit any live or delayed television or internet streaming of WIAA State Tournament Series events without permission from the WIAA or an authorized (by the WIAA) person or entity, which varies depending on event. Exs. D (2009-10 Senior High School Handbook at 51) & C (2008-09 Senior High School Handbook at 51).

17. It is also the WIAA's policy, however, to permit commercial stations covering WIAA State Tournament Series for "newscast purposes," without paying a fee, to (1) use tournament action as a backdrop for live actions reports (provided no play-by-play is used); and/or (2) use up to two minutes of film, videotape, etc. on a regularly scheduled news or sports program. Exs. D (2009-10 Senior High School Handbook at 51) & C (2008-09 Senior High School Handbook at 51).

18. The WIAA has also issued a 2008-09 Media Policies Reference Guide ("Media Guide") "to assist media with requesting/issuing of working media credentials . . . the use of equipment by news gathering media and the comprehension of WIAA property rights for State Tournament Series competitions." Ex. E (2008-09 Media Guide at 1). These include policies for radio, television, cable, and internet, and apply only during the WIAA-State Tournament Series, which includes regional, sectional, and state final tournaments. Ex. E (2008-09 Media Guide at 10). These policies define the term "broadcast" as "the airing/streaming . . . the entire duration of tournament games." Ex. E (2008-09 Media Guide at 11).

19. Although “live coverage” of tournament events is not permitted absent permission, consistent with the 2009-10 Senior High School Handbook, commercial television stations and websites covering the WIAA State Tournament Series for “newscast purposes” are permitted use of two minutes of film, video or audio tape for regularly scheduled news, sports programs, or websites, and may use tournament action as a backdrop for live actions reports, provided no play-by-play is used. Exs. E (2008-09 Media Guide at 12) & F (2009-10 Media Guide at 11-12). No fees are required for tape-delayed broadcasts or streams for schools wishing to air games on their school’s educational channel on local cable systems or the school’s website. Ex. E (2008-09 Media Guide at 12).

20. Beyond this, parties who wish to broadcast or internet stream State Tournament Series events are required to obtain permission from the rights holder. Ex. E (2008-09 Media Guide at 16). It is my understanding that the WIAA has entered into an exclusive contract with When We Were Young Productions (“WWWY”) for the internet streaming rights to all pre-state Tournament Series events for all sports (i.e., regional and sectional events) and all State Tournament events (i.e., finals) excluding football, basketball, and hockey finals; that Fox Sports Wisconsin (“Fox”) has the exclusive rights to State Football Championship games; and that WAOW-TV/Quincy Newspapers, Inc. (“Quincy”) has the exclusive rights to the Boys and Girls Basketball State Tournaments and Hockey State Finals. Ex. E (2008-09 Media Guide at 16). I have been provided each of these contracts, which were attached to the initial complaint in this matter.

21. In addition to policies related to video transmission of games, the WIAA has adopted policies that allow for media access to communication lines (i.e., telephone, high-speed, and wireless connections) at State Tournament venues (Ex. F (2009-10 Media Guide at 6)),

photography (Ex. F (2009-10 Media Guide at 6)), radio or other audio broadcast (Ex. F (2009-10 Media Guide at 10-11, 13-14, 17)), and post game interviews. Under these policies, subject to some limitations, newspapers are offered up to five media credentials for daily papers (two for weekly newspapers), which allows reporters access to communications lines for a fee of \$25-30, permits the taking of pictures for reporting (Ex. F (2009-10 Media Guide at 6-8)), and allows for post-game interviews of players and coaches (Ex. F (2009-10 Media Guide 8-10)).

VI. OPINION

A. SUMMARY OF OPINION

22. I have reviewed the policies of the WIAA related to internet transmission of the WIAA Tournament events, and, in my opinion based on more than forty years in the field of broadcasting and journalism, these policies are reasonable, strike a proper balance between news and broadcast entities seeking to report on the events and/or live broadcast from the events, and are consistent with those generally used by sports teams, organizations, and leagues, including public educational institutions. In my opinion, these policies do not unreasonably restrict newspapers from reporting on these events or from covering these events in a comprehensive way. Exclusive rights agreements for television, radio, and internet such as the ones employed by the WIAA, are commonly used by athletic teams, leagues, and organizations. Such agreements are frequently used by public education institutions to generate funds to support a broad array of athletic participation opportunities for student athletes. In my opinion, the WIAA's policies properly serve this function while simultaneously and reasonably permitting access to the broadcast and print media. These policies are intended to and do balance and reasonably accommodate the otherwise potentially competing and inconsistent interests of the WIAA and member schools to receive financial benefits from these events and the desire of the media to report on these events.

