IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

I, Monica Santa Maria, declare and state as follows:

1. I am an attorney with the law firm of Godfrey & Kahn, S.C., counsel to defendants Gannett Co., Inc. and Wisconsin Newspaper Association, Inc.

2. I make the following statements based on my personal knowledge.

3. Attached hereto as Exhibit A is a true and correct copy of Plaintiff American-HiFi, Inc's Responses to Defendant Gannett Co., Inc.'s First Set of Requests for Interrogatories served on Defendants' counsel on January 11, 2010. The exhibits attached to the responses are not filed herewith.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 12th day of February, 2010.

s/Monica Santa Maria
Monica Santa Maria

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EXHIBIT A

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.

PLAINTIFF AMERICAN-HIFI, INC.'S RESPONSES TO DEFENDANT GANNETT CO., INC.'S FIRST SET OF REQUESTS FOR INTERROGATORIES

Plaintiff American-HiFi, Inc. ("WWWY") hereby objects and responds to Defendant Gannett Co., Inc. ("Gannett") First Set of Interrogatories (the "Interrogatories"). WWWY reserve the right to amend and/or supplement these objections and responses as discovery continues in this case.

GENERAL OBJECTIONS

1. WWWY objects to Defendant's Interrogatories to the extent they seek information protected by the attorney-client privilege, the work product doctrine or any applicable privilege, rule or duty that precludes or limits disclosure of information. Inadvertent disclosure of any privileged or otherwise confidential information shall not be a waiver of any claim or privilege, work product protection, exemption or immunity.

2. WWWY objects to Defendant's Interrogatories to the extent they require disclosure of proprietary, trade secret or other commercially protected or confidential

information unless and until the entry of an appropriate confidentiality order and implementation of procedures that will ensure continued confidentiality of such information.

3. A representation of a willingness to provide information, if any, is not a representation that any responsive, non-privileged information exists. A refusal to provide information is not an admission that responsive information exists.

4. A representation of a willingness to provide information and/or providing information is not an admission that the information provided or to be provided is relevant to any claim or defense of any party in this case or to any issue in this case or is reasonably calculated to lead to admissible evidence.

5. In the event that WWWY agrees to provide information and/or documents that are subject to a contractual prohibition against their disclosure, WWWY will seek permission from the party to the contract imposing such a prohibition to provide the requested information and/or documents prior to providing them to Plaintiff. In the event that such permission is not forthcoming, WWWY will not provide the requested information and/or documents unless and until ordered to do so by the Court.

6. Subject to its objections and entry of an appropriate confidentiality order, WWWY will provide responsive, non-privileged information. WWWY provides this response without prejudice to its right to amend and/or supplement this response should additional facts and/or documents be discovered.

7. WWWY does not waive, and specifically reserves, any additional objections WWWY may have, including (a) all questions as to competency, privilege, relevance, materiality, authenticity, and admissibility; (b) the right to object to the uses of any objections, responses, or documents in any lawsuit or proceeding on any or all of the foregoing grounds, or

on any other proper ground; (c) the right to object on any and all proper grounds, at any time, to other discovery procedures involving or related to objections, responses or documents; and (d) the right, at any time, to revise, correct, or clarify any of the following objections or any later responses. Any objection or response by WWWY does not constitute an admission that such information is probative of any particular issue in this case.

8. WWWY objects to "Definition" Nos. 2 and 3 to the extent they are overbroad and unduly burdensome, and request information not within the custody or control of WWWY.

9. WWWY objects to these requests to the extent they are duplicative to requests served on plaintiff WIAA.

10. The foregoing General Objections are applicable to all interrogatories and are incorporated into the responses to specific interrogatories as if set forth fully therein, whether or not they are expressly stated. Each of the General Objections shall be deemed continuing as to each interrogatory and are not waived or in any way limited by the specific objections.

OBJECTIONS AND RESPONSES TO SPECIFIC INTERROGATORIES

INTERROGATORY NO. 1: For each school year, 2006-07, 2007-08 and 2008-09, identify each WIAA Tournament event that was streamed live over the Internet, identify the entity that produced the Internet stream and, for each streamed event, state the license fee paid to WWWY, if any, and the amount of that fee WWWY paid to WIAA, if any.

RESPONSE TO INTERROGATORY NO. 1:

Plaintiff objects to this Request to the extent it calls for third-party information or information beyond the custody or control of WWWY. WWWY incorporates by reference Exhibit 2 to the Affidavit of Todd C. Clark, dated September 28, 2009, identifying tournament events live streamed and archived streamed in 2008-09. Plaintiff further incorporates by

reference in its response to Interrogatory No. 5. WWWY is in the process of determining if comparable records exist for the years 2006-07 and 2007-08, and, if such records exist, will produce and identify documents responsive to this request pursuant to Fed. R. Civ. P. 33(d). WWWY will supplement this response at that time.

Other than those internet transmissions identified in paragraph 30 of the Amended Complaint, Dkt. No. 7, which were made without the authorization of WIAA or WWWY, to the best of WWWY's current knowledge, WIAA tournament events have been live streamed by iFan Sports Net (aka ISPTV), with the consent of WWWY. In addition, WIAA tournament have been live streamed by Morgan Murphy Media, which live streams were produced by WWWY. Pursuant to Fed. R. Civ. P. 33(d), WWWY directs Defendants to Exhibit A, attached hereto. WWWY reserves the right to supplement or amend this response as discovery continues in this case

INTERROGATORY NO. 2: For each school year, 2006-07, 2007-08 and 2008-09 (or calendar year if your records are kept on that basis), state the amount of revenue you received as a result of the WWWY Contract and itemize, by year, the amounts you paid to WIAA under ¶¶ V(a)(iii), V(a)(iv), V(e) and any other provision of that contract.

RESPONSE TO INTERROGATORY NO. 2:

WWWY objects to this Request to the extent it is irrelevant and unlikely to lead to admissible evidence. WWWY objects to this request to the extent the phrase "as a result of the WWWY Contract" is vague, ambiguous, and undefined. WWWY objects to this request to the extent the term "itemize" is vague, ambiguous, and undefined. Subject to the foregoing objections, WWWY answers as follows. Pursuant to Fed. R. Civ. P. 33(d), WWWY directs Defendants to Exhibit B, attached hereto and incorporated by reference to this response.

WWWY reserves the right to supplement or amend this response as discovery continues in this case.

INTERROGATORY NO. 3: Specify, by year, the services you provided to WIAA under ¶ VI(a) of the WWWY Contract and estimate your annual cost of providing those services.

RESPONSE TO INTERROGATORY NO. 3:

WWWY objects to this request to the extent the phrase "services" as vague, ambiguous, and undefined. Subject to the foregoing objection, WWWY responds as follows. WWWY does not maintain records of "services" provided to WIAA "by year." In general, as part of the Agreement with the WIAA, WWWY provides at least the following services to WIAA:

- WIAA state tournament event production costs in the field;
- WIAA state tournament event post-field production costs;
- WIAA channel production;
- WIAA state tournament venue production;
- wiaa.tv hosting and management;
- wiaa.tv live streaming;
- WIAA sports meeting production; and
- production of other WIAA meetings.

WWWY provides the following video production services to the WIAA at no cost:

- WWWY films, edits, and makes available to WIAA members on wiaa.tv, the WIAA's sports meetings, such as the WIAA's seasonal rule interpretation meetings, so that members can access such meetings without attending in person, saving members time and expense, and increasing participation.

- WWWY films, and makes available to WIAA members on wiaa.tv live, the WIAA's Annual Meeting, so that the entire membership can hear and watch the annual report from the executive director and discussions regarding key changes without attending in person, saving members time and expense, and increasing participation.
- WWWY produces an annual video that compiles highlights of all state WIAA tournaments throughout the year.
- WWWY films, edits, and makes available on wiaa.tv, the annual scholar athlete award ceremony held in the spring in Wausau, Wisconsin. WWWY gives the award winners a DVD copy of the event.
- WWWY films, edits, and makes available on wiaa.tv, the annual WASC spirit of excellence award ceremony. WWWY films interviews of the presenters which it includes in the final production of the award ceremony tape. WWWY helps promote the award ceremony at tournaments by showing the tape on the video board at various venues.
- At venues where the WIAA hosts championship tournaments, WWWY provides live game feed to the video board. Normally, the venue itself charges a large fee to provide live game feed to the video board. Instead of hiring someone from the venue to provide feed to the video board, WWWY has two to three extra staff members present at the event solely to work on the video board feed, all at no cost to the WIAA.
- WWWY produces highlight segments from other WIAA sponsored sectionals or tournaments, and does recaps with video from other WIAA state championship tournaments that it presents on the video board at championship tournaments.

- WWWY films starting line-up introduction videos and/or team videos that it shows on the video board at all tournaments that have video board capability.
- WWWY creates public service announcements that the WIAA and member schools can display on video boards at events and that are displayed on wiaa.tv.

In addition to the services detailed above, WWWY provides consulting services to the WIAA regarding media, technology, video production and market and industry trends at no cost to the WIAA.

WWWY estimates that the total cost to fulfill WWWY's contractual commitments to the WIAA was approximately $508,806 in the 2008-09 year, as detailed in Exhibit B to Gannett's First Set of Document Requests, incorporated by reference to this response. WWWY reserves the right to supplement or amend this response as discovery continues in this case.

INTERROGATORY NO. 4: State how you calculated your payment of $60,000 to WIAA, on July 31, 2009, under ¶ V of the WWWY contract and identify all supporting documents.

RESPONSE TO INTERROGATORY NO. 4:

The $60,000 payment to the WIAA on July 31, 2009, constitutes1/6 of the revenues paid by Charter Communications Operating, LLC, and Fox Sports Net to WWWY pursuant to these contracts, which payments totaled $360,000. Documents that support this calculation include WWWY's distribution contracts with Fox and Charter (attached as Exhibits D and E to WWWY's Responses to Gannett's First Set of Requests for Production), and documents detailing the payments related thereto. The amount of this payment, and the method by which it was calculated, was orally agreed to by WWWY and WIAA prior to payment.

INTERROGATORY NO. 5: With respect to the Affidavit of Todd C. Clark, ¶ 8:

(a) identify each of the 82 tournament events streamed live during the 2008-09 school year and identify the entity that produced the live stream; and

(b) identify each of the 182 tournament events from the 2008-09 school year offered on archived stream and identify the entity that produced the archived stream.

RESPONSE TO INTERROGATORY NO. 5:

Subject to the foregoing General objections, WWWY answers as follows. Pursuant to Fed. R. Civ. P. 33(d), Defendant directs Defendants to Exhibit 2 to the Affidavit of Todd C. Clark, dated September 28, 2009, identifying tournament events live streamed and archived streamed in 2008-09. All live streamed events noted on Exhibit 2 were produced by WWWY. With regard to archived stream events, WWWY believes only 175 games were archived streamed on wiaa.tv in 2008-09. For seven games included on the spreadsheet as archived streamed (Football Divisional Finals), WWWY believes that Fox Sports did not allow archive stream of the games on wiaa.tv in 2008-09, although it has for other years. Of the 175 events archive streamed, 141 events were produced by WWWY, 134 of which were produced pursuant to the WIAA-WWWY contract. Seven archived events (Football Tournament Highlights) were produced by WWWY pursuant to a separate agreement with Fox Sports, the rights holder for Football State Championship games. The remaining events, which consist of Boys and Girls Hockey Finals and Boys and Girls Basketball, were produced by either Fox Sports Wisconsin or Quincy Newspapers, Inc. However, WWWY produced the archive stream of these events for WIAA TV, and provided it to affiliate sites free of charge (see Exhibit C). WWWY reserves the right to supplement or amend this response as discovery continues in this case.

INTERROGATORY NO. 6: Do you contend that you own the copyright of images of WIAA Tournament events fixed in a medium suitable for Internet streaming produced by

members of the media who have not obtained pre-approval, authorization or a license from you or from WIAA? If so, please state the complete factual basis of your contention.

RESPONSE TO INTERROGATORY NO. 6:

WWWY objects to this Interrogatory to the extent it seeks information protected by attorney-client privilege and/or work-product immunity. WWWY objects to this Interrogatory to the extent it calls for a legal conclusion. Subject to the foregoing general and specific objections, WWWY responds as follows. Pursuant to its contract with the WIAA, WWWY contends that it owns the exclusive right to produce, sell, and distribute the WIAA series and championships included in its agreement with WIAA. WWWY incorporates by reference plaintiff WIAA's response to Interrogatory No. 11. WWWY reserves the right to supplement or amend this response as discovery continues in this case.

Dated this 11th day of January, 2010.

Respectfully submitted,

As to objections:

PERKINS COIE, LLP

By: */s/ Autumn N. Nero*
John S. Skilton
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David L. Anstaett
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ANDERSON, O'BRIEN, BERTZ, SKERENE & GOLLA

Gerald O'Brien
gmo@andlaw.com
1257 Main Street
P.O. Box 228
Stevens Point, WI 54481-0228
Telephone: (715)344-0890
Facsimile: (715)344-1012

VERIFICATION

I, Timothy Eichorst, declare and state:

I am the majority shareholder of American Hi-Fi, Inc., d/b/a When We Were Young Productions ("WWWY"), and I am authorized to make this verification on its behalf.

I have read Plaintiff's Responses to Defendant Gannett Co., Inc's First Set of Interrogatories and know the contents thereof. Upon information and belief, I allege that the matters stated therein are true, complete, and correct.

I declare that the foregoing is true and correct.

Executed this 11th day of January, 2010.

Timothy Eichorst

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

DECLARATION OF MARY BENNIN CARDONA

I, Mary Bennin Cardona, declare and state as follows:

1. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently.

2. I am the Executive Director of the Wisconsin Association of Public, Educational and Government Access Channels d/b/a Wisconsin Association of PEG Channels ("WAPC"), and have been employed in this position since June 2005. WAPC is a professional member organization currently serving 63 public, education and government access television stations ("PEG stations") in Wisconsin. In 2005, when the events discussed in this declaration occurred, WAPC had a membership of approximately 40 PEG stations.

3. In August of 2005, one of our member PEG stations informed me that the Wisconsin Interscholastic Athletic Association ("WIAA") had entered into an agreement with When We Were Young Productions ("WWWYP"), which granted WWWYP exclusive broadcasting rights to most post-season WIAA-sponsored games. They had come into possession of a document called WWWYP "2005-06 Affiliate Guidelines" and this member

wanted to know what WAPC thought of it, because community television stations would have to sign it, if they wanted to continue to cover tournament games.

2. PEG channels have a long history of producing high school sports coverage, both regular season and post-season tournament games. Prior to WWWYP being granted exclusive broadcast rights to most tournament events, we estimate that PEG channels produced more than 4,000 hours of high school sports programming per year. Nonetheless, WAPC was not informed that WIAA was seeking to grant exclusive post-season rights to a private entity until after the WIAA signed the contract with WWWYP.

3. On September 1, 2005, after an August 31, 2005 special meeting of the Board of Directors in which the Affiliate Guidelines we were given was reviewed, at the direction of the Board, I wrote a letter to Doug Chickering, then-Executive Director of the WIAA, expressing WAPC's concerns with the affiliate program. A true and correct copy of that letter is attached as Exhibit A.

4. On September 29, 2005, I, as Executive Director, attended a meeting with Tim Eichorst, Tim Knoecht of WWWYP, and Todd Clark of the WIAA to discuss WIAA granting WWWYP exclusive rights to produce, broadcast, and distribute tournament coverage and how WWWYP envisioned PEG stations operating as "Affiliates."

5. Eichorst informed me that PEG channels could no longer produce post-season games without entering into an Affiliate Agreement with WWWYP and that the WWWYP business plan was to license PEG stations as affiliates to produce the thousands of regional, subsectional and sectional games, with some exceptions based on the level of interest in the contest.

6. Based on the discussion at this meeting, Eichorst subsequently provided WAPC with a revised Affiliate Agreement that contained better terms for PEG stations. A true and correct copy of that agreement is attached as Exhibit B.

7. In October 2005, the WAPC Board of Directors met to discuss WWWYP's affiliate program and the now revised Affiliate Agreement and to vote on whether WAPC should take a position, as an organization, on the program. The Board of Directors did decide to take a position, on behalf of the organization, and voted unanimously against endorsing the affiliate program. The WAPC Board of Directors authorized the issuance of a press release explaining its position that the affiliate agreement was fundamentally flawed because it asked that publicly-funded PEG facilities use their resources for a private company's private gain. A true and correct copy of the October 21, 2005 press release is attached as Exhibit C.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 9 day of February, 2010.

Mary Bennin Cardona

EXHIBIT A

WAPC

Wisconsin Association *of* PEG Channels

Serving the needs of public, education, and government cable access television stations since 1998.

September 1, 2005

WIAA Board of Directors
Attn: Doug Chickering
5516 Vern Holmes Dr.
P.O. Box 267
Stevens Point, WI 54481
(715) 344-8580

Dear Mr. Chickering:

I am writing this letter on behalf of the WAPC Board of Directors regarding our concerns about the recently announced WIAA agreement with When We Were Young Productions (WWWYP).

As you are well aware, the Wisconsin Association of PEG Channels (WAPC) and its 40 member facilities have been long-time supporters of WIAA sports. For the past 15-20 years, our high school sports coverage has highlighted outstanding student athletes, built community pride, and created positive shared experiences for fans, parents, supporters, and viewers. Our full-coverage sports programming is well respected within our communities and many facilities have received state, regional and national awards of excellence for their productions.

Our member facilities have maintained strong positive relationships with our respective teams, coaches, athletic directors, as well as the WIAA office. Our members have always followed WIAA policies as they applied to game coverage and the WAPC has regularly assisted the WIAA in disseminating any changes or updates to those policies to our membership. It is estimated that on an annual basis, WAPC members alone cablecast 4,000 hours of high school sports programming on our channels. As our member facilities are non-profit and non-commercial, our sports coverage has been made possible through local business sponsorships and revenue derived from game duplications permitted by the WIAA. These mutually beneficial arrangements have stood well for almost two decades and enabled the WIAA and the access centers to promote and celebrate high school sports.

Recently we have been made aware of a new agreement between the WIAA and WWWYP. An apparent by-product of the agreement is the WWWYP 2005-06 "Affiliate Guidelines." Quite frankly, as the major producers of high school sports coverage, we are disappointed in the lack of consideration given to local cable access stations in these new guidelines.

At the heart of our frustration is Item #7 indicating that the WIAA has granted to

WWWYP the sole right to duplicate any cablecast tournament series games -- game coverage that our access centers produce. This provision not only appears to our membership as grossly unfair, but also severely undermines the ability of access facilities to meet the cost of producing game coverage. Most of our television sponsorships only partially offset the actual production costs. Many stations (especially smaller facilities) justify additional tournament game coverage with the hope that they will recoup the season's expenses through the duplication of these popular tournaments for families and fans. If duplication fees cannot be collected, many facilities will be forced to stop or curtail coverage of tournament games—certainly an outcome we believe the WIAA did not intend with these new guidelines.

In addition, we also question other provisions of the guidelines including:

- Item #3 requiring that an edited copy be sent to WWWYP within one day of the first broadcast day (forcing access facilities to outlay staff time, use their own tape stock, and incur shipping charges without any recompense);
- Item #4 noting that play-by-play content must adhere to WIAA broadcast standards (we have not been made aware of what these standards will entail);
- Item #6 requiring that at least one high school student be employed in the production (a noble endeavor we support, but not realistic or enforceable).

We hope the WIAA will consider some alternatives, including waiving the non-duplication policy for cable access station game producers and exploring other sources of revenue.

Please do not question the WAPC's support of the WIAA, its program, or mission. We simply believe the WWWYP Affiliate Guidelines, in its current form, did not consider the needs of a key partner, the very stations that produce the bulk of WIAA's televised regular season and tournament games. We certainly do not look forward to telling parents, athletes and viewers that tournament series games will not be covered any more due to changes in WIAA duplication policies. The WAPC hopes the WIAA Board will reconsider the provisions we have highlighted in this letter.

The WAPC Board is very interested in sending representatives to meet with you prior to the WAPC October 7 Workshop at Beloit College, when Mr. Clark and Mr. Knoeck plan to speak about the guidelines to our membership. While the Workshop presentation is a step in the right direction and will provide more information to access facility administrators, we believe a smaller meeting to discuss our mutual concerns would make the Workshop session a more positive and productive one.

If you have any questions or to arrange a meeting with WAPC representatives, please call me at the WAPC office at any time; the number is (608) 215-5594. I thank you for your attention to this matter and look forward to speaking with you soon.

Sincerely,

Mary Bennin Cardona
Executive Director
4209 Bagley Parkway
Madison, Wisconsin 53705

cc: WAPC Board of Directors
Mr. Tim Knoeck, WWWYP, 608-274-9999 x225

EXHIBIT B

AFFILIATE PRODUCTION PARTNERSHIP AGREEMENT
FOR WIAA TOURNAMENT SERIES EVENTS

AFFILIATE NAME:_____ CONTRACT YEAR:_____2005-2006_____

ADDRESS:_____ PHONE:_____

_____ FAX:_____

MAIN CONTACT:_____ E-MAIL:_____

SCHOOLS COVERED:_____

_____

By execution of this agreement, the "Affiliate Partner" shall be granted the right, as a sub-contractor of When We Were Young Productions, to produce WIAA Tournament Series Events during the agreed contract year in accordance with the following terms and conditions.

WIAA Tournament Series Events are defined as sub-regional, regional, and sectional events. This agreement does not grant any production rights to the "Affiliate Partner" for WIAA State Tournament Events.

1. FEES – Affiliate sub-contractor will be required to pay a $50.00 per year partnership fee. All checks for partnership fees should be made out to When We Were Young Productions and sent to 313 W. Beltline Hwy, Suite 31, Madison, WI 53713, Att: Tim Knoeck. All fees are due prior to any production allowed under this agreement. The WIAA, or When We Were Young Productions will require no other tournament series production fees.

2. EVENT LOGISTICS – When an Affiliate desires to film an event, they will be required to notify Tim Knoeck, WWWYP Affiliate Program Manager, at (608) 274-9999 ext 225 or cell at (608) 712-5900, in advance of the event. At which time WWWYP will notify the host school via phone, fax or email that you are authorized to film this event. After notification has been given, the Affiliate then may contact the host school to arrange any logistical requirements.

3. CABLECASTING – Affiliate will be granted the rights to cablecast the filmed event on its local public access channel. Affiliate shall have the right to cablecast this event an unlimited amount of times as long as they are in good standing, and current with this agreement. The Affiliate is prohibited from offering this event to any other cablecast or broadcast entity without the express permission of WWWYP.

4. ADVERTISEMENTS/SPONSOR UNDERWRITING – Affiliate shall be granted the rights to solicit local advertisers and sponsor underwriters and promote these entities on their cablecasts. However, all advertisers and sponsor underwriters must meet the requirements as set forth by the WIAA in the WIAA Media Policies Guide. You can obtain a copy of this guide by contacting the WIAA at (715) 344-8580. All dollars generated, by the Affiliate for advertisers and sponsor/underwriters, may be retained by the Affiliate.

5. DUPLICATION – The Affiliate is prohibited from any duplication and/or offering of these events for re-sale or for free.

6. PRODUCT DISTRIBUTION – Within one week of the event filmed, the Affiliate is required to send WWWYP the master copy of the event. Films should be sent to When We Were Young Productions, 313 W. Beltline Hwy, Suite 31, Madison, WI 53713, Att: Tim Knoeck. Films can be sent in any format, however, mini-DV or DVCPRO is preferred. After receipt of the film, WWWYP will created a dub of the master and return the original to you.

7. PRODUCT RE-SALE – WWWYP will master and re-purpose each event to a DVD and offer it for re-sale on prepfilms.com. WWWYP will promote these offerings on all WIAA Tournaments broadcasts. (Re-purposing involves the removal of any advertisements or sponsor underwriter insertions on the event). It is recommended, but not required, that the Affiliate promote prepfilms.com and these offerings on each production to enhance sales. The Affiliate will be given production credits at the end of each DVD. Each event received by WWWYP will be graded for quality and assigned a sales category. A for high quality, B for medium quality, and C for low quality. The quality will be measured based on camera work, multi-camera productions, on-air talent, graphic insertions, replay, and in-game segments. The product pricing will be reflective of the quality category assigned. A - $24.95, B - $19.95, and C - $14.95.

8. ROYALTIES – The Affiliate shall receive a royalty of 20% of gross sales revenue on all products produced by them and sold on prepfilms.com. Sales reports will be generated and distributed quarterly. Royalty checks will be sent 15 days after the close of each quarter.

9. ARCHIVE – Under this agreement, the Affiliate shall maintain the rights to cablecast archived WIAA Tournament Series events that they have captured previously under the conditions set forth. The Affiliate will be required to forward a master copy of all archived events, within 90 days of the date of this contract, to WWWYP. After receipt of these films, WWWYP will re-master to DVD (same as section 7). The Affiliate will also be eligible (as stated in section 8) for the same royalty fee for archived product sales that occur on prepfilms.com. It is important to note, that the Affiliate is not required, by this contract, to send us these archived events unless they desire to re-cablecast or re-sale any of these past films.

10. FAILURE TO COMPLY – Violation of any of these terms and conditions will result in the immediate termination of the Affiliate's rights under this agreement. Any illegal cablecasts, duplication, or re-sale of these events, outside of this agreement, will be pursued under violation of United States Copyright Law.

AGREED TO BY AFFILIATE SUB-CONTRACTOR:

_____

_____
Print Name/Title

_____
Date

WHEN WE WERE YOUNG PRODUCTIONS:

_____

_____
Print Name/Title

_____
Date

EXHIBIT C

WAPC

Wisconsin Association *of* PEG Channels

Serving the needs of public, education, and government cable access television stations since 1998.

PRESS RELEASE

Friday, October 21, 2005

Contact: Jon Urben
920-236-5260/3

Hometowns lose control of WIAA tournament sports coverage in business deal

The Wisconsin Association of PEG Channels (WAPC) took a stand on Thursday against the commercialization of WIAA-sponsored high school tournament sports and against the use of publicly-funded video production facilities for private business ventures. The WAPC board voted unanimously to urge its 40 member stations to reject the year-long Affiliate Contract proffered by When We Were Young Productions (WWWYP). As of May, WWWYP holds the exclusive video production, broadcast, and distribution rights to all WIAA tournament games, except state-level football and basketball games, whose rights were already sold to Quincy Newspapers, Inc. "The contract with When We Were Young may be a financial win for the WIAA, but it's a loss for high school sports," said WAPC President Jon Urben.

For over twenty years, cable access stations obtained the right to produce and cablecast WIAA tournament games on a game-by-game basis. This partnership resulted in high school sports coverage that nurtured student athletes, built community pride, and created shared positive experiences for fans, parents, supporters, and viewers. "Generating revenue has never been a consideration in our coverage of local high school sports," said Urben, "and we are disappointed that revenue generation appears to be the focus of this agreement." According to the WIAA's May 20, 2005 press release, the agreement was struck after "more than two years of deliberation" in order to "generate an alternate financial resource for the WIAA."

The WIAA-WWWYP agreement requires cable access television stations to request authorization from WWWYP to cover WIAA tournament games. Authorized cable access stations pay a yearly fee to WWWYP to become affiliates, with the ability to cablecast the games they record on their basic cable channels as long as they are affiliates in good standing. Master copies of games produced must be turned over to WWWYP for their commercial use, including the sale of DVD's,

--MORE--

web streaming, and the assigning of broadcast, cablecast, and distribution rights to third parties, such as Fox Sports North, who already has the rights to broadcast the State-level tournaments from WWWYP, and cable operators interested in the digital tier Video-On-Demand potential of high school sports. As part of the deal, access stations would get a percentage of DVD sales, but would not be allowed to sell or give away any copies of the games they record.

Over the last two months, the WAPC met with WWWYP twice in the hope that changes to the draft 2005-2006 Affiliate Contract would make it workable for non-profit access centers. However, in the end, the WAPC Board decided that the contract was fundamentally flawed, as it asks publicly-funded facilities to use its resources for private gain. The WAPC board also expressed disappointment that the WIAA chose not to consult with the access television community before signing the agreement with WWWYP. WWWYP planned to rely heavily on free production services from cable access stations to cover the thousands of sectional and regional games that would later be sold through various outlets.

Wisconsin communities expecting full-coverage of high school sports on basic cable this year will not be totally disappointed. While opposition to the contract means that many public, education, and government access cable channels will choose not to produce and cablecast this year's WIAA sectional and regional tournaments, rights to the regular season games are not held by the WIAA and these games will be covered as usual.

-30-

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

SECOND AFFIDAVIT OF MATTHEW P. VELDRAN

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Matthew P. Veldran, being duly sworn on oath, states as follows:

1. I have personal knowledge of the facts stated herein, and if called upon to do so, could and would testify competently.

2. I am a paralegal at Godfrey & Kahn, S.C.

3. On February 2, 2010 and again on February 9, 2010, I accessed the websites http://www.wiaawi.org, http://wiaa.tv and the portal to WWWY's website (*See* Affidavit of Matthew P. Veldran, dated January 22, 2010, ¶¶ 3-8, Dkt. No. 45).

4. I searched these websites for videos of the WIAA's Annual Meetings. I could only locate the 2009 WIAA Annual Meeting – Director's Report and the New Business meeting on the http://wiaa.tv website. Both of these meetings took place on April 22, 2009. I could not locate any other WIAA Annual Meeting.

5. I also searched for the annual scholar athlete award ceremony held in the spring in Wausau, Wisconsin on the http://wiaa.tv website. I could not locate any such ceremony.

6. I also searched for the annual WASC Spirit of Excellence Award ceremony on the http://wiaa.tv website. I could not locate any such ceremony.

7. The WIAA makes available certain publications on its website, http://www.wiaawi.org, under the tab "WIAA Info." In particular, by clicking on the "Publications" menu item, I was directed to a page which allowed me to access what is identified as the "Bulletin Archive" of the WIAA. I subsequently downloaded two WIAA Bulletins. Attached as Exhibit A is a true and correct copy of an excerpt from the WIAA Bulletin, dated March 28, 2008 (pages 1 and 16). Attached as Exhibit B is a true and correct copy of an excerpt from the WIAA Bulletin, dated March 27, 2009 (pages 1 and 16).

8. I reviewed the "86th Annual WIAA Yearbook (Reviewing the 2008-09 School Year)" (Dkt #69). The yearbook is published by the WIAA. (p.1).

9. The yearbook contains information about all subsectional (if any), regional, sectional and finals athletic events the WIAA sponsored in 2008-09. Based on that information, I prepared two charts listing the number of each type of event (subsectional for Boys and Girls Tennis, rounds 1, 2 and levels 3, & 4 for Football, regional, sectional and finals) by sport.

10. Attached as Exhibit C is the chart I prepared showing the number of subsectional, regional, sectional and finals events in the following sports: Boys Cross Country, Girls Cross Country, Girls Golf, Boys Soccer, Girls Swimming/Diving, Boys Volleyball, Girls Volleyball, Gymnastics, Boys Swimming/Diving, Team Wrestling, Baseball (Spring), Baseball (Summer), Boys Golf, Girls Soccer, Softball, Boys Track & Field, Girls Track & Field, Boys Team Tennis and Girls Team Tennis.

11. Attached as Exhibit D is the chart I prepared showing the number of rounds 1, 2 and levels 3, & 4, regional, sectional and finals games in the following sports: Boys Basketball, Girls Basketball, Boys Hockey, Girls Hockey and Football.

12. For most of the sports, such as Girl's Soccer, identifying the number of games of each type required only that I count the number of each game on the page showing the brackets for that sport. The Division 1 bracket for Girl's soccer, for example, is located on pages 176-77 of the yearbook.

13. Certain sports were counted differently. Some of the differences I encountered were:

(a) For sports that have both team and individual championship events, I did not include individual matches in my calculations. For example, I did not include the individual matches for Girls Tennis on pages 233-39 of the yearbook;

(b) For sports which have individual events that award individual winners in separate events which are also used to determine the team state championship, I did not include the individual events in my calculations. For example, the 12 individual events in Boys and Girls Swimming and Diving on pages 198-201 and 209-212 of the yearbook, are not included in my calculations;

(c) For sports that did not have teams identified for each part of the bracket, I did not count the empty game brackets in my calculations. For example, I did not count empty brackets in the Spring Baseball brackets on pages 31-38 of the yearbook.

14. The total number of regional, sectional and final events I counted using this method in the WIAA 2008-09 Yearbook is shown below:

(a) Exhibit C: 1,726 Regionals, 479 Sectionals, 144 Finals.

(b) Exhibit D: 1,038 Regionals, 198 Sectionals, 49 Finals.

(c) Total: 2,764 Regionals, 677 Sectionals, 193 Finals.

FURTHER, AFFIANT SAYETH NAUGHT

Matthew P. Veldran

Subscribed and sworn to before me
this 12th day of February, 2010.

Notary Public, State of Wisconsin
My Commission ~~expires~~: is permanent.

4656336_1

EXHIBIT A

WIAA Bulletin

Vol. 84
Issue Number 8

Official Publication of the Wisconsin Interscholastic Athletic Association

Stevens Point, WI *March 28, 2008*

Charter Member
National Federation of State HS Associations

Annual Meeting Scheduled for April 23

The 2008 Annual Meeting of the Wisconsin Interscholastic Athletic Association will be held at the Stoney Creek Inn in Wausau on Wednesday, April 23.

School district administrators, principals, or others designated by the local board of education or governing body will be allowed to vote on amendments to the Constitutions, Bylaws and Rules of Eligibility.

The Annual Meeting and the Open Forum, which will be conducted under the new business segment of the meeting this year, provide an opportunity for all authorized personnel to participate.

Inasmuch as proxy votes are not allowed, school districts with two or more high schools must have a representative from each school in order to have as many votes as there are schools in their multi-school districts.

The Stoney Creek's phone number is 715-355-6858. Housing is also available at the Holiday Inn Hotel and Suites and their number is 715-355-1111 or 888-272-2792.

Preregistration for the WIAA Annual Meeting is required; therefore, please email those who will be attending from your school by Friday, April 11 to Julie Kage at jkage@wiaawi.org.

Your registration materials, including the membership voting cards, treasurer's report and a copy of the proposed amendments (enclosed) will be available in the lobby by the Northwoods Conference Center. Coffee will be served at 8 a.m. with the meeting commencing at 9 a.m. in the Northwoods Conference Center. ✢

2008 Annual Meeting Agenda

8 a.m. - 9 a.m. - Registration (Lobby by the Northwoods Conference Center)
Coffee (Next to the fireplace)

9 a.m. - Annual Meeting (Northwoods Conference Center)

A. Opening Remarks - President Gus Mancuso
B. 2007-08 Highlight Video
C. Minutes of 2007 Annual Meeting
D. Treasurer's Report - Roger Foegen
E. Elections Report
F. Vote on Amendments
G. Director's Report
H. Old Business
I. New Business (including open forum)
J. Announcements
K. Adjournment

Board of Control and Advisory Council Elections in Progress

General election ballots were mailed to schools on March 28 with a return date of April 15. Ballots will be counted on April 21 and the results will be announced April 23 at the WIAA Annual Meeting.

The following individuals are the candidates listed on the ballots:

BOARD OF CONTROL

District 3 (west central) - Roger Foegen of Bangor

District 4 (east central) - James Smasal of Winneconne

District 6 (south central) – Dean E. Sanders of Lake Mills and Keith Brandstetter of Waterford

Gender At-Large – Jennifer Vogler of Ithaca and Mary Pfeiffer of Green Bay

Ethnic At-Large – Keith Posley of Milwaukee

ADVISORY COUNCIL

Large schools (2 positions) – Gordon Sisson of Marshfield and Mike Younggren of Wausau East

Medium schools (2 positions) – Troy M. Gunderson of West Salem, Mike Beighley of Whitehall and Jeffrey D. Jacobson of Platteville

Small schools (1 position) – Brian Henning of New Auburn and Brad Pettit of Brookwood

Ethnic At-Large – No declared candidates ✢

Sportsmanship Summit Coming in October

The Wisconsin Interscholastic Athletic Association in cooperation with Rural Insurance will conduct its fourth biennial Sportsmanship Summit Wednesday, Oct. 15, 2008 at the Holiday Inn & Convention Center in Stevens Point, Wis.

All schools in the membership are encouraged to attend. Registration information will be sent to all schools later this month. Teams will consist of six members from each participating school, which can include students, coaches, administrators or members of the community.

The Summit is scheduled to begin with registration at 8:30 a.m. with the first session starting at 9 a.m. The cost of the event is $125 per team, which includes Summit materials, souvenir t-shirt and lunch.

The purpose of the Summit is to assist membership schools in addressing citizenship and sportsmanship issues with students, student-athletes, adult fans, advisors, parents and booster clubs; developing plans to improve or maintain good sportsmanship; defining appropriate behavior; and setting sportsmanship expectations as a means to educate. ✢

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WIAA BULLETIN

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Publisher: Douglas Chickering, Executive Director — Editor: Todd Clark, Communications Director

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BOARD OF CONTROL

President
GUS MANCUSO
Wisconsin Rapids Lincoln
(District 2)

MARK GOBLER
Luck
(District 1)

JAMES SMASAL
Winneconne
(District 4)

JIM MCCARTNEY
Horicon
(District 6)

President-Elect
KEVIN KNUDSON
Barneveld
(District 5)

SCOTT LINDGREN
Kenosha Public Schools
(District 7)

JERRY JONES
Seneca (Wisconsin Association of School Boards)

PEG EKEDAHL
Milton
(At-Large)

Treasurer
ROGER FOEGEN
Bangor
(District 3)

AQUINE JACKSON
Milwaukee Public Schools
(At-Large)

CARL EISMAN
Martin Luther
(At-Large)

DR. MICHAEL THOMPSON, State Department of Public Instruction Liaison
GREG SMITH, West De Pere, Wisconsin Athletic Directors Association Liaison
JOHN ASHLEY, Wisconsin Association of School Boards Liaison

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Assistant Director

MARCY THURWACHTER
Assistant Director

TODD CLARK
Communications Director

EDITORIAL

Advocating for Appropriate Perspective a Challenge

There are numerous catalysts at work when attempting to place the proper perspective on a youth's involvement in sports.

Claims of the benefits interscholastic athletics have on young student-athletes have been supported over the years by studies and data. But, is it possible to conceive the continued emphasis on specialization and the mounting pressure placed on young athletes by coaches, parents and the current culture may begin to erode some of these positive influences?

Recent articles in a number of publications beg the question.

In pondering this question, a review of the foundation on which the WIAA was created and has operated since 1896 is germane to the topic.

The purpose of this organization in relation to high school sports is "to organize, develop, direct and control an interscholastic athletic program" that promotes the ideals of its membership and opportunities for their participation. Our purpose also emphasizes athletics as a partner in the total educational process by making and maintaining policies that encourages good citizenship and sportsmanship. Finally, we promote the uniformity of standards in competition and prevent exploitation of member schools and individuals in those programs by outside interests.

This clear perspective becomes convoluted when others–based on self-interests–choose to make involvement in youth and interscholastic sports more than what is their intended purpose.

Nowhere in the purpose of this organization with its 505 members acting as stewards does it state high school sports exists to provide a showcase for a rare few to enhance their chance at a college scholarship.

A recent *New York Times* article addressed the unrealistic expectations, and lack of understanding and knowledge parents, coaches and young athletes have in the whole process. Parents commit years to transporting children to competitions, practices and camps at significant financial cost in hopes their sons or daughters receive a college scholarship. In many cases, they are "buying into" the flattering evaluations of their child's potential shared by others that have personal motives of their own for making their claims.

While parents involvement in a child's life is commendable, too often it appears out of whack when it comes to athletic expectations. Ultimately, its a family decision how to involve their children in programs, but parents should understand what is reality in forming expectations.

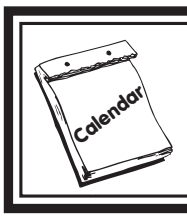
In a 2003-04 NCAA study, only 1.4 percent of all high school student-athletes fill freshman roster positions at NCAA colleges and only five percent of high school seniors move on to fill those freshman positions. The *Times* article stated NCAA figures identified 138,216 student-athletes received some athletic financial assistance, including upperclassmen, and most were partial scholarships. The average scholarship was about $10,400 per recipient–and only $2,000 if you remove football and basketball from the equation. That's only about 15 percent of college tuition costs.

Likewise, nowhere is it stated in the purpose of the WIAA that student-athletes need to be involved in a sport for 365 days a year, which is fueling some of the unrealistic expectations through a sense of entitlement. Individual success with nonschool providers outside of the school seasons don't always translate to the same individual successes or expectations parents and players experience with school teams. Out-of-school programs and travel teams may be at the heart of the difficulties school programs face with over-zealous parents and discontented players.

Working on fundamentals and skills of a particular sport throughout the year will, in most cases, improve one's individual talents. Working hard and honing one's skills are desirable attributes, but there is a ceiling or point of diminishing returns to balance with the cost to a young person's physical, mental or emotional development.

The WIAA recently created a video segment that promotes the life-long benefits of interscholastic athletics. Among the attributes conveyed were developing self-discipline and good character, learning team work, reacting appropriately in emotional situations and gaining appreciation for physical fitness and activities. Developing future opportunities in college or professional sports was not mentioned as a positive by-product of participating in high school athletics.

The integrity and purpose of education-based athletics should not be compromised by outside influences that choose to impose their self-interests on interscholastic programs, especially when unrealistic expectations based on a lack of understanding, knowledge and awareness is the catalyst. ✣



Keep These Dates in Mind

April 1 . . . . . Coaches Advisory Committee Meeting – Basketball (Stevens Point)
April 11 . . . . . Board of Control Meeting (Stevens Point)
April 15 . . . . . Board/Council Election Ballot Deadline
April 23. . . . . WIAA Annual Meeting (Stevens Point)
May 2. . . . . Sportsmanship Committee Meeting
May 4 . . . . . Scholar/Athlete Awards Program (Wausau)
May 6 . . . . . Middle Level Council Meeting
May 7 . . . . . Medical Advisory Meeting (Stevens Point)
May 15 . . . . . Earliest Day for Summer Baseball Practice
May 15, 20 & 22 . . . . . Softball Regionals
May 16. . . . . Board of Control Meeting (Stevens Point)
May 19 . . . . . Track & Field Regionals
May 19-20. . . . . Boys Tennis Subsectionals
May 19-20-21. . . . . Boys Golf Regionals
May 21-22 . . . . . Boys Tennis Sectionals
May 22 . . . . . Track & Field Sectionals
May 22 & 24 . . . . . Girls Soccer Regionals
May 23, 27, 28 & 30 . . . . . Spring Baseball Regionals
May 26. . . . . Memorial Day
May 27-28. . . . . Boys Golf Sectionals
May 29 . . . . . Softball Sectionals
May 29-30-31 . . State Boys Individual Tennis Tournament (Madison)
May 29 & 31. . . . . Girls Soccer Sectionals
May 30-31. . . . . State Track & Field Meet (La Crosse)
June 2 . . . . . Officials License Reapplication Deadline
June 2-3 . . . . . State Boys Golf Tournament (Madison)
June 3 . . . . . Spring Baseball Sectionals
June 5-6-7 . . . . . State Softball Tournament (Madison)
State Girls Soccer Tournament (Milwaukee)
June 6-7 . . . . . State Boys Team Tennis Tournament (Madison)
June 9. . . . . Sports Advisory Committee Meeting
June 10-11-12 . . . . . State Spring Baseball Tournament (Appleton)
June 18-19 . . . . . Advisory Council Meeting
June 19 . . . . . Board of Control Meeting
July 17 . . . . . Media Day
July 18 & 22 . . . . . Summer Baseball Regionals
July 25. . . . . Summer Baseball Sectionals
July 30-31. . . . . State Summer Baseball Tournament (Stevens Point)

Test Dates

Students participating in interscholastic sports often find conflicts between these events and college test dates.

Listed below are the 2007-2008 and 2008-2009 dates for ACT.

ACT - 2007-2008

Test Date	Regular Registration Postmark Deadline (regular fee)	Late Registration Postmark Deadline (additional fee required)
April 12, 2008	March 7, 2008	March 8–21, 2008
June 14, 2008	May 9, 2008	May 10–23, 2008

ACT - 2008-2009

Test Date

September 13, 2008*	February 7, 2009**
October 25, 2008	April 4, 2009
December 13, 2008	June 13, 2009

** Due to the special requirements of legislation in effect in New York, a February 2008 test is not scheduled in that state. The test date restriction may continue for the 2008-2009 testing year. ✣

EXHIBIT B

WIAA Bulletin

Vol. 85
Issue Number 7

Official Publication of the Wisconsin Interscholastic Athletic Association

Stevens Point, WI — *March 27, 2009*

Charter Member
National Federation of State HS Associations

Annual Meeting at Holiday Inn in Stevens Point On April 22

Live Web Stream of Meeting will be Available on WIAA.TV

The 2009 Annual Meeting of the Wisconsin Interscholastic Athletic Association will be held on Wednesday, April 22, at the Holiday Inn located at 1001 Amber Ave., in Stevens Point. The event will again be streamed live in its entirety on WIAA.TV.

School district administrators, principals, or others designated by the local board of education or governing body will be allowed to vote on amendments to the Constitution, Bylaws and Rules of Eligibility, as well as editorial changes.

The Annual Meeting provides an opportunity for all authorized personnel to participate. Inasmuch as proxy votes are not allowed, school districts with two or more high schools must have a representative from each school in order to have as many votes as there are schools in their districts.

Preregistration for the WIAA Annual Meeting is a must; therefore, please email those who will be attending from your school by Friday, April 10 to Julie Kage at *jkage@wiaawi.org*. Registration materials, including the membership voting cards, treasurer's report and a copy of the proposed amendments schools received earlier this month will be available in the commons area. Coffee will be served at 8:00 a.m. with the meeting getting underway at 9:00 a.m.

Any inquiries for lodging can be directed to the Holiday Inn at 715-344-0200. ✢

2009 Annual Meeting Agenda

8:00 - 9:00 a.m. - Registration & Coffee (Commons Area)

9:00 a.m. - Annual Meeting (Expo Rooms 3A, 3B and 4)

A. Opening Remarks - President Kevin Knudson
B. 2008-09 Highlights
C. Minutes of 2008 Annual Meeting
D. Treasurer's Report - Jim Smasal
E. Elections Report
F. Vote on Amendments
G. Director's Report
H. Old Business
I. New Business
J. Announcements
K. Adjournment

Board of Control and Advisory Council Elections in Progress

The WIAA strongly encourages all member schools to participate in the general election for their respective Board of Control district and Advisory Council classification. Ballots were mailed to schools on March 27 with a return date of April 14. Results will be announced at the WIAA Annual Meeting on April 22.

The following individuals are the candidates listed on the general election ballots:

BOARD OF CONTROL

District 2 (northeast) – Gordie Sisson of Marshfield and Terry Reynolds of Pittsville. Gordie and Terry were the top two vote getters from the primary election.

District 5 (southwest) – Jeff Athey of Dodgeville and Ted Evans of Mineral Point

Gender At-Large – Mary Pfeiffer of Green Bay

Non-Public School At-Large – Carl Eisman of Martin Luther

ADVISORY COUNCIL

Large schools (2 positions) – Randy Refslund of Waupun, Mike Devine of Stevens Point and Eric Burling of Burlington

Medium schools (1 position) – Todd Fischer of Osseo-Fairchild and Leonard Lueck of Brodhead. Todd and Leonard were the top two vote getters from the primary election.

Small schools (2 positions) – Brad Pettit, Jr. of Brookwood, Bill Perry of Gilmanton, Brad Ayer of Clear Lake and Paul Schley of Cornell. Brad P., Bill, Brad A. and Paul were the top four vote getters from the primary election.

Gender At-Large – Beth Sternig of Oak Creek

Non-Public School At-Large – Ted Knutson of Aquinas

Each candidate is eligible for a position on the Board of Control or Advisory Council as an administrator, assistant administrator, high school principal or assistant principal at a WIAA member senior high school in the respective district or school-size classification. In addition, each candidate has a Department of Public Instruction license and is not a member of the teachers' bargaining unit. ✢

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President
KEVIN KNUDSON
Barneveld
(District 5)

MARK GOBLER
Luck
(District 1)

DAVID BARDO
Wittenberg-Birnamwood
(District 2)

DEAN SANDERS
Lake Mills
(District 6)

President-Elect
ROGER FOEGEN
Bangor
(District 3)

SCOTT LINDGREN
Kenosha Public Schools
(District 7)

TIM SIVERTSON
Elk Mound (Wisconsin
Association of School Boards)

MARY PFEIFFER
Green Bay Public Schools
(At-Large)

Treasurer
JAMES SMASAL
Winneconne
(District 4)

KEITH POSLEY
Milwaukee Public Schools
(At-Large)

CARL EISMAN
Martin Luther
(At-Large)

DR. MICHAEL THOMPSON, State Department of Public Instruction Liaison
LINZI GRONNING, Holmen, Wisconsin Athletic Directors Association Liaison
JOHN ASHLEY, Wisconsin Association of School Boards Liaison

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Associate Director

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Assistant Director

MARCY THURWACHTER
Assistant Director

TODD CLARK
Communications Director

EDITORIAL

Emotions Make Tournaments A Real Slice of Life

We can almost set our calendars to those dates each year, and sometimes we can even set our clocks to that time of year – tournament time.

For high school sports and all those involved with them, they are the times of the year excitement and emotions reach their peak. It's those moments in life that provide the unforgettable experiences for all interested in interscholastic athletics.

It would be an early retirement for anyone who could bottle and sell the experiences and excitement of the tournament season. Coaches would be an easy sell for the intensity it instills; schools would appreciate the hallways filled with the morale boost and the spirit it creates; and whole communities would jump at the opportunity to walk their streets with added pride.

This is the essence of tournament time.

We don't need to search very long or hard to find examples of such an impact on the lives of so many involved with high school sports.

A coach whose team competed in the State tournament expressed the magnitude of his experience by stating besides his wedding and the birth of his children, coaching his team was the greatest experience of his life.

Another coach fought back tears, not because of the defeat he just experienced, but because of how proud he was of his team and the realization he coached the seniors on the team for the final time.

Wow, that is powerful stuff.

Yet, all the spoils are not all spent on the victors. The statement of a player whose team had just been defeated in the State championship final conveyed this. Despite a bitter loss, he stated he wouldn't change the experience of playing in the State Tournament for anything.

How about the community that came out in full force to support its hometown heroes. A school with an enrollment of 86 sold over 1,200 tickets for the championship final session. It's hard to believe that could even be possible when that school's community itself has a population of 998 according to its Web site. That section of fans was a sea of school colors. This type of support gives credence to the cliche "last one out of town, turn off the lights."

The interest and excitement of WIAA State Tournaments extend beyond the four walls of the schools competing or any city boundaries. They are events for the entire state to embrace and witness the quality of educational experiences provided by school systems throughout our state.

Such interest is evident with the audiences for live broadcasts of the State basketball tournaments and the State football and hockey championships each year, as well as the live internet streams on WIAA.TV for other State events. Wisconsin is believed to be the only state to have preemption of programming on a major over-the-air network for its entire boys and girls State basketball tournaments. In addition, the live stream on WIAA.TV of the individual wrestling tournament attracted almost 40,000 different viewers, which accounted for more than 578,000 page views. In the world of internet streaming, that is significant–very significant.

It's apparent such significant interest in high school sports fuel the emotions that exist at tournament time. When channeled appropriately, these experiences can take us on a ride of a lifetime. Misdirected, however, and emotions can tarnish these experiences for a few or the many.

With the attention directed at the tournaments, we are reminded each season of the emotions that consume a relatively small number not happy with their playoff pairing or seed, or by fanatical individuals spoiling the experience for others by advancing their own personal grievances, agendas or unsportsmanlike behavior.

However, even in a time of emotion, poise and etiquette are still evident in school-based sports. Statements made immediately following competition at State tournaments confirm this. Student-athletes and coaches were humble in victory and graceful in defeat. Even when a question regarding the success of private schools in the membership was asked, the answers of two student-athletes were precious. "Public, private, it doesn't matter," one said. "I don't really know how privates work, but we all play basketball," said another.

We know what time of year it is simply by the emotions we encounter during tournament time. Harnessed and directed in an appropriate manner, emotion is what makes the WIAA tournaments a life-enriching experience for all of us. ✢

Keep These Dates in Mind

March 30 . . . . . Earliest Day for Boys Golf Practice
Earliest Day for Boys Tennis Practice
April 1 . . Coaches Advisory Committee Meeting – Basketball (Stevens Point)
April 3 . . . . . Board of Control Meeting (Stevens Point)
April 10. . . . . Good Friday
April 12. . . . . Easter
April 14 . . . . . Board/Council Election Ballot Deadline
April 22. . . . . WIAA Annual Meeting (Stevens Point)
May 3 . . . . . Scholar/Athlete Awards Program (Wausau)
May 5 . . . . . Middle Level Council Meeting
May 6 . . . . . Medical Advisory Meeting (Stevens Point)
May 8. . . . . Sportsmanship Committee Meeting
May 15 . . . . . Earliest Day for Summer Baseball Practice
Board of Control Meeting (Stevens Point)
May 21, 26 & 28 . . . . . Softball Regionals
May 25. . . . . Memorial Day
May 26 . . . . . Track & Field Regionals
Boys Tennis Subsectionals
May 26-27 . . . . . Boys Golf Regionals
May 27-28 . . . . . Boys Tennis Sectionals
May 29 . . . . . Track & Field Sectionals
May 28 & 30 . . . . . Girls Soccer Regionals
May 29 & June 2, 3 & 5. . . . . Spring Baseball Regionals
June 1-2 . . . . . Boys Golf Sectionals
June 4 . . . . . Softball Sectionals
June 4-5-6 . . . . . State Boys Individual Tennis Tournament (Madison)
June 4 & 6 . . . . . Girls Soccer Sectionals)
June 5-6 . . . . . State Track & Field Meet (La Crosse)
June 8-9 . . . . . State Boys Golf (Madison)
June 11-12-13. . . . . State Girls Soccer (Milwaukee)
State Softball (Madison)
June 12-13 . . . . . State Boys Team Tennis (Madison)
June 16-17-18 . . . . . State Spring Baseball (Appleton)
June 24-25. . . . . Advisory Council Meeting
June 25 . . . . . Board of Control Meeting
July 16 . . . . . Media Day
July 17 & 21 . . . . . Summer Baseball Regionals
July 24. . . . . Summer Baseball Sectionals
July 29-30 . . . . . State Summer Baseball Tournament

Test Dates

Students participating in interscholastic sports often find conflicts between these events and college test dates.

Listed below are the 2008-2009 dates for ACT.

ACT - 2008-2009

Test Date	Regular Registration Postmark Deadline (regular fee)	Late Registration Postmark Deadline (additional fee required)
April 4, 2009	February 27, 2009	February 28–March 13, 2009
June 13, 2009	May 8, 2009	May 9–22, 2009

ACT - 2009-2010

September 12, 2009*

October 24, 2009

December 12, 2009

February 6, 2010**

April 10, 2010

June 12, 2010

* The September test date is not offered in the U.S. Territories, Puerto Rico, or Canada.

** No test centers are scheduled in New York for the February test date. ✢

EXHIBIT C

2008-2009 WIAA Sponsored Events contracted with WWWY

Event	State Regional	State Sectional	State Finals	
Cross Country - Boys				
Division 1	-	10	1	
Division 2	-	8	1	
Division 3	-	8	1	
Total		26	3	
Cross Country - Girls				
Division 1	-	10	1	
Division 2	-	8	1	
Division 3	-	8	1	
Total		26	3	
Golf - Girls				
Division 1	12	6	1	
Division 2	6	3	1	
Total	18	9	2	
Soccer - Boys				
Division 1	96	24	7	
Division 2	48	12	3	
Division 3	48	12	3	
Total	192	48	13	
Swimming/Diving - Girls				
Division 1	-	6	1	(12 Events)
Division 2	-	4	1	(12 Events)
Total		10	2	
Volleyball - Boys	20	12	7	
Volleyball - Girls				
Division 1	83	24	7	
Division 2	95	12	3	
Division 3	107	12	3	
Division 4	107	12	3	
Total	392	60	16	
Gymnastics				
Division 1	-	5	1	(5 Events)
Division 2	-	5	1	(5 Events)
Total		10	2	
Swimming/Diving - Boys				
Division 1	-	6	1	(12 Events)
Division 2	-	4	1	(12 Events)
Total		10	2	

2008-2009 WIAA Sponsored Events contracted with WWWY

Event	State Regional	State Sectional	State Finals	
Wrestling (Team)				
Division 1	16	8	7	
Division 2	16	4	3	
Division 3	16	4	3	
Total	48	16	13	
Baseball (Spring)				
Division 1	64	12	7	
Division 2	77	12	3	
Division 3	78	12	3	
Division 4	77	12	3	
Total	296	48	16	
Baseball (Summer)	35	24	7	
Golf - Boys				
Division 1	16	8	1	
Division 2	12	4	1	
Division 3	12	4	1	
Total	40	16	3	
Soccer - Girls				
Division 1	96	24	7	
Division 2	43	12	3	
Division 3	46	12	3	
Total	185	48	13	
Softball				
Division 1	82	24	7	
Division 2	94	12	3	
Division 3	91	12	3	
Division 4	89	12	3	
Total	356	60	16	
Track & Field - Boys				
Division 1	16	8	1	(18 Events)
Division 2	16	4	1	(18 Events)
Division 3	16	4	1	(18 Events)
Total	48	16	3	
Track & Field - Girls				
Division 1	16	8	1	(18 Events)
Division 2	16	4	1	(18 Events)
Division 3	16	4	1	(18 Events)
Total	48	16	3	

2008-2009 WIAA Sponsored Events contracted with WWWY

Event	State Regional	State Sectional	State Finals
Tennis (Team) - Boys	Subsectional‡	Sectional	
Division 1	16	8	7
Division 2	8	4	3
Total	24	12	10
Tennis (Team) - Girls	Subsectional‡	Sectional	
Division 1	16	8	7
Division 2	8	4	3
Total	24	12	10
Totals	**Regionals**	**Sectionals**	**Finals**
	1,726	**479**	**144**

‡ - Subsectional treated as Regional for purposes of calculations

EXHIBIT D

2008-2009 WIAA Sponsored Events not under the WWWY Contract

Event	State Regional	State Sectional	State Tournament or State Finals
Basketball - Boys			
Division 1	83	24	7
Division 2	100	12	3
Division 3	110	12	3
Division 4	110	12	3
Total	403	60	16
Basketball - Girls			
Division 1	84	24	7
Division 2	99	12	3
Division 3	107	12	3
Division 4	106	12	3
Total	396	60	16
Hockey - Boys	58	24	7
Hockey - Girls	13	12	3

Football	1st Rd*	2nd Rd*	Level 3†	Level 4†	
Division 1	16	8	4	2	1
Division 2	16	8	4	2	1
Division 3	16	8	4	2	1
Division 4	16	8	4	2	1
Division 5	16	8	4	2	1
Division 6	16	8	4	2	1
Division 7	16	8	4	2	1
Total	112	56	28	14	7

	Regionals	**Sectionals**	**Finals**
Totals	**1,038**	**198**	**49**

* - 1st & 2nd Rounds Games treated as Regionals for purposes of calculations
† - Level 3 & Level 4 Games treated as Sectionals for purposes of calculations

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010, I caused a copy of the following documents:

- **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT;**
- **DEFENDANTS' RESPONSES TO PLAINTIFFS' PROPOSED FINDINGS OF FACT;**
- **SUPPLEMENTAL PROPOSED FINDINGS OF FACT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM;**
- **DECLARATION OF MARY BENNIN CARDONA;**
- **SECOND DECLARATION OF MONICA SANTA MARIA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM;**
- **SECOND AFFIDAVIT OF MATTHEW P. VELDRAN**

to be electronically filed with the Clerk of Court using the ECF system which will send notification to the following ECF participants:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' PROPOSED FINDINGS OF FACT

Plaintiffs Wisconsin Interscholastic Athletic Association and American-HiFi, Inc., d/b/a When We Were Young Productions, hereby respond to the Defendants' Proposed Findings of Fact in Support of Defendants' Motion for Summary Judgment, in accordance with each numbered paragraph contained therein (with the Defendants' proposed fact reproduced, followed by Plaintiffs' response).

The following abbreviations are used from the declarations and affidavits cited herein:

Chickering Aff.	=	Affidavit of Douglas E. Chickering, Dkt. No. 53, filed 1/22/10
Clark First Aff.	=	Affidavit of Todd C. Clark, Dkt. No. 54, filed 1/22/10
Clark Second Aff.	=	Second Affidavit of Todd C. Clark, filed herewith
Eichorst First Aff.	=	Affidavit of Tim Eichorst, Dkt No. 55, filed 1/22/10
Eichorst Second Decl.	=	Second Declaration of Tim Eichorst, filed herewith
Knoeck Decl.	=	Declaration of Timothy Knoeck, filed herewith
Nero Decl.	=	Declaration of Autumn N. Nero in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 52, filed 1/22/10

Veldran Aff.	=	Affidavit of Matthew P. Veldran, Dkt. No. 45, filed 1/22/10
Walkenhorst Decl.	=	Declaration of Sarah C. Walkenhorst in Support of Plaintiffs' Opposing to Defendants' Motion for Summary Judgment, filed herewith

Gannett's Proposed Finding of Fact No. 1: On December 5, 2008, Wisconsin Interscholastic Athletic Association ("WIAA") filed a complaint in Portage County, Wisconsin that joined as plaintiffs American Hi-Fi, Inc. d/b/a When We Were Young Productions ("WWWY") and other media companies that are no longer participating in this action. *See* Notice of Removal by Defs. (Dkt. #1, Ex. A (Complaint, Case No. 08-CV-629 (Portage County Dec. 5, 2008)) ("Compl.").

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 2: In the Complaint, the WIAA sought a declaratory judgment that it held "ownership rights in any transmission, internet stream, photo, image, film, videotape, audiotape, writing, drawing or other depiction or description of any game, game action, game information, or any commercial used of the same of an athletic event" sponsored by WIAA. Compl. (Dkt. #1, Ex. A) at 5.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 3: The WIAA alleged that a newspaper owned by Gannett Company, Inc. ("Gannett") violated the WIAA's exclusive rights and ownership by live Internet streaming, without permission, a high school football game between Appleton North High School and Stevens Point Senior High School on November 8, 2008 in Portage County, Wisconsin. Compl. (Dkt. #1, Ex. A), ¶ 14.

WIAA's Response: DISPUTED IN PART. Undisputed that the WIAA alleged that the Post-Crescent newspaper live streamed the referenced game without permission of the WIAA. Complaint (Dkt. # 1, Ex. A), ¶ 14, but otherwise disputed. Plaintiffs also object to proposed finding of fact # 3 because whether the WIAA alleged something about a particular subject is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings.").

Gannett's Proposed Finding of Fact No. 4: On March 17, 2008, the Defendants removed the action to this court. Notice of Removal by Defs. (Dkt. #1).

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 5: On March 24, 2008, the Defendants answered the Complaint and additionally asserted counterclaims seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and the Copyright Act, 17 U.S.C. §§ 101 *et seq.* based on the WIAA's discriminatory policies. Defendants' Answer, Defenses and Counterclaim (Dkt. #2), p. 17.

WIAA's Response: DISPUTED. Plaintiffs dispute Defendants' proposed finding of fact # 5 in that Defendants alleged in their prayer for relief with their Counterclaim that the WIAA had a system of "discriminatory media access," but Defendants have not cited any evidence to support such an allegation, and Plaintiffs denied that allegation.

Gannett's Proposed Finding of Fact No. 6: On April 13, 2009, the WIAA and WWWY, collectively "Plaintiffs," filed an amended complaint seeking a declaration that the WIAA controls the right to transmit WIAA sponsored tournament games over the Internet, that it has the right to grant exclusive and nonexclusive licenses to transmit such games, that it may require licensing fees and compliance with the WIAA's media policies as a condition of any license to transmit such games, and that the WIAA's Internet transmission policies do not violate the Defendants' constitutional or statutory rights. First Amended Complaint (Dkt. #7) ("Am. Compl."), ¶ 37.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 7: The WIAA is a voluntary, unincorporated and nonprofit organization with its principal place of business at 5516 Vern Homes Drive, Stevens Point, Wisconsin 54482. Stipulation of Background Facts (Dkt. #26) ("Jt. Stip."), ¶ 1.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 8: The WIAA is a state actor for the purposes of this litigation. Limited Joint Stipulation of the Wisconsin Interscholastic Athletic Association, Gannett Co., Inc. and the Wisconsin Newspaper Association, Inc. (Dkt. #23).

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 9: The WIAA organizes, develops, directs and controls high school interscholastic athletic programs and sponsors tournament series in WIAA recognized sports. Jt. Stip. (Dkt. #26), ¶ 2; Am. Compl. (Dkt. #7), ¶ 16. The WIAA has been organizing such programs since 1896. Am. Compl. (Dkt. #7), ¶ 16. All Wisconsin public high

schools, except for some public virtual and charter schools, are WIAA members. Other WIAA members include private high schools, public and private middle schools, and specialty schools. Jt. Stip. (Dkt. #26), ¶ 2; Am.Compl. (Dkt. #7), ¶¶ 4, 13.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 10: Plaintiff WWWY is a Wisconsin corporation with its principal place of business at 501 Moravian Valley Road, Waunakee, Wisconsin 53597. Jt. Stip. (Dkt. #26), ¶ 3.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 11: WWWY engages in the business of video productions, including Internet streaming, and sales of WIAA tournament events on DVD. Jt. Stip. (Dkt. #26), ¶ 4; Affidavit of Matthew P. Veldran, Jan. 22, 2010 ("Veldran Aff."), ¶¶ 7-8, 10.

WIAA's Response: UNDISPUTED that WWWY engages in the business described, but DISPUTED to the extent this proposed finding of fact suggests anything about revenue from such business. WWWY does not make enough money from the sales of DVDs to cover the cost of production. Instead, WWWY's revenues come from distribution and advertising, which offset other operating expenses. Knoeck Decl. ¶ 3. In the two-year period covering 2007-2008 and 2008-2009, WWWY sold 88 affiliates DVDs at a total cost of $1,660.60, returning $332.12 (20%) to the affiliates in royalties. Knoeck Decl. ¶ 4.

Gannett's Proposed Finding of Fact No. 12: Wisconsin Newspaper Association, Inc. ("WNA") is a non-stock Wisconsin association of Wisconsin daily, weekly, and bi-weekly newspapers with its principal place of business at 1901 Fish Hatchery Road, P.O. Box 259837, Madison, Wisconsin 53725-9837. Jt. Stip. (Dkt. #26), ¶ 5.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 13: Gannett is a Delaware corporation that publishes newspapers across the United States, including 10 daily newspapers and approximately 19 non-daily newspapers in Wisconsin. Gannett's daily Wisconsin publications are:

The Post-Crescent (Appleton)	*The Sheboygan Press*
The Reporter (Fond du Lac)	*Wausau Daily Herald*
Herald Times Reporter (Manitowoc)	*Stevens Point Journal*

Oshkosh Northwestern	*Daily Tribune* (Wisconsin Rapids)
Green Bay Press-Gazette	*Marshfield News-Herald*

Jt. Stip. (Dkt. #26), ¶ 7.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 14: The WIAA publishes an annual Media Policies Reference Guide ("Media Guide") whose policies apply to all post-season WIAA tournament events, which consist of regional, sectional and state finals. Jt. Stip. (Dkt. #26), ¶ 8.

WIAA's Response: DISPUTED IN PART. Plaintiffs do not dispute that the annual Media Policies Reference Guide includes policies that apply to all post-season WIAA tournament events. Plaintiffs further do not dispute that for all sports except football, the WIAA post-season competitions consist of regionals, sectionals and finals in various divisions. Otherwise DISPUTED, however, because for football, post-season competitions consist of five levels of play, Levels I-V, in each of 7 football divisions (resulting in 7 football champions, one for each division). Jt. Stip. (Dkt. #26), ¶ 8.

Gannett's Proposed Finding of Fact No. 15: The WIAA's policies are intended, in part, to "assist media" with issues related to "WIAA property rights." Jt. Stip. (Dkt. #26, Ex. B) at 1 (General Policies).

WIAA's Response: DISPUTED. Plaintiffs dispute Defendants' proposed finding of fact # 15 in that it mischaracterizes the content of the Media Policies Reference Guide. The Media Policies Reference Guide states: "The WIAA Media Policies Reference Guide is produced to inform statewide media of WIAA policies in effect for all levels of State Tournament Series competition and assist members of the media in providing comprehensive coverage to their communities . . . the WIAA has established regulations and guidelines to assist media with the requesting/issuing of working media credentials, the use of equipment by news

gathering media and WIAA property rights for State Tournament Series competitions." Jt. Stip. (Dkt. #26, Ex. B) at 1 (General Policies).

Gannett's Proposed Finding of Fact No. 16: WIAA prohibits the commercial or unauthorized use of images of WIAA tournament events without its permission:

> Any non-editorial, commercial or other unauthorized use of any transmission, internet stream, photo, image, film, videotape, audio tape, any play-by-play depiction or description of any competition and/or game action and/or any non-editorial or commercial use of any team school name or logo, is prohibited without written consent of the WIAA.

Jt. Stip. (Dkt. #26, Ex. B) at 1 (General Policies).

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 17: The WIAA distinguishes between credentials, on the one hand, and transmission rights and fees, on the other. Jt. Stip. (Dkt. #26, Ex. B) at 12 (Comprehensive Policy #7: media credential not a grant for live transmission rights); Jt. Stip. (Dkt. #26, Ex. B) at 2 (Requesting Credentials #7: may revoke credentials for failure to pay rights fees); Am. Compl. (Dkt. #7), ¶ 23 (requests for video transmission rights made to WWWY); Affidavit of John W. Dye, Jan. 22, 2010 ("Dye Aff."), ¶ 21 and Ex. C (credential requests made to WIAA); *see also* Monica Santa Maria Decl. in Support of Defs.' Mot. for Summ. J. on Their Counterclaim, Jan. 22, 2010 ("Santa Maria Decl."), Ex. B, Interrog. Resp. No. 11 (WIAA does not recognize media's right to fix images of WIAA tournament events in a tangible medium absent WIAA's permission to do so).

WIAA's Response: DISPUTED. Plaintiffs dispute Defendants' proposed finding of fact # 17 because it mischaracterizes the Media Policies Reference Guide and the relationship between credentials and transmission rights and fees. Credentials are issued by the WIAA to media organizations to provide access for an individual or individuals who have a legitimate working relationship with an accredited media organization in connection with the event for which the credential is issued. Jt. Stip. (Dkt. #26, Ex. B) at 1. The WIAA's Media Policies Reference Guide describes the tournament transmission rights and fees for audio/text transmissions and video transmissions, which are subject to the tournament transmission policies

contained therein. Jt. Stip. (Dkt. #26, Ex. B) at 10-15, 17. Obtaining media credentials is contingent upon observing the transmission policies. Jt. Stip. (Dkt. #26, Ex. B) at 1, 12.

Gannett's Proposed Finding of Fact No. 18: The WIAA does not impose a media credentials fee but does limit the number of credentials that are issued for a tournament event. Dye Aff., ¶ 21 and Ex. C; Jt. Stip. (Dkt. #26, Ex. B) at 4.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 19: The WIAA policies permit a media member with credentials to report on tournament events using certain reporting techniques, such as writing newspaper articles; the WIAA policies do not permit media members to engage in any activity covered by WIAA's exclusive media contracts or WIAA's play-by-play definition without permission and payment of a rights fee. Jt. Stip. (Dkt. #26, Ex. B) at 12 (Comprehensive Policy #7, #8); Am. Compl. (Dkt. #7), ¶ 26 (WIAA permits media to report outcome of games, describe game events, and provide public with factual information related to games).

WIAA's Response: DISPUTED. Plaintiffs dispute Defendants' proposed finding of fact # 19 in that it mischaracterizes the Media Policies Reference Guide. The WIAA prohibits any non-editorial, commercial, or unauthorized use of any transmission, internet stream, or other depiction of tournament material without written consent of the WIAA. Nero Decl. Ex. 4 at p. 1. Media covering WIAA tournament events for "newscast purposes" may, without paying a fee, (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. Nero Decl. Exs. 2 at 51; 3 at 51; 4 at 12; and 5 at 12-13. The WIAA has provided for media access to communication lines (e.g., telephone, high-speed internet, and wireless connections) for use in reporting at State Tournament venues. Nero Decl. Ex. 5 at 6. The WIAA also permits the taking of photographs for reporting purposes, post-game interviews of players and coaches, radio and other audio broadcasts of WIAA events, and other avenues of reporting and media coverage. Clark First Aff. ¶ 24-25; Nero Decl. Ex. 4, at 6-15; Ex. 5 at 8-14. 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. Nero Decl. Ex. 4 at 12. Under WIAA policies, newspapers have virtually complete access to the WIAA athletic events in order to perform their expected journalistic functions, i.e., to fully describe, explain, and analyze newsworthy events, and newspapers are able to report on the details and outcomes of the games, including sidebars, statistics, and other relevant information, and print in their regular editions and on their websites. Hoyt Decl. ¶¶ 21, 58, 60. Reporters can use good, old-fashioned pen to paper in publishing and producing stories. Hoyt Decl. ¶ 55. Newspapers and other credentialed media are able to transmit games if they pay the required fee to WWWY. Hoyt Decl. ¶¶ 20, 57.

Gannett's Proposed Finding of Fact No. 20: The WIAA enforces compliance with its media policies by reserving the right to deny future credentials to or revoke current credentials of media members:

> The WIAA reserves the right to grant, issue, revoke and deny credentials to any media or Internet site organizations based on the interpretation and intent of these policies determined by the WIAA. In cases deemed unique by the Association, these policies may be amended. The WIAA and its exclusive rights partners retain the rights to all commercial use of video, audio, or textual play-by-play transmitted at a WIAA Tournament Series event. Furthermore, the WIAA owns the rights to transmit, upload, stream or display content live during WIAA events and reserves the right to grant exclusive and nonexclusive rights or not to grant those rights on an event-by-event basis.

Jt. Stip. (Dkt. #26, Ex. B) at 12 (Comprehensive Policy #1).

WIAA's Response: DISPUTED. Plaintiffs dispute Defendants' proposed findings of fact # 20 to the following extent: the Media Policies Reference Guide contains the quoted material, but it does not state that the WIAA "enforces compliance with its media policies" through the right to deny future credentials or revoke current credentials. Instead, the WIAA ensures quality control of its transmissions through a variety of means, including the ability of WWWY to observe and report on media policy violations. Clark First Aff. ¶ 13. The WIAA has never denied a legitimate media organization entry to a tournament or access to

media credentials. Chickering Aff.¶ 31; Nero Decl. Ex. 18 at 8; Nero Decl. Ex. 19 at 8. Nor has WIAA revoked credentials or transmission rights for violations of WIAA media policies. Clark Sec. Aff. ¶ 2.

Gannett's Proposed Finding of Fact No. 21: Loss of credentials is at the WIAA's sole discretion:

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

Jt. Stip. (Dkt. #26, Ex. B) at 2 (Requesting Credentials #7).

WIAA's Response: DISPUTED IN PART. UNDISPUTED that the policy contains this statement, but DISPUTED to the extent that this implies loss of credentials is based solely on this provision. Requests for media credentials will be accepted and issued to members of the media and media organizations based on a set of conditions defined in the Media Policies Reference Guide, including the following: Requests for credentials must be made at least two days in advance of the tournament; requests must be submitted on a completed Credential Request Form or on-line submittable form by the published deadlines; no credential requests will be approved for persons not employed on staff or as freelance by contract of a recognized media organization; credentials will not be granted to coaches, former coaches, family, friends or family of participants not employed by the requesting media organization; media arriving at a tournament must have verification of credential request by the deadline; and Internet organizations must be determined to be a legitimate news-gathering organization and meet five published criteria. Jt. Stip. (Dkt. #26, Ex. B) at 2.

Gannett's Proposed Finding of Fact No. 22: In addition, the WIAA reserves the right to revoke transmission rights from media members whose content or comments the WIAA considers inappropriate:

> The WIAA also reserves the right to revoke or deny the video, audio or text transmission rights of any media or Internet sites that include in any part of its transmission of WIAA Tournament events, including pre-game and post-game shows, content or comments considered inappropriate or incompatible with the educational integrity of the tournament or host institution from which the transmission is originated.

Jt. Stip. (Dkt. #26, Ex. B) at 12 (Comprehensive Policy #3).

WIAA's Response: UNDISPUTED that WIAA so reserves this right. Consistent with the WIAA's stated constitutional purposes to promote the ideals of its membership, to emphasize interscholastic athletics as a partner with other school activities in the total educational process, to formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship, and to prevent exploitation by special interest groups of the student athlete, the WIAA's Media Policies Reference Guide contains policies that prohibit content associated with transmission of WIAA events related to tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter. These protective policies were implemented because the WIAA membership views it as part of the WIAA's mission when dealing with impressionable adolescents to protect the members' student athletes. Once approved, the WIAA has not revoked any transmissions rights for inappropriate transmissions. Jt. Stip. (Dkt. #26, Ex. B) at 16; Clark Second Aff. ¶ 2.

Gannett's Proposed Finding of Fact No. 23: Under the current media policies, the WIAA and the rights holder have joint discretion to grant permission, enforce policies and determine video transmission policies:

> Production and distribution rights include, and are not limited to, live or delayed television through network or cable outlets, video on demand, content streaming through any platform and/or physical media. All permission granted, policies enforced and fees required will be at the sole discretion of the WIAA and the rights holder. Detailed

information regarding polices and fees are available upon request from When We Were Young Productions (608) 849-3200.

Jt. Stip. (Dkt. #26, Ex. B) at 17 (Video Transmissions).

WIAA's Response: DISPUTED IN PART. Plaintiffs dispute Defendants' proposed finding of fact # 23 because it mischaracterizes the Media Policies Reference Guide. The quoted language is UNDISPUTED; however, DISPUTED that the quoted language authorizes the rights holder to "determine video transmission policies" as alleged by Defendants. The WIAA decided on the fee structure. Eichorst First. Aff. ¶ 38, Clark First Aff. ¶ 15. WWWY has not charged anything other than what the WIAA has determined to be the appropriate fee. Clark First Aff. ¶ 17.

Gannett's Proposed Finding of Fact No. 24: The current policy differs from the prior policy in effect in 2008-09 in that the prior policy granted sole discretion to the rights holder:

> Production and distribution rights include, and are not limited to, live or delayed television through network or cable outlets, video on demand, content streaming through any platform and/or physical media. All permission granted, policies enforced and fees required will be at the sole discretion of the rights holder. Detailed information regarding polices and fees are available upon request from When We Were Young Productions (608) 849-3200 ext. 225.

Jt. Stip. (Dkt. #26, Ex. A) at 16 (Television/Cable/Internet Video).

WIAA's Response: DISPUTED IN PART. UNDISPUTED that the policy language in effect in 2008-09 is accurately stated, but IMMATERIAL because this is not current policy. Further, this fact is DISPUTED because in actual practice, the WIAA and WWWY worked together to determine fees, and WWWY never charged a fee that was not approved by the WIAA. Eichorst First. Aff. ¶¶ 37-39; Clark First Aff. ¶ 17.

Gannett's Proposed Finding of Fact No. 25: The WIAA prohibits the use of video exceeding two minutes by the originating station, publication or Internet site – other than by the exclusive

video production rights holder – for any purpose other than highlights on regularly scheduled news or sports broadcasts or on a Web page. Jt. Stip. (Dkt. #26, Ex. B) at 12 (Video #3).

WIAA's Response: DISPUTED IN PART. UNDISPUTED that this is the general policy. However, DISPUTED in that written approval may be granted by the WIAA for use of more than two minutes of video, video may be used after five days from the last day of a tournament, and schools may air tape-delayed transmissions on their school's educational channel, local cable system or school's Internet site. Jt. Stip. (Dkt. #26, Ex. B) at 13.

Gannett's Proposed Finding of Fact No. 26: The WIAA prohibits sales of video of Tournament Series action without written consent from the WIAA and its respective licensed video production partner. Jt. Stip. (Dkt. #26, Ex. B) at 13 (Video #6).

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 27: The WIAA imposes a $50 rights fee for regional and sectional events and a $100 rights fee for state events on any commercial radio station seeking permission to produce a live audio transmission. Jt. Stip. (Dkt. #26, Ex. B) at 17 (Audio/Text Transmissions). The WIAA permits multiple radio stations to transmit the same game upon payment of the requisite fees. Jt. Stip. (Dkt. #26, Ex. B) at 4.

WIAA's Response: UNDISPUTED, but IMMATERIAL. Defendants have not challenged WIAA's radio policies, and this proposed finding has no bearing on any other issue in this case.

Gannett's Proposed Finding of Fact No. 28: The WIAA asserts exclusive property rights over real-time and tape-delayed audio, video and text transmissions of play-by-play descriptions of WIAA tournament events, including written accounts in Internet blogs, forums, and "tweets" produced through the Twitter messaging service. Jt. Stip. (Dkt. #26, Ex. B) at 12 (Comprehensive Policy #2) and at 14 (Text #2). Such text transmissions are subject to a text transmission fee, and in the absence of WIAA's consent, are prohibited both on-site and off-site. Jt. Stip. (Dkt. #26, Ex. B) at 12 (Comprehensive Policy #2, #4) and at 14 (Text #2).

WIAA's Response: DISPUTED. Plaintiffs object to proposed findings of fact # 28 because whether the WIAA asserts something about a particular subject is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006)

("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings."). Plaintiffs dispute proposed finding of fact #28 on the grounds that all real-time, or tape-delayed audio, video or textual transmission of play-by-play, is the exclusive property of the WIAA and rights-granted entities. Jt. Stip. (Dkt. #26, Ex. B) at 12. Internet blogs, forums or twitters not posting continuous play-by-play accounts of game or event action are permitted and are not subject to rights fees unless determined by the WIAA to be a live, play-by-play depiction of event action. Jt. Stip. (Dkt. #26, Ex. B) at 14. Any account/transmitting of real-time video, audio or textual play-by-play is prohibited onsite or off-site without consent of the WIAA. Jt. Stip. (Dkt. #26, Ex. B) at 12. Real-time play-by-play accounts of WIAA Tournament Series events are subject to text transmission rights fees. Jt. Stip. (Dkt. #26, Ex. B) at 14.

Gannett's Proposed Finding of Fact No. 29: The WIAA currently charges a per event text transmission fee (for text transmissions constituting play-by-play) of $20 for sectional and regional games and $30 for state finals games. Jt. Stip. (Dkt. #26, Ex. B) at 17.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 30: In 2008, WIAA charged a $100 per event text transmission fee to two newspapers for blogs which the WIAA determined, after the fact, included play-by-play descriptions. Affidavit of Michael Davis, Jan. 21, 2010 ("Davis Aff."), ¶¶ 4-5; Davis Aff., Ex. B; Declaration of Greg Sprout, Jan. 21, 2010 ("Sprout Decl."), ¶ 5-6; Sprout Decl., Ex. B.

WIAA's Response: DISPUTED IN PART. UNDISPUTED that in 2008, the WIAA charged $100 per event text transmission fees to Madison.com and the Milwaukee Journal-Sentinel for live play-by-play, but proposed finding of fact #30 is otherwise DISPUTED in its characterization of events. Neither Madison.com nor the Milwaukee Journal-Sentinel applied or asked for permission to transmit live play-by-play blogs before the games in question.

Because they did not apply for permission before the game, the WIAA did not know they were planning on transmitting live play-by-play before or during the game. It came to the WIAA's attention after the tournaments were completed that Madison.com and the Milwaukee Journal-Sentinel had transmitted live play-by-play. Therefore, the WIAA sent them invoices for those transmissions consistent with the fees specified in the Media Policies Reference Guide. If they had applied for transmission rights before the game, they would have been advised of whether their transmission was permissible and how much the WIAA would charge for such a transmission beforehand. The newspapers never paid the fees invoiced. At that time, the WIAA discussed and offered to work with the media to develop an agreement as to what would be permitted on a real-time blog from tournament series events, and waived the transmission fees invoiced with the expectation that the media would propose a definition, but the media did not pursue the subject. The issues of blogging had been discussed at the prior two Media Days (an annual meeting that the WIAA hosted with members of the media to discuss media policies). In 2008, the text transmission fee was $100 per state tournament game. That fee was subsequently reduced to $30 for each state tournament game. Jt. Stip. (Dkt. #26, Ex. A) at 16; Jt. Stip. (Dkt. #26, Ex. B) at 17; Clark First Aff. ¶¶ 27-30; Clark Second Aff. ¶ 3.

Gannett's Proposed Finding of Fact No. 31: The WIAA did not define the term "play-by-play" in its 2008-09 Media Policies Reference Guide. *See* Jt. Stip. (Dkt. #26, Ex. A).

WIAA's Response: DISPUTED. The 2008-2009 Media Policies Reference Guide clearly states that play-by-play is a real-time or live transmission account of a WIAA State Tournament series event, while an event is in progress. Jt. Stip. (Dkt. #26, Ex. A) at 14. In 2008, the WIAA invited the media to propose suggestions for a definition of live blogging to the

WIAA, but the media never did. Further, the issue of blogging was discussed at two prior Media Day events with members of the media. Clark First Aff. ¶¶ 28-30.

Gannett's Proposed Finding of Fact No. 32: The WIAA did imply, however, that a rights fee might be required for play-by-play text transmissions through two of its policies:

> Web blogs not posting continuous play-by-play accounts of game or event action are permitted if determined by the WIAA to be in compliance with the mission and media policies of WIAA, and if they are not associated with any promotion, reference or link to material deemed inappropriate or not in the best interest of the WIAA.

Jt. Stip. (Dkt. #26, Ex. A) at 14 (paragraph 1).

> There is no fee for live report "updates" of pre-State Tournament events provided no play by play is done.

Jt. Stip. (Dkt. #26, Ex. A) at 10 (Radio, Television and Cable Policies, paragraph 5).

WIAA's Response: DISPUTED. The 2008-2009 Media Polices Reference Guide explicitly states that a fee is required for live internet placement of text, images or audio directly from venue, in the amount of $50 for regional and sectional games, and $100 for state tournaments. Jt. Stip. (Dkt. #26, Ex. A) at 16.

Gannett's Proposed Finding of Fact No. 33: The WIAA's current media policies include a definition of live play-by-play:

> A live or real-time play-by-play is defined as transmitting a live (while the event/game is in progress from beginning to conclusion) written, audio or video description (identifying competitors with descriptions or results of game action) of all or a significant number of plays/events occurring sequentially during a game/event." [sic]

Jt. Stip. (Dkt. #26, Ex. B) at 11 (Transmission Terms #3).

WIAA's Response: UNDISPUTED. In 2008, the WIAA also invited the media to propose suggestions for the definition of live blogging to the WIAA, but the media never did. Clark First Aff. ¶¶ 28-30.

Gannett's Proposed Finding of Fact No. 34: The WIAA has executed a contract with Visual Image Photography, Inc. ("VIP") that grants VIP certain exclusive photography rights for a five-

year period from October 1, 2008 to September 30, 2013. Jt. Stip. (Dkt. #26), ¶ 10; Jt. Stip. (Dkt. #26, Ex. C). Prior to October 1, 2008, the WIAA had another exclusive rights contract with VIP. S*ee* Ans. to Defs.' Counterclaims (Dkt. #5), ¶ 30 (discussing 2007 dispute related to rights granted to VIP).

WIAA's Response: DISPUTED IN PART. UNDISPUTED that the WIAA has, and has had, an exclusive contract with VIP. However, DISPUTED in that under the 2008 contract with VIP, the only item of "exclusivity" that the WIAA guarantees to VIP is with regard to "the sale of any products using images from Covered Events." Clark First Aff. ¶ 24. In 2005, the WIAA contracted to grant the exclusive right to VIP to sell photos and images of all state tournaments including quarterfinals and semifinals. The contract was for a 3-year term and expired in 2008. Chickering Aff. ¶ 32.

Gannett's Proposed Finding of Fact No. 35: The WIAA previously prohibited the "resale of images and/or photographs [except those] actually included and distributed in printed publications," and "sale of photography, digital image files, videotape or film" from tournament events without written consent of the WIAA. Jt. Stip. (Dkt. #26, Ex. A) at 6.

WIAA's Response: DISPUTED IN PART, BUT IMMATERIAL. UNDISPUTED that the WIAA policies contained such a prohibition, but DISPUTED because in mid-2007, the WIAA suspended enforcement of its photography policy for credentialed media that prohibited the sale of photographs taken at tournament games. Clark First Aff. ¶ 23. Further, the proposed fact is IMMATERIAL in that it relates to a policy not enforced since 2007 and no longer in existence.

Gannett's Proposed Finding of Fact No. 36: In February 2007, a dispute arose between the WIAA and WNA member newspapers over the practice by certain newspapers, without the WIAA's permission, of selling photographs of WIAA tournament events that were not published in print. Ans. to Defs.' Counterclaims (Dkt. 5), ¶ 30. In response to their objection, the WIAA informed media organizations, including the WNA and Gannett, that it would not enforce its prohibition on photography sales. *Id.*, ¶ 31. However, the WIAA did not remove the disputed

policies restricting such photography sales until the 2009-10 edition of the Media Guide. *Id.*, ¶ 31; *see* Jt. Stip. (Dkt. #26, Ex. B) at 6 (sale of photographs now permitted).

WIAA's Response: UNDISPUTED that as of mid-2007, the WIAA suspended enforcement of its photography policy for credentialed media that prohibited the sale of photographs taken at tournament games, and that it removed the photography policy from the 2009-10 edition of the Media Guide. Clark First Aff. ¶ 23.

Gannett's Proposed Finding of Fact No. 37: The WIAA's contract with VIP prohibits VIP from taking any "action that would reflect adversely on or injure the reputation of the WIAA" and requires that VIP, at WIAA's direction, "shall immediately withdraw from public sale/distribution all products containing objectionable content." Jt. Stip. (Dkt. #26, Ex. C) at 2.

WIAA's Response: UNDISPUTED that these are portions of the terms of the contract between the WIAA and VIP, but otherwise DISPUTED as the citation is incomplete. The withdrawal of objectionable content shall be "until such time as the WIAA's objections can be addressed and cured." Jt. Stip. (Dkt. # 26, Ex. C) at 2.

Gannett's Proposed Finding of Fact No. 38: The WIAA currently prohibits the "noneditorial, commercial, or otherwise unauthorized use of any photographs, images, film, videotape or other depictions" of WIAA sponsored tournament events without written consent of the WIAA. Ans. to Defs.' Counterclaims, (Dkt. #5), ¶ 25.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 39: Live streaming, which involves transmitting a live event for public viewing on a website, is a technology that many news media, including more recently newspapers, have used since the early 2000s. Affidavit of Danny L. Flannery, Jan. 21, 2010 ("Flannery Aff."), ¶ 6.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the cited evidentiary support for this proposed fact, the Affidavit of Danny L. Flannery, does not contain any evidence stating that "live streaming…involves transmitting a live event for public viewing on a website." Further, the evidentiary basis for this proposed fact

is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on a lack of personal knowledge and Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. *See* Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment. WIAA objects to Fact 39 to the extent it relies on Flannery Affidavit ¶ 6, which evidence lacks foundation under Fed. R. Evid. 602, and is therefore inadmissible.

Gannett's Proposed Finding of Fact No. 40: Gannett newspapers have had access to a fairly mobile and easy to use Internet streaming platform, Livestream, since summer 2008. Declaration of Joel Christopher in Support of Defs.' Mot. for Summ. J. on Their Counterclaim, Jan. 22, 2010 ("Christopher Decl."), ¶ 13; *see also* Flannery Aff., ¶¶ 7-8.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 41: Since September 2008, *The Post-Crescent* has live streamed more than 125 events, including high school sports, general news, 2008 Election coverage, Wisconsin Supreme Court debates, political debates, community events, interviews with newsmakers and health care officials, and weekly programs produced by the newspaper. Christopher Decl., ¶¶ 8, 14; Flannery Aff., ¶¶ 8-9.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 42: Internet streaming provides a unique reporting opportunity for live coverage of events that cannot be replicated by other technology. It allows newspapers to reach a broader geographic and demographic audience than their print editions, to report on a game in an entirely different way than print reporting, and to provide real-time coverage. Flannery Aff., ¶¶ 7, 8, 15, 22; Dye Aff., ¶ 15 (streaming high school sports games likely to increase audience); Christopher Decl., ¶ 3(d); *see also* Flannery Aff., ¶ 8 (*The Post-Crescent* shared its feed of a Wisconsin Supreme Court debate with all members of the WNA throughout the state); Answer to Defs.' Counterclaims (Dkt. #5), ¶ 39 (distinguishing Internet streaming from a newspaper's other reporting techniques).

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment). WIAA objects to Fact 42 to the extent it relies on Dye Affidavit ¶ 15, which evidence is speculative and conclusory and thus inadmissible. *See Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) ("conclusory statements, unsupported by the evidence of record, are insufficient to avoid summary judgment"); *U.S. v. Mt. Vernon*, 345 F.2d 404, 407 (7th Cir. 1965) ("intangible speculation does not raise an issue of material fact").

Gannett's Proposed Finding of Fact No. 43: An Internet stream of a high school athletic event by a newspaper is not a standalone production. Due to a website's capabilities, a newspaper can collect many sources and types of information about the event, including the stream and other information not included in the newspaper's print edition, and make them available as a collection to an online visitor. Dye Aff., ¶¶ 4-6, 10; Christopher Decl., ¶ 3(a).

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 44: Newspapers consistently seek ways to expand and engage their website audience. *See* Dye Aff., ¶¶ 6, 14-16; Flannery Aff., ¶¶ 8, 14; Christopher Decl., ¶ 3(d).

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 45: *The Post-Crescent*'s Internet streams have generated significant interest and drawn viewers from across the country and even from overseas. Viewers have communicated to *The Post-Crescent* that the newspaper's online efforts give them an opportunity to connect with their families and alma maters in a way that is not available to them anywhere else. Flannery Aff., ¶¶ 23-26.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment). WIAA objects to Fact 45 to the extent it relies on Flannery Affidavit ¶ 26, which evidence is inadmissible hearsay in violation of Fed. R. Evid. 801.

Gannett's Proposed Finding of Fact No. 46: Both *The Post-Crescent* and the *Green Bay Press-Gazette* use technology, called Coverit Live, to produce on-line conversations. Christopher Decl., ¶ 4; Dye Aff., ¶ 16. Coverit Live is an interactive conversation that displays words, images, polls, audio and video. During a Coverit Live conversation, members of the public submit comments about a live event to be approved and posted by *The Post-Crescent* staff member moderating the conversation. Christopher Decl., ¶ 4; Dye Aff., ¶ 19.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 47: Coverit Live conversations are saved simultaneously with their transmission. Christopher Decl., ¶ 5.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 48: Because the WIAA definition of play-by-play is vague, editors cannot give their reporters and editors appropriate guidance about what actions might violate the policy or trigger application of the rights fee. Flannery Aff., ¶ 12; Dye Aff., ¶ 19.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on conclusory allegations. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment). WIAA objects to Fact 48 to the extent it relies on Flannery Affidavit ¶ 12, which evidence lacks foundation under Fed. R. Evid. 602, and is therefore inadmissible. Plaintiffs objections object to this proposed finding on the grounds that it calls for a legal conclusion, in particular whether the WIAA definition of play-by-play is "vague." Otherwise DISPUTED. For the reasons stated in Plaintiffs' opposition to Defendants' motion for summary judgment, the WIAA's definition of play-by-play is not vague and contains numerous criteria for identifying a play-by-play description. *See* PFOF 33; FOF 230-31, 238-42; *see also* Br. in Opp'n to Defs.' Mot. for Summ. J. on Their Countercls., at 12-13, filed herewith. Further disputed because in 2008, the WIAA invited the media to propose suggestions for a definition of live blogging to the WIAA, but the media never did. Clark First Aff. ¶¶ 28-30.

Gannett's Proposed Finding of Fact No. 49: Editors fear running afoul of the WIAA's play-by-play restrictions or being fined after the fact. Dye Aff., ¶ 19. As a result, newspaper staff must

moderate comments from Coverit Live participants before posting them to avoid producing a conversation the WIAA might later determine included "play-by-play." *Id.*

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on conclusory and speculative allegations. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 50: Requiring reporters and editors to second-guess whether comments have crossed the play-by-play threshold could cause reporters to limit news coverage; editors must weigh whether reporting two consecutive game events might meet the WIAA's definition of "play-by-play." Dye Aff., ¶ 19.

WIAA's Response: DISPUTED. Plaintiffs object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on conclusory and speculative allegations. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 51: After-the-fact invoicing does not allow newspapers to budget in advance for the necessary expenditures to cover a game. Flannery Aff., ¶ 12.

WIAA's Response: DISPUTED. Neither Madison.com nor the Milwaukee Journal-Sentinel, the organizations to whom the WIAA sent the invoices described in Mr. Flannery's cited affidavit, applied or asked for permission to transmit live play-by-play blogs before the games in question. Because they did not apply for permission before the game, the WIAA did not know they were planning on transmitting live play-by-play before or during the game. It came to the WIAA's attention after the tournaments were completed that Madison.com

and the Milwaukee Journal-Sentinel had transmitted live play-by-play. Therefore, the WIAA sent them invoices for those transmissions consistent with the fees specified in the Media Policies Reference Guide. If they had applied for transmission rights before the game, they would have been advised of whether their transmission was permissible and how much the WIAA would charge for such a transmission beforehand. It is not uncommon for the WIAA to submit invoices to media organizations after the transmission is completed. Clark Second Aff. ¶ 3. WIAA objects to Fact 51 to the extent it relies on Flannery Affidavit ¶ 12, which evidence lacks foundation under Fed. R. Evid. 602, and is therefore inadmissible.

Gannett's Proposed Finding of Fact No. 52: The equipment necessary to live stream an event is not bulky and most tournament venue press boxes can accommodate more than one streaming crew. Christopher Decl., ¶ 20; *see also id*., ¶ 19 (describing streaming equipment); Affidavit of Ricardo D. Arguello, Jan. 22, 2010 ("Arguello Aff."), ¶ 5 (press box at streamed game large enough to accommodate another crew); Affidavit of Brett C. Christopherson, Jan. 22, 2010 ("Christopherson Aff."), ¶ 5 (press boxes at streamed game large enough to accommodate another crew).

WIAA's Response: DISPUTED because this proposed fact is only true for the larger schools (Division I and Division II schools) with respect to football tournaments. The smaller schools (Division III through Division VII) most often do not have sufficiently large designated areas for press. In addition, for other sports besides football, such as basketball, many smaller schools do not have press-designated areas at all. For example, at basketball tournaments, it is not uncommon for the media to be sitting at a table set up in the bleachers, with their equipment stationed on the bleachers, or to be placed in the corners of the gym on the floor. Further, the size of an individual school's "press box" or designated area does not alone dictate how many individuals can live stream from that area. That will depend on what each individual school has assigned for that area. For example, a school may assign the same area to both the host and visiting school, or other operational event staff, such as scoreboard operator,

school filmers, PA announcer, spotter, or other individuals assisting with the administration of the event. Clark Second Aff. ¶ 4.

Gannett's Proposed Finding of Fact No. 53: Live streaming, Coverit Live conversations and blogs are all expressive activity that require and incorporate editorial decisions. Flannery Aff., ¶¶ 16-21; Dye Aff., ¶ 19; Christopher Decl. ¶¶ 4, 7, 10-11, 17, 21-22; *see also* Christopher Decl., Ex. A, B (excerpts of Coverit Live conversations); Davis Aff., Ex. A (blog excerpt).

WIAA's Response: DISPUTED. Plaintiffs object to this finding on the basis that it calls for a conclusion of law regarding "expressive activity." Plaintiffs also object to this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on conclusory allegations. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 54: On May 20, 2005, the WIAA executed a ten-year, no-bid contract with WWWY ("WWWY Contract") which grants WWWY "the exclusive right to produce, sell, and distribute all WIAA tournament series and championship events for all WIAA sports with the exception of existing contracts" as of the date of the contract's execution. Jt. Stip. (Dkt. #26), ¶ 11 and Ex. D, at p. *1 (at I(a)), *3; *see* Ans. to Defs.' Counterclaims (Dkt. #5), ¶ 38 (WIAA did not seek bids from Defendants); *see* Santa Maria Decl., Ex. E, ¶ 7 (Todd Clark of the WIAA describing history of WWWY contract).

WIAA's Response: DISPUTED. Plaintiffs dispute Defendants' proposed finding of fact # 54 in that it mischaracterizes the contract between the WIAA and WWWY as a "no-bid contract," and to the extent such mischaracterization assumes facts and/or the existence of an obligation to obtain such a bid. WWWY approached the WIAA with the idea of transmitting WIAA games over the internet. At no time prior to that did any media or production company express any interest in transmitting WIAA events via internet, and there were no inquiries or requests to the WIAA by media organizations to transmit then-underexposed and less visible sports. The WIAA asked if its other media partners were interested in broadcasting those other

sports, but they declined. WWWY's proposal to the WIAA contained a comprehensive proposal and analysis providing the WIAA with substantial benefits that no other organization had proposed. Clark First Aff. ¶¶ 6-7; Chickering Aff. ¶¶ 16-27.

Gannett's Proposed Finding of Fact No. 55: The WIAA's contract with WWWY includes the exclusive rights to Internet stream all WIAA tournament events with the exception of Football State Finals, Boys and Girls Basketball State Tournaments, and Boys and Girls Hockey State Finals. Jt. Stip. (Dkt. #26), ¶ 11.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 56: The contract permits WWWY to meet its production "goals" by subcontracting out its video-production rights to other media companies:

> American-HiFi/When We Were Young Productions will agree to produce directly or through an affiliate all WIAA tournament series and championship events. Our production goals would be as follows for all sports:
>
> i. 100% of all state tournaments
> ii. 50% of all sectional events
> iii. 25% of all regional events

Jt. Stip. (Dkt. #26, Ex. D) at II(a).

WIAA's Response: DISPUTED. WWWY is allowed to produce directly or through an affiliate all WIAA tournament series and championship events that are not otherwise covered under existing contracts. WWWY agrees to actively seek out and affiliate all qualified production resources that have a history of producing WIAA tournament series or championship events. Jt. Stip. (Dkt. #26, Ex. D) at II(a) and II(d). The purpose of the affiliate program was to expand exposure of high school sports and improve the availability of transmission of the events. By allowing other producers to affiliate with WWWY, such transmissions could be expanded in a controlled manner, minimizing spatial demand and keeping transmissions consistent with the WIAA's quality standards and branding. The affiliate program allowed WWWY to facilitate the monitoring of transmissions to ensure consistency and quality, and to ensure that transmissions

do not violate the WIAA's content standards, such as transmission of prohibited content related to tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter. Clark Second Aff. ¶ 5.

Gannett's Proposed Finding of Fact No. 57: The WWWY's Contract requires WWWY to make payments to the WIAA under the following formula:

> i. [WWWY] will establish a tournament/event production cost that encompasses all business related expenses to produce the tournament or event.
>
> ii. [WWWY] will receive 100% of all revenues generated by the distribution of the tournament/event up until all of the costs have been recaptured.
>
> iii. All revenues generated after the tournament/event cost has been recaptured will be split 50% to the WIAA and 50% to [WWWY] with the exception of physical media sales.
>
> iv. All sales of physical media after the initial cost has been recaptured will be split 20% to the WIAA and 80% to [WWWY].

Jt. Stip. (Dkt. #26, Ex. D), at p. 2, at V.

WIAA's Response: DISPUTED IN PART. UNDISPUTED that this language in contained in the contract. However, otherwise DISPUTED. WWWY paid $60,000 to the WIAA in 2008 for the rights under the contract, and currently pays the WIAA an annual fee of $60,000. Clark First Aff. ¶ 8; Eichorst First. Aff. ¶ 28. WWWY has not made a profit under its contract with the WIAA in any year of the contract. Under the formula contained in the WIAA contract, WWWY's losses would preclude a payment to the WIAA. Despite these historical losses, however, the WIAA and WWWY have agreed to modify the formula in the contract and WWWY has agreed to pay fees to the WIAA. The current fee structure is based upon a percentage of the distribution revenues that WWWY receives from the Fox Sports Wisconsin. Eichorst Second Decl. ¶ 5.

Gannett's Proposed Finding of Fact No. 58: The WIAA has authorized WWWY to fine media who do not seek prior permission to stream a game:

> All media and/or Internet parties interested in video transmission of WIAA Tournament Series events must make arrangements with When We Were Young Productions (608) 849-3200 to inquire about video transmission or Internet transmission permission prior to the date of the contest. Entities not adhering to permission policies are subject to fines imposed by the rights holder. Live or tape-delayed video transmission rights of regional and sectional events by television stations, cable operators and Internet sites is prohibited without consent of the WIAA and When We Were Young Productions.

Jt. Stip. (Dkt. #26, Ex. B), at 14 (Video #1).

WIAA's Response: DISPUTED IN PART and IMMATERIAL. Undisputed that such language is contained in the WIAA's 2009-2010 Media Policies Reference Guide. Jt. Stip. (Dkt. #26, Ex. B) at 14. However, otherwise DISPUTED and IMMATERIAL as such policy was not in effect at the time of the unauthorized streaming the subject of the lawsuit. Jt. Stip. (Dkt. #26, Ex. A). Further, at no time has WWWY sought to impose a fine on any media organization for failing to seek or obtain permission to live stream a WIAA game. Knoeck Decl. ¶ 5.

Gannett's Proposed Finding of Fact No. 59: WWWY markets both its own and its licensed affiliates' productions of WIAA tournament events on a website accessible through www.wiaa.tv. Veldran Aff., ¶¶ 3, 11; Santa Maria Decl., Ex. F.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 60: Before the WIAA signed the contract with WWWY, media entities other than WWWY were broadcasting WIAA tournament events and did not pay any rights fee to the WIAA. In fact, the WIAA states that "in some instances local community access channels would broadcast local games. The WIAA received no direct revenue from these local community access broadcasts." Santa Maria Decl., Ex. E, ¶ 5.

WIAA's Response: DISPUTED. The broadcasts in question were delayed broadcasts, not live. The WIAA did not charge for delayed broadcasts of regular season games. For WIAA tournament games, the WIAA always charged a fee to local PEG channels for delayed broadcasting of WIAA tournaments. That fee was $20 per game. In practice, however,

the WIAA did not have the resources to monitor compliance with this requirement, and it believed there were instances when local PEG channels would broadcast a local WIAA tournament game without paying the fee to the WIAA. That was the benefit of the contract between WWWY and the WIAA: the contract allowed WWWY to monitor compliance of these transmissions for the WIAA. The new fee was a $50 per year fee rather than $20 per game. In 2005, before the WIAA's contract with WWWY contract was executed, the vast majority of the WIAA's sports were not transmitted by any media organizations. Clark Second Aff. ¶ 6. Plaintiffs also object to proposed findings of fact # 60 because whether the WIAA "states" something about a particular subject is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings.").

Gannett's Proposed Finding of Fact No. 61: Twenty-two affiliates have produced the 2006, 2007, 2008 and 2009 WIAA Girls Basketball sectional and regional games that are offered for sale on www.wiaa.tv, including community access channels. Some affiliates have also produced state finals games of other sports. Veldran Aff., ¶¶ 11, 12.

WIAA's Response: DISPUTED. Plaintiffs dispute proposed finding of fact # 61 because there is no evidentiary support in the Veldran Affidavit for the allegation in the second sentence that "some affiliates have also produced state final games of other sports," nor is there a paragraph 12 in the Veldran Affidavit which has been cited by Defendants. WWWY does not make enough money from the sales of DVDs to cover the cost of production. Instead, WWWY's revenues come from distribution and advertising, which offset other operating expenses. Knoeck Decl. ¶ 3. In the two-year period covering 2007-2008 and 2008-2009, WWWY sold 88 affiliates

DVDs at a total cost of $1,660.60, returning $332.12 (20%) to the affiliates in royalties. Knoeck Decl. ¶ 4.

Gannett's Proposed Finding of Fact No. 62: The WIAA states that WWWY provides it with "costly" services including scoreboard video programming at some tournament events and web transmissions of mandatory WIAA sport rule meetings. Santa Maria Decl., Ex. E, ¶ 9.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 63: In 2008, *The Post-Crescent* live streamed the following four WIAA football games, all of which involved one or more local teams:

> October 28, 2008 Green Bay Preble High School v. Appleton North High School
> October 28, 2008 New London High School v. Waupaca High School
> November 1, 2008 Appleton North High School v. Bay Port High School
> November 8, 2008 Appleton North High School v. Stevens Point High School

Christopher Decl., ¶ 16.

WIAA's Response: UNDISPUTED that these four games were Level II and Level III WIAA football tournament games live streamed by *The Post-Crescent*. Clark Second Aff. ¶ 7. DISPUTED, however, to the extent that such live streaming activity in any way implies permission for such activity. No permission was granted by the WIAA or WWWY for these live streams. Clark First Aff. ¶ 31; Eichorst First. Aff. ¶ 44.

Gannett's Proposed Finding of Fact No. 64: The streams consisted of video images accompanied by audio commentary by two commentators. No other media entity streamed these games. Christopher Decl., ¶ 16; *see also* Christopher Decl., Ex. C, D and E.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 65: *The Post-Crescent* generally saves Internet streams simultaneously with their transmission. Christopher Decl., ¶ 19. All but one of the game transmissions identified in paragraph 63 above was saved simultaneously with its broadcast; the New London/Waupaca game was not saved because of poor production quality. *Id.* at ¶ 28.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 66: Neither WIAA employees nor any other non-Gannett employees participated in the technical production of *The Post-Crescent*'s Livestream transmissions of the games identified in paragraph 63 above. *See* Christopher Decl., ¶ 27.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 67: On October 28, 2008, the *Green Bay Press Gazette* posted on its website a copy of the *The Post-Crescent*'s stream of the October 28, 2008 game involving Green Bay Preble High school. Dye Aff., ¶ 12.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 68: On October 29, 2008, Tim Eichorst, President of WWWY, emailed John Dye, the Executive Editor of the *Green Bay Press-Gazette*, regarding the newspaper's posting of the Internet stream of the Green Bay Preble/Appleton North football game. Dye Aff., ¶¶ 2, 12, and Ex. B.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 69: In the email, Eichorst stated, in part, that:

> John, it has been brought to my attention that your organization produced a WIAA tournament series event football game last evening between Appleton North and Green Bay Preble.
> …
>
> You may, or may not, be aware that When We Were Young Productions holds the exclusive rights to these events and any full game production must be cleared through us and appropriate rights fees are charged. The fees for a live or delayed single camera internet stream is $250/game. For a multicamera event it is $1500/game. If you wish to keep this video on your site I will need you to remit the rights fee. If not, then please remove this from your site.

Dye Aff., Ex. B.

WIAA's Response: UNDISPUTED that Mr. Eichorst stated those words in that e-mail, but otherwise DISPUTED. Plaintiffs object to this proposed finding of fact because whether a witness "stated" something about a particular subject or event is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated,

acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings.").

Gannett's Proposed Finding of Fact No. 70: The Internet stream of the game was removed from the *Green Bay Press-Gazette*'s site on or before October 30, 2008, and no "rights fee" was remitted to WWWY. Dye Aff., ¶ 12.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 71: On October 31, 2008, Tim Knoeck of WWWY left a voicemail with Dan Flannery, the Executive Editor of the *The Post-Crescent*, in which he stated that he had noticed *The Post-Crescent* had streamed a WIAA football playoff game and that this was illegal. Flannery Aff., ¶¶ 2, 27. He stated that he owned the copyrights to those games and that he distributed them. *Id.*, ¶ 27. He stated that no one had been given permission to do the stream and that it had been against his and the WIAA's wishes. *Id.*

WIAA's Response: DISPUTED. Tim Knoeck, the Vice-President of WWWY, called Dan Flannery about the stream, and left a voice-mail message for him. Knoeck advised Flannery in the voice-mail message that WWWY had become aware of the fact that *The Post-Crescent* live streamed a WIAA football game. Knoeck stated that WWWY held the production and distribution rights to that game, and that *The Post-Crescent*'s live stream of such a game violated WWWY's video rights. Knoeck did not state that WWWY owned the copyrights. *The Post-Crescent* did not obtain WWWY's permission to live stream the game. Knoeck Decl. ¶ 6.

Gannett's Proposed Finding of Fact No. 72: On October 28, 2008, Eichorst emailed Sherman Williams of the *Milwaukee Journal Sentinel* and provided him with the licensing terms then applicable to a media entity seeking permission to Internet stream a WIAA tournament game:

- pay a fee of $250 (single camera production) or $1500 (multi-camera production);
- send WWWY the master copy of the game to market;
- the media entity is prohibited from selling copies of the game to anyone; and
- WWWY will remit 20% of the gross sales.

Affidavit of Sherman Williams, Jan. 20, 2010 ("Williams Aff."), ¶¶ 2, 3, and Ex. A.

WIAA's Response: UNDISPUTED that Mr. Eichorst stated those words in that e-mail.

Gannett's Proposed Finding of Fact No. 73: WIAA has instructed schools hosting WIAA tournament events to deny media members permission to live stream tournament events without WIAA's or WWWY's permission. Ans. to Defs.' Counterclaims (Dkt. #5), ¶ 42.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 74: On November 1 and 8, 2008, three Gannett newspapers were denied permission to live stream four WIAA football tournament games by representatives of the host schools. Each representative cited the WIAA's media policies when issuing the denial. Affidavit of James R. Matthews, Jan. 22, 2010 ("Matthews Aff."), ¶¶ 2-5; Affidavit of Michael T. Woods, Jan. 22, 2010 ("Woods Aff."), ¶¶ 2-4; Declaration of Robert B. Ebert, Jan. 21, 2010 ("Ebert Decl."), ¶¶ 1, 4-6.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 75: No other media entity streamed those games. Matthews Aff., ¶ 6; Woods Aff., ¶ 5; Ebert Aff., ¶¶ 4, 6.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 76: The WIAA states that its exclusive contracts and licensing scheme is necessary to protect its revenue sources. Am. Compl. (Dkt. #7), ¶ 28.

WIAA's Response: DISPUTED IN PART. UNDISPUTED that WIAA has so stated, but DISPUTED to the extent that the proposed finding of fact implies that protecting revenue sources is the only reason for its exclusive contracts and licensing scheme. Plaintiffs also object to proposed finding of fact # 76 because whether the WIAA stated something about a particular subject is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings."). Undisputed that this is one of the things the WIAA has stated about the many reasons it has entered into exclusive contracts.

Gannett's Proposed Finding of Fact No. 77: The WIAA's expert witness has reasoned that:

> Indeed, in this regard WWWY's interest in exclusivity, and the WIAA's interest in limiting internet transmissions of its games [is] 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.

Santa Maria Decl., Ex. C, ¶ 40.

WIAA's Response: DISPUTED. Plaintiffs object to proposed finding of fact # 77 because whether the WIAA's expert reasoned something about a particular subject is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings."). Undisputed that the quoted language is one portion of paragraph 40, which is one paragraph of 54 paragraphs, of the Expert Report of James L. Hoyt.

Gannett's Proposed Finding of Fact No. 78: WIAA asserts that:

> The only way the WIAA would recognize the right of a person or entity to fix an image of a WIAA tournament event in a tangible medium is if that person or entity obtained permission from and paid the appropriate fees to the WIAA and its agents who own and control the right to manage and produce the tournaments that generate the images sought to be fixed. As a condition of and in exchange for that permission, WIAA controls the ownership of the copyright. Absent such permission, the WIAA does not recognize the rights of persons or entities to fix such images of WIAA tournament events in any tangible medium.

Santa Maria Decl., Ex. B, Interrog. Resp. No. 11.

WIAA's Response: DISPUTED. Plaintiffs object to proposed finding of fact # 78 because whether the WIAA asserts something about a particular subject is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated,

acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings."). Undisputed that the quoted language was the response of the WIAA to Defendants' Interrogatory which asked: "Do you contend that a person or entity, if work for hire, who fixes an image of a WIAA Tournament event in a tangible medium does not own the copyright to that image?" The quoted language also omitted the first sentence of the WIAA's response, which stated: "While copyright ownership is a legal conclusion, the answer to this question depends on many variables."

Gannett's Proposed Finding of Fact No. 79: In 2008, WIAA received $60,000 from WWWY. Santa Maria Decl., Ex. E, ¶ 8; Santa Maria Decl., Ex. G at *3.

WIAA's Response: UNDISPUTED that WWWY paid the WIAA $60,000 for the rights granted in the contract, but DISPUTED to the extent that the proposed fact suggests that $60,000 was all WIAA received from WWWY in 2008. In addition to the payment, WWWY provided the multiple identified video services to the WIAA free of charge. Clark First Aff. ¶ 9; Eichorst First. Aff. ¶¶ 29, 40; Chickering Aff. ¶¶ 24-27. In 2008, WIAA received $80,000 from a sponsorship partner, a portion of which came from advertising in programming produced by WWWY. FOF 130 (Dkt. No. 51); Clark First Aff. ¶ 10.

Gannett's Proposed Finding of Fact No. 80: High school sports and decisions that affect high school athletic programs generate significant community interest, support and participation. Affidavit of David Schmidt, Jan. 22, 2010 ("Schmidt Aff."), ¶¶ 12-13; *see also* Flannery Aff., ¶ 28.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 81: Newspapers have a long-standing tradition of reporting on regular season and tournament high school games. Because of the significant interest high school sports generate, the *Green Bay Press-Gazette* does not limit or intend to limit in the future its reporting to only the most popular sports. The newspaper's high school sports coverage extends back at least 94 years. Dye Aff., ¶¶ 6-11, Ex. A.

WIAA's Response: DISPUTED. Plaintiffs object to and dispute this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on Defendants' failure to disclose such evidence in response to Plaintiffs' discovery requests. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment).

Gannett's Proposed Finding of Fact No. 82: The *Green Bay Press-Gazette* news operation employs fifty-three full-time employees and five part-time employees. All but two or three of those staffers perform at least some duties related to high school sports coverage in the course of a calendar year. Dye Aff., ¶ 9.

WIAA's Response: DISPUTED. Plaintiffs dispute the allegation that "all but two or three of those staffers perform at least some duties related to high school sports coverage in the course of the calendar year," because the affidavit supporting that allegation does not so state. Rather, it states, "all but two or three of those staffers have at last some contact related to high school sports in the course of a calendar year." Dye Aff., ¶ 9.

Gannett's Proposed Finding of Fact No. 83: Because of the interest such reporting generates, a local newspaper that was denied credentials to report on WIAA tournament games would suffer significant damage and would likely lose a significant percentage of its print readership and online audience. *See* Flannery Aff., ¶ 13.

WIAA's Response: DISPUTED. Plaintiffs object to and dispute this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on allegations that are speculative and assume facts. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment). WIAA objects to Fact 83 to the extent it relies on Flannery Affidavit ¶ 13, which evidence is self serving, speculative and

conclusory and thus inadmissible. *See Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) ("conclusory statements, unsupported by the evidence of record, are insufficient to avoid summary judgment"); *U.S. v. Mt. Vernon*, 345 F.2d 404, 407 (7th Cir. 1965) ("intangible speculation does not raise an issue of material fact"); *Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) ("self-serving affidavits without factual support in the record will not defeat a motion for summary judgment."). WIAA further objects to this evidence as offering improper opinion. *Stagman v. Ryan*, 176 F.3d 986, 995-96 (7th Cir. 1999) (lay opinions are "meaningless assertion.").

Gannett's Proposed Finding of Fact No. 84: A fee of $250 per event is an excessive fee for a local newspaper like the *Green Bay Press-Gazette*, which provides regular and extensive coverage of numerous WIAA tournament events throughout the year. If the newspaper had to pay such a fee for each tournament event, the newspaper would not be able to report on as many WIAA tournament events using Internet streaming technology as it would otherwise. Dye Aff., ¶ 17.

WIAA's Response: DISPUTED. Plaintiffs object to and dispute this proposed finding on the grounds that the evidentiary basis for this proposed fact is based upon inadmissible evidence and is subject to Plaintiffs' Motion to Strike based on conclusory and speculative allegations. (See Plaintiffs' Motion to Strike Portions of Defendants' Affidavits in Support of Defendants' Motion for Summary Judgment). WIAA objects to Fact 84 to the extent it relies on Dye Affidavit ¶ 17, which evidence is self serving, speculative and conclusory and thus inadmissible. *See Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) ("conclusory statements, unsupported by the evidence of record, are insufficient to avoid summary judgment"); *U.S. v. Mt. Vernon*, 345 F.2d 404, 407 (7th Cir. 1965) ("intangible speculation does not raise an issue of material fact"); *Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) ("self-serving affidavits without factual support in the record will not defeat a motion for summary judgment."). WIAA further objects to this evidence as offering improper

opinion. *Stagman v. Ryan*, 176 F.3d 986, 995-96 (7th Cir. 1999) (lay opinions are "meaningless assertion.").

Gannett's Proposed Finding of Fact No. 85: Interscholastic athletics are an integral part of Wisconsin high school students' education. Schmidt Aff., ¶ 5; *see also* Flannery Aff., ¶ 28; Santa Maria Decl., Ex. D at *2, Art. II, Sec. 1(c).

WIAA's Response: DISPUTED. Defendants' cited reference to Santa Maria Decl., Ex. D at *2, Art. II, Sec. 1(c) does not support this allegation (one of the purposes of the WIAA is to promote uniformity of standards and prevent exploitation). Further, under Wisconsin law, to graduate from high school, a student must have completed 1.5 credits of physical education. Wis. Stat. § 118.33(1)(a)1.

Gannett's Proposed Finding of Fact No. 86: WIAA tournaments provide important opportunities for participating athletes and generate significant interest among some members of the public. Am. Compl. (Dkt. #7), ¶¶ 13, 14.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 87: Media coverage of high school sports has played a substantial role in generating community support and interest in WIAA tournament events. Jt. Stip. (Dkt. #26, Ex. B) at 1 (General Policies); *see also* Schmidt Aff., ¶ 13 (media's role in generating community support and interest). The WIAA itself acknowledges the responsibilities of legitimate news gathering media representatives in covering and reporting from WIAA sponsored tournaments. We recognize the interest and promotion generated by media coverage and the recognition given to the achievements of school teams and student athletes.
Jt. Stip. (Dkt. #26, Ex. B) at 1 (General Policies).

WIAA's Response: DISPUTED. Plaintiffs dispute Defendants' proposed finding of fact # 87 because there is no evidentiary support for the allegation that "media coverage of high school sports has played a substantial role in generating community support and interest in WIAA tournament events." The cited Media Policies Reference Guide states that the WIAA "recognize[s] the interest and promotion generated by media coverage and the recognition given to the achievements of school teams and student-athletes," and the cited Schmidt Affidavit states

that "news media coverage helps support the community's interest in, and support for, interscholastic events;" neither state that the media has "played a substantial role" in generating such support and interest.

Gannett's Proposed Finding of Fact No. 88: The WIAA's constitution states that its purpose includes "[t]o emphasize interscholastic athletics as a partner with other school activities in the total educational process." Santa Maria Decl., Ex. D at *2 Art. II, Sec. 1(c).

WIAA's Response: DISPUTED. Plaintiffs do not dispute that the quoted language is one of the WIAA's purposes as stated in its Constitution, but do dispute that such language can be found at Defendants' citation. Under the WIAA constitution, the purpose of the WIAA is threefold:

> (a) To organize, develop, direct, and control interscholastic athletic programs which will promote the ideals of its membership and opportunities for member schools' participation.
>
> (b) To emphasize interscholastic athletics as a partner with other school activities in the total educational process, and formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship.
>
> (c) To promote uniformity of standards in interscholastic athletic competition, and prevent exploitation by special interest groups of the school program and the individual's ability.

Nero Decl. Ex. 2 at 14.

Gannett's Proposed Finding of Fact No. 89: School districts excuse student athletes and their coaches from classes so they may participate in interscholastic games and may also excuse student-fans so they may attend tournament events to support their classmates. Typically, neither the student athletes nor their coaches are required to make up the missed classroom hours. *See* Schmidt Aff., ¶¶ 6-8.

WIAA's Response: UNDISPUTED that such policies may apply in the Ashwaubenon, Waukesha and Appleton school districts; otherwise DISPUTED, however, as

there is no evidence cited to support such a claim with respect to any other school district.

Schmidt Aff. ¶¶ 6-8.

Gannett's Proposed Finding of Fact No. 90: Interscholastic athletics play a part in the lives of not only the student-athletes themselves, but additionally, in the lives of their non-participating classmates. For many students, school life is framed by the sports culture of their school and communities. Their participation in pep rallies, as spectators and general support of both male and female sports teams, make them a part of what is important in the school beyond academics. Schmidt Aff., ¶¶ 5, 7; Flannery Aff., ¶ 28.

WIAA's Response: UNDISPUTED.

Gannett's Proposed Finding of Fact No. 91: Ashwaubenon and other Wisconsin public school districts spend significant amounts of money each year for interscholastic athletics. The 2009-2010 Ashwaubenon budget includes the following expected expenditures:

a. coach salaries, approximately $120,000
b. athletic facilities: high school sports facilities are multiple use spaces. Our gymnasiums, swimming pool and playing fields get used by community groups and our Village Park and Recreation Department on a regular basis. There are maintenance costs to all of these spaces, but it is difficult to break out direct costs.
c. team equipment, about $12,000
d. travel to/from events, approximately $35,000
e. entry fees, $7,500
f. officials, approximately $21,000
g. WIAA general dues, approximately $1,100 (2008)

Schmidt Aff., ¶ 14.

WIAA's Response: DISPUTED. Plaintiffs dispute proposed finding of fact # 91 to the extent that it refers to "other Wisconsin public school districts," as the cited Schmidt Affidavit refers only to expenditures of the Ashwaubenon school district, and to the extent it alleges facts related to the 2009-2010 Ashwaubenon budget, as the cited Schmidt Affidavit contains only evidence related to the 2008-2009 budget. Defendants' proposed finding of fact # 91 is undisputed to the extent of the 2008-2009 Ashwaubenon budget.

Gannett's Proposed Finding of Fact No. 92: Ashwaubenon may also expend funds to pay supervisory personnel when student-fans travel to state tournament games to support their classmates. Schmidt Aff., ¶ 9.

WIAA's Response: UNDISPUTED that such expenditures may be made.

However such payments are made to ensure appropriate behavior and safety of the students involved. Schmidt Aff. ¶ 9.

Gannett's Proposed Finding of Fact No. 93: The WIAA does not pay state sales tax from gate receipts from WIAA tournament events pursuant to Wis. Adm. Code Tax 11.03(2)(a)5. Santa Maria Decl., Ex. A, Request to Admit No. 12.

WIAA's Response: UNDISPUTED.

Dated this 12th day of February, 2010.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

PLAINTIFFS' ADDITIONAL PROPOSED FINDINGS OF FACTS

Plaintiffs Wisconsin Interscholastic Athletic Association and American-HiFi, Inc., d/b/a When We Were Young Productions, propose the following additional proposed findings of fact in opposition to Defendants' Motion for Summary Judgment. In addition the facts contained herein, Plaintiffs rely on their Proposed Findings of Fact filed in support of their Motion for Summary Judgment, Dkt. No. 51, Jan. 22, 2010, and the supporting papers thereto, previously filed with the Court.

The following abbreviations are used for the declarations and affidavits cited herein:

Chickering Aff.	=	Affidavit of Douglas E. Chickering, Dkt. No. 53, filed 1/22/10
Christopher Decl.	=	Declaration of Joel Christopher, Dkt. No. 36, filed 1/22/10
Clark First Aff.	=	Affidavit of Todd C. Clark, Dkt. No. 54, filed 1/22/10
Clark Second Aff.	=	Second Affidavit of Todd C. Clark, filed herewith
Eichorst First Aff.	=	Affidavit of Tim Eichorst, Dkt. 55, filed 1/22/10
Eichorst Second Decl.	=	Second Declaration of Tim Eichorst, filed herewith

Hoyt Decl.	=	Declaration of James L. Hoyt, Dkt. No. 56, filed 1/22/10
Knoeck Decl.	=	Declaration of Timothy Knoeck, filed herewith
Nero Decl.	=	Declaration of Autumn N. Nero in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 52, filed 1/22/10
Schmidt Decl.		Declaration of Charles C. Schmidt in Support of Motion of Arizona Interscholastic Association, Inc. for Leave to File Amicus Brief and Supporting Declaration, Dkt. No. 28, Filed 1/22/10
Walkenhorst Decl.	=	Declaration of Sarah C. Walkenhorst in Support of Plaintiffs' Opposing to Defendants' Motion for Summary Judgment, filed herewith

1. Consistent with the WIAA's stated constitutional purposes to promote the ideals of its membership, to emphasize interscholastic athletics as a partner with other school activities in the total educational process, to formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship, and to prevent exploitation by special interest groups of the student athlete, the WIAA's Media Policies Reference Guide contains policies that prohibit transmissions of WIAA events to be associated with tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter. Clark Second Aff. ¶ 2.

2. These protective policies were implemented because the WIAA membership views it as part of the WIAA's mission when dealing with impressionable adolescents to protect the members' student athletes. Clark Second Aff. ¶ 2.

3. Once approved, the WIAA has not revoked any transmissions rights for inappropriate transmissions. Clark Second Aff. ¶ 2.

4. Neither Madison.com or the Milwaukee Journal-Sentinel applied or asked for permission to transmit live play-by-play blogs before the games for which they were invoiced. Clark Second Aff. ¶ 3.

5. Because Madison.com and the Milwaukee Journal-Sentinel did not apply for permission before the game, the WIAA did not know they were planning on transmitting live play-by-play before or during the game. Clark Second Aff. ¶ 3.

6. It came to the WIAA's attention after the tournaments were completed that Madison.com and the Milwaukee Journal-Sentinel had transmitted live play-by-play. Clark Second Aff. ¶ 3.

7. The WIAA sent them invoices for those transmissions consistent with the fees specified in the Media Policies Reference Guide. Clark Second Aff. ¶ 3.

8. If Madison.com or the Milwaukee Journal-Sentinel had applied for transmission rights before the game, they would have been advised beforehand of whether their transmission was permissible and how much the WIAA would charge for such a transmission. Clark Second Aff. ¶ 3.

9. It is not uncommon for the WIAA to submit invoices to media organizations after the transmission is completed. Clark Second Aff. ¶ 3.

10. Only the press designated areas at larger schools (Division I and Division II schools) are large enough to accommodate more than one crew engaged in Internet streaming, and then only at football tournaments. Clark Second Aff. ¶ 4.

11. The smaller schools (Division III through Division VII) most often do not have sufficiently large designated areas for press to accommodate more than one production crew engaged in streaming. Clark Second Aff. ¶ 4.

12. For other sports besides football, such as basketball, many smaller schools do not have press-designated areas at all. Clark Second Aff. ¶ 4.

13. At basketball tournaments, it is not uncommon for the media to be sitting at a table set up in the bleachers, with their equipment stationed on the bleachers or to be placed in the corners of the gym on the floor. Clark Second Aff. ¶ 4.

14. The size of an individual school's "press box" or designated area does not alone dictate how many individuals can live stream from that area. Clark Second Aff. ¶ 4.

15. Each individual school may assign the same area to both the host and visiting school, or other operational event staff, such as scoreboard operator, school filmers, PA announcer, spotter, or other individuals assisting with the administration of the event. Clark Second Aff. ¶ 4; Walkenhorst Decl. Ex. 13.

16. The purpose of the WIAA's affiliate program through WWWY was to expand exposure of high school sports and improve the availability of transmission of the events. Clark Second Aff. ¶ 5.

17. By allowing other producers to affiliate with WWWY, such transmissions could be expanded in a controlled manner, minimizing spatial demand and keeping transmissions consistent with the WIAA's quality standards and branding. Clark Second Aff. ¶ 5.

18. The affiliate program also allowed WWWY to facilitate monitoring of transmissions for consistency and quality, and to ensure that transmissions do not violate the WIAA's content standards, such as transmission of prohibited content related to tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter. Clark Second Aff. ¶ 5.

19. In some instances local community access channels would broadcast local games that were delayed transmissions, not live, and they were transmitted only locally. Clark Second Aff. ¶ 6.

20. The WIAA does not charge for delayed transmissions of regular season games. Clark Second Aff. ¶ 6.

21. For WIAA tournament games, the WIAA always charged a fee of $20 per game to local PEG channels for delayed transmissions of WIAA tournaments. Clark Second Aff. ¶ 6.

22. In practice, however, the WIAA did not have the resources to monitor compliance with this requirement, and the WIAA believed there were instances when local PEG channels would transmit a local WIAA tournament game without paying the fee to the WIAA. Clark Second Aff. ¶ 6.

23. The benefit of the contract between WWWY and the WIAA was that it allowed WWWY to monitor compliance with the required fee. Clark Second Aff. ¶ 6.

24. The new fee through WWWY was a $50 per year fee rather than $20 per game. Clark Second Aff. ¶ 6.

25. In 2005, before the WIAA's contract with WWWY was executed, the vast majority of the WIAA's sports were not transmitted by any media organizations. Clark Second Aff. ¶ 6.

26. For football, post-season competitions consist of five levels of play, Levels I through V, in each of 7 football divisions. Clark Second Aff. ¶ 7.

27. Level I is the first round of post-season games, and Level V is the state championship game (resulting in 7 football champions, one for each division). Clark Second Aff. ¶ 7.

28. The four games that were live streamed by *The Post-Crescent* were Level II and Level III football games. Clark Second Aff. ¶ 7.

29. The correct fee structure for a person or entity to livesteam a WIAA tournament is $250 to live internet stream a game produced with one camera, and $1,500 to live internet stream a game produced with multiple cameras. Clark Second Aff. ¶ 8.

30. WWWY has never made a net profit on its contract with the WIAA. Eichorst Second Decl. ¶ 4.

31. For each year of the WIAA contract, the expenses of production and the services that WWWY provides to WIAA have exceeded WWWY's revenues received as a result of WWWY's rights under the WIAA contract. Eichorst Second Decl. ¶ 4.

32. Under the formula contained in the WIAA contract, WWWY's losses would preclude a payment to the WIAA. Eichorst Second Decl. ¶ 5.

33. Despite these historical losses, however, the WIAA and WWWY agreed to modify the formula in the contract and WWWY agreed to pay fees to the WIAA. Eichorst Second Decl. ¶ 5.

34. The current fee structure is based upon a percentage of the distribution revenues that WWWY receives from the Fox Sports Wisconsin. Eichorst Second Decl. ¶ 5.

35. WWWY agreed to pay these fees because of its relationship with the WIAA, its commitment to the WIAA's mission, its interest in maximizing production and distribution of high school athletic competitions in Wisconsin, and its hope that the continuing relationship would ultimately be a profitable venture. Eichorst Second Decl. ¶ 5.

36. Tim Knoeck, the Vice-President of WWWY, is responsible for managing the overall office operations of WWWY as it relates to WWWY's contractual obligations with the

WIAA, including managing relationships with affiliates, overseeing DVD sales of WIAA events, and assisting with enforcing WWWY's legal rights. Knoeck Decl. ¶ 2.

37. WWWY does not make enough money from the sales of DVDs to cover the cost of production. Knoeck Decl. ¶ 3.

38. Instead, WWWY's revenues come from distribution and advertising, which offset other operating expenses. Knoeck Decl. ¶ 3.

39. In the two-year period covering 2007-2008 and 2008-2009, WWWY has sold 88 affiliates DVDs at a total cost of $1,660.60, returning $332.12 (20%) to the affiliates in royalties. Knoeck Decl. ¶ 4.

40. At no time has WWWY sought to impose a fine on any media organization for failing to seek or obtain permission to live stream a WIAA game. Knoeck Decl. ¶ 5.

41. Shortly after *The Post-Crescent* live streamed a WIAA football game in about October of 2008, Knoeck called Dan Flannery, the Executive Editor of *The Post-Crescent* about the stream. Knoeck Decl. ¶ 6.

42. Knoeck did not speak with Flannery directly, but left a voice-mail message for him. Knoeck Decl. ¶ 6.

43. Knoeck advised Flannery in the voice-mail message that WWWY had become aware of the fact that *The Post-Crescent* live streamed a WIAA football game. Knoeck Decl. ¶ 6.

44. Knoeck stated that WWWY held the production and distribution rights to that game, and that *The Post-Crescent*'s live stream of such a game violated WWWY's video rights. Knoeck Decl. ¶ 6.

45. Knoeck did not state the WWWY owned the copyrights. Knoeck Decl. ¶ 6.

46. *The Post-Crescent* did not obtain WWWY's permission to live stream the game. Knoeck Decl. ¶ 6.

47. At football games that *The Post-Crescent* live streamed, WWWW did not live stream them because WWWY had cameras at numerous other games on those same evenings. Knoeck Decl. ¶ 7.

48. Because WWWY did not stream those games, had it been asked for permission by another organization to do so, it would have agreed to that request contingent on the payment of the appropriate fees. Knoeck Decl. ¶ 7.

49. *The Post-Crescent* streamed those games with one camera, so therefore the fee would have been $250. Knoeck Decl. ¶ 7.

50. WIAA's advertising policy, part of its media policies governing transmission of tournament games, "strictly prohibits the sponsorship and advertising of tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances, or lewd subject matter." Nero Decl. Ex. 5 (Media policies at 16).

51. WIAA's seeks to make its events an affordable, family-friendly outing. Chickering Aff. ¶ 35.

52. The WIAA encourages school administrators to prohibit sponsors for transmissions whose primary business is sale of tobacco, alcohol, lottery/gambling, mood-altering substances or lewd subject matter during the regular season. Nero Decl. Ex. 5 (Media Policies at 10).

53. The WIAA's Audio/Text transmission policies, contained in the 2009-2010 Handbook, contain a similar discouragement of sponsorship whose primary business is sale of

tobacco, alcohol, lottery/gambling, mood-altering substances or lewd subject matter. Nero Decl. Ex. 3 (WIAA Senior High School Handbook at 50).

54. The WIAA's Video Transmission policies also note that tobacco, alcohol, lottery/gambling, mood-altering substances and lewd subject matter are prohibited by the WIAA. Nero Decl. Ex. 3 (WIAA Senior High School Handbook at 51).

55. WIAA publications set out in detail the standards expected from media organizations who seek to obtain credentials and transmit live broadcasts of tournament events, including information regarding how to request and receive credentials, limits on the number of credentials, and eligibility for credentials. Nero Decl. Exs. 3 (Senior High Handbook at 50-51) & 5 (Media Policies at 1-5).

56. The fees for transmission of WIAA have not varied from event to event; all private applicants approaching the WIAA or WWWY receive the same fee schedule. Clark First Aff. ¶¶ 14-17; Clark Second Aff. ¶ 8.

57. WWWY pays $60,000 per year to contract with WIAA, while all other media members pay a nominal rights fee to stream live games on the internet or provide live play-by-play streaming. Clark First Aff. ¶¶ 8, 30; Clark Second Aff. ¶ 8; Nero Decl. Ex. 5 at 17.

58. All non-rights holders pay $250 for a single camera live internet transmission and $1500 for a multi-camera live transmission of a WIAA state tournament event. Clark First Aff. ¶ ¶ 14-17; Clark Second Aff. ¶ 8.

59. The transmission fees help defray the cost of organizing the very tournament event being streamed, including the likely cost of providing logistical support for the streaming. Eichorst First Aff. ¶ 39.

60. WIAA media policies extend to post-season WIAA Tournament events only and do not extend to regular season games. Nero Decl. Ex. 5 (Media Policies at 1).

61. The WIAA's policy on internet streaming relates only to post-season events, and the WIAA places no restrictions on the streaming of regular season events. Nero Decl. Ex. 5 (Media Policies at 1).

62. The WIAA's policy on play-by-play transmissions relates only to post-season events, and the WIAA places no restrictions on play-by-play transmissions of regular season events. Nero Decl. Ex. 4 (Media Policies at 1).

63. The WIAA charges a $20 fee to use internet play-by-by at pre-State tournament events and a $30 fee to use play-by-play at State tournament events. Clark First Aff. ¶ 30; Nero Decl. Ex. 5 (Media Policies at 17).

64. The WIAA has issued policies to ensure that crowd conduct will not interfere with the competition. Nero Decl. Ex. 3 (Senior High Handbook at 48).