B. THE WIAA HAS A SUBSTANTIAL INTEREST IN LIMITING INTERNET TRANSMISSIONS FOR TOURNAMENT EVENTS

1. EXCLUSIVE LICENSE AGREEMENTS ARE COMMONLY USED BY SPORTING ORGANIZATIONS

18. Based on my experience in intercollegiate athletics administration, protecting broadcast rights and awarding them on an exclusive basis is clearly a major financial underpinning of college sports. As a member of a variety of committees over the years, I have been a party to discussions and deliberations which have led to exclusive contracts between universities and/or conferences and rights holders. Specifically, in 1989 I was a member of the UW Committee on Broadcast Exclusivity, which determined there was a substantial value to the UW by awarding exclusive rights for radio broadcasts of football and men's basketball games, and solicited and awarded exclusive rights for the first time at the UW. *See Exs. G-I.* As a part of our discussions, it is my recollection that we reviewed the broadcast policies of other Big Ten universities, and determined that UW's policy of non-exclusivity was inconsistent with the policies of other institutions, which allowed for exclusive broadcast rights thereby gaining substantial additional revenue. The committee therefore changed a long-standing UW non-exclusive policy that permitted virtually any radio station to carry games so long as they paid a modest rental fee for a broadcast booth. *See Exs. H & I.*

23. I have also participated in discussions within the Big Ten Conference Joint Group (the athletic directors and faculty representatives) regarding the conference policy that awards exclusive television rights for multiple sports to one or more of the major national networks. Universities 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. Revenues from these contracts are then divided among the Conference members. For example, the Big Ten currently licenses Big Ten Football coverage to Disney, i.e., ABC and ESPN, for a

substantial (but confidential) fee. This agreement lasts from 2007-2017. *See Ex. J.* For the past two years, since the advent of the Big Ten Network, games that are declined by Disney are carried on the Big Ten Network. *Ex. K.*

24. In addition, as a member of the Television committee of the Western Collegiate Hockey Association, I was involved in discussions that led to the awarding of an exclusive television contract for televising and/or streaming all WCHA Tournament Games—opening round and Final Five. *See Ex. L.* Much like the WIAA, it is my understanding based on my participation in the administration of the WCHA that the WCHA is funded primarily through revenues derived from its tournament events, i.e., the opening round and Final Five. Thus, the purpose of the awarding of this exclusive contract was to increase revenues of the WCHA.

25. Prior to the awarding of exclusive rights at the UW, individual radio stations could rent a booth and broadcast football and basketball games on their own. In 1988-89, that rental rate was a minimum of \$550 per game. *Ex. H.* According to records from the UW Committee on Broadcast Exclusivity, revenues from radio of football and basketball for the years 1983-88 were as follows:

Review of Radio Broadcast Rights Fee Income from Football and Basketball

	<u>Football</u>		<u>Basketball</u>	<u>28 Games</u>
1988	11 Games Home & Away	\$ 99,905.86	\$6970.00	88-89
1987	11 Games Home & Away	99,041.48	7700.00	87-88
1986	12 Games Home & Away	108,372.48	8130.00	86-87
1985	11 Games Home & Away (increased rate)	87,478.45	3360.00	85-86
1984	11 Games Home & Away	77,713.86	4380.00	84-85
1983	11 Games Home & Away (reciprocal arrangement started)	72,777.00	4350.00	83-84

Ex. I. The UW's initial estimate was that an exclusive license agreement would *triple* radio broadcast revenue. Ex. G. In fact, Wisconsin's most recent renewal with its current radio rights holder, Learfield Communications, is for *\$75 million* over 12 years, far exceeding initial estimates.¹ Ex. M. Clearly, there is a value to a school, league, tournament, or sponsor in protecting and awarding exclusive broadcast rights.

26. UW's policies are consistent with other public universities throughout the country in that the value of the exclusive broadcast rights is a key component in the business plan for athletics, which I have reviewed in my work with the above-noted committees. Learfield alone has agreements with more than 50 universities and conferences related to radio sports coverage. Ex. N. The exclusivity of UW's broadcast rights is similar to that of other large public universities. This is common practice. It is nothing out of the ordinary for organized sports.

27. In my opinion, the UW's exclusive license agreements and those of other universities and conferences are comparable to the exclusive license arrangements of the WIAA related to internet transmissions of WIAA Tournament events.

2. LICENSING FEES PROVIDE NEEDED FUNDING FOR THE WIAA

28. It is my opinion that the WIAA's exclusive rights agreements, in particular its agreement with WWWY productions, provides much needed funding for the WIAA. The WIAA therefore has a substantial interest in this contractual arrangement.

29. It is my understanding that the contract with WWWY productions was entered into in part due to budgetary needs of the WIAA. Clark Aff. ¶ 4-7. According to the WIAA, in 2004 it was informed by Quincy, carrier of Boys and Girls State Basketball State Tournament and Hockey State Finals Tournament, that it could not afford to continue to pay the amount included

¹ In addition to radio, this contract covers expanded rights, including additional sports (e.g., women's basketball and hockey), game programs, and inventory such as stadium signage.

in the rights agreement. Clark Aff. ¶ 4. The WIAA accordingly sought out other sources of revenue. Clark Aff. ¶ 4. In 2005, the WIAA was approached by WWWY with the idea of transmitting WIAA games over the internet. Clark Aff. ¶ 7. At the time, it is my understanding that no television station carried games other than the Football Finals, Boys and Girls Basketball, and Hockey Finals, except that in some instances local community access channels would broadcast local games. Clark Aff. ¶ 5. The WIAA was unaware of any internet streaming of games. Clark Aff. ¶ 5. The WIAA thus received no rights fees related to the vast majority of its sports. Clark Aff. ¶ 5-6. The WWWY contract thus represented an entirely new and important stream of revenue for the nonprofit organization.

30. I have been provided with a copy of the WIAA budget from the year 2007-08. Ex. O. The WIAA's tournament events are overwhelmingly the largest source of WIAA operating revenue. Ex. O; Clark Aff. ¶ 3. Indeed, by my calculation based on the 2007-08 budget, the WIAA receives approximately 87% of its annual revenues from the WIAA Tournament series. *See Ex. O.* Like the WCHA, the WIAA thus depends on its tournament events to survive.

31. A portion of this operating revenue is derived from its exclusive media rights agreements. In 2008, the WIAA received \$75,000 for the Boys and Girls Basketball State Tournaments and Hockey State finals, \$20,000 for Football State finals, and \$60,000 from When We Were Young Productions for all other tournament events. Ex. P; Clark Aff. ¶ 8.

32. In my opinion, were these contracts switched to non-exclusive, this revenue stream would all but disappear. Based on precedent in other leagues and athletic organizations, the value of the media rights rests primarily in exclusivity. Stations and networks are willing to make investments in their coverage in order to enhance the value of their exclusive rights payments.

33. In addition to the \$60,000 paid by WWWY in 2008, the WIAA also received \$80,000 from a sponsorship partner. Clark Aff. ¶ 10. A portion of the value of this sponsorship agreement comes from advertising in programming produced by WWWY. Clark Aff. ¶ 10. The overall value to the WIAA associated with the contract with WWWY is therefore substantially above the \$60,000 paid for the internet transmission rights.

34. Furthermore, it is my understanding that WWWY provides additional services to the WIAA as a part of the agreement, including without limitation video production, audiovisual and graphics support for tournament games such as producing video programming for scoreboards at tournament sites. Clark Aff. ¶ 9. In addition, WWWY also provides web transmissions for mandatory WIAA sport rule meetings which allows members, officials, and coaches to view these mandatory meetings remotely thereby avoiding travel, and at their convenience. Clark Aff. ¶ 9. Because it receives these otherwise costly services as a part of the exclusive agreement, the contract with WWWY productions is thus of even greater financial value to the WIAA than the amount paid in royalties from WWWY.

3. AN EXCLUSIVE LICENSE IS NECESSARY TO FUND OTHERWISE UNDER-FUNDED AND UNDER-EXPOSED TOURNAMENT EVENTS

35. In my experience at the UW and with the Big Ten Conference, the WCHA, and the NCAA, the exclusive rights fees for tournament events generates revenue that is critical for the funding of sports that are unable to produce revenue on their own. In this way, the exclusive rights revenue leads to expanded participation opportunities for student athletes. It is my opinion that the WIAA's exclusive rights contracts perform this same role for the organization, by funding otherwise under-funded and under-exposed sports. In this regard, the WIAA's exclusive rights agreements create opportunities for participation for Wisconsin student athletes that otherwise would likely not exist.