65. Some WIAA events occur at smaller facilities, which cannot house multiple broadcasters. Clark Second Decl. ¶ 4; Walkenhorst Decl. Exs. 13-16.

66. Organizations that govern high school sports, including the WIAA, have an interest in ensuring that organized athletics are safe for student participants, and the control of access to events helps achieve this goal. Schmidt Decl. ¶ 25.

67. The presence of excessive cameramen or other representatives at athletic venues during competitions poses a risk of injury to student athletes. Schmidt Decl. ¶ 26.

68. In at least once instance, a collision between a student athlete and cameraman has resulted in serious injury. Schmidt Decl. ¶ 27.

69. The ability to grant exclusive rights regarding transmission of high school sports events ensures that only a safe number of media representatives attend each event, and that such representatives are restricted to safe locations. Schmidt Decl. ¶ 28.

70. Organizations that govern high school sports, including the WIAA, have an interest in protecting student participants from sexual exploitation, stalking, and use of images of the student athletes on lewd or pornographic websites. Schmidt Decl. ¶¶ 29-33.

71. In 2008, photographs of student participants in an organized, student water polo match were posted on a pornographic website. Schmidt Decl. ¶ 29; Schmidt Decl. Ex. B.

72. In 2007, photographs of a student pole vaulter were posted on lewd websites, prompting concerns about safety, sexual exploitation, and stalking. Schmidt Decl. ¶ 30; Schmidt Decl. Ex. C.

73. Exclusive rights agreements assist high school sports organizations in protecting student athletes from sexual exploitation. Schmidt Decl. ¶ 29-32.

74. Defendants feature streamed high school games on their own respective websites in order to increase the number of visitors to those websites and to earn any advertising revenue available for featuring WIAA tournament events. Walkenhorst Decl. Ex. 17 (Annual Report at GA001222) (noting, inter alia, Gannett seeks to "tap into the growing video on the Web business" and discussing "ad placement").

75. Gannett's live streaming and its reporting of games is a for-profit endeavor and runs its streams of WIAA events and stories about WIAA alongside advertisements. Walkenhorst Decl. ¶ 12 & Exs. 8-12 (advertising) & 17 (annual report).

76. Gannett seeks to use "web-based broadcast programming" and "local content assets" to "tap into the growing video on the Web business." Walkenhorst Decl. Ex. 17 at GA001222.

77. Gannett did not have the technology to live stream WIAA events on its websites prior to 2008. Christopher Decl. ¶ 12.

78. At no time has the WIAA denied Gannett media credentials. Nero Decl. Ex. 18 at 8; Nero Decl. Ex. 19 at 8; Chickering Aff. ¶¶ 31.

79. And at no time has Gannett been stopped from offering any written account via any technology related to any WIAA event. Nero Decl. Ex. 18 at 9; Nero Decl. Ex. 19 at 9.

80. In those instances where Gannett alleges its reporters were prohibited from covering an event via their preferred mode of communication, the same reporters (and the media generally) still reported on the game in detailed written accounts in published papers. Decl. of Robert B. Ebert, Dkt. No. 40, Jan. 22, 2010, ¶ 6; Affidavit of James R. Matthews, Dkt. No. 42, Jan. 22, 2010, ¶ 6; Affidavit of Michael T. Wood, Dkt. No. 47, Jan. 22, 2010, ¶ 5; Walkenhorst Decl. Ex. 4-7.

81. The Post-Crescent published detailed written accounts—often with photography—of the October 28, 2008, Green Bay Preble v. Appleton North football game. The October 28, 2008, New London v. Waupaca football game, the November 1, 2008, Appleton North v. Bay Port football game, and the November 8, 2008, Appleton North v. Stevens Point football game. Walkenhorst Decl. Exs. 1-4.

82. When WIAA approached existing rights holders about broadcasting additional events, specifically WIAA volleyball and wrestling, the overtures were rejected, citing, among other things, concerns about production costs. Clark First Aff., ¶ 6.

83. Prior to the WWWY agreement, the WIAA had pre-existing contracts with other vendors for the Football State Finals, Boys and Girls State Basketball Tournament and Boys and Girls Hockey State Finals, about which Gannett has never complained. Chickering Aff. ¶¶ 9-10.

84. WWWY's contract in fact had to be negotiated with an exception to allow for these pre-existing exclusive rights contracts. Chickering Aff. ¶ 19.

85. The challenged WIAA restriction on the transmission on the WIAA events without permission is not a restriction on the reporting or covering of events, but instead a restriction on carrying a game. Hoyt Decl. ¶ 56.

86. In the past, Gannett newspapers have posted internet stories regarding high school sports adjacent to advertising related to adult entertainment; yet, WIAA has never denied media credentials of Gannett reporters or denied or revoked their right to transmit games. Walkenhorst Decl. Ex. 18 (depicting ad for "Presidential Treatment"); Second Clark Aff., ¶ 2, filed herewith; Nero Decl. Ex. 18 at 9; Nero Decl. Ex 19 at 9.

87. As a part of its digital content, Gannett permits the posting of obscene or offensive language with regard to sports; yet, WIAA has never denied the media credential of Gannett reporters media credentials denied or revoked their right to transmit play-by-play or games. See Christopher Decl. at Ex. B; Clark Second Aff., ¶ 2; Nero Decl. Ex. 18 at 9; Nero Decl. Ex. 19 at 9.

88. Defendants have never before raised concerns about policies regarding "inappropriate" content or the possibility of having an internet streaming permit revoked. Nero Decl. Ex. 18 at 5-11; Nero Decl. 19 at 5-11; Defendants' Answers and Counterclaims, Dkt. No. 2, Counterclaim at ¶¶ 1-2, 33-43, 52-56, & 60-61.

Dated this 12th day of February, 2010.

Respectfully submitted,

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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.

SECOND AFFIDAVIT OF TODD C. CLARK

I, Todd C. Clark, hereby declare,

1. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently thereto.

2. Consistent with the WIAA's stated constitutional purposes to promote the ideals of its membership, to emphasize interscholastic athletics as a partner with other school activities in the total educational process, to formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship, and to prevent exploitation by special interest groups of the student athlete, the WIAA's Media Policies Reference Guide contains policies that prohibit transmissions of WIAA events to be associated with tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter. These protective policies were implemented because the WIAA membership views it as part of the WIAA's mission when dealing with impressionable adolescents to protect the members' student athletes. Once approved, the WIAA has not revoked any transmissions rights for inappropriate transmissions.

3. With respect to the two invoices that I sent to Madison.com and the Milwaukee Journal-Sentinel following the 2008 Football State Finals that I mentioned in my first Affidavit, neither Madison.com or the Milwaukee Journal-Sentinel applied or asked for permission to transmit live play-by-play blogs before the games in question. Because they did not apply for permission before the game, I did not know they were planning on transmitting live play-by-play before or during the game. It came to my attention after the tournaments were completed that Madison.com and the Milwaukee Journal-Sentinel had transmitted live play-by-play. Therefore, I sent them invoices for those transmissions consistent with the fees specified in the Media Policies Reference Guide. If they had applied for transmission rights before the game, they would have been advised of whether their transmission was permissible and how much the WIAA would charge for such a transmission beforehand. It is not uncommon for the WIAA to submit invoices to media organizations after the transmission is completed. For example, approximately 20% to 25% of radio stations receive invoices from the WIAA after they engage in live radio broadcasts. In those cases, however, unlike the live play-by-play described above, the radio broadcasters advised us that they would be present to do a live broadcast in advance of the tournament.

4. In my capacity as WIAA Director of Communications, in which I am responsible for coordination of media relations and State Tournament-related coverage, I have been to a number of the venues and facilities at which WIAA tournaments are held. Joel Christopher of *The Post-Crescent* has stated that "the majority of the press boxes are large enough to accommodate more than one crew engaged in Internet streaming." Christopher Decl. ¶ 20. In my experience, Mr. Christopher's observation may only be true for the larger schools (Division I and Division II schools) with respect to football tournaments. The smaller schools (Division III through

Division VII) most often do not have sufficiently large designated areas for press. For other sports besides football, such as basketball, many smaller schools do not have press-designated areas at all. For example, at basketball tournaments, it is not uncommon for the media to be sitting at a table set up in the bleachers, with their equipment stationed on the bleachers. I have also seen media placed in the corners of the gym on the floor. Further, the size of an individual school's "press box" or designated area does not alone dictate how many individuals can live stream from that area. That will depend on what each individual school has assigned for that area. For example, a school may assign the same area to both the host and visiting school, or other operational event staff, such as scoreboard operator, school filmers, PA announcer, spotter, or other individuals assisting with the administration of the event. The circumstances are simply too varied to make the general observation that Mr. Christopher made.

5. In my earlier Affidavit, I discussed the fact that I worked with Tim Eichorst of WWWY to develop the affiliate program through which television stations, web sites, other media outlets or production companies could become affiliates with WWWY for purposes of producing and distributing WIAA events. The purpose of the affiliate program was to expand exposure of high school sports and improve the availability of transmission of the events. By allowing other producers to affiliate with WWWY, such transmissions could be expanded in a controlled manner, minimizing spatial demand and keeping transmissions consistent with the WIAA's quality standards and branding. The affiliate program also allowed WWWY to facilitate monitoring of transmissions for consistency and quality, and to ensure that transmissions do not violate the WIAA's content standards, such as transmission of prohibited content related to tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter.

6. In my earlier Affidavit, I stated that "in some instances local community access channels would broadcast local games. The WIAA received no direct revenue from these local community access broadcasts." Clark Aff. ¶ 5. The broadcasts in question were delayed transmissions, not live, and they were transmitted only locally. The WIAA did not charge for delayed transmissions of regular season games. For WIAA tournament games, the WIAA always charged a fee to local PEG channels for delayed transmissions of WIAA tournaments. That fee was $20 per game. In practice, however, the WIAA did not have the resources to monitor compliance with this requirement, and we believe there were instances when local PEG channels would transmit a local WIAA tournament game without paying the fee to the WIAA. That was the benefit of the contract between WWWY and the WIAA: the contract allowed WWWY to monitor compliance with the required fee. The new fee was a $50 per year fee rather than $20 per game. In 2005, before the WIAA's contract with WWWY contract was executed, the vast majority of the WIAA's sports were not transmitted by any media organizations.

7. For football, post-season competitions consist of five levels of play, Levels I through V, in each of 7 football divisions. Level I is the first round of post-season games, and Level V is the state championship game (resulting in 7 football champions, one for each division). The four games that were live streamed by *The Post-Crescent* were Level II and Level III football games.

8. In my earlier Affidavit, I stated that, with respect to entities other than WWWY streaming WIAA events, the WIAA decided on a fee structure that requires a person or entity to pay $250 to live internet stream a game produced with one camera, and $1,250 to live internet stream a game produced with multiple cameras. Upon further review of our records I realized that those fee amounts were inaccurate. The correct fee structure is $250 to live internet stream a game produced with one camera, and $1,500 to live internet stream a game produced with

multiple cameras. The analysis that led the WIAA to reach that decision was accurately stated in my earlier Affidavit.

9. I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

Dated this 10 th day of February, 2010.

Todd C. Clark

Todd C. Clark

Subscribed and sworn to before me
this 10 day of February, 2010.

Julie A. Kage

Notary Public, State of Wisconsin
My commission expires: 2/17/13

NOTARY PUBLIC
JULIE A. KAGE
STATE OF WISCONSIN

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.

DECLARATION OF TIMOTHY KNOECK

I, Timothy Knoeck, hereby declare,

1. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently thereto. I state that the following is true to the best of my knowledge and belief.

2. I am the Vice-President of American Hi-Fi, Inc., d/b/a When We Were Young Productions ("WWWY"). I am responsible for managing the overall office operations of WWWY as it relates to WWWY's contractual obligations with the WIAA. As part of these responsibilities, I manage relationships with affiliates, I oversee DVD sales of WIAA events, and I assist with enforcing WWWY's legal rights.

3. WWWY does not make enough money from the sales of DVDs to cover the cost of production. Instead, WWWY's revenues come from distribution and advertising, which offset other operating expenses.

4. In the two-year period covering 2007-2008 and 2008-2009, WWWY has sold 88 affiliates DVDs at a total cost of $1,660.60, returning $332.12 (20%) to the affiliates in royalties.

5. If WWWY were to seek a fine from any media organization that did not seek prior permission to live stream a WIAA game, I would be involved in that decision. Such a communication would come from Tim Eichorst, the President, or myself. At no time has WWWY sought to impose a fine on any media organization for failing to seek or obtain permission to live stream a WIAA game. I have been involved in decisions to advise media organizations that they are in violation of WWWY's contractual rights, and have been involved in such communications with the media organizations, but those communications only involved WWWY's attempt to obtain the payment of the WIAA established live streaming fee from the media organization, not any fine.

6. In the course of my responsibilities for WWWY, at some point shortly after *The Post-Crescent* live streamed a WIAA football game in about October of 2008, I called Dan Flannery, the Executive Editor of *The Post-Crescent* about the stream. I did not speak with Mr. Flannery directly, but I did leave a voice-mail message for him. I did advise him in the voice-mail message that WWWY had become aware of the fact that *The Post-Crescent* live streamed a WIAA football game. I stated that WWWY held the production and distribution rights to that game, and that *The Post-Crescent*'s live stream of such a game violated WWWY's video rights. I did not state the WWWY owned the copyrights. *The Post-Crescent* did not obtain WWWY's permission to live stream the game.

7. At the particular football games in question that *The Post-Crescent* live streamed, WWWY did not live stream them because we had cameras at numerous other games on those same evenings. Because WWWY did not stream those games, had we been asked for permission by another organization to do so, we would have agreed to that request contingent on the

payment of the appropriate fees. *The Post-Crescent* streamed those games with one camera, so therefore the fee would have been $250.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

Dated this 11 day of February, 2010.

Timothy Knoeck

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIMS

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I. INTRODUCTION

Although Defendants' Brief in Support of their Motion for Summary Judgment (Dkt. No. 32) ("Def. Br.") attempts to cast their complaint as classic resistance to restraint on First Amendment speech, they fail in the attempt. This is not such a case. The undisputed evidence of record, thoroughly set forth in Plaintiffs' Motion for Summary Judgment and accompanying papers (Dkt. Nos. 49-58), belies Defendants' characterization of the dispute. There has been no restriction, much less denial, of Defendants' First Amendment right to gather and report on the news. In fact, examined closely, Defendants motion does not claim to the contrary.

Rather, the challenged restrictions relate to the unauthorized transmission or broadcast—for a profit and/or economic benefit—of athletic events that the Defendants are otherwise admittedly free to report on, comment on, critique and/or criticize. This is a distinction with a constitutional difference, one that has been recognized in case law for decades. This is, in short, essentially a commercial case, not a speech case. The WIAA's efforts to exploit its own property must be evaluated in this context. In this context the Defendants' commercial foot does not fit in Cinderella's First Amendment slipper.

II. SUMMARY OF ARGUMENT AND FACTUAL CONTEXT

The Wisconsin Interscholastic Athletic Association ("WIAA") organizes and sponsors athletic tournaments for its member high schools and high school students in the state of Wisconsin. FOF 15-21.[1] In order to fund these tournaments the WIAA has entered into exclusive rights contracts with select broadcasting partners, including When We Were Young Productions (WWWY). FOF 79-89, 128-29. In exchange for the option of exclusive internet streaming rights to tournament games, WWWY provides an important source of revenue for the

[1] Citations to "FOF" reference Plaintiffs' Proposed Findings of Fact, Dkt. No. 51, Jan. 22, 2010, filed in conjunction with Plaintiffs' Mot. for Summ. J., Dkt. No. 49. Citations to "AFOF" reference Plaintiffs' Additional Proposed Findings of Fact, filed herewith.

WIAA, as well as numerous other benefits, including the broadcast of WIAA sports with a smaller public following and an increased ability to protect videos and images of tournament events from association with products that would harm the image of the WIAA or participating athletes. FOF 126-36, 167-208, 242-56. All other media companies remain free to attend any tournament event and to report on that event using numerous means of communication, including television, radio, newspaper articles, and stories posted to media websites. FOF 33-51, 74-78, 259-70. Nonetheless, in light of WWWY's exclusive internet streaming rights, media companies wishing to carry the event over the internet, rather than simply report on the event, must apply for a transmission permit and pay a small fee. FOF 148-49, 161, 268-69. No such permit has ever been denied. FOF 155-57.

Defendants Gannett and Wisconsin Newspaper Association (collectively "Gannett" or "Defendants") object to the exclusive streaming rights accorded to WWWY, arguing that the exclusive contracts violate the First and Fourteenth Amendments and are preempted by the Copyright Act. Their members have streamed at least four live games without permission and refused to pay the transmission fee, and in other cases have unsuccessfully tried to bypass the required permit by obtaining permission directly from the host school. FOF 209-14; PFOF 63-64, 74.[2] At bottom, of course, Defendants wish to feature streamed games on their own respective websites in order to increase the number of visitors to those websites and to earn any advertising revenue available for featuring WIAA tournament events. AFOF 74-76. In sum, then, this is a dispute over the constitutional viability of the WIAA's means of funding and organizing its tournaments: can the WIAA enter into exclusive contracts for internet streaming as a way of raising revenue and furthering other organizational objectives? Or must the WIAA

[2] "PFOF" references Proposed Findings of Fact in Support of Defendants' Motion for Summary Judgment on Their Counterclaim, Dkt. No. 33, Jan. 22, 2010.

permit any other media company to carry tournament games on its own website, diverting available advertising revenues and diluting the ability of the WIAA to shape the administration and use of its own tournament?[3]

As argued in the WIAA's own summary judgment motion, the WIAA has the authority to enter into contracts in its proprietary capacity as the organizer and sponsor of the tournaments. *See* Mem. in Supp. of Plfs.' Mot. For Summ. J., Dkt. No. 50 ("WIAA Br."). Furthermore, because these sporting events occur in a non-public forum for First Amendment purposes, the WIAA's funding and organizational objectives more than justify its minor restrictions on the transmission of WIAA events. Moreover, regardless of the precise nature of the forum at issue, the WIAA may set reasonable limits on this particular means of transmission as a constitutionally valid time, place, and manner restriction.

Defendants do not address the WIAA's interests in exclusive contracts or engage the case law establishing a public actor's proprietary capacity to enter into contracts.[4] Rather, Defendants raise myriad First Amendment arguments, some of which relate only tangentially to the issues raised in the complaint. None of these claims survives careful analysis of the relevant case law.

Contrary to Defendants' persistent invocation of discriminatory and inconsistent policies, the WIAA requires a fee from anyone who wishes to transmit live tournament action over the internet, while the WIAA's partners pay a substantial yearly sum. FOF 79-88, 109-10, 129, 142-61. Not only does this transmission policy often involve minimal expressive activity, but it

[3] Defendants' assertion that the WIAA's media policies "were not drafted with constitutional compliance in mind" because the WIAA "until recently denied that it is a state actor," mischaracterizes the Limited Joint Stipulation, in which the parties agreed, for purposes of this action only and reserving all of the WIAA's right to defend such a claim otherwise, that the Court could consider the WIAA a state actor. Def. Br. at 7; *see also* Dkt. No. 23. As shown more fully herein, irrespective of the WIAA's state actor status in this action, or the procedural posture in which that issue is presented to the Court, Defendants cannot support a claim as a matter of law that the WIAA's media policies are unconstitutional.

[4] Indeed, Defendants did not do any discovery at all on the issue of the WIAA's interests.

epitomizes content neutrality. The WIAA's policy involves a particular *means* of communication and does not in any way depend upon what prospective applicants intend to say. Thus, the various content-based First Amendment challenges raised by the Defendants do not apply. Nor do they succeed on the merits in light of the reasonable and limited nature of the restriction imposed and the compelling reasons put forward for their adoption. Similarly, while the First Amendment indeed bars "unbridled" discretion over access to a public forum, the policies here do not impede access to any forum. Defendants remain completely free to enter the forum and communicate with the public about the events there using multiple modes of transmission. Finally, although case law firmly establishes that a sporting arena is a non-public forum, the WIAA's transmission fee would also qualify as a viewpoint-neutral time, place, or manner restriction in any public forum.

Defendants' Fourteenth Amendment and copyright claims also fail under well-established case law. The Fourteenth Amendment does not give non-partners "equal" access to contractual terms negotiated with other businesses. Because the First Amendment claims fail, the heightened scrutiny applied to Fourteenth Amendment claims involving "fundamental rights" does not apply. Defendants also claim that copyright law bars the WIAA from claiming authorship or ownership of the games it organize, but simultaneously preempts any claim that could protect its interest and bar others from making a copyright recording. Defendants offer no examples of courts adopting this unprecedented theory, which, if adopted, would bar any organizer of a sporting event or other spontaneous performance from limiting the commercial exploitation of those events by outsiders.

III. ARGUMENT

A. Applicable Legal Standards

Summary judgment is appropriate only when the record shows there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those that "might affect the outcome of the suit" under the applicable substantive law. *Anderson*, 477 U.S. at 248. The moving party bears the burden of demonstrating that there is no genuine issue of material fact and that he is entitled to summary judgment. *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008) (citing *Celotex*, 477 U.S. at 323). The nonmoving party must then submit evidence "to set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). All facts and reasonable inferences must be construed in favor of the nonmoving party, in this case the WIAA. *Chelios*, 520 F.3d at 685 (citing *Magin v. Monsanto Co.*, 420 F.3d 679, 686 (7th Cir. 2005)).

Defendants' choice to bring a facial challenge means they face a "heavy burden" in advancing their claim because facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)); *Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996); *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1189-91 (9th Cir.1988).

Moreover, summary judgment is improper where a Defendant relies upon inadmissible evidence and improperly proposed facts in support thereof. *See* Fed. R. Civ. P. 56(e); *see also* Procedure to Be Followed on Motions for Summary Judgment I.B, appended to Preliminary Pretrial Conference Report, Dkt. No.13 ("Each fact must be proposed in a separate, numbered paragraph, limited as nearly as possible to a single factual proposition" and "[t]he court will not

consider facts contained only in a brief."); *Knauf Realty, LLC v. Prudential Real Estate Affiliates, Inc.*, 486 F. Supp. 2d 855, 857 (W.D. Wis. 2007) (disregarding facts included in plaintiff's brief that were not properly proposed and supported by admissible evidence). Here, Defendants have instead relied upon numerous unsupported proposed facts and allegations that constitute inadmissible hearsay, speculation or conclusions, allegations made without personal knowledge, and evidence that should have been disclosed in response to Plaintiffs' discovery requests but was not. These violations are subject to Plaintiffs' Motion to Strike, filed herewith. In relying upon such inadmissible or undisclosed evidence, however, Defendants merely underscore their inability to produce factual support for their position.

B. The WIAA's Media Policies Satisfy the First Amendment

1. The WIAA's Internet Transmission Rights Policies Are Content Neutral

The Supreme Court has determined that the principal inquiry in determining content neutrality in speech cases is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As the First Circuit explained, "a law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched." *McGuire v. Reilly*, 260 F.3d 36, 41 (1st Cir. 2001) (citing *Hill v. Colorado*, 530 U.S. 703, 736 (2000)). The court noted that "[t]he critical question in determining content neutrality is not whether certain speakers are disproportionately burdened, but, rather, whether the reason for the differential treatment is—or is not—content-based." *Id.* at 44 (upholding a law creating a buffer zone around abortion clinics). Thus, a government regulation of speech is content neutral if it "is justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. The "starting point" of this analysis is

the motive of the government in instituting the policy. 1 Rodney A. Smolla, *Smolla & Nimmer* ("*Smolla & Nimmer*") *on Freedom of Speech* § 2.66 (2009 ed.) ("*Smolla & Nimmer*").

As argued in the WIAA's motion for summary judgment, the WIAA's exclusive rights policy makes no reference to the content of protected speech; reporters are merely restricted from transmitting tournament games without a license. FOF 43-45, 48, 229, 231-232, 266, 268-269. No content-based distinction is made, nor has Gannett come forward with any evidence to the contrary. Moreover, the exclusive rights agreements serve purposes wholly unrelated to the content of any expression. First, the WIAA entered into these agreements in order to increase its revenue, thereby allowing it to organize and operate the post-season tournaments in which member schools' athletes compete. FOF 244, 277, 283-284. Second, the WIAA sought to promote public access to broadcasts of sports and events with a smaller public following. FOF 243-254.[5] Because these justifications are "without reference to the content of the regulated speech," *Ward*, 491 U.S. at 791, the challenged restrictions are content neutral.

In addition, when alternative methods of communication remain open, the potential for content-based discrimination is minimal. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 n.2 (1997); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 n.6 (1997). Here, numerous alternative methods exist for members of the media to report on and express opinions about WIAA sporting events, including newspaper articles, television reports, radio broadcasting, and internet stories. FOF 259-262, 264.

[5] Gannett alleges that on November 1 and November 8, 2008, three Gannet newspapers were denied permission by host schools to stream football games and that these games were not streamed by anyone. Def. Br. at 28. However, as Gannett notes, Gannett asked permission from the host schools, not from WWWY. Def. Br at 28; FOF 214. Had Gannett asked WWWY permission to stream these games and paid the appropriate rights fee, Gannett would have been granted permission to stream the football games, as per WWWY's policy. AFOF 48; FOF 156-57. In fact, WWWY has never rejected a request to produce an event not already live-streamed. FOF 157.

Finally, the live streaming of the games themselves contains minimal expressive content, as athletic events are not considered expressive activity. *See, e.g.*, *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 86 (D. Conn. 1981) (noting that the "exposition of an athletic exercise" is only "on the periphery of protected speech."); *Top Rank Inc. v. Fla. State Boxing Comm'n*, 837 So. 2d 496, 501 (Fla. Ct. App. 2003) (noting that sporting events "do not convey any message, symbolic or otherwise" but instead are mere entertainment). Defendants argue that reporting on an athletic event involves expressive conduct. Def. Br. at 9-10. However, "covering," or reporting on, a sporting event is wholly distinct from "carrying" a live broadcast or stream of a game, which involves less expressive activity. FOF 257; AFOF 85. The more limited expressive content further diminishes the potential for content-based discrimination. Thus, the exclusive contracts and associated policies at issue in the complaint are content neutral, rather than content based.

2. The Court Should Reject Defendants' Attempt to Raise a New Claim Regarding Media Policies in a Motion for Summary Judgment

Defendants argue in their brief that the WIAA's media policies violate the First and Fourteenth Amendment. Def. Br. at 10-15. As a part of this motion, Defendants for the first time challenge the WIAA's right to revoke media credentials and transmission rights for "content or comments considered inappropriate or incompatible with the educational integrity of the tournament or host institution . . . ." Def. Br. at 12-14.

Defendants never complained about or raised the WIAA's "inappropriate content" policies or policies related to the revocation of credentials or transmission rights as an issue in Defendants' Counterclaim or discovery responses. AFOF 88. Defendants' Counterclaim focused solely on the WIAA's photography policy (¶¶ 25-32), the WIAA's contract with WWWY as it relates to internet streaming (¶¶ 33-43), and the WIAA's live blogging policies.

See Dkt. No. 2. Nowhere in Defendants' Counterclaim were Plaintiffs put on notice that the Defendants were concerned about such revocation on inappropriate content policies, that Defendants thought such policies were unconstitutional, or indeed that such policies had ever been invoked or applied with respect to any media organization. This does not meet the standard for notice the Federal Rules require. Fed. R. Civ. P. 8(a) (noting that a pleading must contain "a short and plain statement of the claim"); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 337 (2005) (a complaint must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests) (quotations omitted).

In the Seventh Circuit, a party "may not amend his complaint through arguments in his motion for summary judgment." *Jackson v. Ackerman*, No. 08 CV 273, 2009 WL 212141, at * 2 (N.D. Ill. Jan. 28, 2009) (citing *Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir.1996); *Car Carriers, Inc. v. Ford Motor Co*., 745 F.2d 1101, 1107 (7th Cir.1984)); *see also id.* at *3 ("Ackerman has had neither the opportunity to answer the allegations, nor to take discovery with respect to these allegations."); *Schumacher v. Swiss Colony, Inc*., No. 06-C-47-C, 2007 WL 5515308, at *3 (W.D. Wis. Mar. 19, 2007) (Crabb, C.J.) (a party "may not amend [its] complaint through arguments in [its] brief in opposition to a motion for summary judgment") (internal quotation omitted). If Defendants wish to amend their pleadings, they must file a motion under Fed. R. Civ. P. 15(a), and, given that the deadline to amend the pleadings is long passed in the Scheduling Order, show "good cause" under Rule 16. Preliminary Pretrial Order, Dkt. No. 14, May 6, 2009, at 1 ("A party may not amend its pleadings after [June 1, 2009] without leave of court, which will be granted only upon a showing of good cause for the late amendment and lack of prejudice to the other parties."); *see also Gen. Elec. Co. v. Sonosite, Inc.*, No. 07-cv-273-bcc, slip op. at 2 (W.D. Wis. Apr. 7, 2008) (Crabb, C.J.) (rejecting motion for leave to amend

complaint six months after deadline in scheduling order for lack of "good cause") ("In a court with a fast-moving docket such as this, six months is an eternity. In light of this, plaintiffs would need to present a very compelling reason for this delay."). Given that the Defendants have not made these allegations part of this litigation and have not shown good cause to amend their complaint, but instead seek to amend their Counterclaim through their summary judgment filings, these arguments and claims should be disregarded by this Court.

3. The WIAA's Media Policies Are Sufficiently Definite to Overcome Any Vagueness Challenge

If the court considers Defendants' new claims, the court should reject them on the merits. Defendants claim that a provision in the WIAA's media policies that addresses content "inappropriate or incompatible with the educational integrity of the tournament" fails to "provid[e] speakers the fair notice due process requires as to what content or comments might violate the rule." Def. Br. at 13-14. This argument is hypothetical and speculative. Defendants have made no showing that they have been concerned about this provision, that it has impacted their decision to apply for transmission rights, or that it has in any way impacted their business, their reporting, or their behavior. Defendants have not alleged that they are likely to include material potentially seen as inappropriate in any of their transmissions. Nor has the WIAA ever revoked any transmission rights under this policy. AFOF 3.

The Supreme Court has squarely held that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill*, 530 U.S. at 733 (internal quotation omitted); *see also Green v. City of Raleigh*, 523 F.3d 293, 301 (4th Cir. 2008) ("Notably, Green fails to cite any example of arbitrary or discriminatory enforcement of the ordinances or interpretation of the term 'picketing.' Green's mere conjecture about potentially

arbitrary or discriminatory enforcement scenarios dooms his claim."). The absence of any evidence or allegation that this provision has chilled speech by the Defendants or anyone else, combined with the absence of any invocation of this provision by the WIAA, renders this vagueness challenge purely "hypothetical" and thus inappropriate for even a facial challenge.

Nonetheless, the phrases "inappropriate" and "incompatible with the educational integrity of the tournament" are not vague in light of the WIAA's policies taken as a whole. The Supreme Court has recognized that "mathematical certainty" of language can never be expected. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). As a result, an ordinance may be unconstitutionally vague only when it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or when it "encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 705; *see also United States v. Williams*, 553 U.S. 285 (2008) ("perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity") (*quoting Ward*, 491 U.S. at 794).

Here, the WIAA's media policies provide adequate guidance as to prohibited content. The WIAA's advertising policy, part of its media policies governing transmission of tournament games, "strictly prohibits the sponsorship and advertising of tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances, or lewd subject matter." AFOF 50. The WIAA encourages school administrators to prohibit the same list of sponsors during the regular season. AFOF 52. The WIAA's Audio/Text transmission policies, contained in the 2009-2010 Handbook, contain a similar prohibition on sponsorship by these businesses. AFOF 53-54. The WIAA's Video Transmission policies also note that these products are prohibited by the WIAA. AFOF 54. The WIAA adopted these policies because the WIAA membership views it as part of the WIAA's mission when dealing with impressionable adolescents to protect the members'

from association with advertising of this sort. AFOF 1-2. Given the ubiquity of this list, and the absence of any other references to inappropriate content in the transmission policy section, any reasonable person would conclude that the phrases "inappropriate" and "incompatible with the educational integrity of the tournament" refer to this type of inappropriate advertising or sponsorship.

Thus, a reasonable person would know that the WIAA has prohibited sponsorship by these businesses, and that the WIAA would consider advertising by these businesses on a streamed tournament event to be "inappropriate." This provides sufficient guidance under Supreme Court precedent to both media companies contemplating the transmission of a tournament event and to any administrators charged with enforcing the WIAA policy. The phrases are therefore not void for vagueness.

Defendants also challenge the definition of "play-by-play" in the WIAA's media policies. Def. Br. at 14-15. Although the Media Guide specifies that the media do not have to pay a fee for "live report updates" involving information about results or the event without play-by-play description of the contest, the WIAA does require payment of a small rights fee for a live play-by-play description of a tournament event as it occurs. FOF 230-31. In 2008, following an incident of unauthorized play-by-play transmission, the WIAA offered to work with media companies, including representatives of Defendants, to develop a workable threshold and definition for play-by-play transmissions. FOF 236-42. The WIAA never received any proposals from Defendants about this issue. FOF 241.

As Defendants acknowledge, the WIAA amended its media policies in 2009-10 in order to add more precision to the definition of play-by-play, which is now defined as follows:

> A live or real-time play-by-play is defined as transmitting a live (while the event/game is in progress from beginning to conclusion) written, audio or video description (identifying

competitors with descriptions or results of game action) of all or a significant number of plays/events occurring sequentially during a game/event.

PFOF 33.

This definition provides ample guidance to media representatives, with numerous distinct criteria for identifying a play-by-play description, including (1) it is written while the game is in progress; (2) it is transmitted live; (3) it identifies competitors; (4) it describes game action as it happens; (5) it covers a significant number of plays or events; and (6) the descriptions occur sequentially. Defendants quibble with the word "significant" but courts do not expect absolute precision in regulatory language. Instead, because the policy provides "a reasonable opportunity to understand what conduct it prohibits," *Hill*, 530 U.S. at 705, the provision satisfies constitutional requirements.

4. The WIAA's Media Policies Do Not Create a Substantial Risk of Censorship and Thus Do Not Imply Excessive Discretion

Defendants also argue that the WIAA's media policies and exclusive contract with WWWY cede excessive discretion to WWWY regarding the granting of transmission rights to third parties, or, alternatively, that the WIAA reserves excessive discretion to itself. Def. Br. at 16. Defendants point to a sentence in the 2009-10 Media Guide stating that "[a]ll permissions granted, policies enforced and fees required will be at the sole discretion of the WIAA and the rights holder." Def. Br. at 16 (citing PFOF 24). However, this argument ignores the rest of the media guide and other WIAA publications, which set out in detail the standards expected from media organizations who seek to obtain credentials and transmit live broadcasts of tournament events. AFOF 55. Moreover, the discretion at issue does not involve the right of access to a public forum or the sole right to speak therein, as in the cases cited by Defendants. Rather, the discretion involves a decision by the exclusive rights holder as to whether it will produce and transmit the particular event itself or not—in other words, a purely internal business decision

with limited implications for censorship of particular viewpoints. FOF 156-157. Indeed, media companies like Defendants remain free to access the forum, to observe the event, and to report on that event using many different means of communication, regardless of whether they apply for the right to transmit the event live. FOF 257-70; PFOF 19. They would also remain free to transmit games via internet streaming by paying a fee. AFOF 63. The First Amendment concerns raised by courts in unbridled discretion cases simply do not exist here.

Defendants rely on three cases regarding discretion, each of which involves significant discretion awarded to public officials over whether and on what terms a potential speaker has access to a public forum. Def. Br. at 17-19. In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149 (1969), the Supreme Court struck down an ordinance permitting a city commission to deny a permit for any "parade, procession or other public demonstration" if "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" so required. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Court invalidated an ordinance setting speaker fees for parades and demonstrations at a rate determined in the sole discretion of an administrator. Finally, in *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 769 (1988), the Court struck down a local ordinance granting the mayor complete discretion to allow or deny the placement of news racks on sidewalks and other public property or to set conditions on them. In each case, the ordinance involved discretion over the access of a speaker to a traditional public forum. *See also U.S. v. Griefen*, 200 F.3d 1256 (9th Cir. 2000) (discussing *Lakewood* and *Shuttlesworth* and noting that these "permit cases dealt with venues generally open for expressive activity, but only with the prior permission of a government licensor, or a gatekeeper, whose discretion was unbridled and unfettered").

Here, by contrast, the discretion to grant or deny a permit to transmit an entire WIAA tournament event does not affect Defendants' access to the forum established by the WIAA. Media organizations may attend any tournament event on the same terms as the general public and may also obtain credentials permitting access to designated media facilities and reserved media areas. FOF 40, 42, 49, 51, 258. Defendants may report on any aspect of the tournament event through newspaper articles, internet stories, television or radio broadcasts, and many other means of communication. FOF 259-267; PFOF 19. Defendants may also take and use photographs, interview players and coaches, and use live tournament action as a backdrop for live action reports from the event. FOF 47, 50, 262-264, 267. Defendants may even use up to two minutes of live game action in any news broadcast without requesting or receiving a permit from the WIAA or WWWY. FOF 47, 267; PFOF 25. Unlike the discretion cases cited by Defendants, any discretion exercised by the WIAA or WWWY would not impede access to the relevant forum.

As a result, the specific First Amendment concerns raised in *Lakewood* and other discretion cases are not present here. In *Lakewood*, the Supreme Court noted that unbridled discretion could "intimidate[] parties into censoring their own speech" in order to receive a favorable permit decision, and it could permit the licensor to "discriminat[e] against disfavored speech" in the guise of exercising discretion. 486 U.S. at 758. Here, the access always available to Defendants and the numerous alternative avenues of communication at their disposal eliminate the risk that the WIAA may somehow suppress the Defendants' speech or cause self-censorship in the reporting of events. The WIAA's media policies even guarantee the right of Defendants to use two minutes of transmitted footage for news reports, regardless of whether they obtain their own rights to transmit a game. FOF 47, 267; PFOF 25. The *Lakewood* Court itself noted that

the press could not simply "challenge as censorship every law involving discretion to which it is subject." 486 U.S. at 759. Rather, the law needed a sufficient nexus to expression such that the discretion posed "a real and substantial threat of the identified censorship risks." *Id.*; *see also Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 66 (3d Cir. 1990) ("Hence, a statute granting discretion to governmental officials can be said to violate the First Amendment only if it specifically relates to expression and only if it gives rise to a real and substantial risk of unconstitutional censorship.") (internal quotation omitted). Here, those "real and substantial risks" are lacking because Defendants remain free to speak on whatever topic they wish in a wide variety of ways. And, of course, there is no evidence in this record—or any other evidence of which the WIAA is aware—of any attempt to intimidate the media in any way, much less to create a slant on how it reports sporting events.

Furthermore, as described below, *infra* Parts III(c)(1) & III(c)(3)(a), a WIAA tournament event is a not a public forum, but a non-public forum or, at most, a limited public forum specifically designated for the organization and presentation of sporting events and the reporting of them. As the Federal Circuit explained, "the unbridled discretion doctrine has been articulated as a limit on licensing regimes in public fora." *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Cir. 2002). As Defendants note, unbridled discretion over access to non-published forum or to limited public forum may also raise First Amendment concerns. However, when courts review discretion available in these fora, they review any standards or regulations promulgated "only for reasonableness instead of some higher level of scrutiny." *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1199 n.11 (11th Cir. 1991) (remanding for consideration of facial challenge to regulation governing placement of news racks at highway rest areas). Courts also consider any discretion granted in light of the nature and function of the forum at

issue. *Ridley v. Mass. Bay Transp. Auth.,* 390 F.3d. 65, 94-95 (1st Cir. 2004) ("Excessive discretion and vagueness inquiries under the First Amendment are not static inquiries, impervious to context.") In *Griffin*, the Federal Circuit upheld a regulation limiting the display of different flags in a Veterans Administration cemetery despite the discretion granted to administrators:

> The nature and function of the national cemetery make the preservation of dignity and decorum a paramount concern, and the government may impose restraints on speech that are reasonable in that pursuit. Because the judgments necessary to ensure that cemeteries remain "sacred to the honor and memory of those interred or memorialized there" may defy objective description and may vary with individual circumstances, we conclude that the discretion vested in VA administrators by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries.

288 F.3d at 1325. *See also Ridley*, 390 F.3d at 95 ("Our view is that a grant of discretion to exercise judgment in a non-public forum must be upheld so long as it is reasonable in light of the characteristic nature and function of that forum.") (internal quotation marks omitted.)

Here, too, the WIAA has created a non-public forum and specifically reserved the internet transmission of live tournament action for its exclusive broadcast partner. The forum depends upon the ability to grant exclusive streaming rights in order to raise the revenue needed to operate the tournament, to ensure the streaming of sports with a smaller public following, and to prevent the association of high school athletes with inappropriate advertising. FOF 196, 200, 243-55. Without the WWWY's ability to decide whether or not it wished to stream a game (and exclude others from creating an alternative broadcast), the contract would have limited economic value for WWWY, and the WIAA would not be able to operate the forum. FOF 252-56, 283-89. Similarly, without the ability to subject those who wish to stream a game to the WIAA's media policies on advertising, the WIAA could not protect streamed images of its student athletes from association with inappropriate advertising. Thus to the extent WWWY and the WIAA exercise

discretion over whether another media company may stream an event over the internet, that discretion is reasonable in light of the nature and function of the WIAA tournaments.

Moreover, the WIAA and WWWY have developed a uniformly applied practice surrounding the exercise of this discretion that provides significant certainty to any applicant for internet streaming rights. First, the discretion at issue turns solely on whether WWWY has decided to exercise its exclusive transmission rights awarded by the contract. FOF 142-66. If WWWY has decided not to produce an event, WWWY allows anyone else who applies to produce and distribute that event. FOF 156. WWWY has never rejected a request to produce a "declined" event. FOF 157. Second, the WIAA and WWWY have established a strict fee structure based on the number of cameras used in producing a tournament event. FOF 161. The WIAA and WWWY determined those fees based on the resources devoted to the production, the fees charged by other state athletics association, and the likely distribution of the streamed event. FOF 162-65. Although Defendants argue that nothing prevents WWWY from charging $5,000 for streaming permission, Def. Br. at 16, the fees have not varied from event to event, and any private applicant approaching the WIAA or WWWY receives the same fee schedule. FOF 161; AFOF 56, 58.

Courts have routinely accepted an agency's interpretation and practice of implementing its own regulation when reviewing for excessive discretion, including the cases relied upon by Defendants. *See, e.g.*, *Forsyth County*, 505 U.S. at 131 (noting that it would "consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it" and concluding that the county had not established meaningful standards in practice); *Lakewood*, 486 U.S. at 770 n.11 (recognizing that the authoritative construction of a statute or an equivalent "well-understood and uniformly applied practice" would inform the

court's analysis but noting the absence of such practice in the case before it). Here, the WIAA and its partners have established a clear pattern of approving any application for internet streaming upon payment of a set fee whenever WWWY has not independently accepted the event.

5. The WIAA's Rights Fees Cannot Violate the First Amendment as an Unconstitutional Tax

Defendants also argue that the WIAA's licensing system amounts to an unconstitutional tax on the freedom of expression because media companies must pay a fee in order to stream a tournament event live over the internet. Citing two cases involving door-to-door purveyors of religious materials, Defendants object to the "exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment." Def. Br. at 20. Defendants then claim that WIAA's fees "condition the right to cover public tournament events by audio or video transmission upon the payment of a flat license tax." Def. Br. at 20. This flatly mischaracterizes the fee in question. The WIAA does not charge any fee for "covering" an event, and Defendants remain free to report on tournament events using any and all means of communication without paying any kind of fee. FOF 42-51, 258-265, 267; PFOF 18-19. The WIAA merely requires a fee for the separate privilege of carrying a tournament event live, an entirely different endeavor. FOF 45, 48, 269; PFOF 19. These fees help defray the cost of organizing the very tournament event being streamed, including the likely cost of providing logistical support for the streaming. FOF 52-55, 244; AFOF 59.

Defendants cite no authority for the proposition that a modest fee imposed for broadcasting the entirety of an event organized and sponsored by a different organization is a burden on protected expression. Instead, Defendants rely on *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944), involving a flat tax on

door-to-door religious expression, and on *Grosjean v. American Press Co*., 297 U.S. 233 (1936), which invalidated a Louisiana tax based on the gross receipts of newspapers above a certain circulation size. In each case the tax directly and substantially burdened the only relevant means of First Amendment expression, whereas here the fee impacts the wholesale transmission of an athletic event without any burden on reporting at all.

Defendants also suggest that the WIAA policies constitute "differential taxation of First Amendment speakers" because they impose different fees on permit applicants than those imposed on WWWY. Def. Br. at 19-20. Surprisingly, Defendants rely upon *Leathers v. Medlock*, 499 U.S. 439, 447 (1991), which actually upheld an Arkansas sales tax exempting newspapers but not other media companies. The *Leathers* court explicitly rejected the argument that "intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." *Id.* at 449-50. Instead, the *Leathers* court stressed that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Id.* at 453. Here, the policy charging fees to media members who wish to stream WIAA games live is not directed at suppressing particular ideas and poses no threat of viewpoint censorship. As discussed above, media members have complete access to tournament events and may report on those events or any other topics using many different modes of communication. FOF 33-51, 258-70; PFOF 19.

Courts have also upheld fees on expressive content when the actual fee imposed is relatively small and is used to defray costs associated with administering a related scheme in pursuit of a legitimate government interest. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (upholding a license fee on parade marchers); *Ne. Ohio Coalition for the Homeless v. City*

of Cleveland, 105 F.3d 1107, 1109-10 (6th Cir. 1997) (upholding a licensing fee on peddlers); *Ctr. for Auto Safety v. Athey*, 37 F.3d 139, 145-46 (4th Cir. 1994) (upholding a licensing fee for charitable organizations).

Here, WWWY pays $60,000 per year to contract with the WIAA, while all other media members pay a limited rights fee to stream live games on the internet—$250 for a single-camera production and $1500 for a multiple-camera production. FOF 129; AFOF 57-58. The revenue generated by these rights fees is used to pay for the WIAA programs, including the WIAA-sponsored sporting events streamed by the applicants, as well as to defray the costs of supporting the production. FOF 52, 55; AFOF 59. All private media members, apart from WWWY's exclusive business partner, pay this same amount to defray costs associated with sponsoring WIAA sporting events. FOF 161; AFOF 58-59. The amount media members are required to pay varies only based on whether the applicant will use one camera or multiple cameras. FOF 161-63; AFOF 58. And, as always, media representatives remain free to report on the event using any means of communication without paying any fee at all. Therefore, the license fee is not unconstitutional.

C. The WIAA's Exclusive Rights Agreements Satisfy the First Amendment Under the Public Forum Doctrine

Gannett raises a host of arguments challenging the WIAA's "exclusive-rights policies" under the public forum doctrine, all directed solely at the WIAA's internet transmission policies.[6] At bottom, Gannett asks this Court to hold that "the WIAA's sale of preferential rights

[6] Gannett frames its challenge as one to WIAA "exclusive-rights polices." Def. Br. at 26. The WIAA has a number of exclusive rights agreements, including without limitation agreements with WWWY, Quincy, and Fox Sports. FOF 79-81, 126-28. Both Gannett's brief and Gannett's Counterclaims (Dkt. No. 2, ¶¶ 33-43), however, challenge only the internet streaming policy, i.e., the WWWY rights agreement. Indeed, Gannett's summary judgment challenge is premised on the discretion afforded to WWWY under the WIAA's policies, which WIAA disputes herein. *See, e.g.*, Def. Br. at 15-19, 27, 29-32. In contrast, Gannett has come forward with no evidence that discretion has been granted with respect to the WIAA's

to report on high school tournament events violates the First and Fourteenth Amendments under any standard of review." Def. Br. at 22-23. Gannett's authorities, however, fail to support its many bald assertions of law. Despite unequivocally maintaining that "[e]xclusive rights are unconstitutional in a designated public forum," *id.* at 26, Gannett fails to come forward with a *single case* so holding. Numerous courts have held found similar policies constitutional in analogous situations. *Foto USA, Inc. v. Bd. of Regents of the Univ. Sys. of Fla.*, 141 F.3d 1032 (11th Cir. 1998) (upholding exclusive photography agreement); *KTSP-Taft Television & Radio Co. v. Arizona State Lottery Comm'n*, 646 F. Supp. 300, 309 (D. Ariz. 1986) (upholding an exclusive broadcast agreement for the Arizona Lottery); *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir. 1986) (upholding an exclusive advertising policy at a sports arena).

In stretching for its desired outcome, Gannett reaches for incorrect legal standards and inapposite authority. Equally problematic, however, is Gannett's failure to come forward with evidentiary support for its assertions; bald assertions do not pass muster on summary judgment, especially where, as here, the record is replete with support for the WIAA's assertion that it has not created any public forum. But even were the Court to agree with Gannett's forum analysis, and hold that the WIAA has created a forum for "reporting," the WIAA has come forward with ample evidence to support its limitation on internet transmission under the controlling constitutional frameworks for both limited and designated public fora. Accordingly, having failed to show that it is entitled to summary judgment under the correct legal standards, Gannett's summary judgment motion should be denied.

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other rights agreements. Gannett's attempt to frame the issue before this Court as all "exclusive-rights agreements" is therefore improper.

1. Gannett Misapplies the Law of Public Fora: WIAA Events Are Not Public Fora

Gannett argues that this "Court should find that the WIAA intentionally created a designated public forum for journalists at tournament venues, by opening them generally to the media for coverage of the events." Def. Br. at 24. As support for this assertion, Gannett relies on (1) the general accessibility of the events and (2) media policies controlling news gathering and providing for credentials for covering WIAA events. Def. Br. at 25. The WIAA does not dispute that the public (including the media) is permitted entry to WIAA sponsored events, the public upon payment of an admission fee and the media upon obtaining credentials without paying a fee. FOF 74; PFOF 18. But "[n]ot all public places are public forums." *Int'l Soc. for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 159 (3d Cir. 1982) ("[A] place owned or controlled by the government does not become a public forum simply because members of the public are freely permitted to visit it.") (citing *Greer v. Spock*, 424 U.S. 828, 837 (1976)). "Such a principle of constitutional law has never existed, and does not exist now." *Greer*, 424 U.S. at 836. Nor did the WIAA create a public forum by issuing policies to restrict media conduct. *Cornelius v. NAACP Legal Def. & Educ. Fund., Inc.*, 473 U.S. 788 (1985) ("[S]elective access, unsupported by evidence of a *purposeful designation* for public use, does not create a public forum.") (emphasis added). Rather, to create a public forum, Gannett must show that the WIAA made the decision to intentionally open a nontraditional forum for public discourse. *Id.*

Absent from Gannett's brief are the factors relied upon by courts in determining the public or nonpublic status of property, including "[t]he primary factor in determining whether property owned or controlled by the government is a public forum": "how the locale is used." *Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dep't of Parks &*

Recreation, 311 F.3d 534, 547 (2d Cir. 2002) (internal quotation omitted). Aside from the fact that the WIAA does not own or control the fora at which its athletic events are held (FOF 68-72), the WIAA, in contrast, has provided evidence that the facilities used by the WIAA are for the purpose of athletic competitions—selected based on the nature of the particular competition. *See* FOF 64-72. These facilities include sports fields, arenas, and venues of purely athletic character, such as swimming pools, golf courses, and tennis courts. FOF 70-72. When the WIAA leases these facilities, they do so for athletic competitions only. FOF 66. Quite simply, the WIAA venues are not places of public assembly intended for the exchange of ideas, but designed for the non-expressive activity of athletic competitions.[7] And numerous courts have held that facilities of like character are not public fora. *See, e.g.*, *N.J. Sports*, 691 F.2d at 161 (New Jersey's Meadowlands sporting complex was a non-forum); *Hubbard Broad*, 797 F.2d at 555 ("The Metrodome is not a place of public assembly intended for the communication of ideas or for the exchange of different points of view."); *HippoPress, LLC v. SMG*, 837 A.2d 347, 356-57 (N.H. 2003) (public sporting and entertainment facility not a public forum); *Hone v. Cortland City Sch. Dist*., 985 F. Supp. 262, 271 (N.D.N.Y. 1997) (public high school sporting program did not create a public forum for a reporters); *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986) (municipal stadium a non-forum). This is because, as stated by the Third Circuit, "stadiums are the kind of public places . . . so clearly dedicated to recreational use that talk of their use as a

[7] Sports are not expressive activity and are not afforded First Amendment protection. *See Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So. 2d 496, 501 (Fla. Ct. App. 2003) (citing *Sunset Amusement Co. v. Bd. of Police Comm'rs*, 496 P.2d 840, 845-46 (Cal. 1972) (no First Amendment right to roller skate); *see also Murdock v. City of Jacksonville*, 361 F. Supp. 1083, 1096 (M.D. Fla. 1973) ("The promotion of wrestling matches in this case is not a symbolic act, nor is the wrestling match itself a symbolic act, protected by the First Amendment. Wrestling is just not 'free speech,' 'akin to free speech,' nor a "symbolic act.'"); *Justice v. NCAA*, 577 F. Supp. 356, 374 (D. Ariz. 1983) ("[i]n its most basic form, athletic competition does not constitute pure speech; rather, participation in athletic competition constitutes physical activity"); *Post Newsweek*, 510 F. Supp. at 86 (figure skating is "entertainment" and not entitled to First Amendment protection akin to political speech).

public forum would in general be totally unpersuasive." *N.J. Sports*, 691 F.2d at 161 (internal quotation omitted).

Gannett also neglects to consider the intent of the WIAA in creating the "forum" in the first instance, a critical factor in forum analysis. *See* 1 *Smolla & Nimmer* § 8:14-15; *Cornelius*, 473 U.S. at 804-05. Gannett has come forward with no evidence that the WIAA intended to create a public forum for media to carry the WIAA's games at its events. The WIAA uses leased facilities solely for its athletic competitions, with the intent to showcase the sporting events, FOF 65-69, and has issued its media guidelines not for the purpose of creating a forum, but "to address ownership and distribution issues." FOF 37; PFOF 15. Media members may apply for credentials to report on WIAA events, subject to approval by the WIAA. FOF 42, 51; PFOF 18-19. The WIAA's policies limiting media conduct, including those proscribing internet streaming, thus support a *lack* of intent to create a public forum—to open the facility for any manner of expression. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (holding that policies of selective access limiting a school mailing system to those approved by the school principal supported nonpublic forum status). Indeed, "the government does not create a designated forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (internal quotation and citation omitted).

Finally, in arguing the WIAA has created a public forum, Gannett fails to consider whether "the full exercise of First Amendment rights would be inconsistent with 'the special interests of a government in overseeing the use of its property.'"[8] *N.J. Sports*, 691 F.2d at 160-

[8] The property in question is not even the WIAA's own property, but rather leased property for the specific event. FOF 68-72.

61 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980)). Here, allowing the public to engage in the full panoply of First Amendment activities would be inconsistent with the special interests of the WIAA. The WIAA organizes student athletic events and has issued policies to ensure that crowd conduct will not interfere with the competition. FOF 22, 33; 65-69; AFOF 64. The same concern applies to media conduct, as, for example, numerous WIAA events occur at smaller facilities, which cannot house multiple broadcasters. AFOF 65-69, 10-15. Because multiple production crews competing for the best location beside a crowded pool or at an indoor tennis court could disrupt the event, the WIAA has issued policies to control the number of production crews filming an event. Allowing any and all manner of expressive conduct at a sporting event like a swim meet would detract from the event, and create unsafe conditions. AFOF 67-68.

The WIAA likewise has a special interest in raising revenue through its state-level events, especially its high-interest sports. FOF 52-63, 79-89, 129-30, 243-46. These revenues, raised in part via exclusive rights fees for the carrying of games, are required to subsidize less popular sports and fund the WIAA's programs. FOF 58-63; 129-30. This legitimate proprietary interest is inconsistent with allowing a free range of expression in WIAA facilities, given that such behavior would undermine the WIAA's own ability to raise revenue in its proprietary capacity. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (where city is involved in commercial venture, a public forum was not created with regard to advertising on city transit). Indeed, at the very heart of the current dispute is Gannet's own desire to profit from WIAA events at the expense of the WIAA, which finances and organizes the event in the first instance and depends on raising revenue through exclusive rights agreements. AFOF 74-76; FOF 20, 52-55. Gannett's self-admitted goal "to tap into the growing video on the Web business," however,

does not transform WIAA events into public fora, wherein Gannett can cherry pick high profile events to stream. AFOF 76. Nor does it strip the WIAA of its right to protect its proprietary interest.

In the end, a review of the record makes clear that no public forum is at issue. While the WIAA has provided ample evidence to support its position, Gannett has come forward with nothing in opposition.

2. In a Non-forum, the WIAA Has Wide Latitude to Institute Media Polices

Because the WIAA has not created a public forum, it may impose any viewpoint neutral[9] and reasonable limitation on speech. *Hotel Employees*, 311 F.3d at 546. Here, the restriction makes no distinction based on viewpoint of the speaker and, as explained more fully *infra* Parts III(c)(2) & III(c)(3)(a-c) below, the WIAA's policy is more than reasonable. It is substantially justified to further significant government interests (*see* FOF 52-63, 76, 79-96, 126-141, 167-208, 242-55, 276-89) and leaves open the vast majority of alternative means of communication (*see* FOF 32-51, 74-78, 257-76).

Gannett, however, challenges the WIAA's restrictions on two grounds. First, Gannett argues that the WIAA's internet streaming provision is not viewpoint neutral because it places "unbridled discretion" in the hands of WWWY. Br. at 29. As addressed *supra* Part III(B)(4), this is not the case. Regardless of any decision by WWWY, Defendants remain free to access the forum, to observe tournament events, to report on those events using multiple forms of

[9] In a non-forum, the WIAA is free to make content-based distinctions; "only the narrower prohibition on viewpoint discrimination applies." I *Smolla & Nimmer*, *supra*, § 2:72 (collecting cases). Indeed, if this were not the case, "a judge could not use content to rule evidence out of a courtroom . . . . Government, in short, simply could not function if the full regime of First Amendment principles normally applicable in the general marketplace of public discourse applied to every aspect of public institutional life." *Id.* Thus, any reasonable regulation that is "not an effort to suppress expression merely because public officials oppose the speaker's view" is constitutional in a nonpublic forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

communication, and to express any viewpoint about them. *See* FOF 257-70; PFOF 19. Defendants note that "the unbridled discretion doctrine applies even in a nonpublic forum," Def. Br. at 29, pointing to *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006). However, *Child Evangelism* involves *access* to a forum, children's mailboxes in an elementary school, rather than permission to use a single means of communication within that forum, as here. *Id.* at 387. Moreover, the court acknowledged that the nature and function of a non-public or limited forum should inform the analysis of the discretion involved. Id. Here, as described above, WWWY's exclusive rights contract, and WWWY's discretion over whether to exercise its exclusive rights, are reasonable in light of the nature and function of the forum at issue—a high school athletic tournament open to reporting but not to broadcast of the tournament itself.

Gannett also argues that WWWY's exclusive rights contract inherently violates viewpoint neutrality because "exclusivity is inconsistent with the neutrality requirement applicable in any public forum." Def. Br. at 31. According to Gannett, the "cozy, symbiotic relationship" between WIAA and WWWY and the "substantial business" developed by WWWY invite "the very kind of self-censorship" of concern in *Lakewood*. Def. Br. at 30. Gannett's argument fails on both legal and factual grounds. First, numerous courts have upheld exclusive rights contracts in both public and non-public fora. *See, e.g.*, *Foto USA*, 141 F.3d 1032 (upholding an exclusive contract for graduation photography at state university ceremonies); *Post Newsweek*, 510 F. Supp. at 85 (upholding an exclusive rights agreement for the transmission of figure skating event at a public arena); *KTSP-Taft Television*, 646 F. Supp. at 309 (upholding an exclusive broadcast agreement for the Arizona Lottery); *Hubbard Broad*, 797 F.2d at 555 (upholding an exclusive advertising policy at a sports arena). Given widespread judicial

approval of such exclusive contracts, WWWY's contract cannot inherently violate viewpoint neutrality.

Second, Gannett's analysis turns the *Lakewood* jurisprudence on its head. In *Lakewood*, which involved excessive discretion over the placement of newspaper racks, the Court expressed concern that a newspaper would be forced to report favorably on local officials in order to encourage a successful application for access to the forum at issue. 486 U.S. at 757-58. In other words, the *Lakewood* line of cases seeks to *protect* media companies facing a strong incentive for favorable coverage, freeing them to exercise their First Amendment rights and report as they see fit. In this case, Defendants seek to *punish* a company allegedly facing such an improper incentive structure, *preventing* it from conducting its business and expressing its views as it sees fit. *Lakewood* never countenanced this scenario.

Moreover, as a factual matter, Gannett misapprehends the economic benefits of the contract and thus the "incentives" facing WWWY. According to Gannett, WWWY has built "substantial" and "somewhat profitable" business around the WWWY contract. Def. Br. at 30. Gannett comes forward with no factual support for this assertion, relying on three proposed facts: PFOF 59, which alleges only that WWWY markets it own and affiliate productions; PFOF 61, which notes that WWWY has 22 affiliates, including community access channels; and PFOF 79, noting that in 2008 WWWY paid $60,000 to WIAA. None of these establish Gannett's assertion. This is likely because WWWY has never made a profit on its contract with the WIAA. AFOF 30-31. In fact, under the WWWY-WIAA contract, the financial losses WWWY has suffered would preclude payment to WIAA. AFOF 32. WWWY has only pays a rights fee to WIAA because the parties agreed to modify the formula used in the WWWY-WIAA contract,

giving a WIAA fees based on a percentage of WIAA's distribution revenues under a separate WWWY agreement with Fox Sports Wisconsin. AFOF 33-35.

Gannett further asserts that WWWY's business generates revenue "principally by selling permits and allowing other media companies to stream tournament events and then selling licensees' recordings of the events through the website, wiaa.tv, rather than producing events on its own." Def. Br. at 30. Gannett comes forward with no support for this assertion, other than the twenty affiliates noted in PFOF 59 and 61. In fact, WWWY does not generate enough revenue from sales of DVDs to cover the cost of production. AFOF 37. And in a two-year period, WWWY has sold 88 affiliates DVDs at a total cost of $1,660.60, returning $332.12 to the affiliates in royalties. AFOF 39. Thus, WWWY has no "strong financial incentive to please the WIAA in hopes of winning" another contract. The record contradicts Defendants' unsupported assertions and, in fact, underscores the substantial benefits obtained by the WIAA through the current contract. Furthermore, WWWY is a production company, not a media company, and does not "report" on the WIAA or the tournament events it carries. FOF 99-102, 109, 111-12, 126, 128, 131-135, 147-151, 159-160, 167-182, 186, 192-193, 195-197. The dangers identified by Defendants simply do not exist.

Second, Gannett argues that the WIAA's policies are not "reasonable" because "equal access to cover tournament events, using a variety of reporting technologies, is perfectly compatible with the intended purpose of the property and consistent with the purpose which the forum at issues serves." Def. Br. at 26 (internal quotation omitted). Gannett's argument is framed around the assumption (for which it has no record support) that "the purpose of the forum at issue is to enable reporting of public high school tournament events to the public." Def. Br. at

28. This is untrue. As noted above, the purpose of the nonpublic forum at issue is an athletic competition. FOF 65-69. Gannett has come forward with no evidence to the contrary.

Even assuming Gannett has correctly defined the purpose of the forum at issue, contrary to Gannett's assertions, the challenged policy does not restrict Gannett's "access to cover" tournament events or "report[] … events to the public." Def. Br. at 28; PFOF 19; FOF 32-51, 74-76, 257-276; AFOF 78-81, 85. Quite to the contrary, at no time has Gannett's access to tournament events been denied. FOF 77-78; AFOF 78-81, 85. At no time has Gannett been prohibited from entering any WIAA event. FOF 77-79. At no time has Gannett been denied credentials. FOF 77-78; AFOF 78. And at no time has Gannett been stopped from offering any written account *via any technology*—related to any WIAA event. FOF 32-51; AFOF 79. Indeed, even in those instances where Gannett alleges its reporters were prohibited from covering an event via their preferred mode of communication, i.e., where they failed to request permission to live stream a WIAA event, *by their own admission* reporters still published extensive written accounts of the game accompanied by photography. AFOF 80-81. Gannett is even free to report on WIAA events via the internet, and can without a license use up to two minutes of game action on its website. FOF 47-48; PFOF 25. Thus, in the end, what the WIAA has restricted is not Gannett's access or ability to report an event, as Gannett asserts, but instead Gannett's ability to *carry* an event, a right only granted to the WIAA's business partners in exchange for significant revenue and services. FOF 129-30, 242-57, 273-74,[10] AFOF 85.

Moreover, Gannett's conclusory allegations of the purported "unreasonableness" of the WIAA's policies *absent any record support* are insufficient grounds for summary judgment.

[10] Gannett's own documents refer to carrying events on the internet as "web-based broadcast programming" and "local content assets," which programming Gannett seeks to use to "tap into the growing video on the Web business." AFOF 76.

Gannett's argument relies on two cited propositions: (1) WIAA events are open to the public and involve public funds[11] (Def. Br. at 29) and that (2) the WIAA allows anyone to transmit a radio broadcast of a game (subject to a rights fee) but has entered an exclusive agreement with respect internet transmissions. Def. Br. at 28. That the public is able to attend games is insufficient to create a public forum. *See, e.g.*, *N.J. Sports*, 691 F.2d at 159. That the WIAA has developed one consistent policy related to audio transmissions and another related to video transmission does not mean that either one is unreasonable. In fact, the availability of alternative means of communication about events (e.g., television, radio, print, photography) strongly supports the reasonableness of the restriction. *See Perry Educ. Ass'n*, 460 U.S. at 53.

Gannett's only remaining support for the unreasonableness of the restriction is the bald assertion that it "undermine[s]" the forum's purposes (which Gannett limits to reporting) by "depriving the public the opportunity to view events." Def. Br. at 28. Regardless of whether the forum's purpose is "reporting," and whether transmitting an event is reporting (which it is not), Gannett has cited no evidence that the public has been deprived of any opportunity to view events. Instead, the record demonstrates that the WIAA's exclusive rights agreement has *increased* public access to events, in particular to less popular sports not otherwise available. FOF 90-96, 205, 286-89.

Finally, Gannett's reliance on *Perry* is misplaced. Def. Br. at 28-29. In *Perry*, the Court ruled that a school mail system was not a public forum, and, as such, the government could limit use of that system to those participating in the district's official business, which included the

[11] Gannett's allegation that WIAA tournaments are "supported primarily by public funds" is without record support. *See* Def. Br. at 29. Gannett relies on its Finding of Fact 91, which details a $1,100 payment of dues to the WIAA from the Ashwaubenon School District. *See* Defendants PFOF 91, Dkt. No 51. The WIAA's annual operating revenue is over $7,000,000, 86% of which comes from tournament events—not public funds. FOF 53. Indeed, membership dues comprise only .5% of the WIAA revenue. FOF 54. Gannett's assertion is not merely misleading, it is unsupported by Gannett's own record and should be disregarded.

teachers' official labor union. *Perry Educ. Ass'n*, 460 U.S. at 47-48 ("Because the school mail system is not a public forum, the School District had no constitutional obligation per se to let any organization use the school mail boxes.") (internal quotation omitted). The Court rejected a challenge from a rival union, who claimed that the district engaged in viewpoint discrimination by allowing only one union access to the mail system. *Id.* at 47-49. In ruling that the district had not engaged in viewpoint discrimination, the Court concluded that there was no evidence that denial of "access" to the mail system was based on an intent to "discourage one viewpoint and advance another." *Id.* Instead, the Court relied on the relationship between the official union and the district. The Court held that the district had distinguished the official union due to its status—not due to disagreement with the second union's viewpoint. *Id.* at 49.

Gannett maintains that, unlike the plaintiff in *Perry*, WWWY does not "participate in the forum's official business[12] in any manner that would justify special treatment, much less exclusivity." Def. Br. at 28 (internal quotation omitted). This is untrue and unsupported. As detailed in the WIAA's motion for summary judgment, in addition to paying substantial fees to the WIAA for the right to produce WIAA events, WWWY provides extensive audio-visual services to the WIAA, including the production of DVDs for the WIAA. FOF 167-82; *see also* PFOF 62. WWWY produces live and delayed streams of WIAA events for wiaa.tv, which is the WIAA's own website for the streaming of games. FOF 188-208. WWWY likewise provides web services to the WIAA. FOF 195. Given that Gannett has failed to come forward with evidence that the policy is intended to suppress a speaker's viewpoint, the presence (or lack thereof) of the particular kind of evidence discussed in *Perry* is of little weight. Indeed, the fact

[12] Gannett's argument here is most perplexing, as Gannett has identified the official purpose of the forum as reporting on high school sports. It is clear, however, that the official business of the WIAA is the administration of high school sporting events. FOF 1, 15-21.

that the policy applies not only to Gannett but to all organizations other than the exclusive rights holder is strong evidence that it is viewpoint neutral. *See id.* at 49 n.9 ("The access policy applies not only to PLEA but to all unions other than the recognized bargaining representative, and there is no evidence the policy was motivated by a desire to suppress the PLEAs views.").

Second, Gannett relies on *Perry* for the proposition that in a nonpublic forum, "'[w]hen speakers and subjects are similarly situated, the state may not pick and choose.'" Def. Br. at 31 (quoting *Perry*, 460 U.S. at 55). As demonstrated above, however, Gannett and WWWY are not "similarly situated." WWWY is a production company and exclusive rights holder who provides services to the WIAA. FOF 126-30, 167-208, 242-56. Gannett is a publisher of newspapers, while the WNA is an association of newspapers—not a production company. PFOF 12-13 (Dkt. No. 33); FOF 3-6. Regardless, Gannett's selective quotation is misleading. The entire passage reads as follows: "When speakers and subjects are similarly situated, the state may not pick and choose. *Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used.*" *Perry*, 460 U.S. at 55 (emphasis added). Thus, rather than supporting Gannett, *Perry* underscores that in a non-public forum, the WIAA is free to draw distinctions, so long as such distinctions are reasonable and do not constitute viewpoint discrimination.[13] This is precisely what the WIAA has done with its internet streaming policies.