36. The vast majority of the WIAA tournament revenue is derived from basketball and football. Ex. O. In fact, in 2008 the WIAA generated positive net revenues in only basketball, football, wrestling, volleyball, hockey, and soccer. Ex. O. All remaining sports, which include baseball, track, swimming, tennis, gymnastics, cross country, softball, and golf, *operate at a loss* and must be subsidized by the revenue from the more popular WIAA tournament events. Ex. O. The WIAA thus depends in part on its rights agreements to fund otherwise under-funded sports tournaments for less popular sports.

37. Moreover, in my opinion, the WWWY exclusive license agreement provides expanded exposure for less visible sports. As noted above, prior to the WWWY agreement, these games were carried solely on local cable access, and even then on an irregular basis. Clark Aff. ¶ 5. Thus, by way of example, a resident of Green Bay would only be able to watch a WIAA volleyball tournament game if that game were carried on local cable access in Green Bay. In contrast, under the WWWY contract, this game can be made available over the internet to anyone with a computer and internet access on WIAA TV (<http://wiaa.tv/>), a web portal that allows access to WIAA events. Clark Aff. ¶ 8. In fact, whereas in 2004-05 no WIAA events were offered on the internet, in 2008-09 the WIAA web portal transmitted 82 live WIAA events on WIAA TV and 182 offered on archived stream and DVD, of which 134 were under the WWWY contract with WIAA. Ex. Q; Clark Aff. ¶ 8. Thus, in my opinion, the WWWY contract has enhanced public access to WIAA events.

38. The WWWY contract helps fulfill one of the WIAA's stated objectives, to promote "opportunities for member schools participation." Ex. C (2008-09 Senior Handbook at 14). Prior to entering its contract with WWWY, it is my understanding that the WIAA (at the request of participants) had unsuccessfully sought out a carrier for sports other than football finals,

basketball, and hockey finals by making inquiries with their existing rights holders. Clark Aff. ¶

6. In fact, it is my understanding that prior to WWWY, no other organization had approached the WIAA with an offer to transmit events via internet at all, let alone to transmit the then-underexposed and less visible sports such as cross country and tennis. Clark Aff. ¶ 7. The contract with WWWY thus provided an opportunity for the WIAA to promote a particular group of events and student athletes. Clark Aff. ¶ 7.

39. Finally, in my opinion, were the contract on a non-exclusive basis, it is unlikely these sports would be made available to the non-attending public. Other than WWWY, media have not expressed an interest in carrying a full range of the WIAA Tournament events. This is demonstrated in Gannett's complaint, which discusses multiple attempts by newspapers to transmit football *only* from their local area teams. Furthermore, without the economic protection provided by exclusivity, an internet rights holder would be unlikely to invest in and commit the equipment and facilities necessary to produce this number tournament events, in particular those sports which do not normally command significant public attention.

40. Indeed, in this regard WWWY's interest in exclusivity, and the WIAA's interest in limiting internet transmissions of its games, is comparable to a newspaper's or wire service's need to protect its product from unapproved use on other websites or publications, or, more directly on point, much like Major League Baseball's interest in prohibiting unauthorized use of the broadcast of its game without the advance written consent of Major League Baseball, which has itself entered into rights agreements related to that content.

C. THE PRINT AND BROADCAST MEDIA HAVE A RECOGNIZABLE AND APPROPRIATE INTEREST IN REPORTING ON AND COVERING ATHLETIC EVENTS

41. As someone who has worked long and hard in, and has studied and taught in, the field of news gathering and reporting, and in the field of broadcast journalism, I recognize and profoundly respect the interests and needs of the public, and the eyes and ears of the public (i.e., the media) not only to report on newsworthy events, but to have reasonable access to newsworthy events in order to properly carry out these tasks and responsibilities.

42. However, as a result of my long tenure in this field, I am also firmly of the opinion that “rights of access” to newsworthy events is a relative, not an absolute concept, particularly as it has played out in the context of real life events. That is because of the practical truth of the observation that the “legitimate” rights of one entity inherently conflict with the “legitimate rights” of another. That is particularly true in the context of sports events and the “reporting” on the same. There is no doubt that there is a news gathering/news reporting aspect to these events. What a team does in an athletic event certainly has public interest and may be “newsworthy.” And, of course, “incidents” at a game, such as a fight or the collapse of bleachers, have their independent “newsworthy” significance.

43. But, in my opinion, it is equally true that the “sponsoring” or “supporting” or “responsible” entity that puts on the event has a rational and realizable interest in maximizing the economic benefit which accrues from the event, i.e., the public sees the event, in part at least, as entertainment and will pay to see it, particularly when the proceeds are invested in promoting other such events, or related events, or activities.