[13] Moreover, to the extent that the WIAA's work with WWWY on wiaa.tv is in itself expressive activity, WIAA is entitled to its own speech. *Pleasant Grove City v. Summun*, 129 S. Ct. 1125, 1131 (2009) ("A government entity may exercise the same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."). Where, for example, the government commissions a monument, it is entitled to "government speech." *Id.* The WIAA likewise has a right to commission DVDs of its choosing for wiaa.tv, produced to meet its standards of quality, promote the WIAA brand and the ideals of its organization. *See* FOF 183-206; *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 381 n.2 (4th Cir. 2006) ("[W]hen the government alone speaks, it need not remain neutral as to its viewpoint.").

3. The WIAA's Internet Streaming Policy Is Constitutional in a Public Forum

Even were the Court to conclude that the WIAA has created a public forum for the reporting of its events, Gannett's constitutional challenge would still fail. First, Gannett applies the incorrect level of scrutiny for content-neutral policies. Second, regardless of the level of scrutiny, Gannett improperly assumes that "access" to a WIAA event grants it unlimited freedom to engage in any behavior it likes. Case law demonstrates, however, that media access to an event need not include the right to videotape that event, and that such a restriction is reasonable under the public forum rubric.

a. Gannett Incorrectly Applies Content-Based Strict Scrutiny to the WIAA's Content-Neutral Internet Streaming Restriction

Gannett asserts that the exclusive rights agreements cannot pass constitutional muster because they do not survive the strict scrutiny applied to restrictions in a public forum. According to Gannett, because the WIAA cannot show that its policy is necessary to serve a "compelling state interest" and that it is "narrowly drawn to achieve that end," the WIAA's exclusive rights policies cannot survive Gannett's challenge. Def. Br. at 23 (citation omitted). This level of scrutiny applies only to *content-based* restrictions in traditional and designated public fora. *See Pleasant Grove City v. Summun*, 129 S. Ct. 1125, 1132 (2009). Gannett fails to establish that the WIAA's restriction on streaming is content-based in the first instance.

As demonstrated above, *supra* at Part III(B)(1), the WIAA's internet transmission policies are not content based. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. The "starting point" of this analysis is the motive of the government in instituting the policy. 1 *Smolla & Nimmer*, *supra*, § 2.66. Government regulation of speech is content-neutral if it "is justified without reference to the content of the regulated

speech." *Ward*, 491 U.S. at 791. Here, the WIAA has demonstrated that the exclusive rights agreements serve purposes wholly unrelated to the content any expression. Record evidence supports the WIAA's assertion that it entered into exclusive rights agreements in order to increase revenue for the WIAA, thereby allowing it to organize and operate the post-season tournaments, FOF 244-45, 277, 283-284, and to provide public access to sports and events with a smaller public following. FOF 243-254. These reasons bear no relation to the content of the speech at issue, making the challenged restrictions content-neutral. Accordingly, Gannett's application of strict scrutiny is improper.

Gannett's scrutiny analysis also fails for a second reason. Gannett argues that the WIAA has created an alleged "designated public forum for journalists" for reporting. Def. Br. at 24. If, in fact, the WIAA has created a public forum for reporting, however, this is a "limited," not "designated," public forum.[14] In a "limited" forum, the WIAA is free to prescribe a specific channel or medium of expression, or to limit the forum to certain groups or subjects. *Pleasant Grove City*, 129 S. Ct. at 1132 (citing *Perry*, 460 U.S. at 46, n.7). As the Supreme Court recently stated, in a limited forum, "a government entity may impose restrictions on speech that are *reasonable and viewpoint-neutral*." *Id.* (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)) (emphasis added). As demonstrated above, the challenged WIAA policies meet this test.

Finally, even assuming strict scrutiny applied to some portion of the WIAA's media policies, those policies are narrowly tailored to meet a compelling state interest. In their summary judgment motion, Defendants raise for the first time a provision stating that the WIAA

[14] In a limited forum, the government opens a non-traditional forum to limited expression for a particular purpose. By contrast, in a "designated" public forum, the government opens a nontraditional forum to a full range of First Amendment expression, subject only to content-neutral time, place, or manner restrictions, or content-based strict scrutiny. *See Pleasant Grove City*, 129 S. Ct. at 1132.

may revoke transmission rights for inappropriate content. As described above, *infra* Part III(B)(2), this argument should be rejected based on the Defendants' failure to amend their pleadings or provide notice to the WIAA. Nonetheless, this provision satisfies strict scrutiny based on the WIAA's compelling interest in protecting its high school athletes from association with certain adult products and businesses, such as alcohol, drugs, lewd subject matter, or gambling. *See* AFOF 1-2, 70-73.

Courts have routinely declared that safeguarding the well-being of minors constitutes a compelling state interest. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'") (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). This interest in safeguarding minors may include shielding them from association with alcohol, drugs, pornography, or other potentially harmful influences. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (reviewing case law and noting that deterring drug use by schoolchildren has been recognized as "an important—indeed, perhaps compelling interest") (internal quotation marks omitted); *Crawford v. Lungren*, 96 F.3d 380, 386 (9th Cir. 1996) (recognizing a compelling interest in shielding minors form the influence of adult oriented literature). Here, the WIAA's media policies prohibit content associated with transmission of WIAA events that relate to tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter. AFOF 50. These policies were implemented because the WIAA membership views it as part of the WIAA's mission to protect the members' student athletes who are impressionable adolescents. AFOF 1-2, 50-54. Organizations that govern high school sports, including the WIAA, also have an interest in protecting student participants from inappropriate use of their images. AFOF 70-73.

The means adopted in the WIAA's media policies are also carefully tailored to achieve these compelling ends. *See Crawford*, 96 F.3d at 387 (upholding restrictions on the display of adult material in coin-operated newsracks to safeguard children as "minimally restrictive if its ends are to be accomplished at all"). The WIAA limits its prohibition on inappropriate content to *transmissions* of tournament events, which have limited independent expressive content. No prohibition applies to media *reporting* on tournament events, including newspaper and internet stories. In fact, in the past, Gannett newspapers have posted internet stories regarding high school sports adjacent to advertising related to adult entertainment, but the WIAA has never denied media credentials of Gannett reporters or denied or revoked their right to transmit games. AFOF 1-3, 78-79, 86-87. Thus, the WIAA has crafted a narrowly tailored policy aimed at protecting its student athletes without burdening the First Amendment rights of media companies reporting on tournament events.

b. A Forum for "Reporting" Does Not Require the WIAA to Grant Transmission Rights

By entering into an exclusive rights agreement and prohibiting internet streaming without permission, the WIAA has made clear that it did not intend to include internet streaming within the "limited" forum for reporting it has allegedly created. This is because there is a recognized distinction between reporting on a game and transmitting a game, i.e., the difference between covering a game and carrying a game. FOF 257, 273-74; AFOF 85. It is within the WIAA's rights in opening a limited public forum to keep that forum for reporting only—it is not required to open its events to any manner of expression. *Child Evangelism*, 457 F.3d at 382.

Gannett's repeated assertions that the First Amendment grants it any method of newsgathering—in particular the wholesale broadcast of an entertainment—is unsupported. While it is true that the government cannot deny media "access" once a forum has been created,

it does not follow that the government must permit videotaping as a part of that "access." "[C]ourts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access." *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999) (finding no "essential nexus between the right of access and a right to videotape"). Videotaping restrictions "regulate only the time, place, and manner of news-gathering activities," and must be upheld "if they are neutral and reasonable." *United States v. Kerley*, 753 F.2d 617, 620-21 (7th Cir. 1985). Nor does the press have a constitutional right of "special access" or immunity to engage in behavior unavailable to the general public—for example, the infringement of a property or privacy rights. *See Post Newsweek*, 510 F. Supp. at 84 (collecting cases); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (media has "no special right of access . . . different from or greater than that accorded the public generally") (concurring opinion cited in Def. Br. at 22); *Dietemann v. Time, Inc*., 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."); *Zacchini v. Scripps-Howard Broad. Co*., 433 U.S. 562, 574-75 (1977) ("Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.").

Here, reporters may attend WIAA events on the same terms as the public regardless of their affiliate or credential status. FOF 74, 77-78. Gannett admits that it is "not aware of any instance in which the WIAA has denied Defendants or other members of the news media entry to a WIAA-Sponsored Event." FOF 77-78. Reporters are likewise free to apply for and receive

credentials from the WIAA. FOF 51, 77; PFOF 18. Gannett admits that no one has been denied such credentials. AFOF 78. But reporters are not free, under the guise of reporting and the First Amendment, to transmit the entirety of an athletic competition in violation of the WIAA's policies.

c. The WIAA's Exclusive Policies Are Permissible Reasonable Time, Place, Manner Restrictions in a Limited Public Forum

Finally, regardless of the type of forum created, the WIAA may "impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are . . . narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (internal quotation omitted).

Gannett, while recognizing the existence of the time, place, or manner test, fails to apply it to the present dispute, i.e., to internet transmissions. Instead, Gannett notes in passing that "WIAA's further restrictions on journalists, like the credentials it requires for access to specific locations for reporting at tournament events, are constitutional only to the extent they qualify as reasonable time, place and manner regulations." Def. Br. at 25. However, relying on *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), Gannett dismisses this analysis, arguing that a time, place, and manner restriction must be applied "evenhandedly to all" who wish to use that reporting method. Def. Br. at 26 (quoting *Heffron*, 452 U.S. at 649).

Heffron does not support this generalization. In *Heffron*, the Court addressed whether the operators of a state fair could limit charitable organizations to specific areas of the grounds. *See Generally* 452 U.S. 640. Rather than creating a *per se* rule that all persons in a forum must be subject to identical restrictions, the Court relied on the "evenhanded" application of the policy as evidence of content-neutrality, noting that "since as the Supreme Court of Minnesota observed,

the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes." *Id*. at 649. The case creates no rule that reporters in a forum may transmit games using any means desired.

Gannett's only remaining support for its assertion is dicta from *Perry*, discussed *supra* Part III(C)(2), stating that "[w]hen speakers and subjects are similarly situated, the state may not pick and choose." 460 U.S. at 55. Again, however, this statement stands for the principle that the government may not deny access to a forum as means of engaging in viewpoint discrimination—not that it cannot prohibit a particular activity, such as the transmission of its events. And again, the crux of Gannett's grievance is not that it has been denied "access" to the forum (as in *Perry*), but that it has been denied the right to transmit the events via the internet absent payment of a rights fee. *Perry* is thus inapposite to the current dispute.

Under the time, place, or manner test, and as explained in further factual detail in the WIAA's own motion for summary judgment, the WIAA's policy on internet transmission is constitutional. First, the restrictions do not "burden substantially more speech than is necessary" to achieve a substantial government interest, and are therefore narrowly tailored. *Ward*, 491 U.S. at 799. Here, the media is free to engage in a large array of reporting activities. FOF 47, 50, 225-226, 257-270; AFOF 79. To the extent any speech is burdened, it is only the transmission of a WIAA event, which right must be exclusively held to protect its economic value. FOF 256, 279-85, 289.

Second, the WIAA's policy of exclusive rights agreements serves the significant interest of raising necessary revenue.[15] FOF 52-63, 129-30, 244-246-255. The WIAA tournaments

[15] Without support, however, Gannett dismisses this interest as "not a compelling state interest," again applying the wrong standard. Def. Br. at 25. Regardless, courts have recognized the need to raise

generate 86% of its annual operating budget. FOF 53. The WIAA's broadcast contracts form an important part of this revenue, and as the value of these rights rests primarily on exclusivity, this revenue stream would all but disappear should the Court permit Gannett to steam WIAA games. FOF 284-285; *see also Zacchini*, 433 U.S. at 574-75 ("Much of its economic value lies in the right of exclusive control over the publicity given to his performance.") (internal quotation and citation omitted).

The WIAA depends on this funding—it is critical for otherwise under-funded sports that could not produce revenue on their own. FOF 57-63, 252. These "subsidized" sports constitute the majority of WIAA events, and the exclusive rights agreement increases exposure for them. FOF 58-63. Without WWWY's production, these events would be unavailable to the non-attending public. FOF 287-89, 58-61, 193, 205-207, 252. The contract has thus enhanced public access to WIAA events. FOF 18-19, 246-252, 290-91, 96, 116, 288-89, 79, 116, 286-89.

Without its exclusive policy, the WIAA and WWWY would be unable to offer to the public the variety of content and services currently available, including services offered by WWWY in addition to web streaming. FOF 243-56, 284-88, 122, 167-82, 186-95, 207-08, 242; 249, 121, 128, 130 129 207-08, 249. Moreover, the array of audio-visual support WWWY provides to the WIAA as a part of the contract would disappear, at a cost of over $500,000. FOF 167-208, 242, 255-56.

Finally, the WIAA's policies leave more than sufficient alternative means of communicating information to the public regarding these tournament events. FOF 32-51, 259, 261-62, 265-67, 271; PFOF 19. Under the WIAA's policies, newspapers are able to report on the details and outcomes of the games, rely on photographs, audio stream, internet play-by-play,

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revenue as a valid government interest. *Post Newsweek*, 510 F. Supp. at 86 (noting the government's interest in protecting the commercial value of a sporting event by limiting the broadcast coverage).

video highlights, provide game commentary, using game action as a backdrop. FOF 261-62, 266-67. Newspapers have access to the athletic events in order to fully describe, explain, and analyze newsworthy events. FOF 32-51, 259, 271, 265-66; AFOF 85. Moreover, *as with all WIAA media policies*, the WIAA's policy on internet streaming relates only to post-season events, and the WIAA places no restrictions on the streaming of regular season events. AFOF 60-61.

D. The WIAA's Exclusive Rights Policies Do Not Violate Gannett's Fourteenth Amendment Right to Equal Protection

Gannett acknowledges, as it must, that without a finding of a First Amendment violation, Gannett's equal protection claim under the Fourteenth Amendment only merits analysis under a rational basis standard. Def. Br. at 32. When no fundamental right is burdened and there is no suspect class involved, the government entity need only show that the challenged action "'rationally further[s] a legitimate state purpose' to be valid under the Equal Protection Clause." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 291 (1984) (quoting *Perry Educ. Ass'n,* 460 U.S.37 at 54); *see also Srail v. Village of Lisle*, 588 F.3d 940, 943 (7th. Cir. 2009) ("In the absence of deprivation of a fundamental right or the existence of a suspect class, the proper standard of review is rational basis."). Because Gannett cannot demonstrate any fundamental First Amendment right to transmit WIAA-sponsored events, the rational basis standard applies.

Gannett thus faces an "onerous test to overcome," as the "burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification." *Srail*, 588 F.3d at 946 (citing *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006)). Indeed, classifications reviewed under the rational basis standard are "accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citations omitted).

Further, the United States Supreme Court has admonished that with respect to equal protection analysis, review under the rational basis standard "is not a license for courts to judge the wisdom, fairness, or logic" of the action. *Id.* (quoting *FCC v. Beach Comm's, Inc.*, 508 U.S. 307, 313 (1993) (internal quotations omitted)). Here, Gannett fails to put forth any evidence that "eliminate[s] any reasonably conceivable state of facts that could provide a rational basis" for the WIAA's exclusive rights policies.

Courts have previously recognized that "the state, as a purchaser of services, enjoys a broad freedom to deal with whom it chooses on such terms as it chooses" and, "in the absence of an invidious and discriminatory design to favor one individual over another, a state agency's purchasing decision is not subject to review in federal court." *See, e.g.*, *Foto USA*, 141 F.3d at 1036-37. Gannett has presented no evidence of any such "individious and discriminatory design," nor can it. Rather, the agreement that exists between WWWY and the WIAA is a contract for services, exclusive by necessity to make it worthwhile for WWWY to provide the multiple services needed by the WIAA and pay significant amounts of money. The WIAA's previous experiences demonstrated the need for such exclusive contracts. Prior to the WWWY contract, distribution of the WIAA tournaments was very limited. FOF 91-96, 205; AFOF 25 . As of 2005, the vast majority of the WIAA's sporting events were not carried by *any* media organization. FOF 91-96. Nor was the WIAA aware of any internet streaming of its tournament events. FOF 91-96. When the WIAA approached existing rights holders about broadcasting additional events, specifically WIAA volleyball and wrestling, the rights holders rejected those overtures citing, among other things, concerns about production costs. FOF 91-96; AFOF 25.

There are multiple legitimate purposes for the WIAA exclusive rights contract, as discussed in the WIAA's Opening Memorandum in Support of Plaintiffs' Motion for Summary

Judgment. *See* WIAA Br. at 32-36. The money paid for the exclusive contract provides much needed revenue to the WIAA for use in furthering the organization's purposes, for example, for funding otherwise under-funded and under-exposed tournament events. FOF 244, 252, 287. The WIAA seeks to have exposure for as many WIAA sports as possible. FOF 17-21. The revenue from the exclusive contract creates opportunities for participation for Wisconsin student athletes that otherwise would not exist, and provides expanded exposure for less visible sports. FOF 247-48, 252, 254. Indeed, the combined services supplied by WWWY to the WIAA cost WWWY over $508,000 annually, thus providing a substantial cost-savings for the WIAA, and a legitimate interest in establishment of such a contract. *See Bervid v. Alvarez*, 647 F. Supp. 2d 1006, 1013 (N.D. Ill. 2009) (holding that state governments have a legitimate interest under the Fourteenth Amendment in conserving fiscal resources); FOF 242. WWWY provides services—services that the WIAA does not pay for—in addition to the transmission of games, including video production, audiovisual and graphics support for tournament games such as producing video programming for scoreboards at tournament sites. FOF 167-82. WWWY provides web transmissions of the WIAA meetings, allowing members, officials and coaches to attend remotely thereby avoiding the cost of travel. FOF 169. WWWY produces an annual video that compiles highlights of all state WIAA tournaments throughout the year. FOF 171. It films and edits a variety of WIAA ceremonies, provides live game feeds to the video board at championship tournaments, films line-up and introduction videos and team videos, and creates public service announcements. FOF 167-82. WWWY has also obtained advertising revenue for the WIAA (thus far at least $80,000) from a sponsorship partner. FOF 130. Finally, WWWY operates and manages the wiaa.tv web portal as part of its contractual responsibilities and at no cost to the WIAA. FOF 195. It is the collection of these services, the cost-savings to the WIAA,

and the promotion of the WIAA's educational goals that provide the legitimate interest and, hence, the rational basis for the existence of the WIAA's exclusive rights policies. Gannett's argument that WWWY does not cover all tournament events itself in no way supports its argument that the exclusive rights contract has no legitimate purpose. The contract served to increase the amount of coverage possible and create a structured system (including development of relationships with numerous affiliates) to allow the WIAA and WWWY to monitor what events are being broadcast and distribute those events to interested persons via one source. FOF 167-182, 183-196, 203-206. Moreover, WWWY's contracts with affiliates expand the number of games produced, and WWWY has never turned down a request for an affiliate relationship. FOF 155.

Gannett's suggestion that the contract "has negative repercussions for . . . the public, its high schools and its student athletes" is a red herring. Gannett does not list any alleged negative repercussions for these groups, instead listing business costs, license fees and revenue issues under the terms of the exclusive rights contract. Def. Br. at 35. In fact, Gannett would have the WIAA increase its charges for the public to attend WIAA events rather than have media pay fees for the opportunity to live-stream games. Def. Br. at 8; FOF 253. Aside from depriving the WIAA of its business discretion about how much an event should cost (an issue not subject to this litigation), adopting Gannett's position to increase the cost of admission for tournaments would undermine the WIAA's goal of making the events an affordable, family-friendly outing. FOF 76; 253; AFOF 51. Gannett's interests are focused solely on the business of making money, not the promotion of WIAA sports as a whole or the benefit of the student athletes and the schools. *See* AFOF 75-76.

Gannett also complains that the exclusive partner was not selected through a bidding process, but the Fourteenth Amendment requires no such process, and the WIAA was and is entitled to contract on a first-come, first-serve basis. *Hubbard Broad.*, 797 F.2d at 556-57. Indeed, nothing stopped Gannett from "bidding" for a contract by contacting the WIAA with a proposal. It chose not to do so. In fact, Gannett newspapers did not even have the technology to do the kind of internet streaming at issue until the summer of 2008. PFOF 40; AFOF 77. Further, when the WIAA attempted to raise the issue of internet-related policies with media representatives in the past, it received no response. FOF 240-41. Moreover, Gannett sets forth no evidence of any "invidious design" by the WIAA and WWWY. The pre-existing contracts with other vendors for the Football State Finals, Boys and Girls State Basketball Tournament and Boys and Girls Hockey State Finals, about which Gannett has never complained, evidence the WIAA's policy of operating on a first-come, first-serve basis. FOF 79, 81; AFOF 83. As Gannett acknowledged in its opening brief, WWWY's contract in fact had to be negotiated with an exception to allow for these pre-existing exclusive rights contracts. *See* Def. Br. at 33; *see also* AFOF 84. Gannett's late objection to these types of contracts comes from its recognition of the internet as a source for revenue. Gannett newspapers carry substantial advertising with the WIAA sports stories. AFOF 74. It is noteworthy that the events Gannett newspapers live-streamed or sought to live-stream were WIAA tournament football games. PFOF 63, 74. Contrary to the WIAA's goals of getting exposure for its many and varied sports, including those less visible, Gannett and WNA actions show merely that the newspapers seek access to the popular, revenue-making events.[16]

[16] Football, basketball, and hockey are the main revenue-making events for WIAA, with the vast majority coming from football and basketball tournament revenue. FOF 57-60, 91, 93, 94.

E. Copyright Law Does Not Preempt the WIAA's Ability to Prohibit Gannett from Transmitting Its Sporting Events

Gannett's final challenge to the WIAA's policies maintains that "the WIAA's media policies are inconsistent with Gannett's copyrights." Def. Br. at 36. Gannett's argument has two components. First, Gannett appears to argue that the WIAA cannot control who can tape and transmit its events. Second, Gannett contends that it is the owner of a valid copyright in game recordings it made without authorization of the rights holders.

With regard to Gannett's first argument, the bulk of Gannett's brief is directed at the WIAA's original complaint, which was later amended and that has no bearing on Gannett's motion for summary judgment on its own counterclaims the subject of the current dispute. *See* Def. Br. at 37-38. Regardless, and as argued in detail in the WIAA's own motion for summary judgment, the federal copyright law does not preempt the WIAA's right to prohibit internet transmissions at its events. Gannett devotes a single paragraph to the WIAA's current allegations, in which Gannett argues that the WIAA, as a state actor for purposes of this litigation, does "not have the same right a private professional sports league may have to restrict and condition media access to the events its sponsors." Def. Br. at 39. As addressed *supra*, neither the First nor Fourteenth Amendments prohibit the WIAA from restricting recordings at its tournament events. Gannett fails to come forward with any additional support for its position, and should be barred on reply. *Third Wave Techs., Inc. v. Stratagene Corp*., 405 F. Supp. 2d 991, 1001-02 (W.D. Wis. 2005) (Crabb, C.J.) ("[D]efendant waived its opportunity to show that the patents at issue were anticipated or made obvious when it did not raise the argument in its opening brief."). Accordingly, it is not entitled to summary judgment.

Gannett also asserts that it is the owner of the copyright in four internet streams it made without authorization from the WIAA or WWWY. As argued in detail in the WIAA's motion

for summary judgment, Gannett's copyright does not vest in works recorded without authority of the author. *See Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134, 1138 (N.D. Ill. 1997) ("To be fixed in a tangible form, the work must be recorded by or under the authority of the author. 17 U.S.C. § 101 (1994). Because plaintiffs consented to the videotaping, the definition of 'fixed' is satisfied."). Here, the WIAA did not consent to the streaming of its event, and Gannett lacked the authority to fix the game in a tangible medium of expression. FOF 209-14; AFOF 46. Thus, Gannett cannot hold a valid copyright in its transmission, and its motion for summary judgment should be denied.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully requests the Court deny Defendants' Motion for Summary Judgment.

Dated this 12th day of February, 2010.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, AMERICAN HI-FI, INC.,

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

Motions for leave to file amicus curiae briefs are rare at the district court level for good reasons. Indeed, they are the same reasons our circuit court disfavors amicus briefs even on appeal -- "amicus curiae briefs can be a real burden on the court system. In addition, the filing of an amicus brief imposes a burden of study and the preparation of a possible response on the parties." *Nat'l Organization for Women, Inc. v. Schiedler*, 223 F.3d 615, 616 (7th Cir. 2000). The motions before this Court demonstrate the wisdom of the Seventh Circuit's policy "never to grant permission to file an amicus curiae brief that essentially duplicates the brief of one of the parties . . . ." *Id*. at 617. They should be denied.

The Arizona Interscholastic Association, Inc. ("AIA") offers "to provide a unique perspective on the issues before this court" in its proposed amicus brief. AIA Motion, p. 1. However, the brief submitted with the AIA's motion does not refer to the Constitution, any case law or statute. It contains no legal argument whatsoever. The AIA would urge this Court to "grant WIAA's motion for summary judgment" purely for policy reasons. Like the WIAA, the

AIA says it finds exclusive media-rights contracts a useful means to raise revenue and does not want to stop using them.[1] *See, e.g.*, AIA Brief, p. 7 ("Exclusivity adds value."). The fact is immaterial, however, because the "issues before this court," which the AIA promised its brief would address, concern whether those policies are constitutional.

The National Federal of State High School Associations ("NFHS") similarly offers "to provide unique insight into the value and role" of exclusive media-rights contracts in high school athletics. NFHS Motion, p. 3. Yet, the NFHS's proposed brief and its executive director's supporting affidavit merely parrot the arguments of the WIAA and its expert. Like the AIA, moreover, the NFHS makes only broad policy arguments, expressly disclaiming any intention "to address the legal issues" before this Court. Given that, there is no reason to grant their motions. NFHS Brief, p. 3.

The AIA and NFHS motions fail the standards the Seventh Circuit has set for amicus participation before its court:

> No matter who a would-be amicus curiae is, therefore, the criterion for deciding whether to permit the filing of an amicus brief should be the same: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs. The criterion is more likely to be satisfied in a case in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond the what parties can provide.

[1] The AIA also claims that, like the WIAA, its exclusive rights policies somehow help it to combat "safety issues relating to the inappropriate use of photos taken at high school events." AIA Brief, p. 10. It cites two news stories about incidents in other states to justify its concern, but does not claim that the images in those examples were taken by credentialed media at high school tournament events nor does it attempt to explain how exclusive media-rights policies might prevent similar problems from occurring in Arizona. The AIA's physical safety example also misses the mark, *id*. at 9-10, since the incident it cites in which someone collided with a television camera operator apparently occurred *despite* the AIA's exclusive policies. Moreover, the AIA fails to explain why it thinks exclusivity provides greater safety than would the allocation of limited camera-location space on an equal basis using neutral selection criteria.

Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003) (chambers opinion) (citations omitted). The briefs the AIA and NFHS seek leave to file do nothing "more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting." *Id.* Constitutional adjudication is not a popularity contest. That the WIAA's position is supported by other state high school athletic associations and their national organization adds nothing of value to this case.

Neither NFHS nor the AIA claim a direct interest in any other case that might be materially affected by the outcome of this case. The WIAA and its exclusive partner, WWWY, moreover, are represented by three law firms and at least six lawyers. They do not need help addressing the legal issues before this Court and their proposed amicus supporters do not offer any.

This Court should apply the Seventh Circuit's standards for granting leave to participate as amicus curiae. Because the AIA and NFHS briefs merely parrot the WIAA's position and fail to address any of the legal issues presented, they would not assist the Court. Accordingly, their motions should be denied.

Dated: February 16, 2010.

s/Robert J. Dreps

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANTS' AFFIDAVITS SUPPORTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Wisconsin Interscholastic Athletic Association ("WIAA") and American HiFi, Inc., d/b/a When We Were Young Productions ("WWWY"), by their below referenced attorneys, hereby submit this Memorandum of Law in Support of Plaintiffs' Motion to Strike Portions of Defendants' Affidavits Supporting Defendants' Motion for Summary Judgment.

INTRODUCTION

Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment, governs the submission of affidavits with summary judgment motions. That rule provides: "A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e)(1). In this case, Defendants submitted the Affidavits of Danny L. Flannery ("Flannery"), David Schmidt ("Schmidt") (Dkt. No. 43), Joel Christopher ("Christopher") (Dkt. No. 36), and John W. Dye ("Dye") (Dkt. No.39) in support of Defendants' Motion for Summary Judgment. These affidavits, however, contain allegations that do not satisfy the requirements of

Rule 56(e)(1). "An affidavit that does not measure up to the standards of 56(e) is subject to a motion to strike." *Noblett v. Gen. Elec. Credit Corp*., 400 F.2d 442, 445 (10th Cir. 1968); *Hollander v. Am. Cyanamid Co.,* 172 F.3d 192 (2d Cir. 1999). Therefore, Plaintiffs filed a Motion to Strike those portions of the four above-referenced Affidavits that violate the requirements of Rule 56(e).

ARGUMENT

I. DEFENDANTS' AFFIDAVITS LACK PERSONAL KNOWLEDGE.

Because Rule 56(e) requires summary judgment affidavits to be made on personal knowledge, affidavits "must include enough factual support to show that the affiant possesses that knowledge." *El Deeb v. Univ. of Minn.,* 60 F.3d 423, 428 (8th Cir. 1995); *see also Box v. A & P Tea Co.*, 772 F.2d 1372, 1378 (7th Cir. 1985) (affidavit must affirmatively show personal knowledge); *see also* Procedure to Be Followed in Motions for Summary Judgment attached to Preliminary Pretrial Conference Order (Dkt. No. 14, at 13) ("Affidavits must be made by persons who have first hand knowledge and must show that the person making the affidavit is in a position to testify about those facts." It is Defendants' burden "to show circumstances indicating knowledge," not Plaintiffs' burden "to refute a bald, unsupported assertion of competence to testify." *Schneider v. United States*, 257 F. Supp. 2d 1154, 1158 (S.D. Ind. 2003).

A. Portions of Flannery's Affidavit Lack Personal Knowledge.

Flannery alleges in paragraph 6 of his affidavit that "streaming of news events has become a matter of routine for … other … newspapers over the past year," and that "[o]ther news organizations … have done streaming over the Internet with regularity since the early 2000s." He has not presented any evidence in his affidavit, however, to establish how he knows the practices of other news organizations with respect to internet streaming. Indeed, his

experience with news organizations appears from his affidavit to be limited to *The Post-Crescent* and the *Green Bay News-Chronicle*. Flannery Aff. ¶¶ 2-3. This is hardly sufficient experience to establish personal knowledge of the streaming practices of "other news organizations."

Flannery also has not established how he knows that "more people are available" to be analysts for live streaming, as he alleges in paragraph 21 of his affidavit.

B. Portions of Schmidt's Affidavit Lack Personal Knowledge.

Schmidt makes various allegations in his affidavit regarding policies of school districts related to athletic events, including the following: making up missed classroom hours (¶6); school attendance policy (¶8); excusing students from class (¶9); transporting students to state tournament games (¶9); paying for supervisory personnel to travel with students (¶9); student activity fees (¶15); and the activities of booster groups (¶16).

Schmidt, however, has not presented any evidence in his affidavit to establish how he knows the policies of any school district other than the Ashwaubenon, Waukesha and Appleton school districts where he is presently or was previously employed. (¶¶ 2-3). His statement that he is "familiar with the general functioning of other school districts" through his involvement with various school related organizations (¶ 4) does not support knowledge of these specific policies.

C. Portions of Christopher's Affidavit Lack Personal Knowledge.

Christopher alleges in paragraph 20 of his affidavit that "the majority of press boxes are large enough to accommodate more than one crew engaged in Internet streaming." He has not shown sufficient evidence in his affidavit, however, to establish that he has any knowledge of that fact. His statement that he has "significant experience," does not indicate how many venues

he has been to, in what locations, or for what sports, which would be necessary to make a determination as to whether he has knowledge about "the majority of press boxes."

II. DEFENDANTS' AFFIDAVITS CONTAIN ALLEGATIONS INADMISSIBLE IN EVIDENCE.

Rule 56(e) requires that summary judgment affidavits "set out facts that would be admissible in evidence." In accordance with this requirement, "conclusory statements, unsupported by the evidence of record, are insufficient to avoid summary judgment." *Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001). In addition, "self-serving affidavits without factual support in the record will not defeat a motion for summary judgment." *Id.*; *see also Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999) (statements that are "merely conclusory" do not meet the requirements of Rule 56(e)); *MAPCO, Inc., v. Carter*, 573 F.2d 1268, 1282 (Temp. Emer. Ct. App. 1978) ("self serving, conclusionary affidavits…are inadmissible and ineffective…").

Further, "statements that are the result of speculation or conjecture" do not meet the requirements of Rule 56(e). *Stagman*, 176 F.3d at 995; *see also United States v. Mt. Vernon*, 345 F.2d 404, 407 (7th Cir. 1965) ("[i]ntangible speculation does not raise an issue of material fact"). Also, "a party may not rely upon inadmissible hearsay in an affidavit" on summary judgment. *Bombard v. Fort Wayne Newspapers,* 92 F.3d 560, 562 (7th Cir. 1996).

Finally, lay opinions that have not demonstrated personal knowledge of the facts asserted are not admissible, and are a "meaningless assertion." *Stagman*, 176 F.3d at 995-996. Even if opinion evidence were admissible, because "opinion evidence must ordinarily be evaluated by the finder of the facts, an affidavit containing admissible opinion evidence in support of a motion for summary judgment is not conclusive." *MAPCO*, 573 F.2d at 1282.

A. Portions of Flannery's Affidavit Contain Inadmissible Evidence.

In paragraph 11 of his affidavit, Flannery asserts that "I have reviewed the definition of 'Live play-by-play' in the Media Guide and am unable to determine what standard WIAA would apply …." Flannery concludes in paragraph 12 of his affidavit that "the definition is vague." None too coincidentally, the Defendants argue in their Brief in Support of Defendants' Motion for Summary Judgment that "the WIAA's regulation of play-by-play commentary about tournament events also is void for vagueness." (Dkt. No. 32, at 14), Thus, the "factual" assertions in Flannery's affidavit attempt to answer the very legal argument that the Defendants are raising in this litigation. As such, these allegations are merely conclusory and inadmissible.

Flannery asserts in paragraph 13 of his affidavit that "[*i]f The Post-Crescent* lost credentials… it is *my opinion* that *The Post-Crescent* would likely lose a significant percentage of its print and online readership." There is no evidence in the record that 1) *The Post-Crescent* has ever been in jeopardy of losing its credentials or that 2) Flannery has any experience with such a loss sufficient to have knowledge of the consequences of some speculative event. Because this is speculation and Flannery has not established that he has the requisite personal knowledge for expressing this opinion, it is not admissible.

In paragraphs 19 and 20 of his affidavit, Flannery asserts that other media entities transmitting football games "would have created an entirely different work product" (¶19), and "would likely not have been able to produce a transmission of equal interest to high school sports fans." (¶20), There is no evidence in the record that 1) any other media entity did create a different work product, 2) Flannery has any knowledge of how any other media *would* transmit a football game, or 3) how such an imagined transmission would have been received by fans.

Because this testimony is speculation and Flannery has not established that he has the requisite personal knowledge for expressing this opinion, it is not admissible.

In paragraph 21 of Flannery's affidavit, he argues that his newspaper "intends to compete," "*if* we are able to Livestream WIAA-sponsored playoff games *on equal terms*." (emphasis added). This is conclusory and self-serving. Whether the WIAA's policies deprive the media from such "equal terms" is a question to be resolved in this litigation.

Flannery states in paragraph 26 of his affidavit that: "[w]e have…heard how appreciative people are about our efforts and how it gives them an opportunity to connect with their families and alma maters in a way that is not available to them anywhere else." This is hearsay because it refers to statements of individuals other than Flannery offered to prove the truth of the matter asserted. Thus, it violates Rule 801 of the Federal Rules of Evidence.

B. Portions of Christopher's Affidavit Contain Inadmissible Evidence.

Christopher states in paragraph 7 of his affidavit that people "make a point of telling us" that they "enjoy the real-time information gathering and interaction…." This is hearsay because it refers to a statement made by individuals other than Christopher offered to prove the truth of the matter asserted. Thus, this offered testimony violates Rule 801 of the Federal Rules of Evidence.

C. Portions of Dye's Affidavit Contain Inadmissible Evidence.

Dye states in paragraph 14 of his affidavit that "The *Green Bay Press-Gazette* does not seek in this action to establish or benefit from an unnatural monopoly on access to reporting and commenting on public events. We seek only a level playing field." He also states in paragraph 20 that "[t]he *Green Bay Press Gazette* has no interest in seeking exclusive rights to cover any event using any technology." These are conclusory and self-serving allegations. Whether the

WIAA's policies create an "unnatural monopoly," or deprive the media from such "a level playing field" are questions to be resolved in this litigation. Further, Defendants have complained about the WIAA's contract with WWWY as being a "no-bid" contract, as if to suggest that were the contract open for bid, Defendants would have bid on it (otherwise there can be no purpose for complaining about the contract not being open for bids, as opposed to complaining merely about its exclusivity). Their "no-bid" complaint contradicts the claim that they do not want an "unnatural monopoly," or do not seek "exclusive rights."

Dye asserts in paragraph 15 of his affidavit that "using an Internet streaming platform technology called Livestream, *is likely to* expand the *Green Bay Press Gazette*'s audience." This is speculative and conclusory. There is no basis for knowing how audiences will react to various technologies, and Dye has not asserted any basis for his prediction of the future.

In paragraph 17 of his affidavit, Dye asserts that, with respect to internet streaming, "a fee of $250 per event is an excessive fee." This statement begs the question of whether the WIAA has the right to impose such a fee, one of the fundamental legal questions in this litigation. Thus, the "factual" assertion in Dye's affidavit, by providing the answer to the legal question, is conclusory and inadmissible.

III. DEFENDANTS' AFFIDAVITS CONSTITUTE DISCOVERY VIOLATIONS.

Defendants alleged in their Counterclaim that "[n]early all WNA members … report on high school athletic competitions over the Internet…WNA members use their Websites to show visitors additional photographs of high school athletic events and some utilize Internet streaming to provide the public video images, including whole competitions, on a live or delayed basis." (Defs' Counterclaim, Dkt No. 2, ¶ 8), Defendants' Counterclaim also alleged that "each of

Gannett's daily newspapers in Wisconsin operate a Web site and reports on high school sports throughout its coverage area both in print and over the Internet." (*Id*. ¶ 11)

On June 22, 2009, Plaintiffs served Interrogatories on Defendants, to which Defendants responded in August of 2009. Nero Decl. Exs. 18, 19 (Dkt. Nos. 52-19, 52-20). Interrogatory number 14 requested the Defendants to "state the complete factual basis for the allegations in Paragraph 8 of your Counterclaim regarding WNA members' reporting of high school sports over the Internet…", including an identification of witnesses and documents. *Id.* at 12. Defendants responded by referring to their response to Interrogatory No. 13, which stated as follows:

> [N]ews readers statewide know that "WNA members have covered Wisconsin high school sports from their inception," as alleged. Verification is available in the local newspaper archives of every public library in the state and the Wisconsin State Historical Society. In addition, Peter Fox has knowledge of the history of WNA members' coverage of Wisconsin high school sports and additional information about WNA members' more recent coverage of interscholastic high school competitions can be obtained from WNA members' websites and in print publications available at newsstands throughout Wisconsin.

Id. Interrogatory number 15 requested the Defendants to "State the complete factual basis for the allegations in Paragraph 11 of Your Counterclaim regarding Gannett's newspapers reporting of high school sports over the Internet, …" including identification of witnesses and documents. *Id.* Defendants responded as follows:

> [i]nformation about each Gannett newspaper's online and print reporting of high school sports can be obtained by reviewing each Gannett newspaper's Web site and print publications. All of the employees and readers of these newspapers have knowledge of these facts.

Id. Defendants have now submitted in support of their motion for summary judgment a large volume of information through affidavits that is responsive to these requests that was not previously disclosed.

Although the interrogatories specifically requested the identity of witnesses with knowledge of these facts, neither Flannery, Christopher or Dye were identified as witnesses, yet now the Defendants have submitted their affidavits containing information specifically about the subject of newspapers' reporting of high school athletics over the internet. Each of those three affidavits contain substantial information describing in detail exactly how the Defendants "report on high school athletic competitions over the Internet," as alleged in their Counterclaim. They describe in detail the "Mogulus/Livestream" technology that they use to stream high school athletic games; the procedures for producing, editing and streaming a Livestream event; how they use that technology to produce the "Varsity Roundtable" which discusses high school sports, including how many participants; how many games have been carried on their websites; how many viewers watch Livestream or access their websites; how many participants they have had for "Coverit Live" live online conversations about high school athletics; and how many high school events have been produced using Livestream.

In this case, a motion to compel under Fed. R. Civ. P. 37(a) is not warranted because the Defendants did respond to the discovery requests, albeit incompletely. Now they are trying to use the information they withheld to support their motion for summary judgment. In such a case, the failure to fully disclose all relevant information equates to a failure to supplement their earlier response under Rule 37(c)(1), which warrants sanctions. Among the permissible sanctions under Rule 37(c)(1) is that "the party is not allowed to use that information or witness to supply evidence on a motion." In addition to the permissible sanctions under Rule 37(c)(1), courts have "inherent power to sanction" discovery violations. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 344 (6th Cir. 2002).

In determining whether to exclude evidence not disclosed in discovery, the court should consider: "(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596-97 (4th Cir. 2003).

In this case, Plaintiffs are substantially surprised about the existence of this detailed information given Defendants' earlier response to the Plaintiffs' interrogatories. The surprise is compounded by the late date at which such evidence is disclosed, and to support the Defendants' summary judgment motion to which Plaintiffs are now obligated to respond. There is no time or opportunity for Plaintiffs to cure the surprise given the short court deadlines for response. Allowing the evidence at this stage would disrupt the proceedings because the parties have expended considerable effort to bring this case before the court on cross motions for summary judgment, which should be allowed to proceed. The Defendants apparently believe the evidence is important, as they rely upon it to support their position on summary judgment. Finally, the Plaintiffs are not aware of the Defendants' reasons for failing to disclose the evidence.

For these reasons, Plaintiffs believe the exclusion of evidence that should have been produced in response to discovery is an appropriate sanction for the Defendants' discovery violation, and a remedy to avoid the prejudice to Plaintiffs from such a failure of disclosure.

WHEREFORE, for the reasons stated above, Plaintiffs respectfully request that the above referenced portions of the Affidavits submitted by Defendants in support of Defendants' Motion for Summary Judgment be stricken from the record.

Dated this 12th day of February, 2010.

Respectfully submitted,

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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.

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION'S BRIEF IN SUPPORT OF MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

I. INTRODUCTION

Plaintiff, Wisconsin Interscholastic Athletic Association ("WIAA"), by and through its attorneys, Mawicke & Goisman, S.C., submit this Brief in Support of Arizona Interscholastic Association, Inc. ("AIA"), and National Federation of State High School Association's ("National Federation"), Motions for Leave to File Amicus Curiae Briefs with this Court in the above-referenced matter.

After reviewing the proposed Amicus Curiae Briefs from both AIA and National Federation, WIAA believes these briefs more than satisfy the criteria for acceptance by this Court. The Briefs will provide the Court with perspective and understanding, further in resolving the issues presented that cannot always be provided by adversarial parties seeking to gain advantage in litigation.

For those reasons, and as outlined below, WIAA respectfully requests this Court grant AIA and National Federation's Motions and accept the proposed Briefs into the record in this matter.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure neither expressly provide for, nor expressly prohibit, Amicus Briefs at the District Court level. The District Court has inherent authority to appoint an Amicus, however, even in the absence of a statute or rule providing for same. Jin v. Ministry of State Security, et. al., 557 F.Supp. 131, 136, (D.D.C. 2008); State, ex rel. Com'r of Transp. v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001). Federal Rule of Appellate Procedure 29 governs Amicus Curiae Briefs in the Appellate Courts and provides what appears to be the touchstone analysis for the District Court as well. Id.

The criteria by which a Motion for Leave to File an Amicus Curiae Brief should be evaluated are well established. These criteria are generally found to be satisfied when:

- The Brief would assist the Court in understanding and resolving the issues presented;
- The Brief would provide a perspective and arguments not represented by the parties;
- The Brief would provide an objective, non-adversarial analysis of the issues;
- The Amicus has a legitimate interest in the issues presented or in the development of the law in that area;
- The interest of the Amicus are not adequately represented by the parties;
- The Amicus does not merely repeat or rework the arguments of the parties; and,
- Permitting the Brief would not cause undue delay.

See, generally, Jin, *supra*; Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d 542 , 545 (7th Cir. 2003); Fed. R. App. P. 29.

III. ARGUMENT

A review of the proposed Briefs reveal that they satisfy all the aforementioned criteria for the Court. The Briefs provide the Court with an analysis that will help to understand and resolve the issues being presented to this Court. The Briefs also provide a national perspective regarding the impact of this Court's decision, raising arguments which are difficult for the adversaries in this matter to present to the Court. The Briefs also have the opportunity to provide the Court with a non-adversarial analysis of the issues, which may lend credibility to the analysis. Permitting the Briefs would not cause undue delay, furthermore, as the proposed Briefs have already been submitted with the Court and no additional time for filing would be necessary.

IV. CONCLUSION

Due to the complexity of the issues facing this Court, WIAA believes that the Court would benefit from the non-adversarial analysis and broader perspective AIA and National Federation's Briefs bring to the table. The parties in this litigation bring complex issues to the Court to resolve, and providing such an analysis will not slow down the litigation. In fact, AIA and National Federation's analysis may assist the Court in resolving some or all of the claims more efficiently. As such, the Wisconsin Interscholastic Athletic Association respectfully requests that the Court grant the Arizona Interscholastic Association and National Federation of State High School Associations Motions for Leave to File Amicus Curiae Briefs and accept the proposed Briefs submitted into the record for consideration.

Dated this 16th day of February, 2010.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

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

Plaintiffs,

v.

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

Defendants.

ORDER

09-cv-155-vis[1]

- -

Two nonparties have moved for leave to file amicus briefs in this case raising the question whether defendants Gannett Co., Inc. and Wisconsin Newspaper Association, Inc. must obtain a license from plaintiff Wisconsin Interscholastic Athletic Association if they wish to transmit games sponsored by plaintiff over the internet. Dkt. ##27 and 67. The National Federation of State High School Associations is a group of high school athletic associations from across the country. The federation says that it has "a substantial interest

[1] The parties have declined the jurisdiction of the magistrate judge in this case. Because no Article III judge has been assigned, I am assuming jurisdiction over the case for the purpose of resolving the parties' current disputes.

in ensuring that its members are free to enter into the types of contracts at issue here" so that they may generate "revenue essential to funding association-sponsored state championships in all sports." Dkt. #67-2, at 2-3. The Arizona Interscholastic Association, Inc. is "a voluntary association of public and private high schools that serves to supplement the overall aims and objectives of secondary schools by organizing, developing, directing and regulating interscholastic activities among its members." Dkt. #27-2, at 1. Like plaintiff, it restricts media access to events it sponsors.

Defendants oppose the motions of the federation and the association, dkt. #89; plaintiff supports them. Dkt. #92. Having reviewed the briefs, I see no reason to exclude them. Both groups have an interest in the lawsuit and both groups present a perspective not fully represented by any of the parties. To the extent defendants believe that any amici's arguments are incorrect or irrelevant, I will give them an opportunity to file a responsive brief.

ORDER

IT IS ORDERED that the motions filed by the National Federation of State High School Associations, dkt. #67, and the Arizona Interscholastic Association, Inc., dkt. #27, for leave to file an amicus brief are GRANTED. If they wish to file responsive briefs, the

parties may have until March 5, 2010 to do so.

Entered this 18th day of February, 2010.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-0155

v.

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

Defendants.

BRIEF OF AMICUS CURIAE ARIZONA INTERSCHOLASTIC ASSOCIATION, INC. IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTEREST OF AMICUS CURIAE

I. BACKGROUND.

The Arizona Interscholastic Association, Inc. ("AIA") is a non-profit Arizona corporation, with its principal office located in Phoenix, Arizona. (Declaration of Charles C. Schmidt in Support of Motion of Arizona Interscholastic Association, Inc. to File Amicus Brief and Supporting Declaration ("Schmidt Dec.") ¶ 2.) Established in 1925, AIA is a voluntary association of public and private high schools that serves to supplement the overall aims and objectives of secondary schools by organizing, developing, directing and regulating interscholastic activities among member schools. (*Id.*) AIA strives to initiate and pursue policies that will safeguard the educational value

of interscholastic contests and cultivate cooperation, friendship and good sportsmanship among member schools. AIA seeks to encourage maximum student participation and to organize events in a manner that ensures fair and equitable competition. AIA also seeks to ensure the safety of high school youth who participate in athletics and other interscholastic activities and to prevent the commercial and other exploitation of student participants. (*Id.* ¶ 3.)

AIA currently has 275 member schools, who in turn have an enrollment of 311,893 students. (*Id.* ¶ 4.) AIA's operations are financed in part by membership dues and participation fees. In addition to paying annual dues and fees, AIA members must agree to abide by all AIA rules and regulations as a condition of membership. This includes rules on student eligibility, practices, non-school participation, recruitment, use of drugs, alcohol and tobacco, and other rules and regulations designed to protect the health and safety of student participants. (*Id.* ¶ 5.)

AIA conducts state tournaments for its member schools. These tournaments typically consist of several rounds of play, resulting in the "crowning" of a state champion. State tournaments require significant coordination and funding. It is doubtful that Arizona high school athletes would be able to participate in state tournament play absent the resources that AIA makes available. (*Id.* at ¶ 6.)

II. AIA HAS A POLICY THAT REGULATES MEDIA ACCESS TO AIA-SPONSORED EVENTS AND WOULD BE HARMED BY A DECISION GRANTING DEFENDANTS THE RELIEF THEY REQUEST.

AIA and other similar interscholastic associations would be harmed if the defendants in this action are granted the relief they have requested. Although a decision by this court would not be controlling on the courts in Arizona or in other states, it may be viewed as persuasive authority by those courts. Accordingly, AIA believes it is important that the court consider the far-reaching effects of its decision and its potential impact on AIA and other interscholastic associations throughout the country.

Like the WIAA, AIA has established a policy relating to media coverage of the events it sponsors. (*Id.* ¶ 7 and Ex. A.) The current policy was adopted in 2008, with input from Gannett Co., Inc., one of the defendants in this case. (*Id*. ¶ 7.) Pursuant to AIA's policy, members of the media who wish to have access to a facility for purposes of covering an AIA-sponsored event must first obtain a media credential from AIA. (*Id.* Ex. A ¶ 1.) Those who are issued credentials by AIA must agree to abide by the AIA's rules. (*Id.* Ex. A ¶ 6) There are several additional aspects of the credentials that bear on the issues involved in this case.

First, AIA prohibits the transmission and distribution of any broadcast on a live basis or any live audio or video description of any game action while it is still in progress, absent rights granted in accordance with a specific written contract with AIA. (*Id.* Ex. A ¶ 4.) Up to five minutes of video footage of a game or of interviews taken at an event may be used by the credentialed media agency, but only for news broadcasts, dedicated

highlight shows, weekly coaches shows and athletic activity-specific shows. (*Id.* Ex. A ¶ 3.) There is no prohibition against updating scores of the contest while the contest is in progress (except from the courtside/field side), nor is there any restriction on reports concerning non-event activities, other than on a live basis from inside the facility. (*Id.* Ex. A ¶ 4.)

Second, AIA limits the use of the descriptions, accounts, photographs, films, audio or visual recordings, or drawings of or relating to an event "primarily to news and editorial coverage of the event." (*Id.* Ex. A ¶ 2.) Such materials may not be "exploited by the [media] agency for commercial purposes." (*Id.*) An exception is made for the sale of photographs to "ultimate consumers" who agree not to resell the photographs or use them for commercial purposes. (*Id.*) Photographs taken during an AIA event by credentialed media may be sold only if the sale includes an acknowledgment that the photos were obtained at an AIA event and with the permission of AIA. (*Id.*)

Third, AIA tries to ensure that those who receive credentials are reputable individuals or entities. Each year, AIA receives hundreds of requests for credentials. Not all requests are granted. Rather, AIA carefully reviews each request in accordance with pre-established criteria to ensure that the member of the media making the request is affiliated with a properly accredited agency that has a legitimate media-related function in connection with the event at issue. (*Id.* ¶ 8.) Credentials are not issued, for example, to members of the media who are not reporting the news, but who instead wish to use the photos they take for commercial purposes (*e.g.*, selling mugs, t-shirts and the like with

images of student athletes). Similarly, persons looking for the opportunity to take photos they can post in chat rooms or on message boards will not be granted credentials, nor will recruiters desiring to sell highlight tapes to students or their parents. Walk-ins are not permitted and credentials are checked at the events. (*Id.* ¶ 9.) Credentials are expressly nontransferable and may be revoked at AIA's discretion. (*Id.* Ex. A ¶ 1.)

Finally, a person or entity accepting AIA's media credential agrees to assume all risks incident to his or her attendance at the event and releases AIA from any liability arising in connection with their attendance at the event or the creation and use of materials relating to the event. (*Id.* Ex. A ¶ 5.) The person or entity obtaining the credentials also agrees to indemnify, defend and hold harmless AIA from any liability, loss, or expense arising out of the issuance of the credentials, the person's presence at the facility or any other activity connected with the event, including any claims that the materials infringe on the intellectual property rights, publicity rights, or any other rights of any third person. (*Id.*)

The AIA credentialing process applies to all competitive activities sponsored by the AIA. Thus, the AIA maintains the right to control media access to competitive academic events, as well as competitive sporting events. (*Id.* ¶ 11.)

As noted above, AIA's media policy retains for AIA the exclusive right to broadcast tournament games on a live basis. Since September, 2009, AIA has been broadcasting tournament games via live streaming and on-demand streaming over its own website, AIA365.com. In addition to streaming tournament games, the website is used to

permit schools to stream regular season events if they wish to do so. The AIA365.com website not only permits students, their parents and other fans to view games they might not otherwise be able to view, but also serves as a significant source of revenue to AIA, given AIA's ability to sell sponsorships and advertising space on the website. (*Id.* ¶ 12). Revenue from sponsors and advertisers since September, 2009 totals close to $150,000. (*Id.*) Although it is still relatively new, the website is heavily utilized. In December, 2009, the website recorded 1.6 million streams. (*Id.* ¶ 13.)

In recent years, an additional and significant source of revenue for AIA was a contract that it had with Cox Broadcasting, an Arizona broadcasting company, for the rights to television broadcasting of certain AIA-sponsored athletic events. In exchange for granting Cox the exclusive right to produce and broadcast state tournament games, AIA was able to obtain significant consideration from Cox, both in cash and in-kind. In-kind consideration included the commitment by Cox to produce and broadcast less popular tournament events that otherwise would have received no live video coverage at all (like volleyball and softball), the production and broadcasting of promotional spots promoting viewership of and attendance at the games, and broadcasts of post-game productions for various state tournament events. (*Id.* ¶ 14.) AIA also was able to control the advertising that would be shown in connection with broadcasts to ensure that it did not promote alcohol, gaming or any adult entertainment products or services. (*Id.* ¶ 15.)

AIA's contract with Cox expired in mid-2009 (*Id.* ¶ 17.) AIA continues to explore the possibility of granting television broadcasting rights for its tournament games. (*Id.*)

ARGUMENT

The court should grant WIAA's motion for summary judgment. Protecting the proprietary interests of associations such as AIA and WIAA in the events they sponsor is important because it allows the associations to receive the financial benefits flowing from the product they have produced. It also allows the associations to address safety concerns through appropriate restrictions on access to and use of photographs and video images of student athletes. Absent an association's ability to control who may and may not broadcast association-sponsored events, the association would lose both the financial and the non-financial benefits arising out of its production of these events.

I. AIA'S ABILITY TO AWARD EXCLUSIVE BROADCAST RIGHTS IS OF SIGNIFICANT FINANCIAL VALUE TO AIA.

As history has shown, the right to broadcast state tournament events is a valuable commodity. In the past, when AIA contracted with an outside party for such services, it was paid significant fees and received significant non-monetary consideration. (*Id.* ¶¶ 14-15.) When AIA undertook to broadcast events on its own, it was able to obtain significant consideration from sponsors who purchased advertising space on AIA's website. (*Id.* ¶ 12 .) Exclusivity adds value. (*Id.* ¶ 18.) If AIA cannot market exclusive broadcast rights, it will not be able to obtain nearly as high a price as it can obtain for exclusive rights. (*Id.*) Similarly, AIA's ability to sell advertising on its own website would be harmed significantly if another party could enter the market and stream live or on-demand video of AIA-sponsored games, thus diluting AIA's viewership. (*Id.* ¶ 19.)

Having sufficient funding in place permits AIA to improve its programs and to increase access to athletic and other interscholastic activities, to the benefit of all students who attend member schools. (*Id.* ¶ 20.) Pursuant to AIA's business model, at the end of each school year, AIA's net revenues are rebated back to its member schools, including member schools who were not participants in the state tournaments. The schools are free to use this money to defray athletic fees that they would otherwise charge student athletes or for other purposes, as they see fit. (*Id.* ¶ 22.) AIA's ability to help member schools and their students in this fashion would be reduced if AIA did not have the ability to grant (or retain) exclusive rights to stream events it sponsors over the internet or to grant exclusive television broadcast rights. (*Id.* ¶ 23.)

Based on past experience, AIA believes that both its website streaming of events and its ability to license internet and television broadcasts on an exclusive basis will be increasing sources of revenue for AIA in the future. (*Id.* ¶ 24.)

II. AIA'S ABILITY TO CONTROL THE MANNER IN WHICH AIA-SPONSORED EVENTS ARE BROADCAST PROVIDES OTHER IMPORTANT BENEFITS TO AIA AND ITS MEMBER SCHOOLS.

AIA's proprietary interest in the media/broadcast rights associated with the events it sponsors has provided benefits to AIA and its members beyond the direct revenue associated with marketing those rights.

In its past negotiations over broadcast rights, AIA was able to use the exclusive nature of its television rights it was granting to obtain additional consideration in the form of production services, air time for public service announcements and post-game

broadcasts of events—consideration a third party would be unlikely to provide if it were not guaranteed the exclusive right to broadcast the events. Similarly, AIA also was able to leverage the exclusive nature of the rights by requiring coverage of less popular events (such as volleyball and cross country) in exchange for broadcast rights to more popular events (such as football). (*Id.* ¶¶ 14-16.) At present, revenue generated from the exclusive video streaming on AIA's AIA365.com website is used in a similar fashion. Through its sponsorships and advertisers, AIA is able to present live-streaming of tournament games in 22 sports. (*Id.* ¶ 21.) AIA's ability to choose who would be the recipient of exclusive broadcast rights also permitted AIA to place reasonable restrictions on the advertising that would be shown during broadcasts of events—thus preventing ads for alcohol, gaming and adult entertainment from being shown in the middle of a broadcast depicting high school youth. (*Id.* ¶ 15.) If broadcasters had the ability to show any AIA-sponsored event they wanted to, AIA would not be able to obtain these benefits for its member schools. (*Id.* ¶¶ 16, 18, 23.)

One of AIA's goals is to ensure that high school students who participate in athletic and other activities can do so in a safe environment. Being able to control access to events and the broadcast rights for those events has helped AIA achieve this goal. (*Id.* ¶ 25.)

The high demand for media access to high school events has raised safety concerns which, in turn, have caused AIA to impose limits on the number of media credentials that will be granted for any particular event. The risk of injury to a player or a

referee, for example, from running into a television camera is much higher if there are multiple cameramen covering an event or if the cameramen are not restricted to areas that have been set aside for members of the press. (*Id.* ¶ 26.) Several years ago, a participant in an AIA-sponsored event collided with a television cameraman, causing series injury to the cameraman. (*Id.* ¶ 27.) AIA's ability to grant exclusive rights to live broadcasts allows it to make sure that only a safe number of media credentials are issued for any particular event and that television or video cameras are restricted to safe locations. (*Id.* ¶ 28.)

AIA is also concerned about the safety of its participants in other respects. As mentioned above, media credentials are not issued to all who apply. Rather, AIA carefully screens those who apply for credentials to make sure that applicants are reputable members of the media who will use the images only for news reporting purposes. (*Id.* ¶ 8.) If anyone could attend and broadcast any event, AIA would not be able to put these safeguards in place. (*Id.* ¶ 10.)

One of the reasons AIA instituted its credentialing policy was to address safety issues relating to the inappropriate use of photos taken at high school events. For example, the San Diego news reported in 2008 that photos of dozens of unsuspecting high school boys water polo players were found on five gay-oriented websites. (*Id.* ¶ 29 and Ex. B.) In another case, a female California high school pole vaulter became the target of lewd internet banter as a result of a photo "strewn across babe forums" on the web. (*Id.* ¶ 30 and Ex.C.) This internet exposure resulted in large numbers of individuals

who had no interest in reporting the event, but who could best be characterized as stalkers, showing up at track meets to take additional photos. This raised obvious concerns about safety and sexual exploitation. (*Id.* ¶ 30.) AIA hopes to be able to avoid subjecting its high school student athletes to similar abuse by limiting media credentials to only those who have established themselves as reputable members of the media. (*Id.* ¶ 31.)[1] Requiring those receiving credentials to abide by the limitations AIA has placed on the use of images taken at AIA-sponsored events also may serve as a deterrent by assisting AIA in pursuing legal action against those who seek to exploit high school athletes through inappropriate use of such images. (*Id.* ¶ 33.)

Finally, AIA has a legitimate interest in minimizing its own liability, to the extent it can, with respect to media coverage of its events. Addressing the safety concerns mentioned above will help limit AIA's exposure to claims. In addition, AIA's proprietary interest in the events it sponsors allows AIA to require those who obtain credentials to agree to release AIA from liability for any losses they may incur in connection with the event being covered or any subsequent use of the images or broadcasts of that event. AIA also requires those who receive media credentials to indemnify, defend and hold harmless AIA against any claims that might arise in connection with the issuance of the credentials. (*Id.* Ex. A ¶ 5.) If AIA were unable to

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[1] While amateur photography by a fan could create similar issues, amateur photographers are not granted access to the same prime viewing and news-gathering areas as are members of the media. (*Id.* ¶ 32.)

restrict access to its events and to limit the use of images captured at those events, it likely would not be able to obtain any such agreements. (*Id.* ¶ 34.)

CONCLUSION

The issues raised in this action are not unique to the WIAA. Like the WIAA, AIA provides an important service to member schools by organizing and producing state tournament events in a variety of sports and academic areas. Protecting the proprietary media-related rights of interscholastic associations like the WIAA is critical to the associations' ability to carry out their goals of maximizing both student participation and media coverage of sponsored events, while at the same time ensuring the safety of all participants. Accordingly, AIA respectfully requests that the court grant the WIAA the relief it has requested.

Dated: January 22, 2010.

BARBARA A. NEIDER

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

PLAINTIFFS' SECOND MOTION TO STRIKE PORTIONS OF THE CARDONA DECLARATION

Plaintiffs Wisconsin Interscholastic Athletic Association ("WIAA") and American HiFi, Inc., d/b/a When We Were Young Productions ("WWWY"), by their below referenced attorneys, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to strike the below-referenced portions of the Declaration of **MARY BENNIN CARDONA** ("Cardona") dated February 9, 2010, submitted by Defendants in support of Defendants' Motion for Summary Judgment. The grounds for the Second Motion to Strike are stated below with respect to each paragraph sought to be stricken. Plaintiffs also submit a Memorandum of Law in Support of Second Motion to Strike identifying legal authority supporting the grounds for striking the specific affidavit provisions.

1. Exhibit A, cited in Paragraph 3,[1] on the grounds that it is self-serving and conclusory, impermissible opinion, and hearsay.

[1] Cardona's Declaration contains two paragraphs with the number 3, the first one on the first page of the Declaration and the second one on the second page of the Declaration. This motion to strike relates to the second paragraph no. 3 on page two of Cardona's Declaration.

2. The statement in Paragraph 7 that the WAPC Board of Directors explained "its position that the affiliate agreement was fundamentally flawed because it asked that publicly-funded PEG facilities use their resources for a private company's private gain," on the grounds that it is self-serving and conclusory, and impermissible opinion.

3. Exhibit C, cited in Paragraph 7, on the grounds that it is self-serving and conclusory, impermissible opinion and hearsay.

WHEREFORE, for the reasons stated above, and as shown more fully in Plaintiffs' Memorandum of Law in Support of Second Motion to Strike Plaintiffs, respectfully request that the above-referenced portions of the Cardona Declaration submitted by Defendants in support of Defendants' Motion for Summary Judgment be stricken from the record.

Dated this 22nd day of February, 2010.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SECOND MOTION TO STRIKE PORTIONS OF THE CARDONA DECLARATION

Plaintiffs Wisconsin Interscholastic Athletic Association ("WIAA") and American HiFi, Inc., d/b/a When We Were Young Productions ("WWWY"), by their below referenced attorneys, hereby submit this Memorandum of Law in Support of Plaintiffs' Second Motion to Strike Portions of the Cardona Declaration in support of Defendants' Motion for Summary Judgment.

INTRODUCTION

The Defendants submitted the Declaration of Mary Bennin Cardona ("Cardona Decl.") in support of Defendants' Motion for Summary Judgment (Dkt. No. 78). The Cardona Declaration, however, does not comply with the requirement of Fed. R. Civ. P. Rule 56(e)(1) that affidavits supporting summary judgment motions must "set out facts that would be admissible in evidence." Therefore, Plaintiffs filed a Second Motion to Strike those portions of the Cardona Declaration that violate the requirements of Rule 56(e).

ARGUMENT

I. THE CARDONA DECLARATION CONTAINS ALLEGATIONS INADMISSIBLE IN EVIDENCE.

Rule 56(e) prohibits conclusory statements and self-serving affidavits. *Albiero v. City of Kankakee,* 246 F.3d 927, 933 (7th Cir. 2001). Also, "a party may not rely upon inadmissible hearsay in an affidavit" on summary judgment. *Bombard v. Fort Wayne Newspapers*, 92 F.3d 560, 562 (7th Cir. 1996). Finally, lay opinions that have not demonstrated personal knowledge of the facts asserted are not admissible on summary judgment, and are a "meaningless assertion." *Stagman v. Ryan*, 176 F.3d 986, 995-96 (7th Cir. 1999). Even if opinion evidence were admissible, because "opinion evidence must ordinarily be evaluated by the finder of the facts, an affidavit containing admissible opinion evidence in support of a motion for summary judgment is not conclusive." *MAPCO, Inc. v. Carter*, 573 F.2d 1268, 1282 (Temp. Emer. Ct. App. 1978).

A. Exhibit A Must Be Stricken As It Contains Inadmissible Evidence.

Cardona submits as Exhibit A at paragraph 3[1] of her Declaration, a letter that she wrote on September 1, 2005, to Doug Chickering "expressing WAPC's concerns with the affiliate program." That letter, however, is inadmissible for several reasons shown more fully below, and thus may not be used to support Defendants' Motion for Summary Judgment.

First, the letter is conclusory: Cardona concludes in the letter that the WIAA's affiliate program is "grossly unfair" and "severely undermines the ability of access facilities to meet the cost of producing game coverage." Cardona Decl. ¶ 3, Ex. A, at 2. Thus, the letter expresses the fundamental conclusion that this litigation should resolve, i.e., whether the affiliate program,

[1] Cardona's Declaration contains two paragraphs with the number 3, the first one on the first page of the Declaration and the second one on the second page of the Declaration. This motion to strike relates to the second paragraph no. 3 on page two of Cardona's Declaration.

which is part of the WIAA's contract with WWWY, is "unfair." It is self-serving for Defendants to rely upon such a conclusion stated by a group, in this case the WAPC, which is only looking out for its own interests.

Second, the letter is impermissible opinion. Cardona has not been put forth by the Defendants as a witness "qualified as an expert by knowledge, skill, experience, training, or education" to render an opinion. Fed. R. Evid. 702. Cardona's assertion about the consequences of the WIAA's affiliate program through WWWY is merely a lay opinion. A lay opinion is not admissible where the lay witness has not demonstrated personal knowledge of the facts asserted. *Stagman*, 176 F.3d at 995-96. Cardona has not demonstrated she has any knowledge of all of the facts and circumstances relevant to the WIAA's decision to enter into such a contract. Thus, her opinion is not admissible on summary judgment, and is instead merely a "meaningless assertion." *Id.* Even if her opinion were admissible, because "opinion evidence must ordinarily be evaluated by the finder of the facts, an affidavit containing admissible opinion evidence in support of a motion for summary judgment is not conclusive." *MAPCO*, 573 F.2d at 1282.

Third, the September 1, 2005 letter is hearsay. The letter is a "statement" under Fed. R. Evid. 801(a) because it is a "written assertion." Cardona wrote the letter, so Cardona is the "declarant" under Fed. R. Evid. 801(b). "'Hearsay' is a statement, *other* than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c) (emphasis added). Cardona did not write the letter while testifying at a trial or hearing, and her statement (the letter) is offered by Defendants to prove the truth of the matter asserted in the letter, i.e., that the terms of the WIAA's affiliate program were "unfair" and a disadvantage to the WAPC members. Thus, the letter is hearsay. The letter is not

excluded from the hearsay definition under Fed. R. Evid. 801(d), as it is not a prior statement of a witness subject to cross-examination, nor is it a statement of party-opponent, as the WAPC is not a party to the litigation at all, let alone an opponent of the Defendants.

B. Paragraph 7 Must Be Stricken As It Contains Inadmissible Evidence.

Cardona states in paragraph seven of her Declaration that the WAPC Board of Directors explained "its position that the affiliate agreement was fundamentally flawed because it asked that publicly-funded PEG facilities use their resources for a private company's private gain." This statement is inadmissible under rule 56(e) as it is self-serving and conclusory. Whether the affiliate agreement is "fundamentally flawed" is a basic issue in this litigation. Thus, Cardona's factual assertion of the Board of Director's opinion attempts to answer the very question raised in this litigation. It is self-serving for Defendants to rely upon the WAPC's conclusion which none too coincidentally mirrors the Defendants' own position in this litigation.

Further, the statement is impermissible opinion. Cardona is stating the WAPC Board of Director's position about the affiliate agreement. Neither Cardona, nor the WAPC Board of Directors have been put forth by the Defendants as expert witnesses under Fed. R. Evid. 702. The WAPC's position as reiterated by Cardona that the affiliate program is "fundamentally flawed" is thus merely an inadmissible lay opinion, without any showing of any personal knowledge of the facts or circumstances leading up to the WIAA's decision to implement the program.

C. Exhibit C Must Be Stricken As It Contains Inadmissible Evidence.

Cardona submits as Exhibit C at paragraph seven of her Declaration a press release from the WAPC dated October 21, 2005, notifying the press that the WAPC voted against supporting the WWWY affiliate agreement. The press release states: the WAPC "took a stand against the

commercialization of WIAA-sponsored high school tournament sports and against the use of publicly-funded video production facilities for private business ventures;" and that the affiliate agreement was "fundamentally flawed, as it asks publicly-funded facilities to use its resources for private gain." For the same reasons argued above in section B, the press release is inadmissible as it merely states a conclusion about a basic issue in this case, and it contains the impermissible lay opinion of the WAPC Board of Directors, not based on personal knowledge.

Moreover, as with the September 1, 2005 letter, the press release is hearsay. The press release is a "statement" of the WAPC, not made while testifying at a trial or hearing, but introduced in evidence to prove the truth of the matter asserted, i.e., that the terms of the WIAA's affiliate program were "fundamentally flawed" and constituted "commercialization" of WIAA sports. Fed. R. Evid. 801(c). Thus, the press release is hearsay. The press release is not excluded from the hearsay definition under Fed. R. Evid.801(d), as it is not a prior statement of a witness subject to cross-examination, nor is it a statement of party-opponent, as the WAPC is not a party to the litigation at all, let alone an opponent of the Defendants.

WHEREFORE, for the reasons stated above, Plaintiffs respectfully request that the above-referenced portions of the Cardona Declaration submitted by Defendants in support of Defendants' Motion for Summary Judgment be stricken from the record.

Dated this 22nd day of February, 2010.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, AMERICAN HI-FI, INC.,

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

The defendants properly introduced in support of their motion for summary judgment affidavits and declarations containing admissible evidence that was either produced in discovery or never sought by the plaintiffs. The plaintiffs' objections are based on mischaracterizations of, and omissions from, the witnesses' testimony and the plaintiffs' discovery requests. Their motion should be denied.

The affidavits and declarations of Dan Flannery (Dkt. #41), Joel Christopher (Dkt. #36), John Dye (Dkt. #39) and David Schmidt (Dkt. #43) all contain testimony based on knowledge obtained in the course of each witness' work experience. The foundation for such work-based personal knowledge is commonly laid by identifying the person's position within the corporate entity and scope of duties or experience. *E.g.*, *Daniels v. McKay Machine Co.*, 607 F.2d 771, 774-75 (7th Cir. 1979) (finding a sufficient foundation for detailed testimony laid by affiant who

testified as to his job title and that affiant was familiar with the company's metals and plant line); *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053, 1063 n.9 (C.D. Cal. 2003) ("Although the Court applauds zealous advocacy, it deplores the numbing repetition of plainly non-meritorious (indeed, frivolous) evidentiary objections…[E]ach of the witnesses indentifies his relevant position of authority with the Plaintiff entities, and each states that he has personal knowledge of the facts set forth in his declaration. These statements are sufficient, and…Fed. R. Evid. 602 [does not] suggest[] otherwise.") (citation omitted); *United States v. Muñoz-Franco*, 487 F.3d 25, 35 (1st Cir. 2007) ("[C]ourts have allowed lay witnesses to express opinions about a business 'based on the witness's own perceptions and knowledge and participation in the day-to-day affairs of [the] business.'").

Personal knowledge is more than just directly-observed facts; it includes reasonable inferences and opinions drawn from those facts. *See, e.g., Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998). Significantly, personal knowledge is different from issues related to the weight of the evidence or the credibility of witnesses.

Consider, for example, the plaintiffs' objection that there is no foundation for David Schmidt's testimony that other school districts' policies are consistent with the Ashwaubenon, Waukesha and Appleton policies Schimidt knows from direct work experience. Memo. of Law in Support of Pls.' Mot. to Strike Portions of Defs.' Aff. Supporting Defs.' Mot. for Summ. J. (Dkt. #73) ("Pls.' Br.") at 3. The plaintiffs, conveniently, reduce Schimidt's experience to a mere "'familiar[ity] with the general functioning of other school districts' through his involvement with various school-related organizations." Pls.' Br. at 3. But they misconstrue the testimony. *Id.* Schmidt's testifies that he has been a Superintendent or Assistant Superintendent at three districts for at least 12 years, ¶¶ 2-3; that he has worked for Wisconsin public school districts for

over 35 years, ¶ 2; that he works with the Board of Education to set direction and policy, ¶ 2 (and so, presumably, has to think about different policy options); and that he has come into contact with *hundreds* of other school districts over the last 15 years as part of his participation and collaboration with the Wisconsin Association of District Administrators, American Association of School Administrators, Southeastern Wisconsin Schools Alliance, and many other school-related organizations, ¶ 4. The plaintiffs are, of course, entitled to test the weight or credibility of Schmidt's sworn testimony through a deposition or by introducing contrary evidence. The lack of foundation objection, however, is groundless.

The plaintiffs' other foundation objections are equally without merit. The foundation for Dan Flannery's general testimony in ¶ 6 regarding other newspapers' and news organizations' use of Internet streaming is based on his work experience:

- he is the Executive Editor of *The Post-Crescent*, ¶ 2;
- he is responsible for overseeing the newspaper's news operation, ¶ 2;
- he frequently consults with other editors regarding the newspaper's competition with "other media outlets," ¶ 8;
- he has "considerable institutional knowledge" about *The Post-Crescent*'s news-gathering history which he has specifically used to help the newspaper move into reporting by Internet streaming, ¶ 4;
- he has been professionally employed in journalism for approximately 30 years, *see* ¶ 3; and
- he has knowledge of video training Gannett made available to employees, including *The Post-Crescent* staff, that made it "evident that streaming was a possibility…moving forward [that] would allow our print-based news organizations to compete effectively on breaking news stories with the so-called electronic journalists in radio, TV and online," ¶ 6.

As this foundation shows, Flannery's general testimony that other newspapers and news organizations have used Internet streaming regularly for certain periods of time is well within the scope of his personal knowledge.

This same foundation, and in particular, Flannery's editorial responsibilities and personal journalism experience is more than ample to support his lay opinions in ¶ 19 and ¶ 20 that a different media entity transmitting its own Internet stream would produce an entirely different work product or a work product likely of less interest to *The Post-Crescent*'s audience.[1] Such lay opinions merely reflect Flannery's understanding, based on his own experience, of the number of editorial decisions involved in creating such work product and how those decisions affect the final product.

Similarly, the foundation for Flannery's testimony that "more people are available" to serve as guest commentators for playoff rounds than for regular season games is plainly articulated and reasonable: "because [in the playoff rounds] some teams have been eliminated from the playoff [so that] their coaches are available," ¶ 21. Finally, Flannery expressly identifies the basis for his opinion that Brent Engen's guest commentary on one of the disputed streams was "expert": Engen coached a team in the same conference as the team he was commenting on, and thus, was deeply familiar with the participating team. ¶ 20. To conclude Engen was an "expert" commentator for this game is well-founded and reasonable.

The plaintiffs also misconstrue and omit the details of Christopher's testimony to challenge his statement that "the majority of press boxes" can accommodate more than one streaming crew. Pls.' Br. at 3-4. The foundation for this testimony is not only that Christopher claims "significant experience, as plaintiffs suggest." *Id.* Christopher testifies that he has:

> significant experience, gained through <u>six years</u> as a professional sports reporter, in press boxes at high school tournament venues across the state. There is wide variance in the size and quality of a press box at high school sporting events depending on the facility,

[1] Also, plaintiffs' objection that the entirety of ¶ 19 of the Flannery affidavit is speculative, conclusory, self-serving and improper opinion lacking foundation is overbroad. Pls.' Br. at 2. The description of the actions and editorial decisions that need to be made by the camera operator, announcer and color commentator are facts within Flannery's personal knowledge as Executive Editor.

> but it is accurate to say that the majority of press boxes are large enough to accommodate more than one crew engaged in Internet streaming.

¶ 20 (emphasis added). This is more than adequate foundation for Christopher's testimony. The Court should reject the plaintiffs' invitation to strike this testimony based on the plaintiffs' selective omissions and mischaracterizations.

A person who testifies about future events is clearly not testifying about actual eventualities about which they have personal knowledge. That people are not clairvoyant, however, does not preclude testimony about possible future events or expectations. The speculation objection is not so broad. Indeed, the commentary to Rule 701 notes that business owners and officers are often permitted "to testify to the…projected profits of the business.…because of the particularized knowledge that the witness has by virtue of his or her position in the business." Fed. R. Evid. 701, 2000 Amendments Commentary.

The Executive Editors of *The Post-Crescent* and the *Green Bay Press Gazette* are clearly competent to express their opinions about the consequences (be they positive or negative) to their operations if they lost credentials to cover WIAA events (Flannery Aff., ¶ 13) or were allowed equal rights to use live streaming technology (Dye Aff., ¶ 15). *See* Pls.' Br. at 5, 7.

Moreover, the Executive Editors not only are competent to testify as to what actions their respective newspapers would take if permitted to live stream tournament events on an equal basis, they are responsible for *determining* what actions to take. Thus, Flannery's testimony that *The Post-Crescent* "intends to compete"[2] is not conclusory; it is a fact uniquely within his

[2] The plaintiffs also complain that Flannery's testimony that *The Post-Crescent* "'intends to compete' '*if* we are able to Livestream WIAA-sponsored playoff games *on equal terms*'" is inadmissible because one of the questions before the Court, the plaintiffs argue, is whether the WIAA's policies "deprive the media from such 'equal

knowledge. (¶ 21); *see also* Dye Aff., ¶ 14 (the *Green Bay Press-Gazette* is not seeking to create an unnatural monopoly or exclusive rights through this lawsuit); Dye Aff. ¶ 20 (the *Green Bay Press-Gazette* is not seeking exclusivity). Pls.' Br. at 6-7. If the plaintiffs wish to explore further the basis for this testimony, they may do so through a deposition.

The plaintiffs object that some factual testimony by Flannery and Dye that dovetails with counsel's legal arguments is conclusory, and hence inadmissible. Pls.' Br. at 5, 7. It is not. Flannery, for example, provides specific, factual testimony (1) that he is "unable to determine what standard WIAA would apply to determine whether a blog includes 'all or a significant number of plays/events occurring sequentially'" and (2) that he "cannot give a sports reporter appropriate guidance as to what actions might violate WIAA's blogging policy." Flannery Aff., ¶¶ 11-12. He additionally concludes that the WIAA's blogging policy is vague. This is an appropriate lay opinion. The term "vague," in addition to being a legal term of art, is a plain English word that has been defined by one dictionary as "not clearly expressed: stated in indefinite terms…not having a precise meaning…not clearly defined, grasped, or understood." Merriam-Webster's Collegiate Dictionary 1381 (11th ed. 2007). Flannery's factual testimony and lay opinion are within the scope of his personal knowledge, and are thus, admissible evidence. *See* Flannery Aff., ¶ 11 (Flannery has read the blogging definition and policies and his job duties include ensuring journalists' compliance with regulations and credentialing requirements).

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terms.'" Pls.' Br. at 6. Nonsense. That *The Post-Crescent* cannot Internet stream on the same terms as WWWY is an undisputed fact. *See* Defs.' Resp. to Pls.' FOF (Dkt. #75), Fact and Resp. No. 129 (WWWY pays $60,000 for rights to all games), Fact and Resp. No. 156 (other media can only stream "declined events") (disputed on other grounds), Fact and Resp. No. 161 (fee is $250 per-event fee for a single-camera production). Whether such admitted inequality is unconstitutional is the central question of law before the Court.

Similarly, the Executive Editor of the *Green Bay Press Gazette*, John Dye, is competent to testify to the fact that his newspaper could not afford to stream many games at $250 per game. Dye Aff., ¶ 17. Contrary to the plaintiffs' objection, this testimony does not "beg[] the question of whether the WIAA has the right to impose such a fee." Pls.' Br. at 7. Factual testimony about a fee's affordability is independent of a legal determination that the fee is, or is not, permissible.[3]

THE POST-CRESCENT

The testimony about viewer appreciation the plaintiffs challenge is not offered for the truth of the matter asserted, as the plaintiffs argue. Pls.' Br. at 6. The testimony – consisting of both assertions and lay opinion descriptions of tone – is not offered for its truth. It is background information being offered to show the newspaper's motivation for increasing its online reporting. *See, e.g.*, *United States v. Sanchez*, 32 F.3d 1002, 1005 (7th Cir. 1994) (testimony offered to prove motive is not hearsay because it is not offered for the truth of the matter asserted).

Flannery, for example, testifies that the newspaper has "heard how appreciative people are" about the newspaper's online efforts. ¶ 26. The testimony is offered to show that the newspaper has received such commentary and has been influenced by it to continue to expand their online efforts, both facts that Flannery knows as executive editor. The testimony is not offered to prove that *The Post-Crescent*'s viewers are, indeed, appreciative. Similarly, the testimony offered by Christopher is not hearsay: (1) that "reader response to Coverit Live conversations has been overwhelmingly positive" is his own lay opinion, not an out of court statement; (2) "People enjoy the real-time information gathering and interaction with our staff" is similarly not an out of court statement offered for the truth of the matter (that people actually

[3] Nor are the defendants asking the Court to set the fees. The defendants seek a declaration that the fee, for example, must be set in an amount intended to cover the expenses of administering the WIAA's lawful media policies, not to profit from expressive activities.

enjoy the information) – again, it is Christopher's lay opinion; finally, (3) people "make a point of telling us" that they enjoy the real-time information gathering also is not offered for the truth of whether those people are in fact enjoying themselves. ¶ 7. All of these statements are offered to support the newspapers' business decision to invest in this reporting technology.

The plaintiffs would have the Court believe that their Interrogatories Nos. 14 and 15 requested information about "how the Defendants 'report on high school athletic competitions over the Internet'" and that the defendants made such an allegation in the Counterclaim. Pls.' Br. at 9. This is false.

The interrogatories at issue requested "the complete factual basis" for the defendants' allegations in two paragraphs of their counterclaim that WNA members and Gannett newspapers do, in fact, report on high school sports both online and in their print editions. The facts contained in those two paragraphs are so unremarkable and so easily verifiable from public sources as to be subject to judicial notice. *See* Fed. R. Evid. 201(b). For the Court's convenience, the full text of the interrogatory and the corresponding paragraph from the counterclaim it sought discovery about are reprinted below, along with Gannett's response.[4]

> Interrogatory No. 14: State the complete factual basis for the allegations in Paragraph 8 of Your Counterclaim regarding WNA members' reporting of high school sports over the Internet, including without limitation all persons with knowledge of the facts, and all documents or other evidence Defendants will rely upon in support of this contention.
>
> Counterclaim ¶ 8: Nearly all WNA members also report on high school athletic competitions over the Internet, to provide more in-depth coverage than they can provide in print. WNA members use

[4] The plaintiffs requested the same information from the WNA as from Gannett in identically-worded Interrogatories Nos. 14 and 15. The WNA's responses were identical to the Gannett responses printed here with the exception of the identity of the party making the overbreadth objection.

> their Web sites to show visitors additional photographs of high school athletic events and some utilize Internet streaming to provide the public video images, including whole competitions, on a live or delayed basis.
>
> Gannett's Response:[5] Gannett objects to the scope of this interrogatory as being overbroad. Without waiving its objection, news readers statewide know that "WNA members have covered Wisconsin high school sports from their inception," as alleged. Verification is available in the local newspaper archives of every public library in the state and the Wisconsin State Historical Society. In addition, Peter Fox has knowledge of the history of WNA members' more recent coverage of high school sports and additional information about WNA members' more recent coverage of interscholastic high school competitions can be obtained from WNA members' websites and in print publications available at newsstands throughout Wisconsin.
>
> Interrogatory No. 15: State the complete factual basis for the allegations in Paragraph 11 of Your Counterclaim regarding Gannett's newspapers reporting over the Internet, including without limitation all persons with knowledge of the facts, and all documents or other evidence Defendants will rely upon in support of this contention
>
> Counterclaim ¶ 11: Each of Gannett's daily newspapers in Wisconsin operates a Web site and reports on high school sports throughout its coverage area both in print and over the Internet.
>
> Gannett's Response: Gannett objects to the scope of this interrogatory as being overbroad. Without waiving its objection, information about each Gannett newspaper's online and print reporting of high school sports can be obtained by reviewing each Gannett newspaper's Web site and print publications. All of the employees and readers of these newspapers have knowledge of these facts.

There are 230 WNA members as of January 1, 2010. Stipulation of Background Facts (Dkt. #26), ¶ 6. No reasonable person would have interpreted these interrogatories as requesting the "how" of each of 230 mass media publication's reporting, including history, technology, and

[5] The Response to Interrogatory 13 was "*See* Response to Interrogatory No. 13" which is the response reprinted above. Interrogatory 13, in turn, sought the complete factual basis for defendants' counterclaim allegation that WNA members have covered high school sports from their inception. The plaintiffs' request that defendants identify each such report, and every person having knowledge of those reports, is absurd.

staffing and editorial decisions regarding that publication's reporting on high school sports. The allegations plaintiffs questioned do nothing more than state the unremarkable fact that high school sports are reported by WNA member newspapers, online and in print, including the Gannett newspapers specifically.

Significantly, it would appear the plaintiffs also did not interpret these interrogatories as requesting more information than the defendants provided in response. On September 20, 2009, defendants' counsel received a 7-page, single-spaced letter from WIAA's counsel, Jennifer S. Walther, alleging numerous deficiencies in the defendants' discovery responses. The defendants' response that Interrogatories Nos. 14 and 15 sought publicly-available information about the fact that 230 mass media publications report on high school sports information that could be verified by viewing each publications' website and print edition, was not among the deficiencies counsel asserted. Had the plaintiffs understood those interrogatories to mean something else, for example, information on how each of the 230 publications made decisions on what technology to use at tournaments, they were under an obligation to either request supplementary responses, move to compel, serve a discovery request regarding "*how* Gannett reports on high school sports using Internet technology," or otherwise put defendants' counsel on notice that the plaintiffs disputed the responses.[6] *Charter House Ins. Brokers Ltd. v. New Hampshire Ins. Co.*, 667 F.2d 600, 604 (7th Cir. 1981) (when a party has responded to a discovery request that the requesting party believes is inadequate, the requesting party must apply to the court for an order to compel). To allow the plaintiffs to sit on a discovery response

[6] The plaintiffs' complaint that the defendants' response to Interrogatory No. 15 did not alert the plaintiffs that Flannery, Dye and Christopher were witnesses with knowledge of the fact that each of Gannett's newspapers has a Web site, and reports on high school sports throughout its coverage area both in print and online is preposterous. Pls.' Br. at 9. The defendants clearly noted that all Gannett employees are aware of that fact. The plaintiffs were given notice of those particular employees' names and job titles from the defendants' other discovery responses, including counsel's privilege log and chart identifying each person on that log.

they thought was inadequate until a convenient moment, would turn the discovery process into a game of "gotcha."

This lawsuit began when *The Post-Crescent* live streamed four WIAA-sponsored football games. The plaintiffs cannot credibly claim to be "substantially surprised" by the fact that Gannett has information about the technology used to make those streams, or the staffing and editorial decisions required. Pls.' Br. at 10. The plaintiffs, in their discretion and as was there right, chose to not seek discovery of this information, but they cannot fault the defendants by claiming a discovery violation.

Finally, it bears noting that the plaintiffs have labeled information that the defendants *did* provide during discovery, as information that should be stricken because it was not previously disclosed. In particular, they ask the Court to strike the evidence contained in Flannery Aff., ¶ 23 (web page views for each of four football games streamed without permission). Pls.' Mot. to Strike at 3. This evidence was produced to the plaintiffs in Bates GA000533-536. Some of the information about the guest commentator discussed in Flannery Aff., ¶ 20 is contained in the DVD of the game in question, which was produced during discovery at GA000537 and GA000542. *Id.* at 3.

For the foregoing reasons, the Court should deny the plaintiffs' Motion to Strike and find that all of the evidence the plaintiffs have challenged is admissible.

Dated: February 22, 2010.

s/Monica Santa Maria

Robert J. Dreps
Monica Santa Maria

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENTAL PROPOSED FINDINGS OF FACT

Plaintiffs Wisconsin Interscholastic Athletic Association and American-HiFi, Inc., d/b/a When We Were Young Productions, hereby respond to the Defendants' Supplemental Proposed Findings of Fact in Support of Defendants' Motion for Summary Judgment, in accordance with each numbered paragraph contained therein (with the Defendants' proposed fact reproduced, followed by Plaintiffs' response).

The following abbreviations are used for the declarations and affidavits cited herein:

Chickering Aff.	=	Affidavit of Douglas E. Chickering, Dkt. No. 53, filed 1/22/10
Clark First Aff.	=	Affidavit of Todd C. Clark, Dkt. No. 54, filed 1/22/10
Clark Second Aff.	=	Second Affidavit of Todd C. Clark, Dkt. No. 83, filed 2/12/10
Clark Third Decl.	=	Third Declaration of Todd C. Clark, filed herewith
Eichorst First Aff.	=	Affidavit of Tim Eichorst, Dkt. No. 55, filed 1/22/10
Nero Decl.	=	Declaration of Autumn N. Nero in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 52, filed 1/22/10

Second Veldran Aff. = Second Affidavit of Matthew P. Veldran, Dkt. No. 79, filed 2/12/10

Defendants' Supplemental Proposed Fact No. 1: The expenses public schools incur to support WIAA-recognized teams and to participate in, and host, regular season and tournament events are paid for from the school district's budget or from donations or fund raising efforts. Affidavit of David Schmidt, Jan. 22, 2010 (Dkt. # 43) ("Schmidt Aff."), ¶¶ 11, 14, 16.

Plaintiffs' Response: DISPUTED IN PART. Undisputed that these facts are accurate with respect to the Ashwaubenon, Waukesha, and Appleton school districts, which are the only facts within the personal knowledge of the cited affiant. Plaintiffs dispute this proposed fact with regard to any other school district, as there is no evidence to support such an assertion. Plaintiffs object to this proposed fact as outside the affiant's personal knowledge.

Defendants' Supplemental Proposed Fact No. 2: Many communities are deeply invested in their local high school's athletic programs and teams. *See* Schmidt Aff., ¶¶ 10-12, 16; Second Affidavit of Matthew P. Veldran, Feb. 12, 2010 (filed herewith) ("Second Veldran Aff."), ¶ 7, Ex. B at 16 (WIAA editorial).

Plaintiffs' Response: DISPUTED. This fact is not based on the personal knowledge of Schmidt and is not contained in Exhibit B of the Second Veldran Affidavit. Therefore, there is no evidentiary support for this fact.

Defendants' Supplemental Proposed Fact No. 3: The WIAA publishes an official publication called the WIAA Bulletin. *See* Affidavit of Todd. C. Clark, Jan. 19, 2010 (Dkt. # 54) ("Clark Aff."), ¶ 2 (Clark's job responsibilities as WIAA Communications Director include production and supervision of the Bulletin).

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 4: The March 27, 2009 edition of the WIAA Bulletin contained an editorial about emotions and excitement generated by WIAA tournaments. *See* Second Veldran Aff. ¶ 7, Ex. B at 16. The editorial stated in part:

> We can almost set our calendars to those dates each year, and sometimes we can even set our clocks to that time of year – tournament time. For high school sports and all those involved with them, they are the times of the year excitement and emotions reach their peak. It's those moments in life that provide the unforgettable experiences for all interested in interscholastic athletics.

…

> Yet all the spoils are not spent on the visitors. The statement of a player whose team had just been defeated in the State Championship final conveyed this. Despite a bitter loss, he stated he wouldn't change the experience of playing in the State Tournament for anything. How about the community that came out in full force to support its hometown heroes. A school with an enrollment of 86 sold over 1,200 tickets for the championship final session. It's hard to believe that could even be possible when that school's community itself has a population of 998 according to its Web site. That section of fans was a sea of colors. This type of support gives credence to the cliché "last one out of town, turn off the lights." The interest and excitement of WIAA State Tournaments extend beyond the four walls of the schools competing or any city boundaries. They are events for the entire state to embrace and witness the quality of educational experiences provided by school systems throughout our state. *Id.*

Plaintiffs' Response: DISPUTED IN PART. Plaintiffs do not dispute that the reproduced text above is a portion of the editorial contained in the March 27, 2009 WIAA Bulletin, but Plaintiffs dispute that such text was published during the time period the subject of this litigation.

Defendants' Supplemental Proposed Fact No. 5: A community's support for their local high school's interscholastic athletic teams and program can be seen in the community's fund raising efforts to renovate school athletic facilities; opposition to proposed program reductions; and in the community's attendance at local games or away games involving their local teams. Schmidt Aff., ¶¶ 10-12, 16; Second Veldran Aff., ¶ 7, Ex. B at 16 (WIAA editorial).

Plaintiffs' Response: DISPUTED. This fact is not based on the personal knowledge of Schmidt and is not contained in Exhibit B of the Second Veldran Affidavit. Therefore, there is no evidentiary support for this fact.

Defendants' Supplemental Proposed Fact No. 6: High school athletics are an integral part of student life and culture for both the participating athletes and their non-participating schoolmates. Schmidt Aff., ¶¶ 5-9.

Plaintiffs' Response: DISPUTED. This fact is not based on the personal knowledge of Schmidt. Further, under Wisconsin law, to graduate from high school, a student must have completed 1.5 credits of physical education. Wis. Stat. § 118.33(1)(a)1.

Defendants' Supplemental Proposed Fact No. 7: In recognition of the fact that interscholastic athletic events are school events, school districts may excuse both the athletes and coaches, and in appropriate circumstances, nonparticipating schoolmates, from classroom attendance so they may attend the competitions. Schmidt Aff., ¶¶ 6-9.

Plaintiffs' Response: DISPUTED. This fact is not based on the personal knowledge of Schmidt, except with respect to the Ashwaubenon, Waukesha, and Appleton school districts, which does not prove what school districts are doing generally.

Defendants' Supplemental Proposed Fact No. 8: Allowing student fans to display their support for their classmates and school in athletic competition provides important lessons for those students. Schmidt Aff., ¶ 7.

Plaintiffs' Response: DISPUTED, BUT IMMATERIAL. This fact is based on inadmissible conclusion and opinion.

Defendants' Supplemental Proposed Fact No. 9: WIAA treats interscholastic athletics as part of the "total educational process." Declaration of Autumn N. Nero, Jan. 22, 2010 (Dkt. #52) ("Nero Decl."), Ex. 2 at 14. Art.II, Sect. 1, ¶ B.

Plaintiffs' Response: DISPUTED. Plaintiffs dispute this characterization of the WIAA's constitution. The WIAA's constitution states that one of the WIAA's stated purposes is "to emphasize interscholastic athletics as a partner with other school activities in the total educational process. . . ." Nero Decl. Ex. 2 at 14.

Defendants' Supplemental Proposed Fact No. 10: It is WIAA's position that:

> The integrity and purpose of education-based athletics should not be compromised by outside influences that choose to impose their self-interests on interscholastic programs.

Second Veldran Aff., ¶ 7, Ex. A at 16.

Plaintiffs' Response: DISPUTED IN PART. Plaintiffs do not dispute that this language is contained within an editorial in the WIAA Bulletin dated March 28, 2008, but dispute the implication that this quote is related to the issues in this litigation. Further, this quote is taken out of context: The editorial from which it was taken relates to the fact that it is not WIAA's

purpose to provide opportunities for high school athletes to obtain college athletic scholarships or future opportunities in college or professional sports. Second Veldran Aff., ¶ 7, Ex. A at 16.

Defendants' Supplemental Proposed Fact No. 11: In 2008, WIAA received rights fees and other revenue associated with its exclusive broadcast contracts from three sources: WWWY, Quincy Newspapers, Inc. ("QNI") and Fox Sport Network Wisconsin ("Fox"). Affidavit of Douglas Chickering, Jan. 21, 2010 (Dkt. # 53) ("Chickering Aff."), ¶¶ 9, 12, 23.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 12: The 2008 revenue the WIAA attributes to WWWY was of two types: a $60,000 rights fee and some unspecified portion of an $80,000 payment from a sponsorship partner. Chickering Aff., ¶ 23; Clark Aff., ¶¶ 8, 10.

Plaintiffs' Response: DISPUTED to the extent Defendant implies WIAA received only a portion of $80,000. The WIAA received $140,000 in total between these two payments. Clark Aff. ¶ 10.

Defendants' Supplemental Proposed Fact No. 13: During the 2007-08 academic year, the WIAA recorded $6,202,963 in tournament revenue and $7,177,155 in total operating revenue. Chickering Aff., ¶ 5. Thus, the WIAA's tournament revenue accounted for 86% of its total operating revenue.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 14: The WIAA's tournament revenues come primarily from ticket sales. Chickering Aff., ¶ 5.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 15: The table below compares the percentage of WIAA's 2007-08 tournament revenue and total revenue from WWWY (counting the entire $80,000 sponsorship payment) against all 2008 revenues from the WIAA's exclusive contract and sponsorship partners combined.

	Percentage of WIAA's 2008 Tournament Revenue of $6,202,693	**Percentage of WIAA's 2008 Total Revenue of $7,177,115**
WWWY -- $60,000 rights fee	1.0%	.8%
WWWY -- $140,000 total payment	2.3%	2.0%
All exclusive broadcast contract partners combined:	3.8%	3.3%

$235,000 WWWY -- $140,000 QNI -- $75,000 Fox -- $20,000		

Chickering Aff., ¶¶ 5, 9, 12, 23; Clark. Aff., ¶ 10.

Plaintiffs' Response: DISPUTED IN PART. Plaintiffs admit that in 2007-08, the WIAA had $6,202,963 (not $6,202,693 as stated in Defendants' proposed finding) in tournament revenue, while the WIAA's total operating revenue for that year was $7,177,115. Plaintiffs admit that this fact accurately states the exclusive contract partners' payments in that year. Defendants have not presented any evidence of such a comparison or such mathematical calculations. Plaintiffs further dispute this proposed fact as it assumes such a comparison was a necessary part of the WIAA's analysis when entering into exclusive contracts.

Defendants' Supplemental Proposed Fact No. 16: The $60,000 rights fee WWWY paid the WIAA (on July 31, 2009) for its 2008 exclusive rights was not calculated by the formula in Section V of the WIAA's contract with WWWY. Second Declaration of Monica Santa Maria in Support of Defendants' Motion for Summary Judgment on Their Counterclaim, Feb. 12, 2010 (filed herewith) ("Second Santa Maria Decl."), Ex. A at 7 (Interrog. No. 4 and Resp. to Interrog. No. 4).

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 17: The $60,000 rights fee was "orally agreed to by WWWY and WIAA prior to payment" and reportedly represents 1/6 of WWWY distribution revenue from Fox Sports Net and Charter Communications Op., LLC. Second Santa Maria Decl., Ex. A at 7 (Interrog. No. 4 and Resp. to Interrog. No.4).

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 18: The plaintiffs have not identified any written guidelines or factors either entity uses to determine whether to grant any permission, enforce a policy or determine a fee structure with respect to video transmissions of tournament events. *See* Stipulation of Background Facts (Dkt. #26) ("Jt. Stip."), Ex. B (2009-10 Media Guide); Clark Aff., ¶¶ 14-16.

Plaintiffs' Response: DISPUTED. Plaintiffs object to this proposed fact because whether the WIAA identified or did not identify something is immaterial. *See Townsend v.*

Fuchs, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings."). Further, the cited Clark Affidavit recites numerous factors used to determine the fee structure. Clark First Aff., ¶¶ 14-16. Factors were also identified in the Eichorst Affidavit. Eichorst First Aff. ¶¶ 37-39.

Defendants' Supplemental Proposed Fact No. 19: The current fee structure in place, $250 for a single camera Internet stream and $1250 for a multi-camera Internet stream, was determined without reference to any WIAA guidelines. *See* Clark Aff., ¶¶ 15,16; Affidavit of Tim Eichorst, Jan. 15, 2010 (Dkt. #55)("Eichorst Aff."), ¶¶ 37-39.

Plaintiffs' Response: DISPUTED. The current fee structure is $250 for a single camera Internet stream and $1500 for a multi-camera Internet stream. Clark Second Aff. ¶ 8. Further, the cited Clark Affidavit recites numerous factors used to determine the fee structure. Clark First Aff., ¶¶ 14-16. Factors were also identified in the Eichorst Affidavit. Eichorst First Aff. ¶¶ 37-39.

Defendants' Supplemental Proposed Fact No. 20: WWWY, the private company that benefits from the imposition of such rights fees, participated in determining how much to charge. Clark Aff., ¶ 14-16; Eichorst Aff., ¶¶ 37-39.

Plaintiffs' Response: DISPUTED IN PART. The characterization of WWWY as "the private company that benefits from the imposition of such rights fees" is not contained in or supported by the cited evidence.

Defendants' Supplemental Proposed Fact No. 21: The WIAA has not provided any rationale or justification for requiring media companies to surrender a master copy of their work product, and the right to sell that work, to WWWY or for requiring them to surrender 80% of the resulting sales revenue. *See* Clark Aff., ¶ 13-16 (describing process and conclusions regarding appropriate structure of affiliate program for television stations, web sites and other media outlets or production companies); Affidavit of John W. Dye, Jan. 22, 2010 (Dkt. #39) ("Dye Aff."), Ex. B (WWWY's demands).

Plaintiffs' Response: DISPUTED. Plaintiffs object to this proposed fact because whether the WIAA identified or did not identify something is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings."). Because the tournaments are produced and financially supported by the WIAA, the WIAA wanted WWWY to monitor the quality of the products associated with the WIAA name that were being marketed, including compliance with requirements regarding prohibited content. Thus, the WIAA gave WWWY the right to obtain the master copy of any tape produced of an event, as this was how plaintiffs determined what was being produced and its compliance with the WIAA's requirements. Clark Third Decl. ¶ 10.

Defendants' Supplemental Proposed Fact No. 22: In 2005, WWWY sought to sign affiliate agreements with public access channels. Eichorst Aff., ¶ 26; Declaration of Mary Bennin Cardona, Feb. 9, 2010 (filed herewith)("Cardona Decl."), ¶¶ 4-5.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 23: According to the President of WWWY, the affiliate program "would allow the PEG [public access] channels to continue to do what they were doing, which was filming WIAA events and carrying them on their channels." Eichorst Aff., ¶ 26.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 24: The Board of Directors of Wisconsin Association of PEG Channels ("WAPC") unanimously voted in 2005 to not endorse WWWY's affiliate agreement for local access channels. Cardona Decl., ¶ 7.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 25: The board concluded that the contract was "fundamentally flawed, as it asks publicly-funded facilities to use [their] resources for private gain." Cardona Decl., ¶ 7; Cardona Decl., Ex. C.

Plaintiffs' Response: DISPUTED AS INADMISSIBLE AND INCOMPLETE.

Plaintiffs object to this proposed fact as it is not based on admissible evidence in that it is impermissible conclusion, opinion and hearsay. In addition, plaintiffs dispute this fact to the extent it suggests that the PEGs have not actively participated under the WIAA/WWWY contract as affiliates. Indeed, even as of 2005, there were 18 tournament series affiliates, including many PEG channels, and the number of affiliates, including PEG channels, continued to grow over the next few years. Clark Third Decl. ¶ 5.

Defendants' Supplemental Proposed Fact No. 26: The WAPC board recognized that opposition to the affiliate agreement "means that many public, education and government access channels will choose not to produce" WIAA-sponsored regional and sectional games. *See* Cardona Decl., Ex. C at 2.

Plaintiffs' Response: DISPUTED AS INADMISSIBLE AND INCOMPLETE.

Plaintiffs object to this proposed fact as it is not based on admissible evidence in that it is impermissible conclusion, opinion and hearsay. In addition, plaintiffs dispute this fact to the extent it suggests that the PEGs have not actively participated under the WIAA/WWWY contract as affiliates. Indeed, even as of 2005, there were 18 tournament series affiliates, including many PEG channels, and the number of affiliates, including PEG channels, continued to grow over the next few years. Clark Third Decl. ¶ 5.

Defendants' Supplemental Proposed Fact No. 27: A public access channel that does not sign the agreement is not permitted to produce games covered by WWWY's exclusive rights contract. Cardona Decl., ¶ 5; *see also* Eichorst Aff., ¶¶ 25-26.

Plaintiffs' Response: DISPUTED IN PART. Plaintiffs do not dispute that public access channels cannot transmit WIAA events without paying a fee to WIAA or its designated agent, but dispute the implication that this restriction is only related to WWWY's contract with the WIAA, when in fact public access channels were always required to pay a fee to the WIAA for transmitting WIAA events. Clark Third Decl. ¶ 6.

Defendants' Supplemental Proposed Fact No. 28: WWWY demanded exclusivity from the WIAA as part of its contract because "Fox required WWWY to provide it with exclusive content for distribution as part of any agreement." Eichorst Aff., ¶¶ 31-32.

Plaintiffs' Response: DISPUTED. WWWY could not operate at a profit without the exclusive contract with the WIAA. There are no revenues from internet streaming, and WWWY expends considerable amounts providing extra production services to the WIAA. WWWY's revenues come from distribution and advertising. WWWY's distribution partners, such as Fox, and its television advertisers require exclusive content. Eichorst First Aff. ¶ 41.

Defendants' Supplemental Proposed Fact No. 29: WWWY started live streaming WIAA athletic events on wiaa.tv in Spring of 2007. Eichorst Aff., ¶ 20.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 30: During the 2008-09 academic year, there were at least 3,585 WIAA-sponsored tournament events covered by the WWWY contract. Second Veldran Aff., ¶¶ 11, 13-14 (2,764 regionals, 677 sectionals; 144 finals in sports other than Boys and Girl's Basketball, Boys and Girl's Hockey, and Football; not all individual events in certain sports included in count); Clark Aff., ¶ 8 (identifying finals events not covered by WWWY's contract).

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 31: Of those 3,585 events, 134 were produced by WWWY or its affiliates under the WWWY contract with the WIAA. Clark Aff., ¶ 8.

Plaintiffs' Response: DISPUTED IN PART. Plaintiffs do not dispute the numbers of events produced, but do dispute the implication that Defendants were in any way prohibited from producing any of those events that were not produced by WWWY or that the number of events produced was a small number. There were more WIAA events transmitted during the 2008-2009 year than had ever been transmitted before (the number of games livestreamed increased from 0 in 2004-2005 to 82 in 2008-2009). Clark First Aff. ¶ 8.

Defendants' Supplemental Proposed Fact No. 32: Thus, only 3.7% of those covered by the WWWY contract, were produced during the 2008-09 academic year. *See* Second Veldran Aff., ¶ 14 (total games); Clark Aff., ¶ 8 (games produced pursuant to WWWY contract).

Plaintiffs' Response: DISPUTED IN PART. Plaintiffs do not dispute the percentage of events produced, but do dispute the implication that Defendants were in any way prohibited from producing any of those events that were not produced by WWWY or that the percentage of events produced was a small percentage. There were more WIAA events transmitted during the 2008-2009 year than had ever been transmitted before (the number of games livestreamed increased from 0 in 2004-2005 to 82 in 2008-2009). Clark First Aff. ¶ 8.

Defendants' Supplemental Proposed Fact No. 33: The WIAA issues credentials "to members of legitimate media outlets and/or Internet sites that have a professional working function." Jt. Stip., Ex. B at 3 (Credential Provisions #1).

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 34: The WIAA will not grant credentials to "[s]ites with content, forums or advertising…not in compliance with the mission or media policies of WIAA, or associated with any promotion or link to material deemed inappropriate as determined by the WIAA." Jt. Stip. Ex. B at 2 (#9(E)).

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 35: The WIAA constitution contains three stated purposes:

> Article II – Purpose
>
> Section I -- The purpose of this Association is threefold:
>
> A. To organize, develop, direct, and control an interscholastic athletic program which will promote the ideals of its membership and opportunities for member schools' participation.
> B. To emphasize interscholastic athletics as a partner with other school activities in the total educational process, and formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship.
> C. To promote uniformity of standards in interscholastic athletic competition, and prevent exploitation by special interest groups of the school program and the individual's ability.

Nero Decl., Ex. 2 at 14.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 36: James L. Hoyt does not "purport to be an expert in First Amendment Law." Declaration of James L. Hoyt, Ph.D. in Support of the Pls.' Mot. for Summ. J., Jan. 12, 2010 (Dkt. #56) ("Hoyt Decl."), ¶ 10.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 37: Internet streaming technology has improved greatly in recent years, making it easier for companies to reach a wider audience and more likely that they and other media companies would produce more tournament events if WWWY did not have exclusive rights. *See* Affidavit of Danny L. Flannery, Jan. 21, 2010 (Dkt. #41) ("Flannery Aff."), ¶¶ 6, 9, 15, 21.

Plaintiffs' Response: DISPUTED. Plaintiffs object to this proposed fact as vague, speculative and conclusory, and the cited evidence does not support the proposed fact. Plaintiffs further object to this portion of the Flannery affidavit to the extent it offers opinion**,** which opinions must be disclosed pursuant to Rule 26. *See* Fed. R. Civ. P. 26 & Fed. R. Evid. 702**.** Mr. Flannery did not submit an expert report in this matter pursuant to the Order in this case**,** which deadline was in October**.** *See* Dkt. No. 19 & 20 (agreeing to September 14 and October 16, 2009, expert disclosures). Accordingly, the Court should disregard this opinion testimony. *See* Fed. R. Civ. P. 37(b).

Defendants' Supplemental Proposed Fact No. 38: The WIAA's advertising restrictions apply to all credentialed media. *See* Jt. Stip., Ex. B at 16.

Plaintiffs' Response: DISPUTED. The WIAA's advertising policy applies to any radio, television or internet transmission of a WIAA Tournament Series competition, irrespective of the transmitter. Jt. Stip., Ex. B at 16.

Defendants' Supplemental Proposed Fact No. 39: Tim Eichorst, the President of WWWY, produced WIAA high school athletic events for several years before obtaining the exclusive WIAA contract. *See* Eichorst Aff., ¶ 5, 7-8.

Plaintiffs' Response: DISPUTED. Eichorst made highlight videos for a high school sports team before entering into a contract with the WIAA. Eichorst First Aff., ¶ 8.

Defendants' Supplemental Proposed Fact No. 40: The WIAA fears that without its exclusive contracts the "WIAA membership would lose control over the message that was associated with their voluntary athletic association and its ability to promote the members' ideals as stated in the constitution." Chickering Aff., ¶ 35.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 41: The WIAA responded to one of the defendants' interrogatories as follows:

> Interrogatory No. 11: Do you contend that a person or entity, if work for hire, who fixes an image of a WIAA Tournament event in a tangible medium does not own the copyright to that image? If so, please state the complete factual basis for that contention.
>
> Response: While copyright ownership is a legal conclusion, the answer to this question depends on many variables. The only way the WIAA would recognize the right of a person or entity to fix an image of a WIAA tournament event in a tangible medium is if that person or entity obtained permission from and paid the appropriate fees to the WIAA and its agents who own and control the right to manage and produce the tournaments that generate the images sought to be fixed. As a condition of and in exchange for that permission, WIAA controls the ownership of the copyright. Absent such permission, the WIAA does not recognize the rights of person or entities to fix such images of WIAA tournament events in any tangible medium.

Declaration of Monica Santa Maria in Support of Defs.' Mot. for Summ. J. on Their Counterclaim, Jan. 22, 2010 (Dkt. #34), Ex. B at 8, Interrog. No. 11 and Resp. to Interrog. No. 11.

Plaintiffs' Response: UNDISPUTE D that the Defendants asked this question in Interrogatory No. 11 and that this was the WIAA's response to Defendants' Interrogatory No. 11. Plaintiffs further object to this proposed fact because whether the WIAA identified or did not identify something is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in

terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings.").

Defendants' Supplemental Proposed Fact No. 42: WWWY responded, in relevant part, to one of the defendants' interrogatories as follows:

> Interrogatory No. 6: Do you contend that you own the copyright of images of WIAA Tournament events fixed in a medium suitable for Internet streaming produced by members of the media who have not obtained pre-approval, authorization or a license from you or from WIAA? If so, please state the complete factual basis of your contention.
>
> Response: …Pursuant to its contract with the WIAA, WWWY contends that it owns the exclusive right to produce, sell, and distribute the WIAA series and championships included in its agreement with WIAA. WWWY incorporates by reference plaintiff WIAA's response to Interrogatory No. 11.

Second Santa Maria Decl., Ex. A at 8-9, Interrog. No. 6 and Resp. to Interrog. No. 6.

Plaintiffs' Response: UNDISPUTED that the Defendants asked this question in Interrogatory No. 6 and that this was WWWY's response to Defendants' Interrogatory No. 6. However, Plaintiffs object to this proposed fact because whether the WIAA identified or did not identify something is immaterial. *See Townsend v. Fuchs*, No. 05-C-204-C, 2006 WL 1308069, at *1 (W.D. Wis. May 9, 2006) ("Because many of the proposed facts were phrased in terms of what a party admitted, indicated, acknowledged or testified to, it was not possible to interpret some of the responses to these proposed findings.").

Defendants' Supplemental Proposed Fact No. 43: Fox broadcasts television-quality productions of events. *See* Eichorst Aff., ¶31 (Fox requires high production quality); ¶ 16 (Eichorst expected to make profits on, among other things, broadcast TV highlight feeds); ¶¶ 32-33, 35 (describing WWWY's multi-camera television-quality broadcasts shipped to Fox for delayed broadcast).

Plaintiffs' Response: DISPUTED. The cited evidence does not support this proposed fact with respect to the characterization of Fox broadcasts as "television-quality productions of events."

Defendants' Supplemental Proposed Fact No. 44: *The Post-Crescent*'s Internet streams are single-camera productions that are not television-quality. Declaration of Joel Christopher in Support of Defs.' Mot. for Summ. J. on Their Counterclaim (Dkt. #36), ¶ 19 (single camera on a tripod); Flannery Aff., ¶ 26 (not television quality).

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 45: WWWY did not start live streaming WIAA events on wiaa.tv until Spring 2007. Eichorst Aff., ¶ 20.

Plaintiffs' Response: UNDISPUTED.

Defendants' Supplemental Proposed Fact No. 46: The WIAA was aware "that internet streaming was an important technological development" at least in 2003, two years before signing the contract with WWWY. Clark Aff., ¶¶ 11, 18.

Plaintiffs' Response: UNDISPUTED.

Dated this 22nd day of February, 2010.

Respectfully submitted,

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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.

THIRD DECLARATION OF TODD C. CLARK

I, Todd C. Clark, hereby declare,

1. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently thereto.

2. Mary Bennin Cardona, the Executive Director of the Wisconsin Public, Educational and Government Access Channels ("WAPC"), referred in her affidavit to a meeting she attended on September 29, 2005, with members of WWWY and myself. After that meeting, Tim Eichorst of WWWY and I went to the WAPC Workshop at Beloit College on October 7, 2005, to discuss the affiliate plan in front of a larger group of WAPC members. We answered questions and explained the program.

3. As a result of that meeting and to address issues that the WAPC members raised, we revised the Affiliate Agreement so that we could work with the WAPC members to make this a successful program.

4. I was aware that shortly thereafter, despite those revisions to address the WAPC's concerns, the WAPC Board of Directors voted against the program and issued a press release stating their opinion of the Affiliate Agreement.

5. Nonetheless, in 2005, we had 18 tournament series affiliates, including many PEG channels, and the number of affiliates, including PEG channels, continued to grow over the next few years.

6. Ms. Cardona fails to mention in her affidavit, or in the documents that she attached to her affidavit, that the WIAA always required the payment of a fee for PEG channels to tape WIAA tournament events. The fee was published at least as early as the WIAA's 2003-2004 Media Policies Reference Guide. That Guide states that the fee for delayed broadcast without commercial sponsorship (the category in which the PEG channels would fall) was $20 for each regional or sectional event, and $50 for each state event. This policy continued in place until the contract with WWWY. Attached hereto and incorporated herein by reference as Exhibit 5 is page 16 of the 2003-2004 Media Policies Reference Guide showing these fees applicable to PEG channels.

7. Under the broadcast fees section of the 2003-2004 Media Policies Reference Guide, the stations were to make the payment for all regional and sectional events directly to the host school. Because of that requirement, the WIAA itself was not able to monitor whether the PEG channels were complying with the fees policies, unless indicated on the event financial forms the school submits to the WIAA. The WIAA thus would be aware if a PEG channel did pay, but would not be aware if the PEG channel taped an event but did not pay the required fee. The contract with WWWY allowed the WIAA to capture that revenue by monitoring compliance with the fees policies.

8. Under the affiliate program through WWWY, the PEG channels were only charged $50 per year, no matter how many events they broadcast. Thus, for the PEG channel that wanted to do multiple broadcasts of regional or sectional events, this was a lower fee than what the WIAA had previously charged, and the same fee as that for one state event. Further, for this fee structure, WWWY would make the arrangements with school administration for the PEG channel to tape from that location, arrangements for which the stations had previously been responsible on their own.

9. The WWWY affiliate program allowed the PEG channels to have their tapes marketed for sale, without the administrative cost of having to make those DVDs. WWWY assumes all administrative expenses and burdens of the marketing and then provides royalties to the PEG channel from such sale.

10. Because the tournaments are produced and financially supported by the WIAA, the WIAA wanted WWWY to monitor the quality of the products associated with the WIAA name that were being marketed, including compliance with requirements regarding prohibited content. Thus, the WIAA gave WWWY the right to obtain the master copy of any tape produced of an event, as this was how we determined what was being produced and its compliance with the WIAA's requirements.

11. The WIAA's 2009 Annual Meeting is currently posted on the wiaa.tv website. The WIAA removes outdated material from wiaa.tv when it is no longer useful or necessary. For example, the 2008 Annual Meeting was live streamed on wiaa.tv as it was occurring, and then remained on wiaa.tv for delayed viewing. After the 2009 Annual Meeting, however, the 2008 meeting was considered outdated so it was removed. If there were other things not on the

website when viewed in February of 2010, it is most likely because they were removed as outdated.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

Dated this 19 th day of February, 2010.

Todd C. Clark

EXHIBIT 5

Broadcast Rights Fees

Please review broadcast and cybercast policies in each medium's respective policies section for descriptions and guidelines.

Type of Broadcast	Regional/Sectional Fees*	State Fees*
Radio/Internet Cybercast		
Live broadcast with commercial sponsorship	$30	$60
Live broadcast without commercial sponsorship	$20	$50
Delayed broadcast with commercial sponsorship	$20	$50
Delayed broadcast without commercial sponsorship	$20	$50
Stations receiving live feed from originating commercial broadcast	$20	$50
Live internet placement of text, images or audio directly from venue	$30	$60

* Fees listed are per game (per day for State individual wrestling).

Radio broadcasts simultaneously running cybercasts on its internet site does not pay additional fee. The live broadcast fee covers both casts. Rights fees are independent of any telephone line charges covered in the "Telephone Lines" section. Regional and sectional wrestling fees indicated covers entire regional or sectional.

State Tournament payments are to be made payable to the WIAA. Stations can either pay at tournaments or the WIAA will invoice following the respective tournaments. All regional and sectional event payments are to be made payable to the host school prior to the broadcast/cybercast.

Television/Cablecast/Cable Access		
Live broadcast/cablecast with commercial sponsorship	Contact WIAA	$2,000
Delayed broadcast/cablecast with commercial sponsorship	Contact WIAA	$1,000
Live local cable access with commercial sponsorship	$100	$150
Live local cable access without commercial sponsorship	$75	$100
Tape delayed local cable access with commercial sponsorship	$40	$75
Tape delayed local cable access without commercial sponsorship	$20	$50
Tape delayed local school's education access channel	No fee	No fee
Live internet placement of video with audio directly from venue	$100	$200

* Fees listed are per game (per day for State individual wrestling).

State Tournament payments are to be made payable to the WIAA. Local cable access stations must pay fees in advance of or upon arriving at the venue prior to setting up equipment. All regional and sectional event payments are to be made payable to the host school prior to the broadcast/cybercast.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

DECLARATION OF JOHN W. DYE

I, John W. Dye, declare and state as follows:

1. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently.

2. In 2008, the *Green Bay Press-Gazette* had an advertising contract with a local adult-entertainment company called the "Oval Office."

3. An ad from that company appeared in our electronic and print editions from July 2008 through December 2008. The contract expired December 31, 2008, and no live ads from that company appeared on our online site or in our print editions after that date.

4. The online ad from that company originally started on a "run of site" basis, meaning it appeared randomly with any story. But when readers informed me the ad was running on high school sports pages (late July), the ad was blocked/taken off. By so doing, we intended that it not be visible alongside any high school sports pages.

5. Most online advertising on the *Green Bay Press-Gazette* site is "run of site."

6. In researching the information for this declaration, we found out that the ad campaign was not blocked from all online high school sports pages in another crucial computer file. That means that the ad could have run on some high school sports stories online at any time between July and December of 2008.

7. The way our web site ad rotation works, two different people can see two different advertisements alongside the same story even if each person clicks onto the story at the same time.

8. For 30 days, archived stories are available for free from our web site if readers/users use the search tool. Any advertisement in the rotation can appear with that story when it is called up.

9. After 30 days, we require readers/users to buy the story. In that case, only the story -- not advertisements or photographs -- is available.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 22 day of February, 2010.

John W. Dye

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, AMERICAN HI-FI, INC.,

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The WIAA's contract granting WWWY the exclusive right and unfettered control over Internet streaming of most WIAA-sponsored tournament events strikes at the heart of the First Amendment.

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.

Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1988). The plaintiffs struggle in vain to avoid the implications of this fundamental principle for their contractual relationship, asking the court to narrowly construe the pleadings, quibbling over the admissibility of background facts and even ignoring the plain language of the WIAA's media policies. In the end, however, both the law and the material facts stand undisputed in the summary judgment record. And they lead to only one conclusion -- many of the WIAA's media policies, and especially its grant of exclusivity over Internet streaming to WWWY, are facially unconstitutional.[1]

The Court should reject, at the outset, the plaintiffs' unsupported assertion that the defendants' First Amendment rights are somehow diminished because they hope to someday profit, through increased web site traffic and selling advertisements, by streaming tournament events. Pls.' Br. in Opp. to Defs.' Mot. for Summ. J. (Dkt. #86) ("Pls.' Opp. Br.") at 1 ("This is, in short, essentially a commercial case, not a speech case."). The argument ignores settled law.

[1] The defendants do not discuss in this brief the copyright issue before the Court. As is evident from the prior briefing, the parties agree on all the material facts and do not materially disagree on the governing law.

> That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (extending the principle to movies because they also "are a significant medium for the communication of ideas."); *see also Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *Ayres v. City of Chicago*, 125 F.3d 1010, 1014 (7th Cir. 1997) ("[T]here is no question that the T-shirts are a medium of expression prima facie protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away."). The plaintiffs do not even acknowledge this fundamental tenet of First Amendment law, much less try to explain why it should not apply to Internet transmissions. It should.

The plaintiffs' argument also ignores the undisputed fact that the WIAA's exclusivity policies apply whether or not the speaker seeks to profit from transmitting tournament events. Indeed, the Wisconsin Association of PEG Channels ("WAPC") objected to those policies precisely because WWWY is a for-profit enterprise:

> The . . . WAPC took a stand on Thursday against the commercialization of WIAA-sponsored high school tournament sports and against the use of publicly-funded video production facilities for private business ventures. The WAPC board voted unanimously to urge its 40 member stations to reject the year-long Affiliate Contract proffered by When We Were Young Productions (WWWYP).
>
> . . .
>
> Over the last two months, the WAPC met with WWWYP twice in the hopes that changes to the draft 2005-2006 Affiliate Contract would make it workable for non-profit access centers. However, in the end, the WAPC Board decided that the contract was

> fundamentally flawed, as it asks publicly-funded facilities to use its [sic] resources for private gain.

Defs.' Reply to Pls.' Resp. to Findings of Fact in Support of Defs.' Mot. for Summ. J. on Their Counterclaim (filed herewith) ("Defs.' Reply PFOF"), Fact, Response and Reply No. 60. The WIAA's grant of exclusive rights to WWWY affects *all* media groups that might otherwise want to transmit tournament events, not only those who seek to profit from doing so.

The Court also should reject the plaintiffs' attempt to avoid scrutiny of some plain constitutional defects in its policies by narrowly construing the pleadings. They complain that defendants never "raised the WIAA's 'inappropriate content' policies or policies related to the revocation of transmission rights as an issue in Defendants' Counterclaim or discovery responses."[2] Pls.' Opp. Br., p. 8. They object that the defendants' pleadings failed to give them "fair notice" that they thought these policies violate the First Amendment, but they ignore their own pleadings. *Id* at 9.

The WIAA incorporated its Media Policies into plaintiffs' complaint and sought a broad declaration of their constitutionality:

> WIAA contends that it may require Defendants to obtain a license in order to transmit game action from WIAA sponsored events over the Internet, whether live or tape delayed, and that it may require Defendants to abide by WIAA's Media Policies. Defendants deny this and assert among other claims that WIAA's Media Policies violate their rights under the First and Fourteenth Amendments to the United States Constitution.

Am. Compl., ¶ 34, Ex. E; *see also* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.). The defendants, in turn, asked the Court first to "[d]eny the relief requested by WIAA," and then to declare the WIAA's "system of discriminatory media access to report on high school tournament events is

[2] The plaintiffs' unexplained reference to discovery is baseless because neither plaintiff served a discovery request that asked defendants to specify the WIAA Media Policies they contend are unconstitutional.

unconstitutional . . . ." Defs.' Answer and Countercl., p. 17. Having sought the broadest possible declaration of constitutional validity covering all of its "Media Policies," the WIAA cannot now exempt some of them from review by claiming some deficiency in defendants' pleadings.

The plaintiffs' attempt to defeat the defendants' motion for summary judgment by challenging the admissibility of some of their evidence must fail. Pls.' Opp. Br., pp. 5-6. Their evidentiary objections are without merit, *see* Defendants' Brief in Response to Plaintiffs' Motion to Strike (filed herewith), but it would make little difference to the resolution of this case even if their motion was granted. The essential, material facts required to decide the central constitutional issues presented are admitted in the parties' pleadings.

The defendants contend that several of the WIAA's Media Policies, especially its contract granting WWWY exclusive and unfettered control over Internet streaming of most tournament events, are unconstitutional on their face. Those policies and the WWWY contract are attached as exhibits to the Plaintiffs' Amended Complaint. The WIAA's policies also establish, and its answer to the defendants' counterclaim admits, that the tournaments it sponsors are newsworthy events opened generally to the public as spectators and to the media for reporting and coverage. The parties' dispute could be decided on these facts alone.

The other evidence both sides submitted for the summary judgment record serves to demonstrate that their dispute is real and ripe for determination under 28 U.S.C. § 2201, and to provide a factual context for the documents at the heart of that dispute. Challenging the admissibility of some of those background facts, as the plaintiffs have done, cannot prevent this Court from deciding the important constitutional issues presented.

The WIAA admittedly operates its tournaments as if it was a private business. By emulating the media-rights policies of professional sports organizations, however, the WIAA has established a classic and unconstitutional system of prior restraints. The association claims its transmission rights and exclusive rights policies are content neutral, Pls.' Opp. Br., pp. 6-8, but in the absence of "narrow, objective, and definite standards to guide the licensing authority," and the WIAA has none, that simply cannot be determined. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). The WIAA ignores the settled First Amendment principle "that such . . . policies impose censorship on . . . the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *Lakewood*, 486 U.S. at 763-64 (citations omitted). The WIAA's claim that it has never applied a content-based distinction when exercising its boundless discretion is irrelevant. Its policies must be held unconstitutional on their face "even if the discretion and power are never actually abused." *Id.* at 757.

The WIAA's former executive director candidly confirms, moreover, that the Association's exclusive rights policies are *not* content neutral. The plaintiffs twice invite the Court to consider "the motive of the government in instituting the policy" to determine whether it is content neutral. Pls.' Opp. Br., pp. 6-7, 35 (citation omitted). But they ignore Douglas Chickering's admission that the WIAA's exclusive rights policies were intended, in part, to provide "control over the message that was associated with their voluntary athletic association . . . ." Pls.' Proposed Findings of Fact (Dkt. #51) ("Pls.' FOF"), ¶ 254. In short, the WIAA cannot justify its policies as content neutral because there are not "narrowly drawn, reasonable and definite standards guiding the hand" of their administrator, *Forsyth County v.*

Nationalist Movement, 505 U.S. 123, 132-33 (1992) (citation omitted), and because the former administrator of the policies admits their illicit purpose to control speech about the association.

The absence of narrow, objective and definite standards for granting, refusing or revoking transmission rights renders the WIAA's policy unconstitutionally vague.

> The WIAA also reserves the right to revoke or deny the video, audio or text transmission rights of any media or Internet sites that include in any part of its transmission of WIAA Tournament events, including pre-game and post-game shows, content or comments considered inappropriate or incompatible with the educational integrity of the tournament or host institution from which the transmission is originated.

Defs.' Proposed Findings of Fact in Support of Summ. J. on Their Counterclaim (Dkt. #33) ("Defs.' PFOF"), ¶ 22. The basis for the defendants' challenge to this policy is apparent on its face and cannot be dismissed as mere "speculation about possible vagueness in hypothetical situations . . . ." Pls.' Opp. Br., p. 10, quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (upholding restrictions on speech-related conduct outside abortion clinics). The defendants' facial challenge is not based on "hypertechnical theories as to what the [transmission rights policy] covers," as in *Hill*. *Id.* Rather, the policy is unconstitutional because it is completely subjective, precluding the WIAA's contention that "it is surely valid in the vast majority of its intended applications." Pls.' Opp. Br., p. 10, quoting *Hill*.

The plaintiffs contend that the inappropriate content policy is not unconstitutionally vague because "mathematical certainty" of language can never be expected. Pls.' Opp. Br., p. 11, quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). They cannot show, however, that this policy provides "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*, 408 U.S. at 108.

The plaintiffs contend that, by reviewing the WIAA's Media Guide as a whole, "any reasonable person would conclude that the phrases 'inappropriate' and 'incompatible with the educational integrity of the tournament' refer to . . . inappropriate advertising or sponsorship." Pls.' Opp. Br., p. 12. But the transmission rights policy does not mention advertising or sponsorship and cannot reasonably be limited to only those subjects for at least two reasons. First, that narrow construction would render the advertising and sponsorship policies themselves superfluous. More importantly, however, the transmission rights policy expressly applies to any "content or comments" included "in any part" of transmission of WIAA tournament events. The term any "content," of course, includes but is not limited to advertising or sponsorships. The reference to "comments," however, can only refer to the announcers' description of the tournament event. The plaintiffs' narrow interpretation of the WIAA's policy ignores its plain language and actually confirms the policy is unconstitutionally vague.

The plaintiffs also fail in their attempt to read sufficient clarity into the WIAA's current definition of play-by-play transmissions. *Id.* at 12-13. The plaintiffs effectively concede that the WIAA's earlier, undefined policy that was in effect when they commenced this action was unconstitutionally vague by faulting the newspapers that were invoiced for violating that policy, after the fact, for failing to first contact the WIAA:

> If [they] had applied for transmission rights before the game, they would have been advised beforehand of whether their transmission was permissible and how much the WIAA would charge for such a transmission.

Pls.' Additional Findings of Fact (Dkt. #81) ("Pls.' AFOF"), ¶ 8. The whole point of the vagueness doctrine is to avoid such ad hoc restrictions on speech. *See Grayned*, 408 U.S. at 109. The WIAA's current definition provides more guidance to speakers, defendants concede, but it continues to grant WIAA administrators discretion to determine what constitutes "a significant

number of plays/events" on an ad hoc basis. Defs.' PFOF ¶ 33. That "courts do not expect absolute precision in regulatory language" is not a sufficient justification for this completely subjective standard. Pls.' Opp. Br., p. 13.

The plaintiffs try to excuse the unbridled discretion the WIAA has ceded to WWWY on three grounds, none of which are valid. Pls.' Opp. Br., pp. 15-19. First, they argue that because "[m]edia organizations may attend any tournament event on the same terms as the general public and may also obtain credentials permitting access" for reporting ". . . the specific First Amendment concerns raised in *Lakewood* and other discretion cases are not present here." *Id.*, p. 15. The argument is circular, however, because it assumes this degree of unequal "access [is] always available to Defendants," *id.*, and ignores the unbridled discretion the WIAA has retained to deny or revoke credentials on vague and subjective grounds. *See* Defs.' PFOF, ¶ 21. Again, it is irrelevant that the WIAA claims it has not abused this power, for "the success of a facial challenge on the grounds that a [policy] delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the [policy] preventing him from doing so. *Forsyth County*, 505 U.S. at 133 n.10. Here, of course, there is nothing in the WIAA's exclusive-rights policy that prohibits viewpoint discrimination.

The argument also improperly equates the limited reporting opportunities the WIAA grants the defendants and other media companies with the broader and exclusive rights it has granted WWWY over Internet streaming. Far from avoiding "the specific First Amendment concerns raised in *Lakewood*," Pls.' Opp. Br., p. 15, this grant of unbridled discretion to WWWY implicates the Court's primary concern that "permitting communication in a certain manner for

some but not for others raises the specter of content and viewpoint censorship." *Lakewood*, 486 U.S. at 763. The WIAA improperly exercised unbridled discretion when it granted WWWY exclusive streaming rights and now improperly allows WWWY to exercise unbridled discretion over who else may stream tournament events and on what terms.

Next, the plaintiffs argue that the unbridled discretion the WIAA has granted WWWY over Internet streaming is reasonable and, therefore, constitutional because it contends tournament events are nonpublic forums. Pls.' Opp. Br., pp. 16-17. This argument not only misstates First Amendment forum analysis, as defendants demonstrate in the next section of this brief, but it also misstates the unbridled discretion doctrine itself.

The case law plaintiffs cite for this argument does not support its position. The court in *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 95 (1st Cir. 2004) denied, in part, constitutional challenges to advertising guidelines governing Boston's public transit system. The court held the system's written guidelines did not grant administrators excessive discretion because it found the terms plaintiffs challenged on vagueness grounds "have reasonably clear meanings." In *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002) the court held that written guidelines the Department of Administration had promulgated in a Flag Manual sufficiently bridled administrative discretion to support a policy prohibiting the display of a confederate flag at a national cemetery. The court emphasized that "[t]he nature and function of [a] national cemetery" did not pose "a real and substantial threat to expression . . . from the alleged unbridled discretion vested in VA facility heads." *Id.* at 1325-26. Neither case helps the plaintiffs, of course, because there are *no* written guidelines limiting WWWY's control over Internet streaming at tournament events for this Court to review.

> All permissions granted, policies enforced and fees required will be at the sole discretion of the rights holder.

Defs.' PFOF ¶ 24.[3] The WIAA's policy is unconstitutional on its face.

The newsrack case plaintiffs cite confirms this point. The court in *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1199 (11th Cir. 1991) held unconstitutional Florida's permit requirement for newsracks at interstate rest areas because it left newspapers "subject to the completely standardless and unfettered discretion of one bureaucrat . . . ." The court held that "neutral criteria must be established in order to insure that [any] permit decision regarding newsracks 'is not based on the content or viewpoint of the speech being considered.'" *Id.* . at 1199-1200, quoting *Lakewood*, 486 U.S. at 760. The court also noted, in the footnote plaintiffs cite, that *after* the state establishes neutral criteria, they will "be reviewed only for reasonableness instead of some higher level of scrutiny" because interstate rest areas are nonpublic forums. 936 F.2d at 1199 n.11; Pls.' Opp. Br., p. 16.

This case is like *Sentinel Communications*, not *Ridley* or *Griffin*, because there currently are no "neutral criteria" to ensure that the WIAA's decisions on permissions, fees or conditions for Internet streaming of tournament events are not based on viewpoint. Quite the contrary, the WIAA has left those decisions to WWWY in that company's "sole discretion." There are no additional criteria or guidelines to assess, whether for reasonableness or some higher level of scrutiny. In short, even if nonpublic forum standards applied to media coverage of tournament events, as the WIAA incorrectly argues, the WIAA's current licensing scheme for Internet streaming is unconstitutional. *See Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 387 (4th Cir. 2006) ("[E]ven in cases involving nonpublic . . . forums, a policy (like the one at issue here) that permits officials to deny access for any reason,

[3] This statement from the WIAA's 2008-09 Media Guide also indicates that "[d]etailed information regarding policies and fees are [sic] available upon request from" WWWY, but the plaintiffs do not contend that this detailed information includes binding written standards that limit WWWY's discretion.

or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny.") (parenthetical statement in original) (citations omitted).

Finally, the plaintiffs ask the Court to excuse the WIAA's lack of any neutral criteria for granting licenses or setting fees for streaming tournament events because they claim to "have developed a uniformly applied practice surrounding the exercise of this discretion." Pls.' Opp. Br., p. 18. The record establishes, however, that the uniform practice plaintiffs have established is unconstitutional.

In granting permission to stream an event, for example, the plaintiffs concede that "the discretion at issue turns solely on whether WWWY has decided to exercise its exclusive transmission rights awarded by the contract." *Id.* They do not claim to have established a uniform practice of applying the "neutral criteria" the First Amendment requires for permit decisions, *Sentinel Communications*, 936 F.2d at 1199, but instead affirm that WWWY gets first choice to stream events in its sole discretion to help ensure that the company can "operate . . . at a profit . . . ." Pls.' FOF, ¶ 256.

The plaintiffs' established practice on setting fees also is unconstitutional. They claim they "have established a strict fee structure," Pls.' Opp. Br., p. 18, but their evidence shows the fee structure was pulled from the air by Todd Clark of the WIAA and Tim Eichorst of WWWY. *See* Pls.' FOF, ¶¶ 158-165. The two men unilaterally decided the factors to consider and the price to charge. *Id.* In addition, WWWY retains sole discretion to add any other conditions it may desire for obtaining permission to stream those events it chooses not to produce. In particular, WWWY requires a licensee to surrender "a master copy of the game" and the right to sell "copies of the game to anyone." Defs.' Reply PFOF, ¶ 72. The WIAA nowhere acknowledges or claims that it authorized this requirement and, instead, repeatedly claims that

defendants and others "remain free to transmit [declined] games via Internet streaming by paying a fee." Pls.' Opp. Br., p. 14. WWWY's additional requirement serves no governmental purpose and confirms that the WIAA's established practice is to allow WWWY to set whatever license conditions it wants, just as the Media Guide states.