44. The “media” and “sponsoring” schools (or related organizations such as the NCAA and the WIAA) have, at least de facto, recognized these valid, rational and potentially competing

interests. What has developed, in my experience, and in my opinion, is a de facto (but is often formalized in contract and licenses) accommodation, or compromise, or “stand off” whereby all interests agree to “reasonable” time, place and manner restrictions – restrictions that are intended to balance these competing “rights” and concerns, while still recognizing the respective legitimacy of the rights and concerns of each of the involved and affected “entities.”

45. For the reasons hereinafter discussed, in my opinion, the identified practices, policies and restrictions that the WIAA has formulated and practiced strike a proper balance and, in this context, constitute reasonable time, place, rules, practices and restrictions.

D. REASONABLE RESTRICTIONS ARE ACCEPTED PRACTICE IN SPORTS BROADCASTING AND COVERAGE

46. Throughout my years of experience working for broadcast stations and being involved in intercollegiate athletics, I have not encountered ways in which university exclusive broadcast rights policies have hindered media outlets from reporting on games. The only significant restriction from these policies is on the broadcasting or streaming of the games. Other than that, reporters for print, broadcast, and internet media are free to report on games without significant restrictions on their coverage.

47. In fact, the WIAA’s restrictions are typical of those I have encountered in my coverage of games. As a reporter covering UW athletics, I was able to film game action, record relevant statistics and other game information via audio recording and good, old fashioned pen to paper. I had access to coaches and athletes following games to complete game stories and sidebars. The presence or absence of an exclusive broadcast rights policy does not affect any of these basic journalistic practices.

48. Based on my experience, it is common practice for reporters covering athletic events to be restricted to specific locations and to have limitations placed on the equipment they can use,

for example, on the ability to originate a radio broadcast. These policies are typically based both on the availability of space and to control the conduct of the game. For example, television and still photographers are given clear limits on where they can work during a game so as to not interfere with the game itself, or simply because of space limitations. You cannot have an unlimited number of television cameras because there is not space for them. Similarly, broadcasters originating game coverage regardless of the type of media (i.e., radio, television, or internet) are accustomed to working within pre-defined space limitations, for example, a broadcasting booth. In my opinion, in virtually all cases, broadcasters and reporters know and respect any exclusive rights agreements that are in place for that event. There is a widely recognized distinction between *covering* a game, which virtually any news organization can do, and *carrying* a complete broadcast or stream of a game, which is limited to the appropriate rights holder.

E. THE MEDIA HAVE ALTERNATIVE ACCESS TO REPORT ON THESE GAMES

49. First and foremost, under the WIAA's policies, newspapers are not foreclosed from internet streaming of games. They are able to transmit games if they simply pay the required fee to WWWY. This is in contrast to the exclusive license agreements for television, which defendants have not challenged, and which do not allow the defendants or any other organization the right to transmit live or delayed game coverage in any instance.

50. Second, newspapers have sufficient opportunity to report for their regular editions the details and outcomes of the games, including sidebars, statistics, and other relevant information. As detailed above in paragraphs 14-21, they can report on the games, photograph the events, and have interview access to coaches and athletes. This permits the thorough coverage which the newspaper audience expects. At the same time, they can provide online score updates and other relevant information regarding a game in progress, except for carrying the live stream of the

game itself. Newspapers are also permitted to carry live audio streams of tournament games from radio rights holders by paying an additional rights fee of \$40-50 to WIAA.

51. In addition, websites can use up to two minutes of highlights or other action for reporting purposes, and may exceed two minutes with the WIAA's approval. This policy also applies to commercial television stations. Websites can also report live from tournament venues using live game action as a backdrop for the report so long as there is no play-by-play commentary. These policies apply to all commercial television stations and websites using video for newscast or webcast purposes.

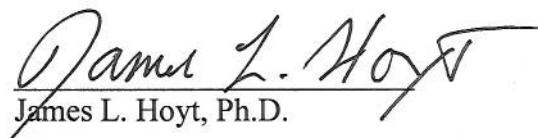
52. As a result of these policies, newspapers have virtually complete access to the athletic events in order to perform their expected journalistic functions, i.e., to fully describe, explain, and analyze newsworthy events. Only in streaming a game do they need to pay a rights fee to anyone outside the WIAA, which is consistent with the policies that apply to radio and television media. This is consistent with the way in which coverage is handled in intercollegiate athletics and also consistent with the practices of professional sports leagues including the National Football League, Major League Baseball, and the National Basketball Association.