In the end, a uniform, established practice might sufficiently clarify a vague or ambiguous licensing statute or policy to satisfy the First Amendment. *See Lakewood*, 486 U.S. at 770 n.11; *Forsyth County*, 505 U.S. at 131. But there is nothing vague or ambiguous about the Media Guide's statement that WWWY has "sole discretion" over "permissions granted, policies enforced and fees required" for Internet streaming of tournament events. To sustain that policy based on the record evidence of how WWWY has actually exercised its unbridled discretion would undermine a central purpose of the doctrine -- to ensure that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, [does not] intimidate[] parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757; *see also Griffin*, 288 F.3d at 1320 ("[I]t is the very existence of such power, not how it is exercised, that renders a licensing law unconstitutional.").

The WIAA fails in its attempt to distinguish the case law forbidding "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment . . . ." *Follett v. McCormick*, 321 U.S. 573, 577 (1944) (citations omitted); *see* Defs.' Summ. J. Br. (Dkt. #32), pp. 19-22. The WIAA relies on the supposed distinction between reporting or covering an event and "carrying a tournament event live, an entirely different endeavor." Pls.' Opp. Br., p. 19. Granted, there are differences between the two activities, but the WIAA cites nothing to support its view that the differences have constitutional significance. They do not. The WIAA has found no authority for its contention that a state actor can lawfully charge the

media a profit-conscious fee for the opportunity to report on a government-sponsored public event, whether the report includes live transmission of the entire event or only an edited summary.

The WIAA then argues, correctly, that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Id*., p. 20, quoting *Leathers v. Medlock*, 499 U.S. 439, 453 (1991). But this argument misses the point. The defendants contend that the First Amendment forbids charging anyone, including WWWY, a profit-conscious fee for the right to stream tournament events over the Internet.

> Eliminating the favored treatment the WIAA affords WWWY on rights fees will not cure the First Amendment violation, however, because a state actor "may not impose a[ny] charge for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).

Defs.' Summ. J. Br. (Dkt. #32), p. 20.

Profit-conscious fees are allowed only in a commercial context, like at a municipal airport that is statutorily required to operate as a self-sufficient business, where newspaper sellers can be treated the same as any other seller. *Atlanta Journal & Constitution v. Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310 (11th Cir. 2003) ("Every vendor, no matter the type of goods sold, must remit to the Airport compensation for the granted right of access to the Airport's customers.").

> While a government acting facially or impliedly in its capacity as regulator or licensor cannot profit from the exercise of First Amendment rights, it is not the law that a government, universally, is prohibited from imposing profit-making or revenue-raising fees on First Amendment expression. We hold that when a government acts in a proprietary capacity, that is, in a role functionally indistinguishable from a private business, then commercially reasonable, profit-conscious contracts may be negotiated for distribution space in a non-public forum for First

> Amendment activities, subject to structural protections that reduce or eliminate the possibility of viewpoint discrimination.

Id. at 1312.[4] This principle does not support the WIAA, however, because it acts as a regulator and licensor at its tournaments, which are educational, not commercial events. *See* Defs.' Resp. to Pls.' Mot for Summ. J. (Dkt. #76) ("Defs.' Resp. Br."), pp. 14-16.

Finally, the defendants agree with the WIAA that fees on expressive activity are constitutional "when the actual fee imposed is relatively small and is used to defray costs associated with administering a related scheme in pursuit of a legitimate government interest." Pls.' Opp. Br., p. 20 (citations omitted); *see* Defs.' Summ. J. Br., pp. 21-22. The WIAA's problem is that, by its own admission, "[t]he revenue generated by rights fees is used to pay for the WIAA programs," not only to defray costs associated with administering its lawful media policies.[5] Pls.' Opp. Br., p. 21. Moreover, there is no evidence in the record that WWWY remits any portion of the rights fees it collects from independent media to the WIAA. Defs.' Resp. to Pls.' AFOF (filed herewith), Fact and Resp. 59.

What the WIAA calls a "rights fee" is actually a flat license tax, forbidden by the First Amendment, under the *Follett* and *Murdock* line of cases.

> "In all of these cases [in which license taxes have been invalidated] the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, *it restrains in advance those constitutional liberties*

[4] The Eleventh Circuit nonetheless invalided the airport's newsrack license fees because of "the boundless discretion granted to the … official responsible for administering the newsrack Plan . . . ." 322 F.3d at 1310-11.

[5] Plaintiffs do not contend the $250 fee for single-camera streams of the events is based on "realized revenues" or on "the expenses of policing the activities in question." *Swaggart*, 493 U.S. at 387. Rather, they based the fee "on a number of [other] factors." Pls.' FOF ¶ 162.

> *of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax.*"

Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 387 (1990), quoting *Murdock*, 319 U.S. at 113-14 (emphasis by *Swaggart* Court). Accordingly, the Court should declare that the WIAA may not constitutionally charge a profit-conscious rights fee for streaming tournament events over the Internet.

The plaintiffs justify their exclusive rights contract on a distinction they claim "has been recognized in the case law for decades" between covering or reporting on government-sponsored public events and the "transmission or broadcast of those events in their entirety." Pls.' Opp. Br., p. 1. Yet, the plaintiffs have not found even a single case that supports this alleged distinction. Rather, they rely on cases involving advertising restrictions by governmental authorities acting in a proprietary capacity, a contract for commercial photography services at public university graduation ceremonies, and a nonexclusive contract to broadcast a state lottery drawing. Pls.' Opp. Br., p. 22. These cases are easily distinguished from the broad, exclusive franchise the WIAA has granted WWWY over Internet streaming of its tournament events. *See* Defs.' Resp. Br., pp. 9-14.

The plaintiffs rely most heavily on a misreading of *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81 (D. Conn. 1981), which they claim affirmed "the government's interest in protecting the commercial value of a sporting event by limiting the broadcast coverage." Pls.' Opp. Br., p. 41 n.15; *see also id*. at 28. This is incorrect. The case

[6] The defendants have not specifically addressed the WIAA's other exclusive contracts because they have no current interest in producing television or cable broadcasts. *See* Pls.' Opp. Br., p. 21 n.6. They do claim a right of access to cover by Internet streaming any WIAA-sponsored tournament event, however, including events covered by those contacts.

actually affirmed that a city does not violate the First Amendment by enforcing a *private company's* exclusive contract to televise a *private sporting event* held at a municipal auditorium. *Post Newsweek*, 510 F. Supp. at 83-86. It was the private company that organized the event, not a state actor like WIAA, that the court found had "a legitimate commercial stake in [the] event" and its exclusive television contract. *Id.* at 84. The plaintiffs cite no authority for the WIAA's claim that a state actor can profit by granting exclusive rights to broadcast or stream over the Internet athletic competitions that involve mostly public high school students. There is none. The First and Fourteenth Amendments command that "[w]hen speakers and subjects are similarly situated, the State may not pick and choose." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983).

The plaintiffs claim the defendants lack "evidentiary support" sufficient to overcome "the WIAA's assertion that it has not created any public forum." Pls.' Opp. Br., p. 22. Nonsense. The WIAA itself supplied conclusive evidence of its intent to create a designated public forum for media coverage of tournament events.

> The Wisconsin Interscholastic Athletic Association acknowledges the responsibilities of legitimate news gathering media representatives in covering and reporting from WIAA-sponsored tournaments. We recognize and appreciate the interest and promotion generated by media coverage and the recognition given to the achievements of school teams and student-athletes.
>
> The WIAA Media Policies Reference Guide is produced to inform statewide media of WIAA policies in effect for all levels of State Tournament Series competition and assist members of the media in providing comprehensive coverage to their communities.

First Amended Compl. (Dkt. #7, Ex. E, 2008-09 Media Guide), p. 1. Contrary to the plaintiffs' argument, moreover, the defendants do not contend and need not prove "that the WIAA made

the decision to intentionally open a nontraditional forum for *public discourse"* to establish that the WIAA created a designated public forum. Pls.' Opp. Br., p. 23 (emphasis added). Rather, the defendants need only show that, as the Media Guide indicates, the WIAA opened the events to speech by a class of speakers -- legitimate media representatives -- for the discussion of certain subjects – comprehensive tournament coverage. *See, e.g., Perry*, 460 U.S. at 46 n.7.

This is not a case where "the government allows selective access for individual speakers rather than general access for a class of speakers," as the plaintiffs contend. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998); Pls.' Opp. Br., p. 25. The WIAA did not simply "reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it," as the association contends. *Id.*, 523 U.S. at 679 (internal quotation omitted). Quite the contrary, the very first page of the WIAA's Media Guide states the association's intent to open tournament events to all "legitimate news gathering media representatives" to enable them to provide "comprehensive coverage to their communities." That the WIAA then claims the right to dictate how the media provides that "comprehensive coverage" does not change the type of forum it has created.

The WIAA's restrictions on reporting methods in this designated public forum "are subject to the same strict scrutiny as restrictions in a traditional public forum." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (citation omitted).[7] The WIAA's revenue-raising purpose for granting WWWY exclusive Internet streaming rights is not, by itself, compelling and its other stated purposes are not furthered by exclusivity. *See* Defs.' Summ. J. Resp. Br., pp. 25-

[7] The plaintiffs' argument that strict scrutiny does not apply in what they call a limited purpose public forum, Pls.' Opp. Br., p. 36, reflects the Supreme Court's inconsistent use of the term. *See Christian Legal Society v. Walker*, 453 F.3d 853, 865 n.2 (2006) (noting that the Court in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001), on which the plaintiffs here rely, used the term "interchangeable with 'nonpublic forum," while it had previously used the term "to describe a subcategory of 'designated public forum,' meaning that it would be subject to the strict scrutiny test."). The Court in *Good News Club* cited *Cornelius v. NAACP Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) -- a case involving a nonpublic forum -- for the reasonableness standard it said applied in a limited public forum. This is the source of the confusion the Seventh Circuit noted.

27. Accordingly, the Court should find the WIAA's exclusive rights policies violate the First Amendment under a designated public forum analysis.

The WIAA attempts to divorce the reasonableness standard applied in a nonpublic forum from its proper grounding in "the intended purpose of the property" on which the speech restrictions are imposed. *Perry*, 460 U.S. at 49. The WIAA claims its exclusive rights contract with WWWY is reasonable because it believes the contract furthers significant government interests and leaves open alternative means of communication. Pls.' Opp. Br., p. 27. Not only is this false, the WIAA misstates the standard. *Perry* teaches that distinctions based on "speaker identity" may be permitted in a non-public forum, but "[t]he touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." 460 U.S. at 49. The WIAA's grant of exclusive Internet streaming rights to WWWY fails this standard.

The WIAA tries to skirt the issue, claiming "the purpose of the non-public forum at issue is athletic competition," as if it had not also intentionally opened those competitions to media coverage. Pls.' Opp. Br., p. 31. And when the issue is whether the Constitution permits a state actor to raise revenue by selling exclusive rights to cover public events, the practice cannot be justified on the grounds that the "vast majority" of other reporting methods and opportunities are open to all media companies. Pls.' Opp. Br., p. 27. The argument begs the question; it does not explain why WWWY should be able to deny, at its sole discretion, all other media companies the opportunity to provide their Internet audience with streaming coverage of tournament events. The plaintiffs have found no authority holding this practice constitutional under any standard of review.

The WIAA minimizes its discriminatory media practices by noting that WWWY's exclusive rights affect only "a single means of communication within [WIAA's] forum." *Id.*, p. 28. This argument ignores the case law. Most of the nonpublic forum cases involved a single means of communication on public property, such as newsracks, where speakers had some other means to try to reach their intended audience. That is not the *Perry* Court's measure of whether a restriction in a non-public forum is reasonable.

The Court found the "differential access "for the incumbent and rival unions in *Perry* "reasonable because it is wholly consistent with the district's legitimate interest in 'preserving the property for the use to which it is lawfully dedicated.'" 460 U.S. at 50-51.

> Use of school facilities enables [the incumbent union] to perform effectively its obligations as exclusive representative of *all* Perry Township teachers. Conversely, [the rival union] does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes.

Id. (emphasis in original). The plaintiffs' relationship is not analogous, as they mistakenly contend. Pls.' Opp. Br., pp. 32-34.

The plaintiffs contend their relationship is free of "viewpoint discrimination," just as the court found in *Perry*, because WWWY participates in the WIAA's official business by providing contractual services, which they contend is similar to the incumbent union's official business with the school district in *Perry*. *Id.* But the plaintiffs overlook a crucial and constitutionally significant difference -- the school district did not select the incumbent union to represent its teacher employees and, therefore, allowing it to use the internal mail system while denying rival union access could not reflect viewpoint discrimination by the school district. *Perry*, 460 U.S. at 49 n.9. Here, of course, the WIAA itself *chose* WWWY as its exclusive Internet streaming partner, for ten years, without neutral criteria or notice to any other media companies.

Accordingly, the plaintiffs cannot claim that their voluntary relationship is similarly free of viewpoint discrimination. That relationship serves only to provide revenue to both parties and cannot be equated with the official relationship between a municipal employer and the exclusive bargaining representative chosen by its employees.

Nor can the WIAA satisfy *Perry*'s "touchstone" requirement because equal access to stream tournament events *is* perfectly "compatible with the intended purpose of the property" where tournaments are held. *Id*. at 49. That WWWY is permitted to stream virtually any tournament event it chooses shows that the activity does not generally interfere with the athletes or with the work of the other media the WIAA invites to cover those events. Indeed, the vast majority of tournament events are not streamed by anyone, so competition for space is not even an issue. Defs.' Supp. FOF in Support of Defs.' Mot. for Summ. J. on their Counterclaim (Dkt. #74) ("SFOF") ¶¶ 30-32. Where space is limited, *see* Pls.' Opp. Br., p. 26, First Amendment principles require that it be allocated by neutral selection criteria to avoid the potential for viewpoint discrimination. In other words, a state actor must use time, place and manner restrictions that treat all media companies equally and fairly. The WIAA's exclusive rights policies fail that standard as well.

The plaintiffs' claim that their exclusive-rights policies are content neutral does not immunize the policies from constitutional scrutiny. Pls.' Opp. Br., pp. 35-37.

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.

Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002), citing *Forsyth County*, 505 U.S. at 131. The Court upheld Chicago's permit system for use of its parks because the city had adopted

neutral access standards that are "reasonably specific and objective, and do not leave the decision to the whim of the administrator." *Id*. at 324. The WIAA's policy on access to stream tournament coverage over the Internet is specific -- WWWY gets first choice and unfettered control over licensing others -- but it is neither objective nor neutral.

Nor can the plaintiffs justify their discriminatory practices by claiming exclusivity serves the WIAA's interest in "protecting its high school athletes from association with certain adult products and businesses, such as alcohol, drugs, lewd subject matter, or gambling." Pls.' Opp. Br., p. 37. This compelling governmental interest is not furthered by exclusivity. If the interest is worth protecting, and the defendants agree that it is, the restrictions must apply *evenhandedly* to all credentialed media and all coverage methods.

The plaintiffs deny that evenhandedness is required to sustain a restriction on the time, place or manner of speech but, again, they have not found a single case in which a restriction based on speaker identity was upheld under that standard. Pls.' Opp. Br., pp. 40-41. In fact, the Court in *Heffron* held that evenhandedness is required of all time, place and manner restrictions to ensure against viewpoint discrimination:

> Nor does Rule 6.05 [forbidding the sale or distribution of literature at the state fair except from a licensed booth] suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system. The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.

Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (citations omitted). The WIAA's overt discrimination against the defendants and other media on access to tournaments for Internet streaming coverage cannot satisfy this standard.

Indeed, the Court reversed the decision of the Minnesota Supreme Court overturning Rule 6.05 precisely because that court ignored the evenhandedness requirement. The Minnesota court held Rule 6.05 invalid because it found the plaintiff religious group would cause minimal disruption if allowed to distribute and sell literature freely throughout the fairgrounds. *Id*. at 651-52. The Supreme Court reversed because the First Amendment mandates that any speech rights extended to the plaintiff religious group must be extended to others:

> [T]he inquiry must involve not only [the plaintiffs], but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to [plaintiffs]. Looked at in this way, it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

Id. at 654. The WIAA's exclusive-rights practices violate this fundamental First Amendment principle.

The requirement that similarly situated speakers must be treated equally arises in a variety of First Amendment contexts, from unbridled discretion analysis to public forum and time, place and manner, because it is essential to avoid even the potential for viewpoint discrimination. *See, e.g., Lakewood*, 486 U.S. at 763; *Perry*, 460 U.S. at 55 ("When speakers and subjects are similarly situated, the state may not pick and choose"); *Heffron*, 452 U.S. at 649. That is why the WIAA's exclusive-rights policies violate the First Amendment under any method of analysis or standard of review.

The plaintiffs focus their equal protection argument on the proposition "that 'the state, as a purchaser of services, enjoys a broad freedom to deal with whom it chooses on such terms as it chooses' and, 'in the absence of an invidious and discriminatory design to favor one individual over another, a state agency's purchasing decision is not subject to review in federal court.'" Pls.' Opp. Br., p. 44, quoting *Foto USA, Inc. v. Bd. of Regents*, 141 F.3d 1032, 1036-37 (11th Cir. 1998). The legal principle is sound but it does not apply here because the WIAA's contract with WWWY is unlike the contract in *Foto USA* or those in any of the other cases plaintiffs rely upon. The differences have enormous constitutional significance.

The plaintiffs' contract does not require WWWY to provide "services" at all the tournament events over which it has been granted exclusivity. Unlike the contract in *Foto USA*, the plaintiffs' contract merely sets coverage goals. Moreover, the plaintiffs' contract does not concern commercial services, like the photography services the state contracted for at graduation ceremonies in *Foto USA*. Rather, the plaintiff's contract grants exclusivity over a method of reporting to a world-wide audience on government-sponsored public events. A state actor cannot trade First Amendment rights for revenue under these circumstances because those rights do not belong to the government to begin with. Besides that insurmountable barrier, moreover, First Amendment freedoms cannot be used as contract consideration because their value is priceless -- the government could never get enough in return.

The plaintiffs ignore the *Foto USA* court's admonition that government contracts which reflect "an invidious and discriminatory design to favor one individual over another," as their contract does, are unconstitutional. 141 F.3d at 1036-37. They chafe at defendants' reference to their "cozy, symbiotic relationship," Pls.' Opp. Br., p. 28, but the description is apt. The

WIAA's argument that a ten-year grant of exclusivity is necessary to justify WWWY's large investment and enable it to provide a relatively small part of the WIAA's budget confirms the association's invidious and discriminatory design to favor that company over almost all other media.

Finally, the plaintiffs ignore the subject matter of their contract. Unlike the disputes over access to advertising or retail space on public property that are addressed in the cases they rely upon, this case concerns access to provide Internet coverage of government-sponsored public events featuring mostly public school athletes. These are not commercial events and the WIAA does not act as a proprietor. The WIAA denies that its "tournaments are supported primarily by public funds" Pls.' Opp. Br., p. 32 n.11, but the record shows that *all* of the WIAA's funds are from public sources, excepting only those it receives from its private school members. The WIAA simply chooses not to count its tournament revenue as public funds by ignoring the Supreme Court's contrary conclusion. *Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 299 (2001). This Court cannot do the same.

No court has held that a state actor can justify a policy of discriminatory access to report on government-sponsored, taxpayer-supported public events based on government contract principles. The practice is an affront to the First Amendment, which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). This Court should reaffirm that principle by upholding the equal right of all credentialed media to report on WIAA tournament events using whatever technology they choose and subject only to uniformly applied time, place, and manner restrictions.

The Court should find that the WIAA's exclusive-rights contracts establish an unconstitutional system of discriminatory media access. The Court should declare that the WIAA has no ownership interest in WIAA-sponsored events and that Gannett owns the copyright to the Internet streams of the four football games at the heart of this dispute.

The Court should also deny all of the WIAA's requested relief, including the request that the Court find that it "may require Defendants to abide by WIAA's media policies." Those policies violate the First Amendment by imposing a flat license tax on protected expressive activities, including written play-by-play reporting of government-sponsored events that the policies only vaguely describe, and authorizing the WIAA to deny credentials or transmission rights to media for vague and content-based reasons. The Court should declare these specific policies unconstitutional, enjoin their enforcement and direct the plaintiffs to prepare neutral policies extending equal coverage rights to all similarly-situated representatives of legitimate news gathering media. Finally, if the WIAA intends to continue charging fees for the opportunity to report on tournament events, the Court should declare they must be limited to an amount intended to defray the WIAA's costs of administering its valid media policies.

Dated: February 22, 2010.

s/Monica Santa Maria

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2010, I caused a copy of the following documents:

- **Reply Brief in Support of Defendants' Motion for Summary Judgment;**
- **Defendants' Reply to Plaintiffs' Response to Proposed Findings of Fact in Support of Defendants' Motion for Summary Judgment on Their Counterclaim – FILED UNDER SEAL;**
- **Defendants' Responses to Plaintiffs' Additional Proposed Findings of Fact – FILED UNDER SEAL;**
- **Defendants' Brief in Response to Plaintiffs' Motion to Strike;**
- **Third Declaration of Monica Santa Maria in Support of Defendants' Motion for Summary Judgment on Their Counterclaim – FILED UNDER SEAL;**
- **Declaration of John W. Dye**

to be electronically filed with the Clerk of Court using the ECF system which will send notification to the following ECF participants:

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Dated this 22nd day of February, 2010.

/s/ Matthew P. Veldran
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4693317_1

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.

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' PROPOSED FINDINGS OF FACT

Plaintiffs Wisconsin Interscholastic Athletic Association and American-HiFi, Inc., d/b/a When We Were Young Productions, reply to Defendants' response to Plaintiffs' proposed findings of fact in support of Plaintiffs' Motion for Summary Judgment:

The following abbreviations are used for the declarations and affidavits cited herein:

Chickering Aff.	=	Affidavit of Douglas E. Chickering, Dkt. No. 53, filed 1/22/10
Clark First Aff.	=	Affidavit of Todd C. Clark, Dkt. No. 54, filed 1/22/10
Clark Second Aff.	=	Second Affidavit of Todd C. Clark, Dkt. No. 83, filed 2/12/10
Eichorst First Aff.	=	Affidavit of Tim Eichorst, Dkt. No. 55, filed 1/22/10
Eichorst Second Decl.	=	Second Declaration of Tim Eichorst, Dkt. No. 82, filed 2/12/10
Flannery Aff.	=	Affidavit of Danny L. Flannery, Dkt. No. 41, filed 1/22/10
Hoyt Aff.	=	Declaration of James L. Hoyt, Ph.D. in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 56, filed 1/22/10
Nero Decl.	=	Declaration of Autumn N. Nero in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 52, filed 1/22/10

Second Veldran Aff. = Second Affidavit of Matthew P. Veldran, Dkt. No. 79, filed 2/12/10

Parties, Jurisdiction and Venue

1. Plaintiff Wisconsin Interscholastic Athletic Association (the "WIAA") is a voluntary, unincorporated and nonprofit organization with its principal place of business in Stevens Point, Wisconsin. First Amended Complaint, Case No. 09-0155, filed April 13, 2009, Dkt. No. 7 ("First Amended Complaint") ¶ 4; Declaration of Autumn N. Nero in Support of Plaintiffs' Motion for Summary Judgment "Nero Decl." Ex. 2 at 3 (filed herewith); Affidavit of Douglas E. Chickering "Chickering Aff." ¶ 3 (filed herewith); Affidavit of Todd C. Clark "Clark Aff." ¶ 3 (filed herewith).

Defendants' Response No. 1: Undisputed.

2. Plaintiff American Hi-Fi, Inc. is a Wisconsin corporation with its principal place of business in Waunakee, Wisconsin, and does business as When We Were Young Productions ("WWWY"). First Amended Complaint, Dkt. No. 7 ¶ 5.

Defendants' Response No. 2: Undisputed.

3. Defendant Wisconsin Newspaper Association, Inc. ("WNA") is a non-stock organization organized in the State of Wisconsin, with its principal place of business in Madison, Wisconsin. First Amended Complaint, Dkt. No. 7 ¶ 6.

Defendants' Response No. 3: Undisputed.

4. WNA is an association of daily, weekly, and bi-weekly newspapers in Wisconsin whose members frequently report on Wisconsin high school athletics, including WIAA-sponsored tournaments. First Amended Complaint, Dkt. No. 7 ¶ 6.

Defendants' Response No. 4: Undisputed.

5. Gannett Co., Inc. ("Gannett") is a Delaware corporation with its principal place of business at 7950 Jones Branch Drive, McLean, Virginia. First Amended Complaint, Dkt. No. 7 ¶ 7.

Defendants' Response No. 5: Undisputed.

6. Gannett publishes newspapers across the United States, including 10 daily newspapers in Wisconsin and approximately 19 non-daily newspapers. First Amended Complaint, Dkt. No. 7 ¶ 7.

Defendants' Response No. 6: Undisputed.

7. Many of the Wisconsin newspapers published by Gannett frequently report on Wisconsin high school athletics, including WIAA-sponsored tournaments. First Amended Complaint, Dkt. No. 7 ¶ 7.

Defendants' Response No. 7: Undisputed.

8. This Court has subject matter jurisdiction based on 28 U.S.C. § 1331 because substantial, disputed questions of federal law underlie Defendants' claim to possess the right to transmit WIAA-sponsored tournament games over the Internet and/or to post Internet streams of such tournament games on their websites without obtaining a license or otherwise complying with the WIAA's media policies. First Amended Complaint, Dkt. No. 7 ¶ 8.

Defendants' Response No. 8: Disputed only to the extent that this is a legal conclusion and not a fact. The defendants do not dispute the stated conclusion.

Plaintiffs' Reply No. 8: Defendants have raised no dispute with regard to proposed Finding of Fact No. 8 and it therefore remains undisputed.

9. Defendants have filed counterclaims in this Court seeking relief under the United States Constitution and various federal statutes, including 42 U.S.C. § 1983. First Amended Complaint, Dkt. No. 7 ¶ 8.

Defendants' Response No. 9: Undisputed.

10. The WIAA disputes that any federal constitutional or federal statutory provision grants Defendants such a right or bars the WIAA from establishing reasonable policies governing the transmission of the tournament events it organizes and sponsors. First Amended Complaint, Dkt. No. 7 ¶ 8.

Defendants' Response No. 10: Undisputed that this is the WIAA's position.

Plaintiffs' Reply No. 10: Defendants have raised no dispute with regard to proposed Finding of Fact No. 10 and it therefore remains undisputed.

11. Jurisdiction over WIAA's claim for declaratory relief is proper pursuant to 28 U.S.C. §§ 2201-2202 because an actual controversy exists between the parties regarding Defendants' alleged right under federal constitutional and federal statutory law to transmit WIAA-sponsored games over the Internet. First Amended Complaint, Dkt. No. 7 ¶ 9.

Defendants' Response No. 11: Disputed only to the extent that this is a legal conclusion and not a fact. The defendants do not dispute the stated conclusion.

Plaintiffs' Reply No. 11: Defendants have raised no dispute with regard to proposed Finding of Fact No. 11 and it therefore remains undisputed.

12. Defendants' threatened claims and asserted counterclaims allegedly arise under federal law, giving this Court the authority to declare the rights and legal relations of the parties. First Amended Complaint, Dkt. No. 7 ¶ 9.

Defendants' Response No. 12: Disputed only to the extent that this is a legal conclusion and not a fact. The defendants do not dispute the stated conclusion.

Plaintiffs' Reply No. 12: Defendants have raised no dispute with regard to proposed Finding of Fact No. 12 and it therefore remains undisputed.

13. This Court may exercise personal jurisdiction over Defendants because they conduct substantial business in this district and have consented to personal jurisdiction in this Court. First Amended Complaint, Dkt. No. 7 ¶ 10.

Defendants' Response No. 13: Undisputed.

14. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the conduct and events giving rise to the claims occurred in this judicial district. First Amended Complaint, Dkt. No. 7 ¶ 11.

Defendants' Response No. 14: Disputed only to the extent that this is a legal conclusion and not a fact. The defendants do not dispute the stated conclusion.

Plaintiffs' Reply No. 14: Defendants have raised no dispute with regard to proposed Finding of Fact No. 14 and it therefore remains undisputed.

The Wisconsin Interscholastic Athletic Association

15. The WIAA began in 1895, and its first set of rules was adopted in 1896. Nero Decl. Ex. 2 at 3.

Defendants' Response No. 15: Undisputed.

16. The WIAA is a member-based organization comprised of 506 participating public and private high schools and 117 Junior High/Middle Level school members. Chickering Aff. ¶ 3.

Defendants' Response No. 16: Undisputed.

17. The WIAA is membership directed, as the members develop the rules that govern the association, and, at an Annual Meeting each April, the membership approves any changes to the Constitution, Bylaws, and Rules of Eligibility. Chickering Aff. ¶ 3.

Defendants' Response No. 17: Undisputed.

18. The purpose of the WIAA is threefold:

(a) To organize, develop, direct, and control interscholastic athletic programs which will promote the ideals of its membership and opportunities for member schools' participation.

(b) To emphasize interscholastic athletics as a partner with other school activities in the total educational process, and formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship.

(c) To promote uniformity of standards in interscholastic athletic competition, and prevent exploitation by special interest groups of the school program and the individual's ability.

Nero Decl. Ex. 2 at 14.

Defendants' Response No. 18: Undisputed.

19. The WIAA seeks to develop, direct and control an interscholastic athletic program to promote the ideals of its membership and opportunities for participation by its members. Chickering Aff. ¶ 4; Clark Aff. ¶ 3.

Defendants' Response No. 19: Undisputed.

20. Opportunities include member participation in post-season WIAA-sponsored, controlled, and funded sports tournaments. Chickering Aff. ¶ 4; Clark Aff. ¶ 3.

Defendants' Response No. 20: Undisputed.

21. The WIAA recognized sports are the following: For boys, baseball, basketball, cross county, football, golf, hockey, soccer, swimming & diving, tennis, track & field, volleyball, and wrestling; and for girls, basketball, cross country, golf, gymnastics, hockey, soccer, softball, swimming & diving, tennis, track & field, and volleyball. Nero Decl. Ex. 20 at 25.

Defendants' Response No. 21: Undisputed.

22. The WIAA publishes a Senior High School Handbook (the "Handbook"), which contains the WIAA's Constitution, the Bylaws, the Rules of Eligibility, the sports calendar, and various policies. Nero Decl. Ex. 2.

Defendants' Response No. 22: Undisputed.

23. Under the Constitution, the Board of Control ("Board") is the governing body of the WIAA. Nero Decl. Ex. 20 at pp. 15, 19-20.

Defendants' Response No. 23: Undisputed.

24. The Board employs the Executive Director. Nero Decl Ex. 20 at 19.

Defendants' Response No. 24: Undisputed.

25. Doug Chickering was Executive Director for the WIAA from January 1, 1986 to July 31, 2009, which includes the period during which the events giving rise to this litigation took place. Chickering Aff. ¶ 2.

Defendants' Response No. 25: Undisputed.

26. As Executive Director, Chickering was responsible for the overall operations of the WIAA. Chickering Aff. ¶ 2.

Defendants' Response No. 26: Undisputed.

27. Chickering reported to the Board of Control of the WIAA, and was authorized by the Board of Control to make decisions as necessary for the proper operation of WIAA business. Chickering Aff. ¶ 2.

Defendants' Response No. 27: Undisputed.

28. Among Chickering's responsibilities as Executive Director was responsibility for the budget, revenue and expenditures of the WIAA, and he was authorized to enter into contracts for the benefit of the WIAA and its members. Chickering Aff. ¶ 2.

Defendants' Response No. 28: Undisputed.

29. Todd Clark is the Director of Communications for the WIAA, where he has been employed since 2000. Clark Aff. ¶ 2.

Defendants' Response No. 29: Undisputed.

30. Clark's responsibilities include production and supervision of the Bulletin, membership publications and State Tournament souvenir programs; coordination of media relations; Web site maintenance; State Tournament-related coverage; all public relations and sportsmanship efforts and initiatives; and assisting in marketing and sponsorship relationships. Clark Aff. ¶ 2.

Defendants' Response No. 30: Undisputed.

31. The WIAA is a member of the National Federation of State High School Associations. Nero Decl. Ex. 2 at 3.

Defendants' Response No. 31: Undisputed.

The WIAA's Media Policies

32. The WIAA acknowledges the responsibilities of legitimate news gathering media representatives in covering and reporting from WIAA Tournaments. Nero Decl. Ex. 4 at 1.

Defendants' Response No. 32: Undisputed.

33. The WIAA provides rules for media conduct in its Senior High School Handbook, which contains both spectator policies and "Video Transmission Policies" applying to broadcast, cable, and internet streams during the WIAA State Tournament Series. Nero Decl. Ex. 3 at 51 (2009-10 guide); *see also* Nero Decl. Ex. 2 at 50-51 (2008-09 handbook, containing "Radio and Television Broadcast Policies").

Defendants' Response No. 33: Undisputed.

34. The WIAA also publishes annually a Media Policies Reference Guide, which is produced to inform statewide media of WIAA policies in effect for all levels of State Tournament Series competition. Nero Decl. Ex. 4 at 1.

Defendants' Response No. 34: Undisputed.

35. The Media Policies Reference Guide aims to assist members of the media in providing comprehensive coverage to their communities, with requesting/issuing of working media credentials, in the use of equipment, and in the comprehension of WIAA property rights for State Tournament Series competitions. Nero Decl. Ex. 4 at 1.

Defendants' Response No. 35: Undisputed that this is the WIAA's stated purpose for producing a Media Policies Reference Guide.

Plaintiffs' Reply No. 35: Defendants have raised no dispute with regard to proposed Finding of Fact No. 35 and it therefore remains undisputed.

36. The Media Policies Reference Guide includes policies that apply to the media during the WIAA-State Tournament Series, i.e., regional, sectional, and state final tournaments. Nero Decl. Ex. 4 at 10.

Defendants' Response No. 36: Undisputed.

37. Clark developed the first WIAA Media Policies Reference Guide in the fall of 2003 to address ownership and distribution issues documenting the WIAA's practices in a definitive written guide that the WIAA could distribute to the media. Clark Aff. ¶ 11.

Defendants' Response No. 37: Undisputed that these were Clark's intentions. Disputed as vague, and to the extent the fact asserts the WIAA has undefined ownership rights that are detailed in the WIAA Media Policies Reference Guide. Whether the WIAA has any such rights is a question of law.

Plaintiffs' Reply No. 37: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

38. This Media Policies Reference Guide was discussed with the 2003 Media Advisory Committee—a standing committee made up of media representatives—which reviewed and approved the policies and language. Clark Aff. ¶ 11.

Defendants' Response No. 38: Undisputed that such review and approval was granted by the WIAA's Media Advisory Committee.

Plaintiffs' Reply No. 38: Defendants do not refer to evidence to dispute the proposed fact as asserted, including that the Media Policies Reference Guide was discussed with the 2003 Media Advisory Committee. Therefore, this proposed fact remains undisputed.

39. The WIAA agreed at the 2003 Media Advisory Committee meeting that it would produce and disseminate the guide to all media on the WIAA mail list. Clark Aff. ¶ 11.

Defendants' Response No. 39: Undisputed.

40. The Media Policies Reference Guide addresses the following issues: media credentials; parking permits; communication lines; photography; post-game interviews; radio, television and cable policies; Internet policies; advertising; and broadcast rights permission/fees. Nero Decl. Ex. 4 at 1-16.

Defendants' Response No. 40: Disputed only to the extent that the above list is not exhaustive and the Media Policies Reference Guide addresses other issues as well. E.g., Declaration of Autumn N. Nero in Support of Plaintiffs' Mot. for Summ. J. (Dkt. #52) ("Nero Decl."), Ex. 5 at 11, 14 (play-by-play).

Plaintiffs' Reply No. 40: Defendants have raised no dispute with regard to proposed Finding of Fact No. 40 and it therefore remains undisputed.

41. Generally, the WIAA prohibits any non-editorial, commercial, or unauthorized use of any transmission, internet stream, or other depiction of tournament material without written consent of the WIAA. Nero Decl. Ex. 4 at p. 1.

Defendants' Response No. 41: Undisputed that this is the WIAA's policy.

Plaintiffs' Reply No. 41: Defendants have raised no dispute with regard to proposed Finding of Fact No. 41 and it therefore remains undisputed.

42. Generally, the WIAA accepts applications from and issues credentials to television stations covering tournaments for newscast purposes; radio stations; daily and weekly newspapers, including photographers; legitimate sport-specific publications; and news-gathering web site organizations that meet certain criteria. Nero Decl. Ex. 4 at pp. 3-4, 15.

Defendants' Response No. 42: Undisputed.

43. The WIAA Internet policies state that "WIAA owns the rights to transmit, upload, stream or display content live during WIAA events and reserves the right to grant exclusive and nonexclusive rights or not to grant those rights on an event-by-event basis." Nero Decl. Ex. 4 at 14.

Defendants' Response No. 43: Undisputed that this is the WIAA's current Internet policy. Nero Decl., Ex. 5 at 12 (2009-10 policies, Comprehensive Policy #1). Whether the WIAA has the asserted ownership right is not a fact; it is a conclusion of law.

Plaintiffs' Reply No. 43: This quoted language is also contained in the WIAA's 2008-09 Media Policies Reference Guide. Nero Decl. Ex. 4 at 14. Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains **undisputed**.

44. The WIAA policies define the term "broadcast" as "airing/streaming the entire duration of tournament games." Nero Decl. Ex. 4 at 11.

Defendants' Response No. 44: Disputed. The WIAA defined the term "broadcast" in its 2008-2009 Media Policies Reference Guide. *See* Nero Decl. Ex. 4 at 11 ("airing/streaming or intent of airing/streaming the entire duration of tournament games.") (emphasis added). The current (2009-10) WIAA policies do not define the term, but define instead a "transmission" as, in relevant part, "the transmitting – or intent of transmitting – any live or taped portion, or entire duration of tournament games." Nero Decl., Ex. 5 at 11.

Plaintiffs' Reply No. 44: Defendants' response does not give rise to a disputed issue of material fact. Defendants do not dispute the proposed finding as stated, and acknowledge that the 2008-09 WIAA policies define the term "broadcast" as "airing/streaming the entire duration of tournament games."

45. The policies prohibit any live or delayed television or internet streaming of WIAA State Tournament Series events of more than two minutes without permission from the WIAA. Nero Decl. Exs. 3 at 51 and 2 at 51.

Defendants' Response No. 45: Disputed. Under the WIAA policies, more than two minutes worth of video may be used as highlights on regularly scheduled news or sports broadcasts or Web page. Nero Decl. Ex. 5 at 12 (Video #3).

Plaintiffs' Reply No. 45: Defendants have misrepresented the WIAA Media Policies Reference Guide, which explicitly states:

> Stations or Web sites may use a backdrop of live action for reports from a tournament facility provided there is no play-by-play commentary and the report is limited to regularly scheduled news of sports programs and are no more than two minutes of a program which is any length.
>
> Use of film, video, audio, tape, etc. is limited to regularly scheduled news, sports programs or Internet site stories, and use on such programs is limited to no more than two minutes of a program which is any length.

Nero Decl. Ex. 5 at 13, No. 4. Defendants' response is otherwise unsupported. The cited evidence, if considered in context, which would include the evidence cited by plaintiffs, does not support defendants' position and clearly indicate there is a two-minute limit absent permission from the WIAA.

46. 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. Nero Decl. Ex. 4 at 12.

Defendants' Response No. 46: Undisputed that this policy is included in the current Media Policies Reference Guide in addition to the 2008-09 policies the citation makes reference to. Nero Decl., Ex. 5 at 13 (2009-10 Guide, Video #5).

Plaintiffs' Reply No. 46: Defendants have raised no dispute with regard to proposed Finding of Fact No. 46 and it therefore remains undisputed.

47. Media covering WIAA tournament events for "newscast purposes" may, without paying a fee, (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. Nero Decl. Exs. 2 at 51; 3 at 51; 4 at 12; and 5 at 12-13.

Defendants' Response No. 47: Disputed. Under the WIAA policies, more than two minutes worth of video may be used as highlights on regularly scheduled news or sports broadcast or web page. Nero Decl., Ex. 5 at 12 (Video #3).

Plaintiffs' Reply No. 47: Defendants have misrepresented the WIAA Media Policies Reference Guide, which explicitly states:

> Stations or Web sites may use a backdrop of live action for reports from a tournament facility provided there is no play-by-play commentary and the report is limited to regularly scheduled news of sports programs and are no more than two minutes of a program which is any length.
>
> Use of film, video, audio, tape, etc. is limited to regularly scheduled news, sports programs or Internet site stories, and use on

> such programs is limited to no more than two minutes of a program which is any length.

Nero Decl. Ex. 5 at 13, No. 4. Defendants' response is otherwise unsupported. The cited evidence, if considered in context, which would include the evidence cited by plaintiffs, does not support defendants' position and clearly indicate there is a two-minute limit.

48. Under the WIAA's policies, those who wish to broadcast or internet stream more than two minutes of tournament events are required to obtain permission from the rights holder. Nero Decl. Ex. 4 at 16.

Defendants' Response No. 48: Disputed. Under the WIAA policies, more than two minutes worth of video may be used as highlights on regularly scheduled news or sports broadcasts or Web page. Nero Decl., Ex. 5 at 12 (Video #3).

Plaintiffs' Reply No. 48: Defendants have misrepresented the WIAA Media Policies Reference Guide, which explicitly states:

> Stations or Web sites may use a backdrop of live action for reports from a tournament facility provided there is no play-by-play commentary and the report is limited to regularly scheduled news of sports programs and are no more than two minutes of a program which is any length.
>
> Use of film, video, audio, tape, etc. is limited to regularly scheduled news, sports programs or Internet site stories, and use on such programs is limited to no more than two minutes of a program which is any length.

Nero Decl. Ex. 5 at 13, No. 4. Defendants' response is otherwise unsupported. The cited evidence, if considered in context, which would include the evidence cited by plaintiffs, does not support defendants' position and clearly indicate there is a two-minute limit.

49. The WIAA has provided for media access to communication lines (e.g., telephone, high-speed internet, and wireless connections) for use in reporting at State Tournament venues. Nero Decl. Ex. 5 at 6.

Defendants' Response No. 49: Undisputed that such communication lines are made available. Disputed to the extent that there are no facts in the record that any media or the defendants have used such communication lines.

Plaintiffs' Reply No. 49: Defendants do not refer to evidence to support their claimed dispute, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

50. The WIAA also permits the taking of photographs for reporting purposes, post-game interviews of players and coaches, radio and other audio broadcasts of WIAA events, and

other avenues of reporting and media coverage. Clark Aff. ¶ 24-25; Nero Decl. Ex. 4, at 6-15; Ex. 5 at 8-14.

Defendants' Response No. 50: Undisputed.

51. Subject to some limitations, newspapers are offered up to five media credentials for daily papers (two for weekly newspapers), which, among other benefits, allow reporters access to various communications lines for a fee of $25-30. Nero Decl. Ex. 5 at 6.

Defendants' Response No. 51: Undisputed.

The WIAA Budget

52. An overwhelming majority of the WIAA's budget is derived from revenues generated by the State Tournament Series, which WIAA organizes, sponsors, and administers, and which is separate from and in addition to regular season games. Chickering Aff. ¶ 5; Clark Aff. ¶ 3.

Defendants' Response No. 52: Undisputed.

53. Chickering was responsible for the WIAA's 2007-2008 budget, and in that year the tournaments brought in $6,202,963, which was 86% of the WIAA's total operating revenue of $7,177,115. Chickering Aff. ¶ 5, Ex. A.

Defendants' Response No. 53: Undisputed.

54. The remaining 2007-2008 WIAA revenue came from membership dues, which amounted to .5% of revenue; sports fees, which amounted to 5.5% of revenue; officials dues, which amounted to 5% of revenue; and miscellaneous revenue such as subscriptions and rule book orders, which amounted to 3% of revenue. Chickering Aff. ¶ 5, Ex. A.

Defendants' Response No. 54: Undisputed.

55. All of WIAA's revenue is used to support its programs and the administration thereof, including paying for the expenses of operating the tournaments in all WIAA recognized sports. Chickering Aff. ¶ 6.

Defendants' Response No. 55: Undisputed.

56. Some of the WIAA recognized sports generate a profit, and others generate a loss for the WIAA. Chickering Aff. ¶ 7, Ex. A.

Defendants' Response No. 56: Undisputed.

57. The profits from one sport are used to offset deficits in other sports. Chickering Aff. ¶ 7, Ex. A.

Defendants' Response No. 57: Undisputed.

58. The vast majority of the WIAA tournament revenue is derived from basketball and football. Declaration of James L. Hoyt, Ph.D. in Support of Plaintiffs' Motion for Summary Judgment "Hoyt Decl." ¶ 44 (filed herewith); Nero Decl. Ex. 14; Chickering Aff. Ex. A.

Defendants' Response No. 58: Disputed to the extent that "vast majority" is vague. In 2008, basketball and football accounted for 60.9% of the WIAA's $6,202,963 total operating revenue. Affidavit of Douglas E. Chickering, Jan. 21, 2010 (Dkt. #53) ("Chickering Aff."), Ex. A at 18-19 (basketball 2008 revenues of $2,785,650 million and 2008 football revenues of $988,884).

Plaintiffs' Reply No. 58: Plaintiffs dispute that the Defendants' vagueness objection creates a material factual dispute, and dispute that $6,202,963 was WIAA's "total operating revenue" in 2008. Chickering Aff., Ex. A at 18-19. Plaintiffs do not dispute that in 2008, basketball and football accounted for 60.9% of the WIAA's $6,202,963 tournament revenue.

59. In 2008, the WIAA generated positive net revenues in only basketball, football, wrestling, volleyball, hockey, and soccer. Nero Decl. Ex. 14; Hoyt Decl. ¶ 44; Chickering Aff. Ex. A.

Defendants' Response No. 59: Undisputed.

60. In 2008, the WIAA subsidized the following sports (meaning expenses for a sport exceeded revenues for that sport, so WIAA revenues from other sports covered the deficit): Baseball, Cross County, Golf, Gymnastics, Softball, Swimming and Diving, Tennis, and Track & Field. Chickering Aff. ¶ 8, Ex. A; Nero Decl. Ex. 14; Hoyt Decl. ¶ 44.

Defendants' Response No. 60: Undisputed.

61. The WIAA member schools desire their students to be able to play sports and have the same exposure for the sports even where a commercial market would not otherwise support such exposure. Chickering Aff. ¶ 8.

Defendants' Response No. 61: Disputed. This fact is not properly in the record because the affiant does not have personal knowledge of the fact.

Plaintiffs' Reply No. 61: The Defendants' claim that Doug Chickering does not have personal knowledge regarding the desires of WIAA member schools ignores his testimony that he was the Executive Director of the WIAA from January 1, 1986 to July 31, 2009. Chickering Aff. ¶ 2. As Executive Director, he was responsible for the overall operations of the WIAA. Chickering Aff. ¶ 2. He reported to the Board of Control of the WIAA, and was authorized by the Board of Control to make decisions as necessary for the proper operation of WIAA business. Chickering Aff. ¶ 2. Among his responsibilities was responsibility for the budget, revenue and expenditures of the WIAA, and he was authorized to enter into contracts for the benefit of the WIAA and its members. Chickering Aff. ¶ 2. Thus, the implementation of the WIAA members' desires by execution of a contract with WWWY was well within his responsibilities as Executive Director. Defendants do not refer to evidence to support their

claimed dispute, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

62. The WIAA provides those opportunities for its members' students through the revenue that comes from the commercially viable sports. Chickering Aff. ¶ 8.

Defendants' Response No. 62: Undisputed.

63. For the 2007-2008 year, the WIAA provided a subsidy of $692,884 to subsidized sports, which is 11% of total revenue earned from tournaments. Chickering Aff. Ex. A.

Defendants' Response No. 63: Undisputed.

WIAA Tournaments

64. The WIAA hosts and administers 25 State Championship Tournaments, which includes both boys and girls sports, and individual and team competition. Chickering Aff. ¶ 28.

Defendants' Response No. 64: Undisputed.

65. The WIAA leases the facilities or venues for the WIAA-hosted State Tournaments through long-term contracts of three to five years (except the WIAA does not have leases with the venues for cross country or gymnastics). Chickering Aff. ¶ 28.

Defendants' Response No. 65: Undisputed.

66. When the WIAA uses the venues, it uses them solely for its athletic competitions. Chickering Aff. ¶ 28.

Defendants' Response No. 66: Disputed as incomplete. The WIAA uses the venues for athletic competitions to which it invites and admits members of the public and credentialed media. Nero Decl., Ex. 3 at 48 (spectator policies); Nero Decl., Ex. 5 at 1 (general credentialing information).

Plaintiffs' Reply No. 66: Defendants' response does not establish a material issue of disputed fact, as defendants do not dispute the stated fact that when the WIAA uses venues, it uses them solely for its athletic competitions. Therefore, this proposed fact remains undisputed.

67. The WIAA has use of the facilities or venues for the duration of the athletic competition as specified in the leases, and does not otherwise have any control over or obligation with respect to the management or operation of the facilities or venues when not used by the WIAA for its athletic events. Chickering Aff. ¶ 28.

Defendants' Response No. 67: Undisputed.

68. The State Tournaments are held in sixteen different athletic facilities throughout the State of Wisconsin. Chickering Aff. ¶ 29.

Defendants' Response No. 68: Undisputed.

69. The WIAA tries to find the best facility available to showcase the athletic event, provided the facility is available and affordable, and offers good value for the WIAA's money. Chickering Aff. ¶ 29.

Defendants' Response No. 69: Undisputed.

70. Each of the public venues used by the WIAA was designed for the specific type of athletic tournament being held there: the boys and girls golf tournaments are held at University Ridge golf course in Madison, a venue solely designed for golf; the football tournaments are held at Camp Randall stadium in Madison, a facility used for football games; boys and girls soccer tournaments are held at Uihlein Soccer Park in Milwaukee, which was designed specifically for soccer games; swimming and diving tournaments are held at the UW Natatorium in Madison, a facility with pools and a diving well; girls and boys tennis tournaments are held at the Nielsen Tennis Stadium in Madison, a facility containing indoor and outdoor tennis courts and squash courts; and softball tournaments are held at the Goodman Diamond in Madison, which is a facility designed and used for softball games. Chickering Aff. ¶ 29.

Defendants' Response No. 70: Undisputed.

71. The WIAA also hosts tournaments at several private facilities: baseball tournaments are held at Fox Cities Stadium in Appleton, which is a privately owned minor league baseball park; the boys volleyball tournament is held at Wisconsin Lutheran College in Milwaukee, a privately owned college; and the cross country tournament is held at the Ridges Golf Course in Wisconsin Rapids, a privately owned golf course (which is not leased). Chickering Aff. ¶ 29.

Defendants' Response No. 71: Undisputed.

72. Other WIAA tournaments are also held at the Lincoln Field House in Wisconsin Rapids (which is not leased), the UW Field House in Madison, the Memorial Stadium in LaCrosse, the Resch Center in Green Bay, the Kohl Center in Madison, and the Alliant Energy Center in Madison, all of which are venues used for different athletic events. Chickering Aff. ¶ 29.

Defendants' Response No. 72: Undisputed.

73. The WIAA establishes a fee for admission to its tournaments. Chickering Aff. ¶ 30.

Defendants' Response No. 73: Undisputed.

74. The public is permitted entry to the tournament upon payment of the admission fee. Chickering Aff. ¶ 30.

Defendants' Response No. 74: Undisputed.

75. The WIAA provides for free admission for certain categories of people, such as cheerleaders, school staff members, game officials and credentialed media, but no other person beyond those identified may be provided complimentary admissions. Chickering Aff. ¶ 30.

Defendants' Response No. 75: Undisputed.

76. The WIAA sets its admission fee so that the event is an affordable outing for families. Chickering Aff. ¶ 30.

Defendants' Response No. 76: Undisputed that the WIAA intends that an event be an affordable outing for families. Disputed to the extent "affordable outing for families" is vague. Disputed also that there are any facts in the record to support the contention that "families" generally consider the WIAA's admission fees affordable.

Plaintiffs' Reply No. 76: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

77. The WIAA has not denied a legitimate media organization entry to a tournament, entry to designated media facilities of WIAA-sponsored events, or media credentials. Chickering Aff. ¶ 31; Nero Decl. Ex. 18 at Interrog. No 6 and Resp. No. 6.

Defendants' Response No. 77: Undisputed.

78. Gannett admits that it is "not aware of any instance in which WIAA has denied Defendants or other members of the news media entry to a WIAA-Sponsored Event." Nero Decl. Ex. 18 at Interrog. No. 6 and Resp. No. 6.

Defendants' Response No. 78: Undisputed.

WIAA Contracts

79. The WIAA has had an exclusive contract with Fox Sport Network Wisconsin ("Fox") to transmit the seven state football finals since 2001. Chickering Aff. ¶ 9.

Defendants' Response No. 79: Undisputed.

80. The WIAA receives $20,000 annually from Fox for that exclusive contract. Chickering Aff. ¶ 9, Ex. B; Clark Aff. ¶ 8.

Defendants' Response No. 80: Undisputed.

81. The WIAA has had an exclusive video transmission contract for boys basketball games with Quincy Newspapers, Inc. ("QNI") since 1968. Chickering Aff. ¶ 10.

Defendants' Response No. 81: Undisputed.

82. In the 1980s, the QNI contract expanded to include rights to exclusively broadcast WIAA's Boys and Girls Basketball Tournaments and Hockey Finals. Chickering Aff. ¶ 10.

Defendants' Response No. 82: Undisputed.

83. QNI owns and operates five different television stations, (collectively called "The WIAA State Network"), that broadcast the WIAA tournaments and finals pursuant to the contract. Chickering Aff. ¶ 10.

Defendants' Response No. 83: Undisputed.

84. Beginning in about 2003, QNI told Chickering that it could no longer afford to offer a competitive product for the contract price of $140,000. Chickering Aff. ¶ 11; Clark Aff. ¶ 4.

Defendants' Response No. 84: Disputed as hearsay. This fact is not supported by admissible evidence.

Plaintiffs' Reply No. 84: The proposed fact is not hearsay, as it not being introduced to prove the truth of the matter asserted (that QNI could not afford the contract price of $140,000), but rather to prove the WIAA's motivation to enter into an exclusive contract with WWWY.

85. The WIAA and QNI negotiated a reduction in the annual fee: In 2002, QNI paid the WIAA $140,000 under the contract; in 2003, QNI paid $125,000; in 2004, QNI paid $75,000. Chickering Aff. ¶ 11.

Defendants' Response No. 85: Undisputed.

86. In 2004, with two years left on the contract, QNI said it could not guarantee that it would enter into a successor agreement unless the WIAA was willing to alter its price. Chickering Aff. ¶ 12.

Defendants' Response No. 86: Disputed as hearsay. This fact is not supported by admissible evidence.

Plaintiffs' Reply No. 86: The proposed fact is not hearsay, as it not being introduced to prove the truth of the matter asserted (that QNI would not enter into a successor contract), but rather to prove the WIAA's motivation to enter into an exclusive contract with WWWY.

87. In or around 2004, the WIAA and QNI negotiated a reduction in price down to $40,000 per year, and secured an extended contract with QNI, operating as The WIAA State Network, until 2010. Chickering Aff. ¶ 12, Ex. C.

Defendants' Response No. 87: Disputed only to the extent that the citation expressly states such negotiation occurred "In 2004." Chickering Aff. ¶ 12.

Plaintiffs' Reply No. 87: Plaintiffs accept defendants' amendment that the negotiation occurred in 2004, but defendants' response raises no material dispute with regard to proposed Finding of Fact No. 87 and it therefore remains undisputed.

88. QNI paid an annual fee of $40,000 to the WIAA until 2008, at which time upon mutual agreement of the parties, the QNI payment to the WIAA increased to $75,000 annually. Chickering Aff. ¶ 12.

Defendants' Response No. 88: Undisputed.

89. In 2004, due to the loss of revenue from QNI, the WIAA began to look for other sources of revenue. Chickering Aff. ¶ 13; Clark Aff. ¶ 4.

Defendants' Response No. 89: Undisputed.

90. At about the same time as WIAA lost the QNI revenue, WIAA staff was hearing from the coaches committees, especially for volleyball and wrestling, that they were questioning why their sports were not being broadcast on TV, and that they had a strong interest in getting their sports on TV. Chickering Aff. ¶ 15; Clark Aff. ¶ 6.

Defendants' Response No. 90: Disputed as hearsay. This fact is not supported by admissible evidence.

Plaintiffs' Reply No. 90: The proposed fact is not hearsay, as it is not being introduced to prove the truth of the matter asserted (that coaches committees wanted their events broadcast on TV), but rather to prove the WIAA's motivation to enter into an exclusive contract with WWWY.

91. The coaches wanted the same exposure for their sports and athletes that basketball, hockey and football were receiving. Chickering Aff. ¶ 15.

Defendants' Response No. 91: Disputed as hearsay. This fact is not supported by admissible evidence.

Plaintiffs' Reply No. 91: The proposed fact is not hearsay, as it is not being introduced to prove the truth of the matter asserted (that coaches wanted the same exposure for their sports), but rather to prove the WIAA's motivation to enter into an exclusive contract with WWWY.

92. The WIAA staff was anxious to get as many sports publicly distributed as possible. Chickering Aff. ¶ 15.

Defendants' Response No. 92: Undisputed.

93. At that time, around 2004, no television station carried games other than the Football Finals (which was carried by Fox), and the Hockey Finals and Boys and Girls Basketball Tournaments (which were carried by QNI), except that, in some instances, local community access channels would broadcast tape-delayed local games. Chickering Aff. ¶ 14; Clark Aff. ¶ 5.

Defendants' Response No. 93: Undisputed.

94. The WIAA was not aware of any internet streaming of WIAA events by any party, and the only rights fees the WIAA received at that time were from the transmission of videos of its tournament events for Football State Finals, Boys and Girls Basketball State Tournament, and Hockey State Finals. Clark Aff. ¶ 5.

Defendants' Response No. 94: Undisputed.

95. In fact, in 2005, the vast majority of WIAA sports were not carried by any media organization either on television or the internet. Chickering Aff. ¶ 14; Clark Aff. ¶ 6.

Defendants' Response No. 95: Undisputed.

96. The WIAA inquired whether its existing contractual partners might be interested in broadcasting these additional events, but the existing contractual partners expressed concern over whether they could implement a feasible financial model from which they could profit by the expansion, so declined to pursue the opportunity. Chickering Aff. ¶ 16; Clark Aff. ¶ 6.

Defendants' Response No. 96: Disputed, as hearsay, the second assertion stating what the existing contractual partners expressed. This portion of the fact is not supported by admissible evidence. Undisputed otherwise.

Plaintiffs' Reply No. 96: The proposed fact is not hearsay as it is not being introduced to prove the truth of the matter asserted (that contractual partners could not implement a feasible financial model), but rather to prove the WIAA's motivation to enter into an exclusive contract with WWWY.

The WIAA's Relationship with When We Were Young Productions

97. In Fall 2003, Chickering met Tim Eichorst, the majority shareholder of WWWY. Chickering Aff. ¶ 17; Affidavit of Tim Eichorst "Eichorst Aff." ¶ 2 (filed herewith).

Defendants' Response No. 97: Undisputed.

98. WWWY was incorporated in 2002. Eichorst Aff. ¶ 3.

Defendants' Response No. 98: Undisputed.

99. WWWY is a video production company located in Waunakee, Wisconsin. Eichorst Aff. ¶ 4.

Defendants' Response No. 99: Undisputed.

100. In about 2000, Eichorst, who has a background in technology, started filming high school football games as a hobby, and he became proficient at it. Eichorst Aff. ¶ 5.

Defendants' Response No. 100: Undisputed.

101. Eichorst researched high school sports and realized that he could connect the growing technology to the industry and cater to the growing interest in high school sports. Eichorst Aff. ¶ 6.

Defendants' Response No. 101: Undisputed.

102. Eichorst initially made highlight videos for a high school sports team, but could not make enough money, so he began to think about a larger platform for producing and distributing high school athletic events. Eichorst Aff. ¶ 8.

Defendants' Response No. 102: Undisputed.

103. Eichorst knew that distribution of WIAA tournaments was very limited, so Eichorst arranged an introduction to Chickering. Eichorst Aff. ¶ 9.

Defendants' Response No. 103: Undisputed.

104. Eichorst first met Chickering at a state football tournament in the fall of 2003, at which time they briefly discussed producing and distributing WIAA tournaments. Eichorst Aff. ¶ 10; Chickering Aff. ¶ 17.

Defendants' Response No. 104: Undisputed.

105. Eichorst and Chickering agreed to meet again in December of that year to discuss these issues in more detail. Eichorst Aff. ¶ 10; Chickering Aff. ¶ 17.

Defendants' Response No. 105: Undisputed.

106. In December of 2003, Eichorst met with Chickering and Clark, and they talked about WWWY's vision to produce and mass distribute high school sporting events. Eichorst Aff. ¶ 11; Chickering Aff. ¶ 18.

Defendants' Response No. 106: Undisputed.

107. In May of 2004, Eichorst for WWWY and Chickering for the WIAA signed a Letter of Intent to pursue a formal contract granting WIAA programming rights to WWWY. Eichorst Aff. ¶ 12, Ex. A; Chickering Aff. ¶ 19.

Defendants' Response No. 107: Undisputed.

108. The Letter of Intent described the mutual interest between the WIAA and WWWY to work together under a long-term contract to produce and distribute WIAA sports events, with the understanding that many details of the relationship would need to be worked out and discussed. Eichorst Aff. ¶ 12, Ex. A.

Defendants' Response No. 108: Undisputed.

109. The general understanding described in the Letter of Intent was that WWWY would have the exclusive right to produce and distribute all WIAA playoff and tournament events, except those under a pre-existing contract, for live or tape delayed programming. Eichorst Aff. ¶ 12, Ex. A; Chickering Aff. ¶ 19.

Defendants' Response No. 109: Undisputed.

110. WWWY would pay the WIAA a fee, to be determined, for those rights. Eichorst Aff. ¶ 12, Ex. A; Chickering Aff. ¶ 19.

Defendants' Response No. 110: Undisputed.

111. Distribution formats would include broadband, cable, network and physical media. Eichorst Aff. ¶ 12, Ex. A.

Defendants' Response No. 111: Undisputed.

112. The Letter of Intent was signed at the same time the WIAA was engaged in discussions with QNI about renegotiating their contract for a reduced fee, so the prospect of a contractual arrangement with another partner to provide revenue to the WIAA, while at the same time satisfying the WIAA's goals and interest in expanding distribution of athletic events, was of great interest to the WIAA. Chickering Aff. ¶ 19.

Defendants' Response No. 112: Undisputed.

113. After the Letter of Intent was signed, Eichorst worked on researching and proposing a business plan for the partnership between WWWY and the WIAA for production and distribution of WIAA sports events. Eichorst Aff. ¶ 13.

Defendants' Response No. 113: Undisputed.

114. Eichorst researched technology, evaluated requirements for capital, equipment, facilities, and personnel, and prepared an estimate of costs and revenues. Eichorst Aff.¶ 13.

Defendants' Response No. 114: Undisputed.

115. In about early 2005, Eichorst made a formal proposal to the WIAA for the production and distribution of WIAA athletic events. Eichorst Aff. ¶ 14, Ex. B; Chickering Aff. ¶ 20; Clark Aff. ¶ 7.

Defendants' Response No. 115: Undisputed.

116. At no time prior to the proposal from WWWY did any media or production company express any interest in transmitting WIAA events via internet, and there were no inquiries or requests to the WIAA by media organizations to transmit underexposed and less visible sports. Clark Aff. ¶ 7.

Defendants' Response No. 116: Disputed as incomplete. At no time prior to the proposal from WWWY did the WIAA provide notice it was seeking members of the media interested in transmitting WIAA events via Internet. See Declaration of Mary Bennin Cardona, Feb. 9, 2010 (filed herewith) ("Cardona Decl."), Ex. C at 2 (WIAA did not consult with public access channels before signing agreement with WWWY); Ans. To Defs.' Counterclaims (Dkt. #5), ¶ 38 (WIAA did not request bid from defendants).

Plaintiffs' Reply No. 116: Defendants' version of the fact does not establish a material issue of disputed fact. Therefore, this proposed fact as stated remains undisputed. Further, plaintiffs reply that defendants' response is inaccurate. The WIAA inquired whether its existing contractual partners might be interested in broadcasting other WIAA events, but they declined to pursue the opportunity. Chickering Aff. ¶ 16.

117. The proposal was for WWWY to deliver broadcast quality video production of WIAA events, to distribute these products through all physical, electronic, and broadcast media, and to establish the WIAA as a progressive thought leader. Eichorst Aff. ¶ 15; Chickering Aff. ¶ 20.

Defendants' Response No. 117: Disputed to the extent that "progressive thought leader" is unclear, but immaterial.

Plaintiffs' Reply No. 117: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

118. Eichorst planned to organize a management structure in the field to tape the events, and the proposal identified the specific field equipment WWWY would use such as Camcorders, computers, and associated accessories, and WWWY's cost for this field equipment. Eichorst Aff. ¶ 15; Chickering Aff. ¶ 20.

Defendants' Response No. 118: Undisputed.

119. The events to be covered under the proposed agreement with WWWY would be live streamed from the venue. Chickering Aff. ¶ 20.

Defendants' Response No. 119: Undisputed that Eichorst proposed to live stream events. Disputed to the extent that the fact suggests all events covered by the agreement are being produced. The vast majority of events covered under the agreement with WWWY are not being produced by anyone, whether by streaming or through any other format. See Supplemental Proposed Findings of Fact in Support of Defendants' Motion for Summary Judgment on Their Counterclaim "Supp PFOF" ¶¶ 30-32 (Only 3.7% of games covered by WWWY were produced in 2008).

Plaintiffs' Reply No. 119: Plaintiffs do not dispute that WWWY does not live stream every WIAA tournament event that could be streamed pursuant to the contract with the WIAA. However, with that amendment, defendants do not dispute that the proposed agreement was that events that were to be produced by WWWY were to be live streamed from the venue.

120. To produce the films, Eichorst planned to construct or acquire a state of the art production facility, acquire hardware and software, and provide all technical staffing, for which he budgeted three million dollars. Eichorst Aff. ¶ 15.

Defendants' Response No. 120: Undisputed that this was Eichorst's proposal.

Plaintiffs' Reply No. 120: As defendants' response does not raise a material dispute as to proposed Finding of Fact No. 120, this proposed fact remains undisputed.

121. In fact, Eichorst invested millions of dollars in building WWWY to be a high quality production company, including: broadcast quality technical equipment; several state of the art mobile television trucks for broadcasting; 10 employees who work full time as producers, directors and editors on producing WIAA events; 20 to 30 part-time, seasonal employees who work as camera operators and graphics operators for filming in the field; and two to three part-time employees to operate the feed to the video board, all at no cost to the WIAA. Eichorst Aff. ¶¶ 33-34.

Defendants' Response No. 121: Undisputed.

122. Under the proposal, Eichorst would also work on marketing efforts in conjunction with the WIAA, and would develop and launch a web site for the distribution of WIAA events. Eichorst Aff. ¶ 15.

Defendants' Response No. 122: Undisputed.

123. Eichorst explained that WWWY would assume the financial responsibility for the venture, and that the WIAA and its members would have no financial commitment to the venture, but would have the opportunity to earn royalties based on distribution revenues. Eichorst Aff. ¶ 16; Chickering Aff. ¶ 21.

Defendants' Response No. 123: Undisputed.

124. WWWY expected to break even on (and not profit from) "hard media" items, such as the game films, highlight videos, documentaries and still photography, which would be priced in a manner to be affordable to the consumer. Eichorst Aff. ¶ 16; Chickering Aff. ¶ 21.

Defendants' Response No. 124: Undisputed.

125. WWWY expected to make profits on "broadcast media," including such things as real-time game feed, broadcast TV highlight feeds, and studio production of weekly TV shows. Eichorst Aff. ¶ 16; Chickering Aff. ¶ 21.

Defendants' Response No. 125: Undisputed.

The WIAA's contract with WWWY

126. Based on WWWY's proposal, WWWY and the WIAA entered into a Production Rights And Distribution Agreement ("the Agreement"). Eichorst Aff. ¶ 17, Ex. C; Chickering Aff. ¶ 22.

Defendants' Response No. 126: Undisputed.

127. The Agreement was fully executed in May of 2005, and lasts for a term of ten (10) years. Eichorst Aff. ¶ 17, Ex. C; Chickering Aff. ¶ 22.

Defendants' Response No. 127: Undisputed.

128. The Agreement gives WWWY the exclusive right to produce, sell, and distribute all WIAA tournament series and championship events for all WIAA sports, except those under existing contract, which are Football and Hockey State Finals, and the entire State Boys and Girls Basketball Tournaments. Eichorst Aff. ¶ 18, Ex. C; Chickering Aff. ¶ 23; Clark Aff. ¶ 8.

Defendants' Response No. 128: Undisputed.

129. WWWY paid $60,000 to the WIAA in 2008 for these rights. Chickering Aff. ¶ 23; Clark Aff. ¶ 8; Eichorst Aff. ¶ 28.

Defendants' Response No. 129: Disputed as incomplete. WWWY made a $60,000 payment to the WIAA in July 2009 (for its 2008 rights), but that payment was by oral agreement and not as part of the payment formula in the Agreement referenced in Proposed Fact 128. Second Declaration of Monica Santa Maria In Support of Defendants' Motion for Summary Judgment on Their Counterclaim (filed herewith) ("Second Santa Maria Decl."), Ex. A at 7 (Interrog. No. 4 and Resp. to Interrog. No. 4); Clark Aff., Ex. 3 at 3.

Plaintiffs' Reply No. 129: Defendants' version of the fact does not establish a material issue of disputed fact, as defendants do not dispute that WWWY paid $60,000 to the WIAA for rights under the contract in 2008. Therefore, this proposed fact remains undisputed.

130. In addition, in 2008 WIAA received $80,000 from a sponsorship partner, a portion of which came from advertising in programming produced by WWWY. Clark Aff. ¶ 10.

Defendants' Response No. 130: Undisputed.

131. In addition, WWWY was granted the rights to market the partnership with the WIAA; to use the WIAA trademark, logo and name for marketing purposes; and to establish an online website for marketing and distribution. Eichorst Aff. ¶ 19, Ex. C.

Defendants' Response No. 131: Undisputed.

132. The Agreement provides for production goals, produced either by WWWY directly or through an affiliate, of 100% of state tournaments, 50% of sectional events, and 25% of regional events. Eichorst Aff. ¶ 23, Ex. C.

Defendants' Response No. 132: Undisputed.

133. Before the Agreement with WWWY, there was no widespread distribution of sectional and regional WIAA events. Eichorst Aff. ¶ 23; Clark Aff. ¶ 6.

Defendants' Response No. 133: Disputed in so far as "widespread distribution" is unclear.

Plaintiffs' Reply No. 133: Defendants do not refer to evidence to support their claimed dispute, as required to establish a material issue of disputed fact, and the meaning of the proposed finding of fact is clear. Accordingly, this proposed fact remains undisputed.

134. The Agreement provides for a multi-platform distribution strategy under which WWWY agrees to distribute directly, or contract with a distribution agent for, WWWY produced events, through live production, live or delayed streaming, video on demand, tape delayed production, and physical media. Eichorst Aff. ¶ 24, Ex. C.

Defendants' Response No. 134: Undisputed.

135. Examples of distribution platforms include internet based video on demand (web streaming), DSL/Broadband based video on demand, cable based video on demand, satellite based video on demand, cable (live or delayed), satellite (live or delayed), network (live or delayed), and other physical media. Eichorst Aff. ¶ 24, Ex. C.

Defendants' Response No. 135: Undisputed.

136. At the time WWWY was negotiating the Letter of Intent and Agreement with the WIAA, Fox Sports Wisconsin ("Fox") saw WWWY's product for individual game highlights and, because of its high production quality, was interested in contracting with WWWY for distribution of WIAA events. Eichorst Aff. ¶ 31.

Defendants' Response No. 136: Undisputed.

137. Eichorst started discussing with Fox an agreement where Fox would be a distribution agent for WWWY produced WIAA events. Eichorst Aff. ¶ 31.

Defendants' Response No. 137: Undisputed.

138. Fox required WWWY to provide it with exclusive content for distribution as part of any agreement. Eichorst Aff. ¶ 31.

Defendants' Response No. 138: Undisputed.

139. Once the WIAA signed the Agreement with WWWY, the WWWY/Fox contract was finalized for Fox's distribution of WWWY produced WIAA events. Eichorst Aff. ¶ 32.

Defendants' Response No. 139: Undisputed.

140. As part of WWWY's Agreement with Fox, events from all WIAA tournaments are distributed for delayed TV through Fox. Eichorst Aff. ¶ 32.

Defendants' Response No. 140: Undisputed that some events from WIAA tournaments are distributed by delayed TV through Fox. Affidavit of Todd C. Clark, Jan. 19, 2010 (Dkt. #54) ("Clark Aff."), Ex. 2 (listing tournament events distributed by Fox).

Plaintiffs' Reply No. 140: Undisputed.

141. WWWY's contract with Fox expires in 2011. Eichorst Aff. ¶ 32.

Defendants' Response No. 141: Undisputed.

Affiliate Production Partners

142. The Agreement between WIAA and WWWY grants WWWY the right to authorize affiliate production partners for the production of WIAA events. In exchange, WWWY agrees to actively seek out and affiliate all qualified production resources. Eichorst Aff. ¶ 25, Ex. C.

Defendants' Response No. 142: Undisputed.

143. Clark worked with Eichorst to develop the affiliate program through which television stations, web sites, other media outlets or production companies could become affiliates with WWWY for purposes of producing and distributing WIAA events. Clark Aff. ¶ 13.

Defendants' Response No. 143: Undisputed.

144. The WIAA did not have a method or resources for monitoring its media policies. Clark Aff. ¶ 13; Eichorst Aff. ¶ 26.

Defendants' Response No. 144: Disputed as unclear as to the time period during which the fact asserts the WIAA did not have a method or resources for monitoring its media policies. Additionally, the Eichorst Affidavit citation does not support the fact.

Plaintiffs' Reply No. 144: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Further, Defendants' objections are unfounded: Clark's Affidavit states that this discussion relates to the time period of the execution of the contract with WWWY in 2005. Clark First Aff. ¶ 12. Eichorst states in his affidavit that "WWWY monitors production and distribution for the WIAA, which did not have the resources for such monitoring." Eichorst First Aff. ¶ 26.

145. Further, the WIAA was concerned about the quality of production of its events, and the images that were associated with its events. Clark Aff. ¶ 13; Eichorst Aff. ¶ 26.

Defendants' Response No. 145: Undisputed.

146. Through the WIAA's relationship with WWWY, WWWY monitors production and distribution for the WIAA, ensuring compliance and quality control. Clark Aff. ¶ 13; Eichorst Aff. ¶ 26.

Defendants' Response No. 146: Undisputed.

147. As part of the affiliate program, Eichorst organized a meeting with the executive director of the Wisconsin Association of PEG (Public, Educational and Government) Access Channels ("WAPC"), to advise the WAPC of the WIAA's affiliate production program. Eichorst Aff. ¶ 26.

Defendants' Response No. 147: Undisputed.

148. The affiliate program would allow the PEG channels to film WIAA events and carry them on their channels, on a fee basis that was less than what the WIAA had been charging. Eichorst Aff. ¶ 26.

Defendants' Response No. 148: Disputed. Prior to signing the contract with WWWY, the WIAA received no direct revenue from PEG channels that broadcast local games. Clark Aff., ¶ 5.

Plaintiffs' Reply No. 148: Defendants' response does not raise a material dispute with respect to Plaintiffs' proposed finding of fact as stated, as the proposed fact relates to the fee charged by the WIAA, not the fee received by the WIAA, and Defendants have not disputed that the fee charged under the affiliate program was less than what the fee that the WIAA charged. Plaintiffs further reply that the WIAA does not charge PEG stations for delayed transmissions of regular season games. For WIAA tournament games, the WIAA charged a fee

of $20 per regional or sectional game, and $50 for state games, to local PEG channels for delayed transmissions of WIAA tournaments since before the contract with WWWY. The stations were to make the payment for all regional and sectional events directly to the host school. Because of that requirement, the WIAA itself was not able to monitor whether the PEG channels were complying with the fees policies, unless indicated on the event financial forms the school submits to the WIAA. The WIAA thus would be aware if a PEG channel did pay, but would not be aware if the PEG channel taped an event but did not pay the required fee. Thus, the WIAA believed there were instances when local PEG channels would transmit a local WIAA tournament game without paying the fee to the WIAA. Clark Second Aff. ¶ 6; Clark Third Decl. ¶ 7.

149. Before the affiliate program, the WIAA had charged $20 per event for local PEG channels to film and broadcast a WIAA event; under WWWY's affiliate program, WWWY charges PEG channels $50 per year. Eichorst Aff. ¶ 26.

Defendants' Response No. 149: Disputed. Prior to signing the contract with WWWY, the WIAA received no direct revenue from PEG channels that broadcast local games. Clark Aff., ¶ 5.

Plaintiffs' Reply No. 149: Defendants' response does not raise a material dispute with respect to Plaintiffs' proposed finding of fact as stated, as the proposed fact relates to the fee charged by the WIAA, not the fee received by the WIAA, and Defendants have not disputed that these were the fees the WIAA charged. Plaintiffs further reply that the WIAA does not charge PEG stations for delayed transmissions of regular season games. For WIAA tournament games, the WIAA charged a fee of $20 per regional or sectional game, and $50 for state games, to local PEG channels for delayed transmissions of WIAA tournaments since before the contract with WWWY. The stations were to make the payment for all regional and sectional events directly to the host school. Because of that requirement, the WIAA itself was not able to monitor whether the PEG channels were complying with the fees policies, unless indicated on the event financial forms the school submits to the WIAA. The WIAA thus would be aware if a PEG channel did pay, but would not be aware if the PEG channel taped an event but did not pay the required fee. Thus, the WIAA believed there were instances when local PEG channels would transmit a local WIAA tournament game without paying the fee to the WIAA. Clark Second Aff. ¶ 6; Clark Third Decl. ¶ 7.

150. In return for the affiliate fee, WWWY takes care of all of the organizational requirements for PEG access, such as making all necessary arrangements with the local school to get the television station set up for production. Eichorst Aff. ¶ 26.

Defendants' Response No. 150: Undisputed.

151. Once the PEG station films the event, they provide a master copy of the film to WWWY, which sells the DVDs online, at WWWY's administrative expense. Eichorst Aff. ¶ 26.

Defendants' Response No. 151: Undisputed.

152. The PEG station gets royalties from the DVD sales. Eichorst Aff. ¶ 26.

Defendants' Response No. 152: Undisputed.

153. No PEG station has complained about or refused to provide the master copy of the film to WWWY. Eichorst Aff. ¶ 26.

Defendants' Response No. 153: Disputed, but immaterial. The Board of Directors of the Wisconsin Association of PEG Channels voted unanimously against endorsing the WWWY affiliate program. Cardona Decl., ¶ 7. One of the reasons for the Board's vote was the requirement that the PEG station surrender the PEG's video. Cardona Decl., Ex. C at 1-2.

Plaintiffs' Reply No. 153: Defendants' version of the fact is not supported by admissible evidence, as the cited evidence is conclusory, speculative, opinion and hearsay.

154. In the fall of 2008 alone, WWWY had 59 affiliates through its affiliate program. Eichorst Aff. ¶ 27.

Defendants' Response No. 154: Undisputed.

155. WWWY has not turned down any request for an affiliate relationship. Eichorst Aff. ¶ 27; Clark Aff. ¶ 17.

Defendants' Response No. 155: Undisputed.

156. For a fee ultimately determined by the WIAA, WWWY allows anyone else to produce and distribute a "declined event"—a WIAA post-season event to which WWWY holds the rights but has declined production. Eichorst Aff. ¶ 36.

Defendants' Response No. 156: Disputed. WWWY charges a fee for multi-camera Internet streams of $1,500, see Affidavit of John W. Dye, Jan. 22, 2010 (Dkt. #39) Ex. B, which is higher than the $1250 the WIAA has approved, Clark Aff., ¶ 15. Also, 2009-10 Media Guide expressly stated that "(a)ll permissions granted, policies enforced and fees required will be at the sole discretion of the rights holder." Nero Decl., Ex. 5 at 17.

Plaintiffs' Reply No. 156: Defendants' response does not give rise to a disputed issue of material fact with respect to proposed Finding of Fact No. 156. Mr. Clark recognized and corrected a statement from his first affidavit in his second affidavit, and confirmed that the fee for multi-camera Internet streams approved by the WIAA is $1,500. Thus, the correct fee structure determined by the WIAA is $250 to live internet stream a game produced with one camera, and $1,500 to live internet stream a game produced with multiple cameras. Clark Second Aff. ¶ 8. *See also* Eichorst First Aff. ¶ 38 ("the WIAA decided on a fee structure"); Clark First Aff. ¶ 15 ("the WIAA decided on a fee structure").

157. WWWY has never rejected a request to produce a declined event. Eichorst Aff. ¶ 36.

Defendants' Response No. 157: Undisputed.

158. Clark and Eichorst worked together to determine the fee for affiliate production of a declined event. Eichorst Aff. ¶ 37; Clark Aff. ¶ 14.

Defendants' Response No. 158: Undisputed.

159. Eichorst works with seven other state high school athletic associations for producing and distributing their high school athletic events, so he was familiar with how different states address the fee structure. Eichorst Aff. ¶ 37.

Defendants' Response No. 159: Undisputed.

160. Clark is familiar with the policies and practices of other states' high school athletic associations with respect to the production and distribution of games, including what they charge for video production or internet streaming. Clark Aff. ¶ 14.

Defendants' Response No. 160: Undisputed.

161. The WIAA decided on a fee structure that requires a person or entity to pay $250 to live internet stream a game produced with one camera, and $1,250 to live internet stream a game produced with multiple cameras. Eichorst Aff. ¶ 38; Clark Aff. ¶ 15.

Defendants' Response No. 161: Undisputed.

162. This fee was determined based on a number of factors, including the fact that the fee was consistent with or lower than the fees charged by other state athletic associations. Eichorst Aff. ¶ 39; Clark Aff. ¶ 16.

Defendants' Response No. 162: Undisputed.

163. In determining the fee, Clark and Eichorst also looked at the value of the production and the resources devoted to the production. Eichorst Aff. ¶ 39; Clark Aff. ¶ 16.

Defendants' Response No. 163: Undisputed.

164. In determining the fee, Clark and Eichorst also considered the medium, whether internet or TV, and how wide the distribution would be, whether local or world-wide. Eichorst Aff. ¶ 39; Clark Aff. ¶ 16.

Defendants' Response No. 164: Undisputed.

165. Clark and Eichorst determined that the multi-camera production lends itself to a wide internet distribution platform that people are able to see world-wide, whereas a single camera local PEG station production is shown only through the television medium for distribution to the local community, and is transmitted on a tape-delayed basis and not live. Eichorst Aff. ¶ 39; Clark Aff. ¶ 16.

Defendants' Response No. 165: Undisputed.

166. WWWY has never charged anything other than what the WIAA has determined to be the appropriate fee for affiliate production. Clark Aff. ¶ 17.

Defendants' Response No. 166: Disputed. WWWY charges more for multi-camera Internet streams than the fee the WIAA has determined is appropriate. *Compare* Clark Aff. ¶ 15 ($1250 for multi-camera) *with* Dye Aff., Ex. B ($1500 for multi-camera).

Plaintiffs' Reply No. 166: Defendants do not raise a disputed issue of material fact with respect to proposed Finding of Fact No. 166. Mr. Clark recognized and corrected a statement from his first affidavit in his second affidavit, and confirmed that the fee for multi-camera Internet streams approved by the WIAA is $1,500. Thus, the correct fee structure determined by the WIAA, as noted by Mr. Clark in his second affidavit, is $250 to live internet stream a game produced with one camera, and $1,500 to live internet stream a game produced with multiple cameras. Clark Second Aff. ¶ 8.

WWWY's Video Production Services for the WIAA

167. As part of the Agreement with the WIAA, WWWY agreed to provide video production resources to the WIAA at no cost to the WIAA. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 167: Undisputed such production resources are available to the WIAA upon request. Affidavit of Tim Eichorst, Jan. 15, 2010 (Dkt. #55) Ex. C at VI(a) (WWWY Contract) (emphasis added).

Plaintiffs' Reply No. 167: Plaintiffs do not dispute defendants' point that the contract between WIAA and WWWY contains the language that WWWY agrees to provide such services "upon request," but Plaintiffs do dispute any implication in defendants' response that such request was not made. Further, Defendants' response does not dispute that there was agreement to provide such services or that such services were actually provided.

168. WWWY films, edits, and makes available on wiaa.tv, the WIAA's sports meetings, such as the WIAA's seasonal rule interpretation meetings, so that members and the public can access such meetings without attending in person. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 168: Undisputed.

169. WWWY films, and makes available on wiaa.tv live, the WIAA's Annual Meeting, so that members and the public can access such meetings without attending in person. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 169: Disputed. Only the 2009 Annual Meeting is available on wiaa.tv. Second Veldran Aff., ¶ 4.

Plaintiffs' Reply No. 169: Defendants' response does not raise a disputed issue with respect to proposed Finding of Fact No. 169. The Second Veldran Affidavit cited in defendants' response only proves that as of February of 2010, the only Annual Meeting available on wiaa.tv was for 2009. Earlier Annual Meetings were on wiaa.tv, but were removed as

outdated. Clark Third Decl. ¶ 11. Defendants provide no evidence to dispute this point and, as such, this proposed fact remains undisputed

170. These services save members time and expense, and allow increased public access to WIAA information, thereby promoting the visibility of the WIAA, and supporting the marketing and branding of the WIAA. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 170: Undisputed.

171. WWWY produces an annual video that compiles highlights of all state WIAA tournaments throughout the year. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 171: Undisputed.

172. WWWY films, edits, and makes available on wiaa.tv, the annual scholar athlete award ceremony held in the spring in Wausau, Wisconsin. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 172: Disputed. No video from any such award ceremony is available on wiaa.tv. Second Veldran Aff., ¶ 5.

Plaintiffs' Reply No. 172: Defendants' response does not raise a disputed issue with respect to proposed Finding of Fact No. 172. The Veldran Affidavit cited in Defendants' response only proves that such award ceremony was not available on wiaa.tv in February of 2010. Earlier ceremonies were on wiaa.tv, but were removed as outdated. Clark Third Decl. ¶ 11. Defendants provide no evidence to dispute this point and, as such, this proposed fact remains undisputed.

173. WWWY gives the award winners a DVD copy of the event. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 173: Undisputed.

174. WWWY films, edits, and makes available on wiaa.tv, the annual WASC Spirit of Excellence Award ceremony. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 174: Disputed. No video from such award ceremony is available on wiaa.tv. Second Veldran Aff., ¶ 6.

Plaintiffs' Reply No. 174: Defendants' response does not raise a disputed issue with respect to proposed Finding of Fact No. 174. The Second Veldran Affidavit only proves that such award ceremony was not available on wiaa.tv in February of 2010. Earlier ceremonies were on wiaa.tv, but were removed as outdated. Clark Third Decl. ¶ 11. Defendants provide no evidence to dispute this point and, as such, this proposed fact remains undisputed.

175. WWWY films interviews of the presenters at the WASC Spirit of Excellence Award ceremony, which it includes in the final production of the award ceremony tape. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 175: Undisputed.

176. WWWY helps promote the award ceremony at tournaments by showing the tape on the video board at various venues. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 176: Undisputed.

177. At venues where the WIAA hosts championship tournaments, WWWY provides live game feed to the video board. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 177: Undisputed.

178. Normally, the venue itself charges a large fee to provide live game feed to the video board. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 178: Undisputed.

179. Instead of hiring someone from the venue to provide feed to the video board, WWWY has two to three extra staff members present at the event solely to work on the video board feed, all at no cost to the WIAA. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 179: Undisputed.

180. WWWY produces highlight segments from other WIAA sponsored sectionals or tournaments, and does recaps with video from other WIAA state championship tournaments, that WWWY presents and feeds to the video board at WIAA championship tournaments. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 180: Undisputed.

181. WWWY films starting line-ups, introduction videos, and/or team videos that it shows on the video board at all tournaments that have video board capability. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 181: Undisputed.

182. WWWY creates public service announcements that the WIAA and member schools can display on video boards at events and that are displayed on wiaa.tv. Clark Aff. ¶ 9; Eichorst Aff. ¶ 29.

Defendants' Response No. 182: Undisputed.

The wiaa.tv Web Portal

183. Since the WIAA first began discussing the role of WWWY in producing and distributing WIAA events, Clark realized that internet streaming was an important technological development that would need to be addressed with respect to distribution of WIAA events. Clark Aff. ¶ 18.

Defendants' Response No. 183: Undisputed.

184. In fact, in the WIAA's first Media Policies Reference Guide in 2003, Clark addressed internet streaming as a distribution platform. Clark Aff. ¶ 18.

Defendants' Response No. 184: Undisputed.

185. Since then, Eichorst and Clark have had regular discussions about internet video streaming as a distribution platform. Clark Aff. ¶ 18; Eichorst Aff. ¶ 20.

Defendants' Response No. 185: Undisputed.

186. As part of his plan to produce and distribute WIAA events, Eichorst had proposed that internet streaming would be one of the distribution platforms. Clark Aff. ¶ 19.

Defendants' Response No. 186: Disputed as hearsay. This fact is not supported by admissible evidence.

Plaintiffs' Reply No. 186: The proposed fact is not hearsay, as it not being introduced to prove the truth of the matter asserted (that Eichorst had proposed internet streaming as a distribution platform), but rather to prove the WIAA's motivation to enter into an exclusive contract with WWWY. Further, the proposed fact is supported by the Affidavit of Tim Eichorst. Eichorst First Aff. ¶ 14, Ex. B, ¶ 15.

187. Eichorst also had proposed that as part of WWWY's distribution efforts, he would create an online property containing the name WIAA for use in marketing and distributing WIAA tournament series and championship content. Clark Aff. ¶ 19.

Defendants' Response No. 187: Disputed as hearsay. This fact is not supported by admissible evidence.

Plaintiffs' Reply No. 187: The proposed fact is not hearsay, as it not being introduced to prove the truth of the matter asserted (that Eichorst proposed to create an online property), but rather to prove the WIAA's motivation to enter into an exclusive contract with WWWY. Further, the proposed fact is supported by the Affidavit of Tim Eichorst. Eichorst First Aff. ¶ 14, Ex. B, ¶ 15.

188. Eichorst thought the web portal was a key part of the strategy for the branding and marketing of the WIAA, that the destination point for WIAA events needed to be branded as part of the WIAA, and that the market for that product should attach itself to that brand. Eichorst Aff. ¶ 20.

Defendants' Response No. 188: Disputed. The affiant is not competent to testify that WIAA Internet sites "need" to be branded.

Plaintiffs' Reply No. 188: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

189. Clark agreed that it was important that the WIAA name be associated with the video distribution platform, and that the WIAA should be the destination point for its own events. Clark Aff. ¶ 19.

Defendants' Response No. 189: Undisputed.

190. Eichorst and Clark considered using the WIAA's own website, but did not believe the server would have sufficient bandwidth capacity to handle the streaming. Clark Aff. ¶ 19.

Defendants' Response No. 190: Undisputed.

191. Based on these considerations, Eichorst and Clark created the web portal known as "wiaa.tv," which is located at http://wiaa.tv/. Clark Aff. ¶ 20; Eichorst Aff. ¶ 20.

Defendants' Response No. 191: Undisputed.

192. In the Spring of 2007, WWWY started live streaming WIAA athletic events on wiaa.tv. Eichorst Aff. ¶ 20.

Defendants' Response No. 192: Undisputed.

193. The wiaa.tv web portal contains all live and archived videos of WIAA events for all WIAA recognized sports that WWWY produces, and all live and archived videos for WIAA meetings that WWWY produces, such as sports meetings (meetings for specific sports such as basketball or wrestling), rules meetings, press conferences, and the annual meeting. Clark Aff. ¶ 20.

Defendants' Response No. 193: Undisputed.

194. The portal contains the WIAA logo and a link to the WIAA website, clearly identifying its connection to and cementing its relationship with the WIAA. Clark Aff. ¶ 20.

Defendants' Response No. 194: Undisputed.

195. WWWY operates and manages the wiaa.tv web portal for WIAA as part of its contractual responsibilities and at no cost to the WIAA. Clark Aff. ¶ 20.

Defendants' Response No. 195: Undisputed.

196. The WIAA has control over the content that is placed on wiaa.tv, including what is displayed, when, and how, to ensure it supports and is consistent with the mission and purpose of the WIAA. Clark Aff. ¶ 21; Eichorst Aff. ¶ 20.

Defendants' Response No. 196: Undisputed.

197. The wiaa.tv portal is a video-only site. Eichorst Aff. ¶ 21.

Defendants' Response No. 197: Undisputed.

198. There is limited advertising on wiaa.tv. Clark Aff. ¶ 21; Eichorst Aff. ¶ 21.

Defendants' Response No. 198: Undisputed.

199. The WIAA has control over the advertising on the website. Clark Aff. ¶ 21.

Defendants' Response No. 199: Undisputed.

200. If any video content or advertising was not consistent with the WIAA members' ideals and the mission of the organization, the WIAA would have the ability to restrict its display. Clark Aff. ¶ 21.

Defendants' Response No. 200: Undisputed.

201. The WIAA has begun a pilot program to use the wiaa.tv portal to the benefit of WIAA members by using the portal as a vehicle for member schools to live stream their own video of their own athletic events during the regular season at no charge to them. Clark Aff. ¶ 22; Eichorst Aff. ¶ 22.

Defendants' Response No. 201: Undisputed.

202. As part of the pilot program, to encourage schools to participate and use the portal, WWWY is paying pilot schools a minimum of $500 this year to implement the program. Clark Aff. ¶ 22.

Defendants' Response No. 202: Undisputed.

203. The WIAA anticipates the wiaa.tv portal to have great potential for its members. Clark Aff. ¶ 22.

Defendants' Response No. 203: Undisputed.

204. The portal provides member schools with a safe haven to place its video content, and member schools do not have to worry about negative advertising or images associated with their video content. Clark Aff. ¶ 22.

Defendants' Response No. 204: Undisputed.

205. Although no WIAA events were offered on the internet in 2004-05, in 2008-09, the wiaa.tv web portal transmitted 82 live WIAA events and 182 on archived stream and DVD. Clark Aff. ¶ 8.

Defendants' Response No. 205: Disputed. 175 games were archive streamed in 2008-09. Second Santa Maria Decl., Ex. A at 7-8 (Interrog. No. 5 and Resp. to Interrog. No. 5).

Plaintiffs' Reply No. 205: Plaintiffs accept Defendants amendment to the proposed finding that 175 games were archive streamed in 2008-09. Accordingly, there is no dispute between the parties with respect to this fact.

206. Of the events offered on wiaa.tv, approximately 134 were under the WWWY contract with WIAA, while approximately 48 were Football State Finals, Boys and Girls Basketball State Tournament, and Hockey State Finals. Clark Aff. ¶ 8.

Defendants' Response No. 206: Undisputed to the extent that the referenced events, numbering 182 in total, may have been live or archive streamed. Only 175 games, total, were archived streamed. Second Santa Maria Decl., Ex. A at 7-8 (Interrog. No. 5 and Resp. to Interrog. No. 5).

Plaintiffs' Reply No. 206: Defendants have raised no material dispute with regard to proposed Finding of Fact No. 206 and it therefore remains undisputed. Plaintiffs accept defendants' additional response that such events may have been live or archive streamed and that only 175 games total were archive streamed.

207. WWWY does not make any money from the streaming of WIAA events on wiaa.tv. Eichorst Aff. ¶ 21.

Defendants' Response No. 207: Undisputed.

208. The expenses that WWWY incurs to operate wiaa.tv are offset by WWWY's distribution contracts. Eichorst Aff. ¶ 21.

Defendants' Response No. 208: Undisputed.

The Newspapers' Violation of the WIAA's Policies and the Exclusive Rights Contracts

209. The Post-Crescent, a newspaper published in Appleton, Wisconsin by Gannett Company, Inc., transmitted the following WIAA-sponsored tournament games through live internet streaming:

- October 28, 2008, Green Bay Preble High School v. Appleton North High School, at Appleton North High School;
- October 28, 2008, New London High School v. Waupaca High School, at Waupaca High School;
- November 1, 2008, Appleton North High School v. Bay Port High School, at Bay Port High School; and
- November 8, 2008, Appleton North High School v. Stevens Point Area High School, at Stevens Point Area High School

Defendants' Counterclaim, Dkt. No. 2 ¶ 39.

Defendants' Response No. 209: Undisputed.

210. The Post-Crescent internet streams of WIAA-sponsored games were made without the consent of WWWY. Eichorst Aff. ¶ 44.

Defendants' Response No. 210: Undisputed.

211. In November of 2008, Eichorst contacted The Post-Crescent and requested that they remove the unauthorized games from its website, pay the associated rights fee, and provide WWWY with the DVD of the game. Eichorst Aff. ¶ 44.

Response No. 211: Disputed. In November 2008, Eichorst contacted the *Green Bay Press-Gazette* by email regarding that newspaper's posting of an Internet stream produced by *The Post-Crescent* and made the above-cited requests. Dye Aff., Ex. B.

Plaintiffs' Reply No. 211: Defendants' response does not create a disputed issue of material fact with respect to proposed Finding of Fact No. 211, as regardless of which paper was contacted, Defendants do not dispute either that The Post-Crescent live streamed WIAA-sponsored games without the consent of WIAA or that in November 2008, Eichorst made contact with a Gannett newspaper regarding the unauthorized streaming produced by The Post-Crescent.

212. The Post-Crescent refused and has not paid the rights fee or provided a DVD to WWWY. Eichorst Aff. ¶ 44.

Defendants' Response No. 212: Undisputed.

213. Clark did not authorize, on behalf of the WIAA or WWWY, any media organization to live stream any WIAA-sponsored tournament without paying the required rights fee for such streaming, including the four WIAA-sponsored football tournaments that The Post-Crescent transmitted by live internet streaming in October and November of 2008. Clark Aff. ¶ 31.

Defendants' Response No. 213: Undisputed.

214. Gannett did not contact WWWY to request permission to stream the four WIAA football events in November of 2008 that Gannett claims its newspapers were not permitted to stream. Eichorst Aff. ¶ 45.

Defendants' Response No. 214: Undisputed.

The WIAA's Photography Policy

215. From 2001-2003, the WIAA contracted to grant the nonexclusive right to Visual Image Photography, Inc. ("VIP") to sell photos and images of all state tournament finals. Chickering Aff. ¶ 32.

Defendants' Response No. 215: Undisputed.

216. In 2004, the WIAA contracted to grant the exclusive right to VIP to sell photos and images of all state tournament finals only. Chickering Aff. ¶ 32.

Defendants' Response No. 216: Undisputed.

217. The 2004 contract with VIP was for a 1-year term and expired in 2005. Chickering Aff. ¶ 32.

Defendants' Response No. 217: Undisputed.

218. In 2005, the WIAA contracted to grant the exclusive right to VIP to sell photos and images of all state tournaments including quarterfinals and semifinals. Chickering Aff. ¶ 32.

Defendants' Response No. 218: Undisputed.

219. The 2005 contract with VIP was for a 3-year term and expired in 2008. Chickering Aff. ¶ 32.

Defendants' Response No. 219: Undisputed.

220. Restrictions on the sale of tournament images helped the WIAA limit those images to association with products and advertising consistent with the WIAA's mission. Chickering Aff. ¶ 32.

Defendants' Response No. 220: Undisputed.

221. In 2007, a controversy arose over the WIAA's right to limit the Wisconsin Newspaper Association's member newspapers from selling photographs taken at tournament games through their website. Chickering Aff. ¶ 33.

Defendants' Response No. 221: Undisputed.

222. he WIAA suspended its enforcement of its photography policy for credentialed media in the summer of 2007 and Chickering notified the media in about July of 2007 that the WIAA would not enforce its photography policy. Chickering Aff. ¶ 33; Clark Aff. ¶ 23.

Defendants' Response No. 222: Undisputed.

223. The WIAA did not enforce its photography policy at any time after it was suspended. Chickering Aff. ¶ 33.

Defendants' Response No. 223: Undisputed.

224. In 2008, the WIAA entered into a contract with VIP for a term of five years, under which the only item of "exclusivity" that the WIAA guarantees to VIP is with regard to "the sale of any products using images from Covered Events." Clark Aff. ¶ 24, Ex. 4.

Defendants' Response No. 224: Disputed as incomplete. The 2008 contract states that "VIP along with the assistance and cooperation of the WIAA, will police the activities of so-called rogue photographers who have not secured any concession rights to take State Championship photographs for sale to the general public." Clark Aff., Ex. 4 at 3. The fact is disputed only to the extent this contract term requires certain photographers to pay rights fees to VIP in exchange for the right to take and sell photographs to the public and may constitute an additional grant of "exclusivity" to VIP.

Plaintiffs' Reply No. 224: Defendants' response does not establish a material issue of disputed fact with respect to the proposed finding of fact as stated. Therefore, this proposed fact remains undisputed. Defendants' response is unsupported: Plaintiffs do not dispute that the quoted language is contained in the VIP contract, but Defendants have cited no evidence to support Defendants' assertion that "this contract term requires certain photographers to pay rights fees to VIP in exchange for the right to take and sell photographs to the public and may constitute an additional grant of 'exclusivity' to VIP."

225. Effective with the 2009-2010 Media Policies, the WIAA changed its photography policy to be consistent with the July 2007 enforcement suspension and the 2008 VIP contract. Clark Aff. ¶ 25; Chickering Aff. ¶ 34.

Defendants' Response No. 225: Undisputed that under the 2008 VIP contract WNA member newspapers are not prohibited from selling photographs taken at WIAA-Sponsored events to the public from their websites.

Plaintiffs' Reply No. 225: Defendants' response does not address or dispute the substance of the proposed fact, and thus does not establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

226. The 2009-2010 policy allows the sale or resale of still photography by WIAA-credentialed media. Clark Aff. ¶ 25.

Defendants' Response No. 226: Undisputed.

227. The 2009-2010 policy prohibits the sale of "any products using images from WIAA Tournament Series events" without written permission from the WIAA. Clark Aff. ¶ 25.

Defendants' Response No. 227: Undisputed.

The WIAA's Policy Regarding Play-by-Play

228. The WIAA's Media Policies Reference Guide addresses issues of play-by-play and "blogging." Clark Aff. ¶ 26.

Defendants' Response No. 228: Undisputed.

229. If media or websites wish to use transmissions of play-by-play descriptions of action/statistics of a WIAA tournament game, they need WIAA consent through transmission rights and fees. Clark Aff. ¶ 26.

Defendants' Response No. 229: Undisputed.

230. The WIAA permits a "blog" (a contraction of the term "web log") where the blog is simply commentary on the athletic event or status updates. Clark Aff. ¶ 26.

Defendants' Response No. 230: Disputed. The WIAA requires a $25 fee from media wishing to transmit live audio report updates of state finals games. Nero Decl., Ex. 5 at 17.

Plaintiffs' Reply No. 230: Defendants' response does not establish a material issue of disputed fact with regard to the proposed finding of fact as stated. Defendants do not dispute that the WIAA permits a blog where the blog is simply commentary on the athletic event or status updates. Therefore, this proposed fact remains undisputed.

231. The WIAA does prohibit "play-by-play" without payment of the fees, whether such play-by-play appears on a blog, website, or otherwise. Clark Aff. ¶ 26.

Defendants' Response No. 231: Undisputed.

232. The WIAA defines play-by-play as live and detailed, spoken or written, regular entries of descriptions, or depictions of the sports events as they are happening, or the actual action as it occurs, including the continuous sequential detailed description of play, of events, or other material such as graphics or video regarding any WIAA tournament game, so that it approximates a video or audio transmission that allows the recipient to experience the game as it occurs. Clark Aff. ¶ 26.

Defendants' Response No. 232: Disputed. The WIAA defines "live or real-time play-by-play" as "transmitting a live (while the event/game is in progress from beginning to conclusion) written, audio or video description (identifying competitors with descriptions or results of game action) of all or a significant number of plays/events occurring sequentially during a game/event." Nero Decl. Ex. 5 at 11 (Terms #3).

Plaintiffs' Reply No. 232: Defendants' response does not establish a material issue of disputed fact, as either version effectively states the same thing. Defendants do not provide any evidence to the contrary. Therefore, this proposed fact remains undisputed.

233. Following the 2008 Football State Finals, Clark discovered after the fact that two media organizations, Madison.com (Wisconsin State Journal and Capital Times together) and the Milwaukee Journal-Sentinel, had engaged in live play-by-play blogging. Clark Aff. ¶ 27.

Defendants' Response No. 233: Undisputed.

234. Clark sent both organizations an invoice to pay the appropriate play-by-play fee. Clark Aff. ¶ 27.

Defendants' Response No. 234: Undisputed.

235. Neither media organization paid the fee. Clark Aff. ¶ 27.

Defendants' Response No. 235: Undisputed.

236. The incident with Madison.com and the Milwaukee Journal-Sentinel prompted discussions with the media about the blogging policies. Clark Aff. ¶ 28.

Defendants' Response No. 236: Undisputed that the incidents prompted Clark to discuss blogging policies with several individual sports editors. Clark Aff. ¶ 28

Plaintiffs' Reply No. 236: Defendants' response does not establish any dispute of material fact with respect to the proposed fact as stated. Defendants concede that the incident with Madison.com and the Milwaukee Journal-Sentinel prompted Mr. Clark of the WIAA to discuss blogging policies with members of the media. Accordingly, this proposed fact remains undisputed.

237. In early December of 2008, Clark informed several sports editors that the WIAA was willing to work with the media to develop an agreement as to what would be permitted on a real-time blog from tournament series events. Clark Aff. ¶ 28.

Defendants' Response No. 237: Undisputed.

238. The issue of what the WIAA would permit as far as blogging had been discussed at the two prior Media Days (an annual meeting that the WIAA hosted with members of the media to discuss media policies). Clark Aff. ¶ 28.

Defendants' Response No. 238: Undisputed.

239. Clark agreed to drop the invoices for the play-by-play with the expectation that the media would reach consensus on the issue and present a policy to Clark. Clark Aff. ¶ 28.

Defendants' Response No. 239: Undisputed.

240. In mid and late December of 2008, Clark also discussed with Peter Fox, the President of the Wisconsin Newspaper Association, the blogging issue, and that the WIAA was willing to discuss a reasonable definition of the threshold for a live depiction of action in blogs. Clark Aff. ¶ 29.

Defendants' Response No. 240: Disputed only to the extent Peter Fox's title is Executive Director of the Wisconsin Newspaper Association.

Plaintiffs' Reply No. 240: Plaintiffs accept Defendants' amendment to Peter Fox's title (Executive Direct of the Wisconsin Newspaper Association versus President). With acceptance of that amendment, there is no dispute between the parties as to this proposed finding of fact.

241. Clark received no further communication from any editor or media organization on the issue of blogging or play-by-play, and they presented no proposal or draft policy to Clark to define the parameters of permissible blogging. Clark Aff. ¶ 30.

Defendants' Response No. 241: Undisputed.

The Value of the WWWY contract to the WIAA

242. Eichorst determined that annually, it costs WWWY $508,806 to fulfill WWWY's contractual commitments to the WIAA, which include the following categories: WIAA state tournament event production costs in the field; WIAA state tournament event post-field production costs; WIAA channel production; WIAA state tournament venue production; wiaa.tv hosting and management; wiaa.tv live streaming; WIAA sports meeting production; and production of other WIAA meetings. Eichorst Aff. ¶ 40.

Defendants' Response No. 242: Undisputed.

243. The Agreement with WWWY substantially benefits the WIAA and its members in multiple ways. Chickering Aff. ¶¶ 24-27.

Defendants' Response No. 243: Disputed to the extent "substantially benefits" is vague.

Plaintiffs' Reply No. 243: Defendants' objection does not establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

244. One benefit to the WIAA and its members is that the WIAA's broadcast partners pay for the exclusive transmission rights to state tournaments, and that allows the WIAA to obtain revenue that it uses to organize and operate its programs and tournaments. Chickering Aff. ¶ 24.

Defendants' Response No. 244: Undisputed.

245. Another benefit is that the WIAA keeps all of the revenue from its contract partners for its own internal operations, and does not transfer any of that revenue to the State of Wisconsin, to any state agency, or to general state funds. Chickering Aff. ¶ 24.

Defendants' Response No. 245: Undisputed.

246. The revenue allows the WIAA to expand athletic program opportunities for its members for all WIAA-recognized sports, including providing revenue for those sports that the WIAA typically subsidizes or for those sports without significant public attendance. Chickering Aff. ¶ 24.

Defendants' Response No. 246: Disputed as incomplete. Money is fungible and the WIAA's budget is not segregated as this assertion suggests. The 3.3% of its revenue that comes from the WIAA's contract partners is applied to all tournament expenses, just like the nearly 86% of its revenue from tournament admissions.

Plaintiffs' Reply No. 246: Defendants' objections do not give rise to a dispute regarding this proposed fact. Defendants do not provide a basis or refer to evidence to support their response, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

247. The Agreement with WWWY also allows the WIAA to expand transmission of athletic events that might not otherwise be transmitted due to the level of public interest or commercial appeal. Chickering Aff. ¶ 25.

Defendants' Response No. 247: Disputed as incomplete. Because of the Agreement, there are some sectional and regional games that are not being taped and transmitted that would have been in the absence of the Agreement. See Cardona Decl., Ex. C at 2.

Plaintiffs' Reply No. 247: Defendants' objections do not give rise to a dispute regarding this proposed fact, as Defendants' proposed version of the fact is not supported by admissible evidence, as the cited evidence is conclusory, opinion, and hearsay. Further,

Defendants do not dispute the underlying fact as proposed, that the Agreement with WWWY allows the WIAA to expand transmission of athletic events that might not otherwise be transmitted due to the level of public interest or commercial appeal.

248. Through the WWWY contract, the WIAA has achieved additional distribution and streaming of tournaments that were not transmitted before, including all state tournaments, and regional and sectional competitions. Chickering Aff. ¶ 25.

Defendants' Response No. 248: Undisputed that WWWY is now streaming all state tournament. *See also* Response No. 247 (some local access channels will stop producing regionals and sectionals). Disputed that in 2008 all regionals and sectionals are streamed. See Second Veldran Aff., ¶ 14 (2,764 regionals; 677 sectionals in 2008); Clark Aff., ¶ 18 (134 events, including finals, done pursuant to WWWY contract).

Plaintiffs' Reply No. 248: Defendants' response does not create a disputed issue of material fact with respect to plaintiffs' proposed Finding of Fact No. 248. The proposed finding does not assert that *all* regional and sectional events were streamed. As such, defendants have raised no dispute regarding the underlying proposed fact and it therefore remains undisputed that through the WWWY contract, the WIAA has achieved additional distribution and streaming of tournaments that were not previously transmitted, including all state tournaments, and some regional and sectional competitions.

249. WWWY provides valuable services to the WIAA that the WIAA does not have to pay for, which allows the WIAA to provide cost savings to its member schools, and to return money to the schools that host events so that they are not losing money on hosting an event. Chickering Aff. ¶ 26.

Defendants' Response No. 249: Disputed. The citation does not support the fact that the WIAA has returned any money to the schools that it would not have otherwise returned because of WWWY's services or that host schools do not lose money on hosting an event.

Plaintiffs' Reply No. 249: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

250. WWWY's services have increased the WIAA's exposure to the public and the public's participation in the WIAA, by making available WIAA meetings and events on wiaa.tv at no cost to the WIAA. Chickering Aff. ¶ 26.

Defendants' Response No. 250: Undisputed.

251. Another benefit of the Agreement with WWWY is that the WIAA can fulfill its purpose to promote the broad educational aims of the WIAA's member schools and to cultivate the high ideals of good citizenship and sportsmanship by controlling the association of high school sports with inappropriate goods and services (such as gambling, alcohol, tobacco, and adult entertainment). Chickering Aff. ¶ 27.

Defendants' Response No. 251: Disputed. WIAA controls the association of high school sports with inappropriate goods and services (such as gambling, alcohol, tobacco, and adult entertainment) through advertising restrictions applied to all credentialed media. Nero Decl., Ex. 5 at 16.

Plaintiffs' Reply No. 251: Defendants' response to this proposed finding does not give rise to a disputed issue of material fact and is unsupported. The contract between the WIAA and WWWY became the vehicle through which the WIAA could monitor compliance with its media policies. Clark First Aff. ¶ 13. The affiliate program also allowed WWWY to facilitate monitoring of transmissions for consistency and quality, and to ensure that transmissions do not violate the WIAA's content standards, such as transmission of prohibited content related to tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter. Clark Second Aff. ¶ 5.

252. Without the revenue from its exclusive contract partners, the WIAA would not be able to afford to subsidize all of its recognized sports, thereby depriving its members and their student athletes of athletic opportunities. Chickering Aff. ¶ 35.

Defendants' Response No. 252: Disputed. This conclusion is speculative and has no factual support.

Plaintiffs' Reply No. 252: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Chickering had responsibility for the budget, revenue and expenditures of the WIAA, and therefore is in the best position to know how WIAA revenues can best be used and distributed among WIAA programs. Chickering Aff. ¶ 2.

253. Without the revenue from its exclusive contract partners, the WIAA would have to increase the cost of admission for tournaments, undermining its goal of making the events an affordable, family-friendly outing. Chickering Aff. ¶ 35.

Defendants' Response No. 253: Disputed. The term "affordable" is vague. Additionally, there is no factual support that the only way WIAA could replace the exclusive contract revenue is by raising ticket prices rather than through some other increase, such as raising officials' fees, or by cutting its budget.

Plaintiffs' Reply No. 253: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Chickering had responsibility for the budget, revenue and

expenditures of the WIAA, and therefore is in the best position to know how best to increase WIAA revenues for WIAA programs. Chickering Aff. ¶ 2.

254. Without the revenue from its exclusive contract partners, the WIAA membership would also lose control over the message that was associated with their voluntary athletic association and its ability to promote the members' ideals as stated in the constitution. Chickering Aff. ¶ 35.

Defendants' Response No. 254: Disputed as speculative.

Plaintiffs' Reply No. 254: Defendants' objection does not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Chickering had responsibility for the overall operations of the WIAA, and therefore is in the best position to know how the WIAA can best control its message and promote its members' ideals. Chickering Aff. ¶ 2.

255. Without the revenue from its exclusive contract partners, the WIAA would not be able to provide the cost-effective services to its members that it receives for free from WWWY. Chickering Aff. ¶ 35.

Defendants' Response No. 255: Disputed as speculative; neither the WIAA nor WWWY has provided even an estimate of what those services cost in the market place.

Plaintiffs' Reply No. 255: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Chickering had responsibility for the overall operations of the WIAA, and therefore is in the best position to know how the WIAA can best provide services to the WIAA membership. Chickering Aff. ¶ 2. Further, Tim Eichorst of WWWY has provided the cost of the services that WWWY provides to the WIAA. Eichorst Second Decl., Ex. D.

256. WWWY could not operate at a profit without the exclusive contract with the WIAA, because it only receives revenue from distribution and advertising, not from internet streaming, and its distribution partners and advertisers require exclusive content. Eichorst Aff. ¶ 41.

Defendants' Response No. 256: Undisputed, but immaterial. Whether a private third-party company can make a profit without exclusivity is not material to determining whether the Constitution permits the WIAA to grant such exclusivity.

Plaintiffs' Reply No. 256: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, as defendants acknowledge, this proposed fact remains undisputed. The profitability of WWWY's business model determines its ability to provide the valuable services to the WIAA free of charge and its ability to engage in production of WIAA events to satisfy the WIAA's goal of increased exposure for under-exposed sports.

The Reasonableness of the WIAA's Media Policies

257. 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. Hoyt Decl. ¶ 56.

Defendants' Response No. 257: Disputed, but immaterial. The fact is unclear: neither the term "covering" nor "carrying" are defined anywhere in the Hoyt Declaration. Moreover, given the lack of definitions, the testimony supporting this assertion lacks the requisite factual support. The dispute, however is immaterial. Whether a state actor may restrict a member of the media from either "covering" or "carrying" a game consistent with the requirements of the First and Fourteenth Amendments is a question of law independent of any industry custom or practice.

Plaintiffs' Reply No. 257: Defendants' objections and legal conclusions do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Defendants could have but chose not to rebut Hoyt's report. Further, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704.

258. The WIAA has provided space and technology to make reporting on WIAA games more convenient for credentialed media. Hoyt Decl. ¶ 21.

Defendants' Response No. 258: Undisputed.

259. Under WIAA policies, newspapers have virtually complete access to the WIAA athletic events in order to perform their expected journalistic functions, i.e., to fully describe, explain, and analyze newsworthy events. Hoyt Decl. ¶ 60.

Defendants' Response No. 259: Disputed. The expected journalistic functions of newspapers today include Internet streaming of public events. Affidavit of Danny L. Flannery, Jan. 21, 2010 (Dkt. #41) ("Flannery Aff."), ¶¶ 6-9.

Plaintiffs' Reply No. 259: Defendants' objections do not put into dispute this proposed fact as there is no foundation to establish personal knowledge of Danny Flannery with respect to any journalistic function of any newspaper other than The Post-Crescent. Flannery Aff. ¶ 2. Plaintiffs object to this portion of the Flannery affidavit to the extent it offers opinion, which opinions must be disclosed pursuant to Rule 26. *See* Fed. R. Civ. P. 26 & Fed. R. Evid. 702. Mr. Flannery did not submit an expert report in this matter pursuant to the Order in this case, which deadline was in October. *See* Dkt. No. 19 & 20 (agreeing to September 14 and October 16, 2009, expert disclosures). Accordingly, the Court should disregard this opinion testimony. *See* Fed. R. Civ. P. 37(b).

260. Policies such as that of the WIAA do not hinder media outlets from reporting on games, as reporters for print, broadcast, and internet media are free to report on games without significant restrictions on their coverage. Hoyt Decl. ¶ 54.

Defendants' Response No. 260: Disputed. Internet streaming and play-by-play reporting are valuable reporting techniques and technology whose use is prohibited under WIAA policies without the WIAA's prior permission. Dye Aff., ¶¶4-5, 15-16,18-19; Flannery Aff., ¶¶ 15-22; Nero Decl., Ex. 5 at 11.

Plaintiffs' Reply No. 260: Plaintiffs do not dispute that Dye and Flannery use internet streaming, and do not dispute that credentialed media must apply for transmission rights for video or textual play-by-play depictions on the Internet, but such applications do not restrict the media from reporting on games. Plaintiffs object to these portions of the Flannery and Dye affidavits to the extent they offer opinion, which opinions must be disclosed pursuant to Rule 26. *See* Fed. R. Civ. P. 26 & Fed. R. Evid. 702. Neither Mr. Flanner nor Mr. Dye submitted an expert report in this matter pursuant to the Order in this case, which deadline was in October. *See* Dkt. No. 19 & 20 (agreeing to September 14 and October 16, 2009, expert disclosures). Accordingly, the Court should disregard this opinion testimony. *See* Fed. R. Civ. P. 37(b).

261. Under the WIAA's policies, newspapers are able to report on the details and outcomes of the games, including sidebars, statistics, and other relevant information, and printing in their regular editions and on their websites. Hoyt Decl. ¶¶ 21, 58.

Defendants' Response No. 261: Disputed. Newspapers may not report on details of a game whenever the WIAA determines those details constitute play-by-play descriptions or are reported with more than two minutes of video streamed over the Internet. Nero Decl., Ex. 5 at 11, 12. In addition, the assertion is vague for not defining the "other relevant information" which the Plaintiffs assert newspapers may report.

Plaintiffs' Reply No. 261: Defendants' statement in their response that media "may not report on details" if it is play-by-play or more than two minutes of video is inaccurate. Media may transmit play-by-play or more than two minutes of video, but they must apply for and pay for the transmission rights to do so. Nero Decl. Ex. 4 at 16, Ex. 5 at 17.

262. Newspapers may use photographs of the events and have interview access to coaches and athletes. Hoyt Decl. ¶¶ 21, 58.

Defendants' Response No. 262: Undisputed.

263. It is typical for reporters to interview coaches and athletes following games to complete game stories and sidebars. Hoyt Decl. ¶ 55.

Defendants' Response No. 263: Undisputed.

264. Reporters are generally permitted to film game action, record relevant statistics and other game information via audio recording, and use good, old-fashioned pen to paper in publishing and producing stories. Hoyt Decl. ¶ 55.

Defendants' Response No. 264: Undisputed.

265. 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. Hoyt Decl. ¶ 56.

Defendants' Response No. 265: Undisputed that reporters are restricted to specific locations and often subject to other reasonable time, place and manner restrictions, and that a reporter's ability to originate a radio broadcast may be affected by such restrictions. Whether any particular practice constitutes a reasonable time, place and manner restriction is a fact-specific question of law.

Plaintiffs' Reply No. 265: Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, as Defendants acknowledge, this proposed fact remains undisputed. Further, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704.

266. In addition to these traditional methods of reporting on events, newspapers may carry live audio streams of tournament games by paying an additional rights fee of $40-50 to WIAA. Hoyt Decl. ¶¶ 19, 58.

Defendants' Response No. 266: Undisputed that the WIAA's current policies authorize this reporting method; the constitutional [sic] of this and other WIAA media policies is a question of law.

Plaintiffs' Reply No. 266: Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Further, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704.

267. Newspapers can use up to two minutes of highlights or other action for reporting purposes (and may exceed two minutes with the WIAA's approval), and can 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. Hoyt Decl. ¶¶ 17, 19, 59.

Defendants' Response No. 267: Disputed as unclear what "reporting purposes" refers to. Additionally, more than two minutes of video is permitted under the WIAA's current media policies as "highlights on other regularly scheduled news or sports broadcasts" without WIAA's permission. Nero Decl., Ex. 5 at 12 (Video #3). The constitutionality of any of these policies, however, is a question of law.

Plaintiffs' Reply No. 267: Defendants' objection does not establish a material issue of disputed fact. Further, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704. Defendants' response is otherwise inaccurate. Defendants have misrepresented the WIAA Media Policies Reference Guide, which explicitly states:

> Stations or Web sites may use a backdrop of live action for reports from a tournament facility provided there is no play-by-play commentary and the report is limited to regularly scheduled news of sports programs and are no more than two minutes of a program which is any length.
>
> Use of film, video, audio, tape, etc. is limited to regularly scheduled news, sports programs or Internet site stories, and use on such programs is limited to no more than two minutes of a program which is any length.

Nero Decl. Ex. 5 at 13, No. 4.

268. Under the WIAA's policies, newspapers are not even foreclosed from internet streaming of games. Hoyt Decl. ¶¶ 20, 57.

Defendants' Response No. 268: Disputed. A $250 per-game fee is excessive for some newspapers and the permission WWWY requires is also conditioned on surrender of work product. Dye Aff., ¶ 17; Dye Aff., Ex. B.

Plaintiffs' Reply No. 268: Defendants' proposed version of the fact is based on inadmissible conclusory statements, and therefore is not sufficient to create a material issue of disputed fact. In addition, Defendants' response does not give rise to a disputed issue of material fact. Defendants do not assert that newspapers are foreclosed from internet streaming of games under the WIAA's policies.

269. Newspapers and other credentialed media are able to transmit games if they simply pay the required fee to WWWY. Hoyt Decl. ¶¶ 20, 57.

Defendants' Response No. 269: Disputed. WWWY additionally requires the surrender of work product. Dye Aff., Ex. B.

Plaintiffs' Reply No. 269: Plaintiffs accept Defendants' amendment to the proposed finding of fact. As such, there is no dispute that newspapers and other credentialed media are able to transmit games is they simply pay the required fee to WWWY and appropriately surrender work product as required.

270. The access the newspapers are provided permits the thorough coverage which the newspaper audience expects. Hoyt Decl. ¶ 58.

Defendants' Response No. 270: Disputed. The expectation of newspaper audiences today are not limited to their print publications but include video coverage of public events by Internet streaming. Flannery Aff., ¶¶ 6-9, 23.

Plaintiffs' Reply No. 270: Defendants' objections do not put into dispute this proposed fact, because the cited evidence does not support this version of the fact: Flannery does not testify at all about the expectations of newspaper audiences, instead merely testifying about the services his newspaper provides. Flannery Aff. ¶¶ 6-9, 23. Further, Flannery has no personal knowledge of any newspaper other than The Post-Crescent. Flannery Aff. ¶¶ 2-3. Plaintiffs object to this portion of the Flannery affidavit to the extent it offers opinion, which opinions must be disclosed pursuant to Rule 26. *See* Fed. R. Civ. P. 26 & Fed. R. Evid. 702. Mr. Flannery did not submit an expert report in this matter pursuant to the Order in this case, which deadline was in October. *See* Dkt. No. 19 & 20 (agreeing to September 14 and October 16, 2009, expert disclosures). Accordingly, the Court should disregard this opinion testimony. *See* Fed. R. Civ. P. 37(b).

271. In fact, the WIAA's restrictions are typical of those placed on the reporting of sporting events. Hoyt Decl. ¶ 55.

Defendants' Response No. 271: Disputed as unclear, but immaterial. The fact does not identify whether the sporting events referred to are sponsored by a state actor.

Plaintiffs' Reply No. 271: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version (including proof that such sporting events are not sponsored by a state actor), as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Defendants could have but chose not to rebut Hoyt's report.

272. Such policies are necessary based both on the availability of space and the need to control the conduct of the game. Hoyt Decl. ¶ 56.

Defendants' Response No. 272: Disputed as unclear, but immaterial. The fact does not identify the policies which are allegedly necessary because of space needs or the need to control the conduct of a game. This fact is also disputed to the extent it asserts that WIAA's exclusive contract with WWWY and resulting restrictions on Internet streaming by other members of the media are necessary because of space considerations. Most pressboxes at high school sports events can accommodate more than one Internet streaming crew and the vast majority of tournament events to which WWWY holds the right to produce are not streamed by anyone. Christopher Decl., ¶ 20; see Second Veldran Aff., ¶ 14 (total number of 2008 events WWWY held rights to number in the thousands); Clark Aff., ¶ 18 (134 total events produced in 2008 pursuant to WWWY contract).

Plaintiffs' Reply No. 272: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version (including proof that such sporting events are not sponsored by a state

actor), as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Defendants could have but chose not to rebut Hoyt's report. Defendants' response is otherwise unsupported and fails to give rise to a disputed issue of material fact: Defendants' allegation that "most pressboxes at high school sports events can accommodate more than one Internet streaming crew," is not supported because it is not based on personal knowledge of Joel Christopher.

273. It is not typical for a reporter to transmit the entirety of a sporting event over the internet in the name of reporting. Hoyt Decl. ¶ 56.

Defendants' Response No. 273: Disputed, but immaterial because First Amendment free speech rights and Fourteenth Amendment equal protection rights are independent of whether the use of a particular reporting technique or technology is typical.

Plaintiffs' Reply No. 273: Defendants' objection and legal conclusion do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed.

274. In virtually all cases, broadcasters and reporters know and respect any exclusive rights agreements that are in place for that event. Hoyt Decl. ¶ 56.

Defendants' Response No. 274: Disputed, but immaterial. The factual basis for this conclusion is not disclosed in the Hoyt Declaration. The fact, however, is immaterial because it assumes that exclusive rights agreements are lawful, the central legal question before the court.

Plaintiffs' Reply No. 274: Defendants' objections and legal conclusions do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports their responsive version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Further, Defendants' assertion of a lack of a factual basis is disputed. Hoyt stated the proposed fact was "based on my experience." Hoyt Decl. ¶ 56. Hoyt details substantial experience in the areas of journalism, mass media, and school athletic events. Hoyt Decl. ¶¶ 4-10. Defendants could have but chose not to rebut Hoyt's report. Further, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704. Also, "[t]he expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data." Fed. R. Evid. 705.

275. WIAA's media policies apply to all commercial television stations and websites using video for newscast or webcast purposes. Hoyt Decl. ¶ 59.

Defendants' Response No. 275: Disputed as unclear. The WIAA's media policies apply to all credentialed media. See Nero Decl., Ex. 5 at 1.

Plaintiffs' Reply No. 275: Defendants' response does not give rise to a disputed issue of material fact. Plaintiffs accept Defendants' statement that the WIAA's media policies apply to all credentialed media.

276. 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. Hoyt Decl. ¶ 48.

Defendants' Response No. 276: Disputed. This is not a fact, it is a conclusion of law. The WIAA's interests, as a state actor engaged in educational activities, are distinct, as a matter of law, from a private sports league.

Plaintiffs' Reply No. 276: Defendants' objections and legal conclusions do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Defendants could have but chose not to rebut Hoyt's report. Further, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704.

277. It is standard practice in sports organizations, both professional and educational, to grant exclusive rights to particular media organizations to increase the value of the rights, and thus increase revenue to the organization. Hoyt Decl. ¶¶ 22-34, 47-48.

Defendants' Response No. 277: Disputed, but immaterial. The supporting declarations do not support the assertion that it is a standard practice among educational sports organizations generally to grant exclusive media rights. The practices of professional sports organizations are irrelevant and the fact does not distinguish between college and high school, or between public and private, educational sports organizations.

Plaintiffs' Reply No. 277: Defendants' objections and legal conclusions do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Defendants could have but chose not to rebut Hoyt's report. Further, Defendants' claim that the supporting declaration does not support the proposed fact misrepresents the Hoyt Declaration, which specifically states: "exclusive rights agreements…are commonly used by athletic teams, leagues, and organizations. Such agreements are frequently used by public education institutions…." (Hoyt Decl. ¶ 22); other Big Ten universities had policies that allowed for exclusive broadcast rights, so UW adopted that policy to (Hoyt Decl. ¶ 23); Western Collegiate Hockey Association awarded exclusive television contract (Hoyt Decl. ¶ 25); "The exclusivity of UW's broadcast rights is similar to that of other large public universities. This is common practice." (Hoyt Decl. ¶ 34).

278. Protecting broadcast rights and awarding them on an exclusive basis is clearly a major financial underpinning of college sports. Hoyt Decl. ¶ 23.

Defendants' Response No. 278: Undisputed, but immaterial. See Response Nos. 276-77.

Plaintiffs' Reply No. 278: Defendants' objections and legal conclusions do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Defendants could have but chose not to rebut Hoyt's report. Plaintiffs also incorporate herein by reference their replies to Defendants' Responses Nos. 276-77.

279. In 1988, when the University of Wisconsin switched from a non-exclusive radio agreement, the University estimated its radio broadcast revenue would triple. Hoyt Decl. ¶ 26; Nero Decl. Ex. 6.

Defendants' Response No. 279: Disputed. This is not an expert opinion and the fact is not supported by admissible evidence. The exhibit that is the source of this assertion is hearsay.

Plaintiffs' Reply No. 279: An expert opinion is "specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue" from "a witness qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Hoyt's knowledge of the reasons the University of Wisconsin rejected non-exclusive broadcasting agreements assists the trier of fact to determine a fact in issue related to the WIAA's legitimate interest in exclusive contracts. The facts upon which an expert bases his opinion "need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703. Moreover, as Dr. Hoyt was a member of the UW Athletic Department Committee on Broadcast Exclusivity, tasked with developing and implementing policy for exclusive radio broadcasts, he has personal knowledge of the asserted fact. Hoyt Decl. ¶ 5.

280. In fact, the University's radio broadcast revenue has increased from just under $100,000 annually in 1988 under a non-exclusive rights policy to $75,000,000 over a twelve-year period under its exclusive agreement with Learfield Communications. Hoyt Decl. ¶ 26; Nero Decl. Exhs. 8, 12.

Defendants' Response No. 280: Disputed. This is not an expert opinion and the fact is not supported by admissible evidence. The exhibits that are the source of this assertion are hearsay.

Plaintiffs' Reply No. 280: An expert opinion is "specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue" from "a witness qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Hoyt's knowledge of the reasons the University of Wisconsin entered into an exclusive agreement assists the trier of fact to determine a fact in issue related to the WIAA's legitimate interest in exclusive contracts. The facts upon which an expert bases his opinion "need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703.

281. In October of 2009, this agreement was amended to include internet streaming of University of Wisconsin games. Hoyt Decl.¶¶ 29-32; Nero Decl. Ex. 17.

Defendants' Response No. 281: Disputed. This is not an expert opinion and the fact is not supported by admissible evidence. The exhibit that is the source of this assertion is hearsay.

Plaintiffs' Reply No. 281: An expert opinion is "specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue" from "a witness qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Hoyt's knowledge of the reasons the University of Wisconsin entered into an exclusive agreement assists the trier of fact to determine a fact in issue related to the WIAA's legitimate interest in exclusive contracts. The facts upon which an expert bases his opinion "need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703.

282. This increase in revenue is consistent with the experiences of other educational institutions—indeed, Learfield alone has rights agreements with over fifty universities and conferences. Hoyt Decl. ¶ 34; Nero Decl. Ex. 13.

Defendants' Response No. 282: Disputed, but immaterial. The first half of the assertion – regarding the increase in revenue – is not supported by the citation. The second half of the assertion – regarding Learfield's other alleged agreements – is not supported by admissible evidence. The exhibit that is the source of this assertion is hearsay. The fact, in any event, is immaterial. The material question is whether the WIAA, as a state actor, may enter into the exclusive contracts that are the focus of this dispute, not whether educational institutions might increase their revenue by such contracts.

Plaintiffs' Reply No. 282: Defendants' objections do not put into dispute this proposed fact. Hoyt testified that the UW realized value in an exclusive broadcasting contract in that revenue substantially increased as a result. Hoyt Decl. ¶ 26. Hoyt further testified that "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…," the value being the increased revenue earlier described. Hoyt Decl. ¶ 34. Further, the facts upon which an expert bases his opinion "need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703. "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704.

283. The exclusive licenses used in college sports are comparable to those of the WIAA related to internet transmission in that they provide much needed funding. Hoyt Decl. ¶¶ 36-42; Clark Aff. ¶¶ 3-10.

Defendants' Response No. 283: Disputed. The assertion is not supported by the citation.

Plaintiffs' Reply No. 283: Plaintiffs mistakenly omitted a citation to the Hoyt Decl. ¶ 35 in support of this proposed fact. Hoyt states: "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." Hoyt Decl. ¶ 35. Hoyt continues: "the WIAA's exclusive rights agreements, in particular its agreement with WWWY productions, provides much needed funding for the WIAA." Hoyt Decl. ¶ 36. Therefore, the Hoyt Declaration at ¶¶ 35-36 supports the proposed fact. As Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact, this proposed fact remains undisputed.

284. The value of these 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. Hoyt Decl. ¶ 40.

Defendants' Response No. 284: Disputed. A media company may make investments to increase its ability to use Internet reporting techniques and technologies without expecting or demanding exclusivity. Dye Aff., ¶ 20.

Plaintiffs' Reply No. 284: Defendants' objections do not put into dispute this proposed fact, as this fact is based upon speculative, conclusory and self-serving statements that are inadmissible. Further, whether a media company expects exclusivity is not material to the value of the exclusive rights to the WIAA, which is the subject of the proposed fact. Plaintiffs object to this portion of the Dye affidavit to the extent it offers opinion, which opinions must be disclosed pursuant to Rule 26. *See* Fed. R. Civ. P. 26 & Fed. R. Evid. 702. Mr. Dye did not submit an expert report in this matter pursuant to the Order in this case, which deadline was in October. *See* Dkt. No. 19 & 20 (agreeing to September 14 and October 16, 2009, expert disclosures). Accordingly, the Court should disregard this opinion testimony. *See* Fed. R. Civ. P. 37(b).

285. Without exclusive contracts, this revenue stream would all but disappear. Hoyt Decl. ¶ 40.

Defendants' Response No. 285: Undisputed, but immaterial. The material question is whether the exclusive contracts at issue are constitutional.

Plaintiffs' Reply No. 285: Defendants' objections and legal conclusions do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Defendants could have but chose not to rebut Hoyt's report.

286. The contract between the WIAA and WWWY has enhanced public access to WIAA events and helps fulfill one of the WIAA's stated objectives, to promote opportunities for member schools' participation. Hoyt Decl. ¶ 46; Nero Decl. Ex. 2 at 14.

Defendants' Response No. 286: Disputed as inadmissible. Professor Hoyt has not disclosed facts to support the conclusion that public access has actually been enhanced because of the contract.

Plaintiffs' Reply No. 286: Defendants' objections do not put into dispute this proposed fact, and Defendants do not state their version of the fact or refer to evidence that supports that version, as required to establish a material issue of disputed fact. Therefore, this proposed fact remains undisputed. Further, "the expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data." Fed. R. Evid. 705.

287. The WWWY exclusive license agreement provides expanded exposure for less visible sports. Hoyt Decl. ¶¶ 45-48; Clark Decl. ¶¶ 5-8.

Defendants' Response No. 287: Disputed. The WWWY exclusive license agreement does not require WWWY to produce any events, directly or through an affiliate, Chickering Aff., Ex. D at II (WWWY Contract identifying production "goals"), and it is speculative to assert that more events are produced because of the agreement than would be produced without it.

Plaintiffs' Reply No. 287: Plaintiffs do not dispute that the WWWY contract with the WIAA refers to "production goals," but this fact does not put into dispute Plaintiffs' proposed fact no. 287. Defendants have not proffered any evidence to dispute the expanded exposure of WIAA events provided by WWWY as testified in Clark Aff. ¶¶ 5-8.

288. Were the contract on a non-exclusive basis, it is unlikely these sports would be made available to the non-attending public. Hoyt Decl. ¶ 47.

Defendants' Response No. 288: Disputed as speculative.

Plaintiffs' Reply No. 288: Defendants' objections do not put into dispute this proposed fact. "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704. The facts upon which an expert bases his opinion "need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R. Evid. 703.

289. Without the economic protection provided by exclusivity, it is unlikely a rights holder would invest in and commit to the equipment and facilities necessary to produce this number of tournament events, in particular for those sports that do not normally command significant public attention. Hoyt Decl. ¶¶ 47-48.

Defendants' Response No. 289: Disputed. A media company may invest in increasing its use of Internet streaming without seeking exclusivity, Dye Aff., ¶ 20, and immaterial because without exclusivity there is no "rights holder."

Plaintiffs' Reply No. 289: Defendants' objections do not put into dispute this proposed fact. This fact is based upon speculative, conclusory and self-serving statements that are inadmissible. Further, whether a media company expects exclusivity is not material to the value of the exclusive rights to the WIAA, which is the subject of the proposed fact. Plaintiffs object to this portion of the Dye affidavit to the extent it offers opinion, which opinions must be disclosed pursuant to Rule 26. *See* Fed. R. Civ. P. 26 & Fed. R. Evid. 702. Mr. Dye did not submit an expert report in this matter pursuant to the Order in this case, which deadline

was in October. *See* Dkt. No. 19 & 20 (agreeing to September 14 and October 16, 2009, expert disclosures). Accordingly, the Court should disregard this opinion testimony. *See* Fed. R. Civ. P. 37(b).

290. Gannett claims that WIAA events are "designated or limited public forums for the purpose of reporting" on WIAA events. Nero Decl. Ex. 18, Resp. to Interrog. No. 9 at 10.

Defendants' Response No. 290: Undisputed.

Dated this 22nd day of February, 2010.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.

Plaintiffs,

Case No. 09-cv-0155

v.

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

Defendants.