53. Finally, I do not see WWWY and state newspapers as being competitors. They each have their own roles to play. WWWY pays an exclusive rights fee to provide production services to client media. Newspapers are able to fully report on the WIAA Tournament events for their readers in all traditional ways. In my opinion, the WIAA's policies do not interfere with the abilities of newspapers to fully cover the WIAA Tournament events.

VII. CONCLUSION

54. The opinions in this report are based on information currently available to me. I reserve the right to continue my investigation and study, and to supplement, expand, or modify the opinions expressed in this report as discovery progresses in this case and further information becomes available to me. In my testimony, I may use demonstratives or exhibits.

Dated this 28th day of September, 2009.



James L. Hoyt
James L. Hoyt, Ph.D.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC
ASSOCIATION, AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

GANNETT CO., INC., and
WISCONSIN NEWSPAPER ASSOCIATION, INC.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2009, I caused a copy of the **Expert Report of James L. Hoyt, Ph.D. and Affidavit of Todd C. Clark** to be served via email on the following:

Robert J. Dreps
Monica Santa Maria
GODFREY & KAHN, S.C.
1 East Main Street, Suite 500
Madison, WI 53703
rdreps@gklaw.com
msantamaria@gklaw.com

Dated this 28th day of September, 2009.

/s/ *Laura E. Distin*
Laura E. Distin

EXHIBIT A

Wisconsin Interscholastic Athletic Association, et al. v. Gannett Co., Inc., et al.

Dr. Hoyt - Materials Considered

Complaint with Exhibits A - G

Defendants' Answer, Defenses and Counterclaim

Answer to Defendants' Counterclaims

First Amended Complaint with Exhibits A – E

Defendants' Answer to Plaintiff's First Amended Complaint

Wisconsin Newspaper Association's Responses to Plaintiff's First Set of Requests for Production of Documents dated 8-12-09

Wisconsin Newspaper Association's Responses to Plaintiff's First Set of Interrogatories dated 8-12-09

Gannett's Responses to Plaintiff's First Set of Requests for Production of Documents dated 8-19-09

Gannett's Responses to Plaintiff's First Set of Interrogatories dated 8-19-09

2-19-09 Letter from John Skilton to Dreps regarding WIAA Internet Streaming Policy

2008-09 Media Policies and Reference Guide

2009-10 Media Policies and Reference Guide

2008-09 Senior High School Handbook

2009-10 Senior High School Handbook

Excerpts of 2007-08 WIAA Yearbook

Big Ten Conference on Television (<http://www.bigten.org/mulimedia/big10-television.html>)

The Big Ten Conference Announces Media Agreements Increasing National Coverage of Big Ten

Sports, June 21, 2006 (<http://www.bigten.org/genrel/062106aad.html>)

Receipts (3) rights fees in 2008

2008-09 Calendar of WIAA Tournament Events

2008-09 Western Collegiate Hockey Association

May 26, 1989 University of Wisconsin Sports News Service article, Subject: UW Athletic Department and WTMJ-Radio to Negotiate Exclusivity Rights

Radio and Television Broadcast Rates and Requirements Effective Fiscal 1988-89

Exclusive Radio Broadcast Rights with Attachment #1

Map of Learfield partners

Affidavit of Todd C. Clark

EXHIBIT B

CURRICULUM VITA

James L. Hoyt

ADDRESS: 3415 Conservancy Lane
Middleton, WI 53562
PHONE: 608/831-3255
E-MAIL: jlhoyt@wisc.edu

DATE: August, 2009

FORMAL EDUCATION:

Ph.D.	Mass Communications	University of Wisconsin, Madison, 1970
M.S.	Journalism and Mass Communications	University of Wisconsin, Madison, 1967
B.S.	Journalism	University of Wisconsin, Madison, 1965

ACADEMIC POSITIONS:

At the **University of Wisconsin, Madison**, School of Journalism and Mass Communication:

2002-present:	Professor Emeritus
1981-2002:	Professor
1981-1991:	Director
1980-1981:	Associate Director
1976-1981:	Associate Professor
1974-1995:	Head, Broadcast News Sequence
1973-1976:	Assistant Professor

At the **Indiana University** School of Journalism and Dept. of Telecommunications:

1970-1973:	Assistant Professor
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At the **University of Wisconsin** School of Journalism and Mass Communication

1968-1970:	Research Assistant
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At the **University of Pennsylvania**, Annenberg School of Communications:

1967-1968:	Research Fellow
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