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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AFOF	=	Plaintiffs' Additional Proposed Findings of Fact, Dkt. No. 81
Def. Br.	=	Brief in Support of Defendants' Motion for Summary Judgment on Their Counterclaim, Dkt. No. 32
FOF	=	Proposed Findings of Fact, Dkt. No. 51
Opp'n Br.	=	Defendants' Response to Plaintiffs' Motion for Summary Judgment, Dkt. No. 76
Pls.' Opp'n Br.	=	Brief in Opposition to Defendants' Motion for Summary Judgment on Their Counterclaims, Dkt. No. 86
Pls.' Br.	=	Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Dkt. No. 50
RFOF	=	Defendants' Response to Defendants' Proposed Findings of Fact, Dkt. No. 75
SFOF	=	Supplemental Proposed Findings of Fact in Support of Defendants' Motion for Summary Judgment on Their Counterclaim, Dkt. No. 74

I. INTRODUCTION

This case is before the Court on cross-motions for summary judgment. In truth there are no issues of material fact with respect to the core issues in the case. Rather, to the extent "disputes" exist, they depend on how the undisputed facts are characterized, and / or interpreted by the parties. These "disputes"—more in the nature of argument—should not prevent the Court from entering summary judgment on behalf of the party that is right on the law. Plaintiffs Wisconsin Interscholastic Athletic Association and American Hi-Fi Inc., (collectively "WIAA") are right on the law. Defendants Gannett Company, Inc. and Wisconsin Newspaper Association Inc. (collectively "Defendants" or "Gannett") are wrong on the law: their content based, news gathering, prior restraint, and/or "pure" First Amendment / Equal Protection precedents have limited application to this case. In the context of the WIAA's exclusive commercial contract for internet streaming, combined with the ample alternative means available for reporting, both of which are fully described in the record, the WIAA has demonstrated its right to summary judgment in its favor and against Defendants. The WIAA's media policies successfully balance the WIAA's own commercial need to finance and administer its postseason tournaments with the First Amendment and/or Equal Protection rights of the Defendants, who remain free to report on any newsworthy events or to participate in the live broadcast by paying a reasonable fee.

In this regard, the Expert Report and Summary Judgment Declaration of Dr. James Hoyt stands unrebutted through the voluminous briefing: The balance that he indicated has been struck between the media and entities like the WIAA, in which reporting is unfettered but live transmission of the event itself is subject to the WIAA's commercial and administrative needs, is both a reasonable balance and one that comports with the industry custom and practice he observed through many years of experience.

Fundamentally, Defendants do not accept that balance. Rather, they insist that they receive untrammeled access to live internet streaming as well as reporting, to the detriment of the WIAA and the post season tournaments it has created over many decades. The WIAA responds to each of the Defendants' arguments below, but, at bottom, the case turns on whether, as the WIAA believes, the Constitution can accommodate the reasonable balance described by Dr. Hoyt. Based on the cases set forth below and in the WIAA's opening brief, the WIAA believes the Constitution can and does embrace the balance already struck through the WIAA's policies.

II. WIAA'S MEDIA POLICIES SATISFY THE FIRST AMENDMENT

A. The WIAA Acted in Its Proprietary Capacity When Contracting with WWWY for Exclusive Internet Streaming

Defendants claim that WIAA acted outside its proprietary capacity in contracting with WWWY because the WIAA does not operate its post-season high school athletic tournaments as a purely commercial venture. Defendants misread both the relevant legal authorities and the factual record. Despite Defendants' representations to the contrary, numerous courts have treated specific acts as proprietary in the context of high school athletics or quasi-educational settings. Moreover, the WIAA signed this particular contract in order to obtain specific commercial services, including quality transmission of post-season athletics tournament events and wider coverage of multiple tournaments. The WIAA leaves all credentialed media companies, including Defendants, free to report on any tournament events through a wide variety of means. The WIAA's decision to exchange exclusive transmission rights for certain commercial media services neither impacts Defendants' ability to report nor reflects non-proprietary concerns. Finally, although Defendants identify minor factual distinctions in the cases cited by WIAA, those distinctions do not reduce their relevance or undermine the principles behind them.

1. The proprietary actor doctrine applies to commercial decisions, even in athletic or educational contexts

In its opening brief, the WIAA demonstrated that it signed an exclusive rights contract with WWWY in order to raise revenue, to expand coverage of less visible sports, and to obtain other related services. Pls.' Br. at 3-5, 10-16, 26-30. Defendants do not challenge these interests. Rather, Defendants argue that the proprietary actor case law does not apply because any decision must be part of a venture that is exclusively commercial in order "to claim proprietary capacity status under the First Amendment." Opp'n Br. at 16. Defendants misapprehend the case law. Although some cases do involve a strictly commercial venture or its equivalent, nothing in the case law specifically limits the proprietary actor doctrine to purely commercial ventures. The only citation offered by Defendants for this proposition, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974), simply states that the advertising space at issue, "although incidental to the provision of public transportation, is a part of the commercial venture." Nothing in that phrase imposes a strict limitation on the general category of policies at issue. Similarly, other courts applying the proprietary actor doctrine have not required that the overall activity be exclusively commercial in nature. *See, e.g.*, *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294, 315 (S.D.N.Y. 2000) (applying the doctrine to applications for a public art exhibition and noting that "when the government places limits on expression in nonpublic spaces while acting in a 'proprietary capacity' for the purposes of raising revenue or managing internal operations, a reduced standard of First Amendment scrutiny is demanded").

Moreover, courts have considered and applied the proprietary actor doctrine when state actors make commercial decisions within an educational or an athletics context. For example, the Eleventh Circuit upheld a series of exclusive contracts between public universities and

commercial photographers at graduation ceremonies. *Foto USA, Inc. v. Bd. of Regents of Univ. Sys. of Fla.*, 141 F.3d 1032 (11th Cir. 1998). The court rejected both First and Fourteenth Amendment claims after noting that the graduation ceremonies were not public fora and concluded that "the state in its proprietary capacity may contract to allow exclusive commercial access to one graduation photographer without offending the equal protection clause." *Id.* at 1037. No one claimed that the graduation ceremonies as a whole were commercial ventures; rather, the state signed commercial contracts for exclusive media services within a larger educational context, even though others also wished to supply those services.

Similarly, the Ninth Circuit has applied the proprietary actor doctrine to the placement of advertising on a high school baseball fence. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999). The court applied the same proprietary actor standard, invoking considerations of enhanced revenue and internal administration, in the context of a high school baseball game. *Id.* at 966. ("In addition, where the government acts in a proprietary capacity to raise money or to facilitate the conduct of its internal business, the Supreme Court generally has found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality."). The court then relied upon the school district's proprietary interests and concluded that no public forum had been created, citing several proprietary actor cases:

> The school sold advertising space on the fence to defray athletic program expenses by raising revenue through the Booster Club. As in *Lehman*, *Children of the Rosary* and *Clark*, the intent of the school in opening the fence to advertising was to raise funds, not to create a forum for unlimited public expression. To raise funds, the District solicited business advertisements, thereby limiting the content of the forum through its solicitation practices.

Id. Similarly, this Court may properly consider a state actor's proprietary interests even though, as Defendants insist in this case, high school athletics may not be exclusively commercial in nature.

As noted in the WIAA's opening brief, Pls.' Br. at 15, a number of state courts have applied proprietary actor principles to broadcasts of high school football games. Faced with First and Fourteenth Amendment challenges to the imposition of a fee on the live broadcast of high school games, an Oklahoma court cited two of the leading proprietary actor cases and concluded that the school district acted in its proprietary capacity. *Okla. Sports Props. v. Indep. Sch. Dist. #11 of Tulsa County*, 957 P.2d 137, 139 (Okla. Ct. App. 1998) ("Rather, we are presented with the independent school district, acting in a proprietary, not governmental, matter, over which the constitution does not proscribe different treatment of the various news media.") (citing *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81 (D. Conn. 1981); *KTSP-TAFT Television & Radio Co. v. Ariz. State Lottery Comm'n*., 646 F. Supp. 300 (D. Ariz. 1986)). Similarly, a Texas court upheld an exclusive high school broadcasting contract with one radio station, noting that "the District is a quasi-municipal corporation, it has a right to seek to make a profit out of the games played on its premises; the profit, of course, to go for the benefit of the District." *Sw. Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230, 233 (Tex. Ct. App. 1947). Defendants only address these cases briefly in a footnote, pointing to the brevity of their analysis, Opp'n Br. at 14 n.5, but there can be no question that the cases treated the relevant school districts as proprietary actors.

Taken together, these cases indicate that the proprietary actor doctrine may govern commercial decisions despite some links to educational or athletic programs.[1] Defendants argue that WIAA tournament events are educational, rather than commercial in nature, citing general WIAA policies on the importance of athletics to the educational experience. Opp'n Br. at 15. In

[1] Defendants assert that "[n]o court has ever held the operation of high school athletic tournaments, or any other school-sanctioned extracurricular activity, is a proprietary rather than a governmental function." Opp'n Br. at 9. In fact, these cases show that courts have classified decisions taken within high school athletic events and other educational contexts as proprietary, and Defendants provide no authority to the contrary.

fact, the only events at issue are post-season tournaments, held outside the school day and involving fewer participants than the athletics program as a whole. Moreover, regardless of the educational relevance of an overall athletics program, the administration and operation of the tournaments involve numerous commercial and business decisions. As the cases above demonstrate, the WIAA may take proprietary actions within that context. The contract at issue here—the broadcast of entire tournament events over the internet—constitutes the provision of commercial services by a business partner in exchange for valuable exclusive rights to those transmissions.

Similarly, Defendants point to the Wisconsin tax code, arguing that the state distinguishes between what they call "private athletic events" (irrespective of the status of the sponsor of the event other than a school) and school-related athletic events (some of which involve private schools), subjecting only the former to sales tax. Opp'n Br. at 15. Defendants provide no authority for applying state tax code distinctions to federal constitutional issues, nor any authority for the impact of taxable status on a state actor's ability to act in a proprietary capacity. The state's basis for making distinctions in the tax code may have nothing to do with whether activities within a particular category are commercial or educational. Moreover, even assuming that the tax code reflects an educational component for high school athletic events, the WIAA may still make commercial decisions in its proprietary capacity about those events given its role in organizing and sponsoring the athletic events at issue. In this case, WIAA has made a legitimate business decision to contract with WWWY for internet streaming of its tournament games, in light of the revenue generated, the expansion of coverage, and the other services provided to the WIAA, without restricting the numerous means of reporting available to Defendants.

2. The proprietary actor cases cited by WIAA apply to the present facts

In its opening brief, the WIAA discussed substantial authority holding that a state actor may make "reasonable choices" about business partners and contracting terms when acting in its proprietary capacity. Pls.' Br. at 10-15. Rather than provide any alternative authority, Defendants attempt to distinguish each case cited by WIAA on factual grounds. These minor differences do not undermine their holdings or their impact on the case at bar.

Defendants first claim that *D'Amario v. Providence Civic Center Authority*, 639 F. Supp. 1538, 1539 (D.R.I. 1986), only upheld the "no camera" ban at issue because the Civic Center Authority merely agreed to enforce a promoter's ban but did not impose one itself. Opp'n Br. at 10. The *D'Amario* court did not describe its holding in that way. Although the court acknowledged the origin of the no camera rule and commented on the absence of a separate Civic Center Authority rule, the case did not turn on the question of enforcement rather than imposition. Rather, the court weighed the "societal gains which would follow from allowing the news-gathering activity" and found them "negligible" given that the press could "attend, report on, and describe" with no content restriction regardless of the rule. 639 F. Supp. at 1543. By contrast, the Civic Center Authority had "substantial" interests in earning revenue from performers and, in any case, possessed greater latitude because it acted in its proprietary capacity. *Id.* at 1544. These factors would exist regardless of who proposed the original rule. Moreover, in summarizing the relevant case law, the court equated governmental rules and governmental cooperation in enforcing the rules of others. *Id.* at 1543 ("Members of the press, to their own behalf and as representatives of the public, have some (limited) claim to access when government attempts selectively to delimit the audience (or when government cooperates in enforcing such restrictions)."). Finally, other cases have applied *D'Amario* to situations in which the state actor imposed its own restriction. *See, e.g.*, *S.H.A.R.K. v. Metro Parks Serving*

Summit County, 499 F.3d 553, 560-61 (6th Cir. 2007) (applying *D'Amario* to a park department's own limitation on park access during deer culling).

Similarly, Defendants claim that *Post Newsweek*, 510 F. Supp. 81, relied upon the Hartford Civic Center's enforcement of another entity's exclusive contract rather than its own contract. Opp'n Br. at 10-11. Here, too, the court acknowledged the origin of the exclusive broadcasting agreement, 510 F. Supp. at 83, but the outcome in no way depended upon this fact. Instead, the court focused on three factors: (1) the City of Hartford acted in a proprietary capacity in operating the Civic Center; (2) the restriction imposed was relatively minor, given public access to the event and the other avenues of reporting available; and (3) the restrictions were not arbitrary in light of the possibility that wider television broadcast could diminish the commercial value of the event. *Id.* at 85-86. None of these factors depended upon the source of the exclusive contract. Indeed, the contract executed by the director of the Civic Center Authority explicitly acknowledged the exclusive broadcasting rights awarded to the ABC affiliate, highlighting the irrelevance of the origin of the restriction. *Id.* at 85 n.5. Finally, as with *D'Amario*, courts have relied upon *Post Newsweek* when the relevant state actor had imposed its own original restrictions. *See, e.g.*, *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 775 (2d Cir. 1984) (citing *Post Newsweek* in discussing a state's own restrictions with respect to news rack placement); *KTSP-TAFT*, 646 F. Supp. at 309-11 (citing *Post Newsweek* in discussing a state's own restrictions on a lottery television broadcast). Thus the reasoning of both *D'Amario* and *Post Newsweek* applies to the present case.

Defendants next argue that *KTSP-TAFT*, 646 F. Supp. 300, did not involve an exclusive contract for the lottery television broadcast, as any broadcast station willing to enter into the contract on the state's terms could do so. Def. Br. at 11-12. This is true but irrelevant. The

issue before the court was whether the First Amendment granted the plaintiff stations the right to broadcast the lottery without abiding by the state's terms. 646 F. Supp. at 306 ("Relying primarily on the First Amendment to the United States Constitution, plaintiffs argue they have an absolute right to broadcast the Pick drawing live, in its entirety."). The court noted that the state had significant interests in raising revenue and ensuring adequate publicity, which outweighed the plaintiff's interest in broadcasting the lottery on its own terms. *See, e.g., id.* at 311-12 (noting that "unrestricted and uncompensated broadcasts of the Pick drawing would affect adversely the economic posture of the Lottery"). Similarly, in this case, the WIAA has a significant interest in raising revenue and in ensuring broadcast of a wider range of tournament events. As in *KTSP-TAFT*, Defendants' unrestricted broadcast would damage these interests, an outcome not compelled by the First Amendment.

Defendants also attempt to distinguish *Gannett Satellite Info. Network*, 745 F.2d 767, and *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1309 (11th Cir. 2003), because they did not "involve[] the grant of an exclusive franchise over expressive activity on public property." Opp'n Br. at 12. However, the WIAA cited these cases for the proposition that when a state actor functions in its proprietary capacity, commercial considerations such as revenue play a large role in determining whether any restrictions are reasonable. Pls.' Br. at 14. Defendants do not dispute this principle. Thus, these cases support the legitimacy of the WIAA's stated objectives in granting exclusive streaming rights.

Defendants breeze past *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd*, 409 U.S. 904 (1972), with one sentence noting that the plaintiff did not raise a First Amendment claim. Opp'n Br. at 13. In that case, however, the plaintiff manufacturer challenged a policy excluding it from contracts with Florida schools for printing yearbooks. 339

F. Supp. at 720. The plaintiff raised Fourteenth Amendment claims similar to those brought by Defendants in this case, and the state responded that the policy constituted "a permissible exercise of the state's proprietary power which is exempt from the prohibitions of the Commerce and Equal Protection Clauses." *Id.* The court upheld the policy, noting the well-recognized distinction between a "state's proprietary power, such as placing conditions on its own public contracts, and an exercise of governmental power." *Id.* at 722. Here, too, the WIAA may place conditions on and exclude some potential business partners from its contracts in the exercise of its proprietary power.

Finally, Defendants argue that *Foto USA* does not support the WIAA's position even though Defendants concede the case involved an exclusive contract for media services rendered at a school-related event (commercial photography at a graduation ceremony). Opp'n Br. at 13. Defendants primarily argue that the "commercial photographer in *Foto USA* was not granted the exclusive right to report on the event." Opp'n Br. at 13. Of course, the WIAA has not granted anyone the exclusive right to report on any tournament event either. Rather, all credentialed media representatives may attend and report on tournament events in myriad ways. The WIAA merely prohibits the unauthorized internet streaming of an event without payment of the rights fee. Like the universities in *Foto USA*, the WIAA has contracted for a particular commercial service—internet streaming and archiving of tournament events—for the benefit of participants, their families, and the public.

B. Gannett Has Failed to Support Its Assertion That WIAA Tournament Events Are Public Fora

Gannett asserts that "the WIAA long ago established" a "designated forum for reporting on its tournament events." Opp'n Br. at 18. Gannett now "seek[s]" to "extend" the reaches of this purported forum to the "relatively new reporting method of internet streaming." Opp'n Br.

at 18. Relying solely on conclusory statements and bald assertions, however, Gannett fails to come forward with any fact or law in support of its forum analysis.

Indeed, "[t]he primary factor in determining whether property owned or controlled by the government is a public forum *is how the locale is used*." *Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155, 160 (3d Cir. 1982) (emphasis added). It is equally true that "[t]he extent to which the government may limit activity protected by the First Amendment depends largely on the *locale* where the speech or conduct takes place." *N.J. Sports & Exposition Auth.*, 691 F.2d at 159 (emphasis added). Here, it is undisputed that WIAA tournaments are used for primarily sporting events, RFOF 64-67, which are not themselves protected expression. *See* Pls.' Br. at 18-19 (collecting cases). It is also undisputed that the locations at issue in this case are WIAA-rented sports facilities, RFOF 68-72, which are not public fora under prevailing case law. Pls.' Br. at 19-20 (collecting cases).

Gannett ignores this precedent, and instead argues that the WIAA's argument is "silly" because the "speakers whose rights are at issue in this case are journalists." Opp'n Br. at 17-18. According to Gannett, the location and use of use of WIAA facilities is "irrelevant." *Id.* This turns public forum law on its head. While it is true the Court must consider the access Gannett seeks, it is not Gannett's intent that controls the designation of a forum. Rather, the relevant determination in a forum analysis is whether the WIAA intended to create a forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

In making this determination, the "nature of the property" at issue aids the court in determining whether the actor intended to open a forum. *See Cornelius*, 473 U.S. at 802-03; *see*

also Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 825 (9th Cir. 1991) ("Both *Hazelwood* and *Cornelius* instruct that we also examine the nature of the government property involved in determining whether the forum is public or nonpublic.") (analyzing the nature of a school itself in holding that a smaller "forum" for publications and athletic programs within that school did not constitute a public forum). And while it is true that "channels for public communication—or alternative fora—may well exist *within* the greater piece of government property," the non-public status of the overall facility must be considered. *Air Line Pilots Ass'n, Int'l. v. Dep't of Aviation*, 45 F.3d 1144, 1152 (7th Cir. 1995) (noting that the non-public status of an airport is relevant to the forum status of alternative channels within that airport). "In discussing the nature of the property, a court cannot ignore the larger context." *Id.* at 1156. Here, the nature of that physical locale—the larger context—is an athletic facility, a facility dedicated to non-expressive activity. Numerous courts have held that such fora are non-public, and this bears directly on the current dispute.

Gannett attempts to sidestep both the character and nature of WIAA tournaments, ignoring this "larger context."[2] Without support, Gannett contends that there is a forum for "reporting" at WIAA events that "the WIAA long ago established." Opp'n Br. at 18. But "[d]etermining the government's intent is an inherently factual inquiry that should not be resolved without due attention to an underlying record," *Air Line Pilots Ass'n, Int'l.,* 45 F.3d at 1152, and Gannett fails to come forward with any evidence to prove the WIAA's intent was to create a public forum.

[2] Gannett likewise attempts to sidestep relevant precedent. To illustrate, Gannett dismisses *Hone v. Cortland City School District*, 985 F. Supp. 262, 266-68 (N.D.N.Y. 1997), stating without analysis that *Hone* does not "appl[y]" to the current dispute. Quite to the contrary, *Hone* is highly instructive. In *Hone*, a local sports reporter brought a First Amendment challenge when he was banned from attending high school sporting events. In rejecting the reporter's challenge, the court determined based on the nature of a high school game not only that the relevant forum was non-public, but that ample alternative methods of reporting existed such that his ban from school property did not prohibit his reporting on the game. *Id.* at 271. Here, too, Defendants have ample alternative methods of reporting available in this non-public forum.

Permitting media access to sporting events does not transform property into a public forum. *See KSTP*, 646 F. Supp. at 306 (rejecting First Amendment right to broadcast lottery drawing and noting attendance at the event by media); *Post Newsweek*, 510 F. Supp. at 86 (rejecting public forum analysis as applied to skating competitions in public arenas and noting that media could attend the event). "To constitute a public forum, even a limited purpose forum, government property must be open for indiscriminate use within the purpose for which the forum was created, subject only to permissible content-neutral restrictions." *Planned Parenthood of S. Nev.*, 941 F.2d at 825 n.11 (citing *Hazelwood*, 484 U.S. at 267). The sole evidence on which Gannett relies, i.e., that the WIAA has issued media policies, is insufficient to prove that WIAA tournaments are public fora. Quite to the contrary, the WIAA's selective access policies, e.g., media credentials (FOF 42) and the general restrictions on media access (FOF 33-51) evidence a lack of intent by the WIAA to grant the media carte blanche at sporting events. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (holding that policies of selective access limiting a school mailing system to those approved by the school principal supported nonpublic forum status); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) ("[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it.") (internal quotation and citation omitted); *DiLoreto*, 196 F.3d at 966 (policies limiting access to advertising at school baseball field evidenced it was not a public forum).

That a particular venue may be used "in part" for reporting, as Gannett asserts, Opp'n Br. at 19, is likewise insufficient on its own to establish a public forum, or else every piece of public property at which the media reports would become a public forum for reporting. That is

certainly not the case. Neither a courtroom nor a prison is a public forum, yet courts and prisons have policies in place to govern media activities therein, including policies related to videotaping. *See* Pls.' Br. at 22.[3] Similarly, reporters may be allowed access to a public stadium during an athletic competition to report on events, and the stadium may have policies regulating or limiting these activities. But such policies do not render the non-public fora a public forum.

Finally, the WIAA's commercial interest in its tournament events, in particular its interest in the streaming thereof, underscores that its events are held at a non-forum. FOF 52-63, 79-89, 129-30, 243-46. "To be sure, the government's status as a proprietor is a factor entering into public forum analysis." *Air Line Pilots Ass'n, Int'l.,* 45 F.3d at 1158. Proprietary or commercial interests are inconsistent with the classification of events as public fora. *See Lehman*, 418 U.S. at 303 (where city is involved in commercial venture, a public forum was not created with regard to advertising on city transit); *see also DiLoreto*, 196 F.3d at 966 ("[W]here the government acts in a proprietary capacity to raise money or to facilitate the conduct of its internal business, the Supreme Court generally has found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality.") (holding that a school's baseball field was not a public forum and collecting cases); *Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n,* 797 F.2d 552, 556 (8th Cir. 1986) (where a city sports arena entered an exclusive advertising contract related to its scoreboard, it was "engaged in commerce" and did not intend to create a public forum for advertising space); *HippoPress, LLC v. SMG*, 837 A.2d 347, 357 (N.H. 2003) ("SMG did not open the arena for public discourse by contracting with Union Leader for the

[3] Gannett rejects application of such cases, stating that such a rule is "unremarkable when applied to events" such as these, e.g., courts, prisons, etc. Opp'n Br. at 19 n.19. But Gannett's reasoning here highlights the shortcomings of its overall analysis. In order to determine whether the media may engage in such activities, Gannett relies on the locale and how it is used, i.e., a courtroom or prison, evidence it has ignored in the instant case. Here, the locale is used for non-expressive sporting activities, and not as a soapbox for public or media discourse.

exclusive newspaper distribution rights in the arena. . . . SMG and the City are engaged in commerce.").[4]

In the end, Gannett "fails to demonstrate the 'clear intent to create a public forum,'" as required by the Supreme Court. *Hazelwood Sch. Dist. v. Kuhlmeie*r, 484 U.S. 260, 270 (1988) (quoting *Cornelius,* 473 U.S. at 802). There is no evidence that WIAA either by "policy or by practice," had an intent to open tournament games to "indiscriminate use," whether by the media or anyone else. *Id.* (quoting *Perry Educ. Ass'n.,* 460 U.S. at 46-47). Instead, the evidence demonstrates that the WIAA has "reserve[d] the forum for its intended purpos[e]," i.e., as a sporting event. *Id.* (quoting *Perry Educ. Ass'n.*, 460 U.S. at 46). Therefore, because the WIAA's policies are reasonable and viewpoint neutral, they survive Gannett's First Amendment challenge. *See* Pls.' Br. at 18-23 & Pls.' Opp'n Br. at 27-34 (addressing the reasonableness and viewpoint neutrality of the WIAA's policies and the facts in support thereof).

C. Gannett Has Failed to Support Its Assertion That the WIAA Has Created a Forum That Includes Internet Streaming

Gannett quibbles with Plaintiffs' argument that, at most, WIAA events are a "limited public forum," stating that "plaintiffs add a fourth category," while, in contrast, Gannett has "followed the Seventh Circuit's practice of using three categories in forum analysis." Opp'n Br. at 16 n.6. The United States Supreme Court, however, repeated as recently as 2009 "that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral." *Pleasant Grove City v.*

[4] As with its treatment of other precedent, Gannett cursorily dismisses *HippoPress,* 837 A.2d at 357, stating that it is inapplicable because "constitutional issues were not decided because the court found no state action." Opp'n Br. at 18. While it is true that the court found no state action, it went on to hold in the alternative as follows: "Even if we assume that there was state action, we reach the same result. We conclude that the arena is a nonpublic forum and that the contract between SMG and Union Leader is a reasonable restriction of speech." *HippoPress, LLC*, 837 A.2d at 356. Thus, it is Gannett and not WIAA who engages in "deliberate avoidance of the issues." *See* Opp'n Br. at 19 n.8.

Summum, 129 S. Ct. 1125, 1132 (2009) (citing *Perry Educ. Ass'n*, 460 U.S. at 46, n.7; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)) (cited in Defs.' Br. at 24); *see also Ill. Dunesland Pres. Soc'y v. Ill. Dep't of Natural Res.*, 584 F.3d 719, 723 (7th Cir. 2009) (noting that decisions recognize a fourth category—"a variant" of the designated public forum—called a "limited designated public forum," a "limited public forum," or a "limited forum").[5]

Regardless of the precise terminology used, however, a "limited" forum "denote[s] a public facility limited to the discussion of certain subjects or reserved for some type or classes of speaker." *Dunesland Pres. Soc'y*, 584 F.3d at 723. And, regardless of whether a forum is called "limited" or "designated," a forum may be preserved for "specified forms of private expressive activity: plays, in the case of a theater, rather than political speeches." *Id.*

If the WIAA has created a public forum (which it has not), it is for a particular type of expression, and Gannett concedes that this expression is "reporting," the speakers being credentialed reporters: "[t]he WIAA has created a classic designated public forum by providing general access to a class of speakers, 'legitimate news gathering media representatives,' for the purpose of 'covering and reporting from WIAA-sponsored tournament events.'" Opp'n Br. at 20 (citing PFOF 87; Defs.' Br. at 23-26). Yet, Gannett also concedes that, to the extent WIAA created a reporting forum, that forum does not currently include "the relatively new reporting method of internet streaming," which the WIAA has not permitted absent a license, and which rights WIAA has licensed for a fee to the production company WWWY for the streaming of games on wiaa.tv, WIAA's own web portal. FOF 43-45, 48, 183-208; *see* Opp'n Br. at 18

[5] Regardless, neither case relied upon by Gannett to support its three-forum analysis supports its assertion. First, in *Christian Legal Society v. Walker*, 453 F.3d 853, 865 n.2 (7th Cir. 2006), the Seventh Circuit addressed confusion between the "limited" and "designated" public fora. While noting that, at times, this terminology was "unclear," the court did not endorse a three-tiered system, and in fact left the task of forum analysis to the district court. *See id.* at 865. Similarly, in *Gilles v. Blanchard*, 477 F.3d 466, 474 (7th Cir. 2007), in determining that forum analysis was ill-fitted to consider whether a university could bar uninvited speakers on its library lawn, the court again noted that there was some confusion in forum analysis. Without reaching issues related to the "forum template," however, the court determined it was "an unnecessary flourish" to refer to the library lawn as a limited forum. *Id.*

("[Gannett seeks] equal access to the designated forum the WIAA long ago established for reporting on its tournament events, and to extend that right to the relatively new reporting method of internet streaming."). Thus, by its own admission, Gannett seeks to "extend" the WIAA's purported public forum to include this "new method." Opp'n Br. at 18.

To the extent WIAA permits reporting at its events, however, Gannett has failed to establish that the transmitting of games is, in fact, reporting. Rather than open a forum for broadcasting, the WIAA has distinguished in its policies between reporting and the video transmission or broadcasts of its events, which is prohibited absent a license and payment of a fee. FOF 41-45, 48, 79, 81. It is undisputed that the WIAA has had an exclusive rights policy for basketball broadcasting *since 1968*. RFOF 81. The distinction between covering and carrying a game is accepted by media experts, and the WIAA has provided expert testimony from Dr. James Hoyt supporting this assertion;[6] journalists "report" on games using a wide variety of tools that do not include wholesale broadcasts, while only the applicable rights holder may carry the entirety of the event. FOF 257-271.

Gannett has come forward with no admissible evidence to refute this.[7] Gannett instead challenges WIAA's expert opinion on the basis that the general practices of sports reporting "are irrelevant to the constitutional issues presented here." Opp'n Br. at 22. This misses the mark. Dr. Hoyt has offered an opinion as to the industry practice distinguishing reporting on a game

[6] Gannett never challenged Hoyt as an expert nor provided a rebuttal to Hoyt's expert report. Their current conclusory assertion in Defendants' Response to Plaintiffs' Proposed Findings of Fact that Hoyt is not an expert, is not supported by any legal argument or evidence. In fact, expert testimony of industry custom is relevant and admissible. *Cf. Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 965 (E.D. Wis. 1999), *aff'd*, 241 F.3d 915 (7th Cir. 2001) (trade custom is proper subject of expert opinion).

[7] Gannett attempts to dispute WIAA's expert opinion testimony through use of affidavits from its own employees. *See* RFOF 259-60. This is inadmissible; the Federal Rules of Evidence limit opinion of "specialized knowledge" to experts. *See* Fed. R. Evid. 701 & 702. These conclusory affidavits, disclosed for the first time with summary judgment, do not suffice as expert opinion in this matter and were not disclosed pursuant to the Order in this case. *See* Dkt. No. 19 & 20 (agreeing to September 14 and October 16, 2009, expert disclosures). Accordingly, the Court should disregard this opinion testimony. *See* Fed. R. Civ. P. 37(b).

from carrying a game—not an opinion regarding First Amendment rights. Whether carrying the entirety of an event is "reporting" impacts whether it is an activity within the ambit of Gannett's purported forum for "reporting." Thus, how the media reports on any sporting event—profession, collegiate, or high school—bears directly on issues before this Court.

Gannett further attempts to undermine Dr. Hoyt's testimony because it references coverage of collegiate sports, in particular those at the University of Wisconsin.[8] *See* FOF 277-283. Gannett asserts that such practices are irrelevant because the NCAA is not a state actor, relying on *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 193-200 (1988). Gannett is correct that *Tarkanian*, which addressed whether the NCAA was a state actor for purposes of disciplinary decisions, supports the non-state actor status of the NCAA. The University of Wisconsin, however, *is* a state actor. *Tarkanian*, 488 U.S. at 192 ("A state university without question is a state actor."). Gannett has failed to come forward with any evidence that the NCAA controls media policies during University of Wisconsin events. *See* Opp'n Br. at 22. Rather, undisputed record evidence demonstrates that the University of Wisconsin, a state actor, has itself directly entered into certain rights agreements, including those relied upon by Dr. Hoyt, and that those rights are recognized by reporters and broadcasters alike. *See* FOF 257-273, 279-83 (citing Nero Decl. Exs. 6, 8, 12, & 17). Thus, Gannett has failed to demonstrate that the NCAA's status has any bearing on the current dispute.

Gannett asserts that the WIAA "cite no authority" for the "startling assertion" that reporting and broadcasting are distinct activities, i.e., that any right to report on entertainment does not include the right to transmit the entirety those events. *See* Opp'n Br. at 21. Cases cited by WIAA establish that, like Dr. Hoyt, courts have widely recognized this distinction. For

[8] Regardless, Gannett misstates the record in this regard. Dr. Hoyt's experience and opinions are based on over forty years of experience, which includes experiences ranging from reporting on NBC Nightly News to covering the WIAA's own state basketball tournaments. Hoyt Decl., Dkt. No. 56, ¶ 7; Hoyt Rep., Dkt. No. 63, ¶ 7.

example, the *KTSP-TAFT* court, in which the media challenged contracts related to the carrying of the lottery drawing, recognized that "[a]ll stations have been offered immediate and simultaneous access to those winning results. What they have not been afforded is a right to broadcast in its entirety the drawing itself. The drawing has entertainment value and as such has certain offsetting value against asserted first amendment rights." *KTSP-TAFT*, 646 F. Supp. at 310 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977)). Likewise, the court in *Post Newsweek*, 510 F. Supp. at 86, distinguished between "reporting" and broadcasting in holding that exclusive rights contracts related to the broadcast of figure skating in a public arena did not violate the First Amendment rights of competing television stations. The court noted that although "the event will be reported by newspaper and radio media without any time or manner restriction, and the plaintiff, itself, may attend and report on the championships," the plaintiff was prohibited from broadcasting entire events, in part because, unlike "newspaper and radio media," "broadcasting would have an unusual impact on the entertainment value of this event." *Id.* Finally, in *Zacchini*, 433 U.S. at 576, the United States Supreme Court held that while the First Amendment provides for newscasts, it does not grant the media immunity to broadcast the entirety of an entertainment event.

Instead, it is Gannett who has no legal authority for its position. Indeed, Gannett's reliance on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), is misplaced. *Miami Herald* stands for the unremarkable principle that the government cannot force newspapers to publish candidate replies to attacks on the candidate's character. *Id.* It is inapposite to the current dispute, i.e., whether the WIAA must allow Gannett to transmit its sporting events in the name of "reporting." Gannett has failed to come forward with a single

case to support its novel interpretation of the First Amendment as providing the media an unqualified right to transmit sporting events.[9]

At bottom, even were the Court to accept Gannett's assertion that WIAA intended to create a forum for "reporting," Gannett has failed to refute the WIAA's evidence that Gannett's streaming of WIAA events falls well beyond any WIAA-created reporting forum. Nor has Gannett come forward with a single case interpreting First Amendment rights so broadly.

D. WIAA's Restrictions Survive the Scrutiny Applied to Any Public Forum

Gannett makes several attacks on the WIAA's final forum argument—that its policies are constitutional time, place, or manner restrictions. Two of these attacks reiterate arguments in Gannett's own motion for summary judgment, and the WIAA has already responded in full in its opposition brief. First, Gannett charges that the WIAA's policies are not viewpoint neutral because exclusivity is "inconsistent with the requirement of viewpoint neutrality." Opp'n Br. at 23. Numerous courts have upheld exclusive contracts in both public and non-public fora. Pls.' Opp'n Br. at 27-30 (collecting cases). Defendants also misapprehend both the factual record and the relevant case law with respect to the economic incentives involved. *See id.* Second, Gannett claims that the WIAA's policies "ignore[] the most fundamental requirement of all—that the

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[9] In both it's own motion for summary judgment and its opposition, Gannett relies almost exclusively on a single phrase from the concurring opinion in *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Steward, J., concurring), which case addressed media access policies in a prison. *See* Defs.' Br. at 22; Opp'n Br. 22. But as the plurality opinion notes,

> The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right.

Id. at 9. So too here, Defendants have pointed to no legal authority granting them a First Amendment right to internet stream a high school event.

restriction apply 'evenhandedly to all' similarly situated speakers." Opp'n Br. at 22.[10] As explained in the WIAA's opposition brief, all similarly situated individuals who wish to stream games must obtain a license and pay the same fee. *See, e.g.*, Pls.' Opp'n Br. at 18-21, 32-34, 40-41. WWWY, as a production company providing numerous production services to the WIAA, is not similarly situated to the media defendants. *See also infra* Part III (addressing Gannett's Fourteenth Amendment argument).

Gannett's two remaining arguments are of no moment. First, Gannett argues that the WIAA's policies "cannot qualify as time, place or manner restrictions . . . because they do not attempt to control when, where or how its tournament events are streamed over the internet." Opp'n Br. at 23. Thus, according to Gannett, because the policies prohibit streaming without a license, rather than dictating when, where, or how streaming occurs, they are not time, place, or manner restrictions. Not surprisingly, Gannett has no authority for this assertion, which is flatly contradicted by case law. The Seventh Circuit has held that prohibitions on use of audiovisual equipment are valid time, place, or manner restrictions on newsgathering. *United States v. Kerley*, 753 F.2d 617, 620-21 (7th Cir. 1985) (noting that because videotaping restrictions "regulate only the time, place, and manner of news-gathering activities, we must uphold them if they are neutral and reasonable"); *see also id.* at 621 (a prohibition on videotaping "can withstand constitutional scrutiny so long as it is reasonable and neutral, as with time, place, and manner restrictions generally"); *United States v. Hasting*, 695 F.2d 1278, 1282 (11th Cir. 1983) (limitations on audiovisual equipment restrict the "manner" of newsgathering and are subject to "time, place, or manner" analysis).

[10] Despite characterizing this as "fundamental," Gannett has failed to come forward with a single case so holding, piecing together a patchwork of phrases from *Ward* and *Heffron* that use the word "all." Neither case addresses the issue of whether time, place, and manner restrictions must be identical in all instances.

Finally, Gannett maintains that the WIAA's restrictions are not valid time, place, or manner restrictions because they do not meet "three essential requirements" of such restrictions: content neutrality, narrow tailoring to serve a significant government interest, and sufficient alternative avenues of communication. Gannett is wrong on each count.

1. WIAA's internet streaming policy is content neutral

Gannett maintains that at least three WIAA policies are content based. First, Gannett asserts that the WIAA policy related to "inappropriate" language is content based. As explained in Plaintiffs' opposition to Gannett's own motion for summary judgment, Gannett has challenged this policy for the first time at summary judgment. Opp'n Br. at 24; Pls.' Opp'n Br at 8-10; *see also* Def.'s Countercl. ¶¶ 25-43, Dkt. No. 2.[11] Regardless, and as argued in detail in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, it is "evident beyond need for elaboration" that there is a compelling interest in protecting its high school athletes from association with certain adult products and businesses, such as alcohol, drugs, lewd subject matter, gambling, or other harmful influences. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)); *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (reviewing case law and noting that deterring drug use by schoolchildren has been recognized as "an important—indeed, perhaps compelling interest") (internal quotation marks

[11] It is a "well established principle" that a party "may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Insolia v. Philip Morris Inc*., 53 F. Supp. 2d 1032, 1045 (W.D. Wis. 1999) (Crabb, C.J.), *aff'd in part*, *rev'd in part on other grounds*, 216 F.3d 596, 607 (7th Cir. 2000); *see also EEOC v. Lee's Log Cabin, Inc.,* 546 F.3d 438, 443 (7th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007)) (plaintiff was unable to assert claims on the basis of status as a person with AIDS at summary judgment because the plaintiff had only alleged in the complaint discrimination on the basis of status as a person who is HIV positive); *Wiesmueller v. Kosobucki*, No. 07-CV-211-BBC, 2009 WL 3535429, at *2 (W.D. Wis. Oct. 30, 2009) (Crabb, C.J.); *Schumacher v. Swiss Colony, Inc.*, No. 06-C-47-C, 2007 WL 5515308, at *3 (W.D. Wis. Mar. 19, 2007) (Crabb, C.J.).

omitted); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) ("The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."); *see also* Pls.' Opp'n Br. at 36-38; AFOF 1-3, 50-54, 70-73, 78-79, 86-87.[12] The WIAA's media policies that prohibit content associated with transmission of WIAA events that relate to tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances or lewd subject matter serve this interest. AFOF 1-2, 70-73. Moreover, the policy is narrowly tailored to achieve these compelling ends because it applies only to transmissions of events rather than to other media advertising. *See Crawford v. Lungren*, 96 F.3d 380, 387 (9th Cir. 1996) (upholding restrictions on the display of adult material in coin-operated news racks to safeguard children as "minimally restrictive if its ends are to be accomplished at all"); AFOF 1-3, 78-79, 86-87. Indeed, no prohibition applies to media *reporting* on tournament events, including without limitation print or internet stories or commentary. AFOF 1-3, 78-79, 86-87; *see also* Pls.' Opp'n Br. at 36-38.

Second, Gannett flatly asserts (without authority or factual support) that the WIAA's "rights fees charged for play-by-play coverage are expressly based on content." Opp'n Br. at 24. Given the lack of detail provided by Gannett, WIAA is left to speculate with regard to Gannett's argument, but Gannett apparently believes that the policy is content based because one must review the content of the broadcast to determine whether it falls within the parameter of a play-

[12] Gannett repeatedly relies on the relationship between the WIAA and school districts in an attempt to characterize the WWWY-WIAA relationship as something other than a commercial endeavor. *See* Opp'n Br. at 2; SFOF 1-8 (chronicling high school sports as education). If as Gannett asserts, this is an educational activity, the WIAA would have broader latitude to impose restrictions. As established by *Hone*, high schools are generally not public forums for reporting on sports: "When a school is not made a public forum, '[t]he public is not invited to use its facilities as a soapbox.'" 985 F. Supp. at 271 (quoting *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1117 (7th Cir. 1986)). Indeed, courts have allotted greater discretion to regulate speech in educational settings. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Courts have likewise afforded educational institutions greater leeway to exclude speakers and speech. *See Gilles*, 477 F.3d at 472 (noting wide latitude of public universities to "bar uninvited speakers" because "the university's facilities" are not a "soapbox").

by-play. However, policy is not content based merely because the government must "look at the content" of a communication to determine whether a policy applies. *Hill v. Colorado*, 530 U.S. 703, 721 (2000) ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.") (finding content neutral a law restricting "oral protest, education, [and] counseling"); *see also Gresham v. Peterson*, 225 F.3d 899, 905-06 (7th Cir. 2000) (same). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill*, 530 U.S. at 719 (quotation omitted). Gannett has come forward with no evidence that this policy was adopted because WIAA disagreed with any message. Nor could the policy apply differently to any particular viewpoint or message.

Finally, Gannett challenges the WIAA's policy prohibiting internet streaming absent a license as content based. *See* Opp'n Br. at 24. The WIAA's internet streaming policy is the very model of content neutrality. Government regulation of speech is content-neutral if it "is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Here, the exclusive rights agreements serve purposes wholly unrelated to the content of any expression, as established by the record. FOF 243-54, 277, 283-284. Indeed, Gannett concedes that "the entire premise of the WIAA's exclusive rights polices is increase 'revenue to the organization.'" Opp'n Br. at 24. Gannett comes forward with no support whatsoever for its assertion that the policy—which merely states that one cannot transmit games without a license—"restrict[s] the content of all media coverage." Accordingly, strict scrutiny

does not apply, and the Court must determine whether the WIAA's policy prohibiting internet streaming absent payment of a fee is a reasonable time, place, or manner restriction.

2. The WIAA has sufficient evidence of a substantial interest in limiting internet transmissions

WIAA has come forward with ample evidence to support the substantial interests behind its internet streaming policy. The policy raises revenue through license fees, provides the non-attending public with increased access to WIAA events, provides opportunities to otherwise un-covered and un-funded sports, protects student athletes from exploitation, addresses safety concerns, and limits overcrowding in press areas to preserve athletic facilities for athletic competition. FOF 167-208, 242-46, 276-89; AFOF 1-2, 10-15, 50-54, 64-734; *see also* Br. of Amicus Curie Arizona Interscholastic Ass'n, Inc. in Supp. of Pls.' Mot. for Summ. J., Dkt. Nos. 95-96 (Feb. 18, 2010); Br. of Amicus Curiae Nat'l Federation of State High School Ass'n, Dkt. 67 (Jan. 27, 2010).

Gannett concedes that "raising revenue admittedly is an important governmental interest." Opp'n Br. at 25.[13] It is undisputed that for the 2008-09 WIAA raised $235,000 in revenue related to its exclusive rights agreements, $140,000 of which related to the WWWY agreement disputed here. FOF 80, 88, 129, 130. According to Gannett, however, the WIAA's interest in this revenue is "insignificant" when compared to WIAA's overall operating revenue

[13] Gannett asserts that while raising revenue is an "important government interest," it "is never sufficient, by itself, to justify restrictions on the press." Opp'n Br. at 25. This is irrelevant to the current dispute, given that the WIAA has come forward with a number of substantial interests supported by its policies. *See KTSP-TAFT*, 646 F. Supp. 300 (noting that increased viewing access to lottery drawings is sufficient government interest to justify a selective tax). Regardless, the cases cited by Gannett address when the government may single out the media for selective taxation, as, for example, via a tax focused on newspaper printing ink and paper. *See Minn. Star & Tribune Co. v. Minn. Comm'r on Revenue*, 460 U.S. 575 (1983). The WIAA prohibits transmissions by any person absent a license, and selective taxation is therefore irrelevant. *See id.* at 581 (noting that the press may remain subject to "generally applicable economic regulations without creating constitutional problems"). Gannett's reliance on *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987) is misplaced, both because it involves selective taxation and because the tax addressed magazine content. *Id.* at 231-32. Here, the streaming policy is content neutral.

(which, of course, is pre-expense *operating* revenue). Opp'n Br. at 25.[14] Gannett's then asserts the WIAA should simply "raise ticket revenue," Opp'n Br. at 25, shifting the financial burden to the families and friends of participants and undermining the WIAA's objective to create family-friendly events with affordable entrance fees. FOF 76; AFOF 51. However, WIAA need only establish the presence of a substantial interest not the absence of alternative methods of achieving it.[15] Furthermore the revenues in question are substantial, covering one-third of the subsidy needed by WIAA sports operating at a loss. RFOF 59-63. For example, in 2008-9, the $140,000 from the WWWY contract alone covered the cost of the tournaments for swimming, tennis, and gymnastics. *See* Nero Decl. Ex. 14 at 19, Dkt. No. 52.

Gannett next turns its attention to the WIAA's interest in increasing coverage for less popular sports, arguing that the "record does not support [the WIAA's] counter-intuitive argument." Opp'n Br. at 26. The record, in fact, belies Gannett's assertion.

It is undisputed that in 2004 no WIAA events were offered on the internet. RFOF 93, 205. It is also undisputed that in 2005, the vast majority of WIAA events were not carried by any media organization, whether televised or streamed. RFOF 95. Indeed, only the Football Finals, the Hockey Finals, and the Boys and Girls Basketball Tournaments were televised, and

[14] Gannett ignores the substantial additional services WIAA receives under the contrast, which are valued at over $500,000 annually. FOF 242.

[15] Gannett's implication that the WIAA's interests in generating revenues are insubstantial as a matter of law because WIAA could raise revenue in "alternative" ways misstates the law. Gannett purports to rely on *Arkansas Writers*. But this language, taken from *Minneapolis Star & Tribune*, 460 U.S. at 586, and quoted in *Arkansas Writers*, when read in full merely stands for the principle that the WIAA cannot selectively tax the media, singling the press out for special taxes: "Standing alone, however, [the state] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." Gannett has come forward with no case law to support its novel assertion that an interest is not substantial if it can be achieved by other methods.

no games were streamed. RFOF 93-94. The non-attending public thus had no means to view these events.

In May, 2005, WIAA entered into a rights agreement with WWWY, which granted WWWY the right to produce, sell, and distribute all events not covered by existing rights agreements, i.e, those not already televised. RFOF 128. In the spring of 2007, WWWY began streaming these events on wiaa.tv. RFOF 190-91. The result has been a substantial increase in transmission of these events. Indeed, in 2008-09 school year alone, WWWY streamed at least 175 games on the WIAA webportal, 134 of which were sports that were not previously offered by any media outlet. RFOF 205-206. Gannett counters this actual evidence with mere speculation that carrying unpopular tournament events would increase absent WIAA's policy. However, prior to the WWWY contract, the WIAA sought out other media organizations to carry these events, and the media was not interested. FOF 89-96. Indeed, to date, Gannett itself has expressed no interest in streaming any event other than football, which is already widely available. FOF 209-214; PFOF 74. Thus, Gannett has come forward with no evidence to refute the WIAA's record evidence that its exclusive contract with WWWY increases access to less popular sports. FOF 96, 116, 243-56, 284-90.

Finally, Gannett disagrees with the WIAA that limiting internet streaming of WIAA events protects children, asserting that this interest is already achieved through WIAA's advertising policies. Opp'n Br. at 27. However, Gannett fails to consider that WIAA events are currently streamed on WIAA's own portal, which serves as a safe haven for children and schools. FOF 193-200, 204. If the WIAA allowed unrestricted streaming, WIAA events could be paired with inappropriate advertisements or even placed on adult websites. *See* Br. of Amicus Curie Arizona Interscholastic Ass'n, Inc. in Supp. of Pls.' Mot. for Summ. J., Dkt. Nos. 95-96

(Feb. 18, 2010) (discussing instances of student athletes' images use in pornographic websites); AFOF 70-73. The WIAA's policy prohibiting streaming of high school sporting events without permission provides an important means of protecting children from this type of exploitation. Further, although the WIAA's advertising restrictions exist on the books, Gannett's argument assumes total compliance. The contract with WWWY benefits the WIAA because it allows the WWWY to monitor compliance with these requirements for the WIAA.

Thus, in the end, Gannett presents the Court with a series of alternative approaches to address the WIAA's needs, which save Gannett money at the expense of the WIAA and its participants. Gannett cannot simply replace the judgment of the WIAA with its own. *See DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) ("The Hallie Board has the job of sorting through the available evidence and making a political judgment about what regulations best serve Hallie's interest.") (finding adequate evidentiary support for a time, place, manner restriction and rejecting evidence contradicting the wisdom of the approach taken). A review of the record makes clear that the WIAA has substantial interests in raising revenue, promoting its events, and protecting its athletes.

3. Gannett concedes there are alternative channels of communication

Gannett further contends that the WIAA's internet streaming restriction is invalid because it fails to leave open ample alternative channels of communication. Gannett does not dispute that there are "alternative" channels. Rather, it insists that nothing but internet streaming will suffice. *See* Opp'n Br. at 28 ("[t]he court should find that the First Amendment guarantees the defendants an equal opportunity to reach its internet audience with streaming coverage of tournament events"). Gannett's real complaint is not that it cannot provide its readers with "information," but that it cannot provide its readers with "full-game coverage" of WIAA events. Opp'n Br. at 27. "Full game coverage," however, is not information. *See KTSP-TAFT*, 646 F.

Supp. at 310 (citing *Zacchini*, 433 U.S. at 576) (noting the distinction between reporting information on the outcome of a lottery and broadcasting the drawing itself). Indeed, the Court need look no further than Gannett's own summary judgment papers in this case for ample evidence that it is able to reach an internet audience without streaming. *See* Decl. of Joel Christopher, Dkt. No. 36, Jan. 22, 2010, ¶¶ 7-10, 15 & Ex. B; Aff. of Micheal Davis, Dkt. No. 38, Jan. 22, 2010, Ex. A; Decl. of Robert Ebert, Dkt. No. 40, ¶ 6. In addition, Gannett is not even foreclosed from streaming high school sports—the WIAA has no policies related to regular season games, and Gannett may stream a tournament event with permission. FOF 33-36, 45-48; AFOF 58, 60-61.

Gannett concedes that legion alternative channels remain available to communicate event information. RFOF 41-51, 258-268. The only channel foreclosed is the streaming of an entire event without paying a rights fee, and Gannett fails to cite to any record support for its assertion that it cannot reach its intended audience through print, radio, internet audio transmissions, internet stories, internet programs using highlight footage, regular season game coverage, and even full game coverage for payment of $250. "[A]n adequate alternative does not have to be the speaker's first and best choice, or one that provides the same audience or impact for the speech." *Gresham*, 225 F.3d at 906 (collecting cases). Here, Gannett has more than adequate means to communicate information about WIAA events to its audience (internet or otherwise).

III. FOURTEENTH AMENDMENT EQUAL PROTECTION PRINCIPLES DO NOT PROHIBIT THE WIAA'S EXCLUSIVE RIGHTS AGREEMENT

The parties agree that absent any burden upon a First Amendment fundamental right, Defendants' equal protection arguments are analyzed under a rational basis standard, meaning the policy at issue need only rationally further a legitimate state purpose. *Minn. State Bd. for Cmty. College v. Knight*, 465 U.S. 271, 291 (1984); *see also Heller v. Doe*, 509 U.S. 312, 319-20

(1993); *Koga v. Busalacchi*, No. 09-C-410, 2010 WL 424601, at *1 (E.D. Wis. Feb. 1, 2010) (a classification "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental service") (citation and internal quotation omitted). As Plaintiffs have addressed previously, Defendants do not have a First Amendment right to transmit WIAA sponsored events. Accordingly, there is no burden upon a fundamental right and nothing prohibits the WIAA from granting this exclusive right to WWWY.

Defendants attempt to sidestep the rational basis standard—and the minimal required showing that the policy at issue rationally furthers a legitimate state purpose—by reiterating their First Amendment arguments under the guise of a Fourteenth Amendment analysis.[16] *See* Opp'n Br. at 28-31. In so doing, however, Defendants acknowledge the WIAA's legitimate purpose for its exclusive rights agreements. For example, defendants acknowledge that they produce only single-camera Internet streams that are not television quality productions. Opp'n Br. at 29. Defendants admit that "[t]he WIAA has valid reasons for encouraging more video coverage of its events, both broadcast and Internet . . . ." *Id.* Finally, Defendants even state that "[i]n the commercial context, and with respect to regulations that affect only commercial speech, exclusivity can be justified when it is required to guarantee the availability of desired services." *Id.* Each of these admissions is a legitimate reason for WIAA's contact.

[16] In addressing Equal Protection, Defendants again argue that WIAA's restrictions are "content" based. Plaintiffs have addressed these arguments in discussing the First Amendment issues. *See supra* Part II.D.1. Defendants also suggest that the two-minute limit on video coverage "dictates editorial decisions about the content of tournament coverage" and that the WIAA's fear of losing control "over the message that was associated with their voluntary athletic association" amounts to some kind of governmental control that the First Amendment was designed to prevent. *See* Opp'n Br. at 31. As discussed in plaintiffs' First Amendment analysis, however, the circumstances here do not support First Amendment protection. The WIAA, with its exclusive contract, seeks only to control any association of the interscholastic sports it presents with things like tobacco, drugs, pornography, or alcohol, *see* FOF 196, 199-200, 204, a type of control acceptable for such an association. The WIAA was also concerned about the quality of production of its events and the images associated with the events. FOF 145. Nothing about these policies amounts to control over the actual viewpoint or content of reporting, and the WIAA does not and has not prevented or restricted any reporting on its events. FOF 42, 47, 48, 49-50, 258, 262-64.

Defendants may not agree that the exclusive contract achieves the goal in the best way, but that is of no moment. As the Seventh Circuit recently stated, "[w]e are required, under the rational basis standard, to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Srail v. Vill. of Lisle,* 588 F.3d 940, 946 (7th Cir. 2009). Indeed, "[a] rational basis 'may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* at 947 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)). So long as the WIAA rationally believed that the exclusive contract with WWWY would achieve the legitimate goals of expanding video coverage and distribution, obtaining revenue and the additional services, and protecting student athletes, the rational basis test has been satisfied. Defendants have put forth no evidence to establish a disputed issue of material fact.

Regardless, a necessary prerequisite for an equal protection argument, of course, is a comparison of those "similarly situated." As the Supreme Court has stated, "[A]ll persons *similarly situated* should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added). Defendants presume that they are "similarly situated" for purposes of the equal protection analysis, but, in fact, Defendants differ significantly from WWWY. WWWY is a production company and exclusive rights holder that provides services to the WIAA. FOF 126-30, 167-208, 242-56; *see also* Pls.' Opp'n Br. at 34. Defendant Gannett is a publisher of newspapers and the WNA is an association of newspapers—neither is a production company. FOF 3-6; *see also* PFOF 12-13 (Dkt. No. 33). Gannett and the WNA do not and would not offer the services or distribution model WWWY offers. Indeed, given that the

Defendants did not have the technology to live stream until Summer 2008, they were not even in a position to bid for the contract. PFOF 40-41; AFOF 77.

Furthermore, Defendants have mischaracterized the WIAA's justification for its contract. Opp'n Br. at 28. The WIAA receives much more than "some revenue" from the exclusive contract, reaping the benefit of a whole collection of services. FOF 167-182, 242. The WIAA contract with WWWY raises revenue through license fees and the provision of audiovisual and internet services, increases access to WIAA events for the non-attending public, increases funding for less visible sports, protects student athletes from exploitation, and limits overcrowding in press areas to preserve athletic facilities for athletic competition. *See supra*, Part II.D.2.; FOF 167-208, 242-26, 276-89; AFOF 1-2, 10-15, 50-54, 64-73; *see also* Br. of Amicus Curie Arizona Interscholastic Ass'n, Inc. in Supp. of Pls.' Mot. for Summ. J., Dkt. Nos. 95-96 (Feb. 18, 2010); Br. of Amicus Curiae Nat'l Federation of State High School Ass'n, Dkt. 67 (Jan. 27, 2010). Further, although defendants suggest that the number of tournament events produced by WWWY in 2008-09 was "paltry," it was a significant expansion over any previous year. There were more WIAA tournament events streamed in 2008-2009 than had ever been streamed before. FOF 205-06.

Defendants agree that in some contexts, "exclusivity can be justified when it is required to guarantee the availability of desired services but object that the WWWY contract contains only goals rather than guarantees. Opp'n Br. at 29. The success in achieving these goals, however, demonstrates that the WIAA had a rational basis for including them. In 2008-09, WWWY assisted with the production of more WIAA tournament events than have ever been previously done. Moreover, the contract does in fact guarantee production of tournament events; it simply leaves open flexibility as to which games are covered, staffing, and other variables.

In effect, the WIAA has contracted for the provision of certain media services, granting it wide discretion over its business partners and contract terms. In *Foto USA*, the Eleventh Circuit summarized the case law relative to the state as a contractor of services: "It is axiomatic that a state may enter into contracts with parties for the purchase of services. In fact, the state, as a purchaser of services, enjoys a broad freedom to deal with whom it chooses on such terms as it chooses." 141 F.3d at 1036-37; *see also Hubbard Broad.*, 797 F.2d at 556-57 (noting that choosing one broadcaster over another, on a first-come/first-served basis, did not discriminate against either party).

Finally, Defendants take issue with this analysis, and contend that reliance on *Foto USA* and *Hubbard* is misplaced because they address "commercial speech." Opp'n Br. at 29-31. The streaming at issue is just as commercial as the graduation photographs in *Foto USA*. Defendants seek to stream games not for some altruistic purpose of expanding coverage of under-exposed sports, but rather to obtain popular games for their websites in order to attract viewers and advertising revenue. In *Foto USA*, the court noted that the photographers were not similarly situated to parents seeking to take pictures of their graduating children to memorialize the event. *Foto USA*, 141 F.3d at 1036. Here, too, the newspapers seek commercial gain from the venture.

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON DEFENDANTS' COPYRIGHT CLAIMS AND DEFENSES.

In Defendants' notice of removal filed with this Court Defendants asserted:

> WIAA, though artfully avoiding the use of terms of art under copyright law, is seeking a declaration of ownership rights in a subject matter within the scope of the Copyright Act—the exclusive right *to broadcast* or otherwise depict athletic events. The rights asserted by WIAA are clearly "equivalent" to the rights of reproduction, performance, distribution or display defined by the Copyright Act.

Notice of Removal, Dkt. No. 1, ¶ 9, Mar. 17, 2009 (emphasis added). In part on this basis, this case was removed from state court. On March 24, 2009, Defendants answered WIAA's initial

complaint and brought counterclaims in this action. Dkt. No. 2, Mar. 24, 2009. Defendants asserted that the WIAA's claimed right to control the "internet stream" of WIAA events was "barred by the Copyright Act." *Id.* ¶¶ 1-4. On April 13, 2009, the WIAA filed its Amended Complaint, which requested a declaration that the WIAA has the right to control the transmission of internet streams. Dkt. No. 7, Apr. 13, 2009. Defendants filed their Answer to Plaintiffs' First Amended Complaint on May 5, 2009, claiming in their defense that the Copyright Act "precludes WIAA's claimed rights to discriminate among news media and to grant exclusive licenses to report WIAA-sponsored tournament events." Dkt. No. 13, May 5, 2009, at 6, ¶ 1. At no time has Defendant amended any of these pleading.

Despite these allegations, in their opposition brief, Defendants concede that the Copyright Act does not preempt the WIAA's exclusive rights media policies. Opp'n Br. at 35. Indeed, Defendants claim that they have "never contended that copyright preemption somehow invalidates the WIAA's exclusive rights media policies." *Id.* Regardless, and based on the authority cited in Plaintiffs' motion for summary judgment, Defendants have conceded this issue, and the WIAA's motion for summary judgment should be granted.

Defendants, however, continue to assert that they own a valid copyright in games recorded without the authorization of the WIAA. Opp'n Br. at 33. Defendants do not refute the principle that copyright cannot vest in works recorded without authority of the author. *See* 17 U.S.C. § 101 (a work is "fixed" only "by or under the authority of the author"). Defendants, however, contend that because sporting events do not have authors, no authority is required for copyright to vest. Opp'n Br. at 22. Defendants cite no legal authority for this position, claiming this issue has been "uninterpreted by the courts" beyond the authority already cited by Plaintiffs. *Id.* at 33, n.12. The Seventh Circuit and the district courts herein have concluded that a work

fixed without authorization is entitled to no copyright protection even where that work is outside the scope of copyright law, e.g., sporting events. *See Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 n.22 (7th Cir. 1986) (citing *Zacchini*, 433 U.S. 562 (1977), ("Merely that the television station might videotape its telecast would not grant the station a copyright in the broadcast of Zacchini's performance or preempt Zacchini's right of publicity."); *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134, 1138 (N.D. Ill. 1997) (copyright vested when work was based on martial arts performance recorded *with authorization* of martial artist); *Cf. Leto v. RCA Corp*., 355 F. Supp. 2d 921, 925 (N.D. Ill. 2004) ("In order for the work at issue in a right-of-publicity claim to be fixed, the plaintiff must authorize its placement in tangible form"); *see also* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess 51 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5664 at p. 53 ("Moreover, a work is fixed in a tangible form when it is has 'an authorized embodiment….'"). Having failed to gain authorization from the WIAA to stream WIAA events, Defendants do not now hold a valid copyright in these unauthorized recordings.

Finally, Defendants assert that the WIAA cannot set policies that control the ownership of recordings of its games prior to fixation. Defendants cite no authority for this proposition, instead contending that "[t]his claimed right is foreclosed by the First and Fourteenth Amendments . . . ." Opp'n Br. at 34. Defendants' argument centers around the unsupported proposition that "[t]he WIAA does not enjoy the same freedom to restrict access, and reporting opportunities, to its events as the Milwaukee Brewers," implicitly recognizing that professional sports organizations retain such rights. Opp'n Br. at 36. "A protected interest in the public showing of an entire performance, applies not only to individuals but to organizations, both

private and public. *KTSP-TAFT*, 646 F. Supp. at 310 (citation omitted).[17] Like *KTSP-TAFT*, and as shown more fully above, the WIAA has substantial and legitimate interests in controlling the streaming of its events. As addressed throughout these summary judgment proceedings, Defendants have no right to stream WIAA events under either the First or Fourteenth Amendment. Accordingly, the Court should grant summary judgment in the WIAA's favor on all copyright claims.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant its motion for summary judgment and deny Defendants' Motion for Summary Judgment.[18]

[17] Defendants' reliance on *Production Contractors, Inc. v. WGN Continental Broadcasting Co.*, 622 F. Supp. 1500 (N.D. Ill. 1985), is misplaced. In *Production Contractors*, the producer of a Christmas parade claimed that the parade itself was a copyrightable work prior to fixation, and sought to prohibit the defendant from telecasting that parade in violation his purported copyright. *Id.* at 1502-03. The court held that parades did not fall within the subject matter of copyright, and that the promoter therefore could not claim copyright protection. *Id.* at 1503-04. The court also concluded that the promoter's own live telecast of that event was not sufficiently fixed so as to prevent a second company under the copyright laws from also taping that event and creating a separate copyright. *Id.* at 1504. The WIAA has not asserted copyright protection in its events but instead claims the right to control within its rented venues the recording of its games and to set conditions for the creation of works. Defendants have come forward with no authority contrary to this position.

[18] Moreover, to the extent Gannett has failed to respond to WIAA's motion as it addressed photography policies, summary judgment should be entered on behalf of WIAA on this issue.

Dated this 22nd day of February, 2010.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 09-cv-0155
GANNETT CO., INC. and WISCONSIN NEWSPAPER ASSOCIATION, INC.,	)	
Defendants.	)	

BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS

IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics. Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. Approximately 90 percent of the high schools in the United States are members of state high school athletic or activities associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students through their participation in interscholastic athletics and activities. It strives to promote participation and sportsmanship in athletics, to develop good citizens through that participation, and to enrich the educational experience of students. The NFHS also seeks to protect the role that interscholastic athletics plays in education and to develop solutions to problems related to high school athletics.

The NFHS has a substantial interest in helping its member associations promote themselves, the activities they sponsor, as well as the educational value of interscholastic activities. To that end, the NFHS supports its member associations' right to enter into exclusive agreements with media companies to produce, license, and broadcast association-organized events on radio, television, and the internet. This not only helps promote the value of interscholastic athletics, it also creates revenue essential to funding

association-sponsored state championships in all sports. If individual state associations are not allowed to enter into and enforce these exclusive agreements, their ability to promote the benefits of interscholastic activities will be significantly diminished.

ARGUMENT

The Wisconsin Interscholastic Athletic Association ("WIAA") and other state athletic associations should be allowed to sell the licensing rights to the sporting events they organize and sponsor. Licensing agreements generate revenue that makes it possible for state high school athletic associations to organize and produce state-wide athletic competitions in all sports. This of course allows for the greatest amount of participation by students in interscholastic athletics, thus maximizing the value athletic competitions have to education. Licensing agreements also allow greater access to the games themselves, which promotes the important role interscholastic sports play in the education of high school students. The agreements also provide an important measure of control to ensure that student-athletes and their schools are shielded from some of the more unsavory commercial aspects that can accompany unrestricted broadcast rights.

The Wisconsin Newspaper Association ("Newspapers") and media conglomerate Gannett Co., Inc. ("Gannett") (collectively "defendants") argue that the WIAA's contracts violate the First Amendment's freedom of the press clause, the Fourteenth Amendment's equal protection clause, and the Copyright Act, 17 U.S.C. § 101, *et seq.* The NFHS will leave it to the parties to address the legal issues raised by these

arguments. This brief will instead focus on the practical reasons why contracts like those at issue here should be valid, and the consequences of holding otherwise.

1. A state high school athletic association's ability to sell exclusive licensing rights is vital to its ability to organize and promote interscholastic athletics, which themselves are invaluable components of students' educations.

State high school athletic associations throughout the country organize, govern and help promote interscholastic athletics as an important part of high school students' educational experience. One of the main functions of associations like the WIAA is to sponsor and organize state-wide athletic tournaments. Some sports are of course more popular than others and their tournaments are self-sustaining. But the championship contests and tournaments in most sports lose money and thus deplete the associations' resources. Because organizations like the WIAA are not-for-profit, the revenue they raise in connection with the most popular events is critical to their ability to survive and to organize events for all sports.

Increasingly, associations like the WIAA are trying to maximize revenue to support their mission by selling the licensing rights to high school basketball tournaments, football championships and other popular state-wide sporting events. Here, the WIAA has entered into multiple agreements granting exclusive production and licensing rights to various companies. It granted When We Were Young Productions ("WWWY") "the exclusive right to produce, sell and distribute all WIAA tournament series and championship events for all WIAA sports with the exception of existing contracts as of the date of this contract." Exhibit A to First Amended Complaint, Doc.

#7. At the time it executed the WWWY contract, the WIAA had already entered into an exclusive contract to Visual Image Photography ("VIP") to take photographs of the events it sponsors. That agreement states:

> VIP shall be designated the "Official Photography Partner" of the WIAA for each year this Agreement is in force. The WIAA guarantees VIP "exclusivity" with regard to the sale of any products using images from Covered Events, whether captured by VIP or not. The WIAA agrees to work in VIP's best interest by denying media credentials to non-news media photographers who sell any products using any image of a Covered Event.

Exhibit C to Stipulation of Facts, Doc. #26.

Similarly, the WIAA has exclusive contracts with Fox Sports Net North, LLC to telecast state football championship games, and with two other local television companies ("Quincy") to broadcast the state boys and girls hockey and basketball championship games. Affidavit of James L. Hoyt, Doc.# 56 ¶ 20. Each of these agreements provides the media companies the exclusive right to disseminate their productions of the event over the air and the internet.

In his affidavit, Dr. James L. Hoyt states that in 2008, the WIAA received $75,000 from Quincy for the rights to the state hockey and basketball tournaments for boys and girls, $20,000 from Fox for the football state finals, and $60,000 from WWWY for all of the other events. Hoyt Affidavit, Doc.# 56 ¶ 39. The WIAA also received $80,000 from a sponsorship partner. *Id.* at ¶ 41. These funds are essential to the WIAA's goals of promoting and fostering interest and participation in interscholastic athletics. This is not some abstract goal. The valuable life lessons students learn about teamwork,

competition, and sportsmanship from participating in athletics are an important supplement to academics.

All student-athletes should have the same opportunity to participate in state-wide, end-of-the-season competitions, even if their talents or interests lie outside the most popular, self-sustaining sports. The WIAA, and its sister associations across the country, ensure that these opportunities are available by, among other things, obtaining corporate sponsors for their tournaments and selling exclusive licensing rights to third parties.

Without the revenue from the Fox, Quincy, and WWWY contracts, the WIAA would be hard-pressed to afford championship events for all sports. In 2008 less than half of the WIAA-organized tournaments paid for themselves. Baseball lost around $109,000, softball lost about $121,000, and track lost nearly $200,000. Exhibit A to Affidavit of Douglas Chickering, Doc. #53. Sports like swimming ($45,495), tennis ($56,234), gymnastics ($31,153), cross country ($78,346), and golf ($51,755) were all in the red as well. *Id.* All told, these nine sports accounted for approximately $692,983 of the expenditures in the WIAA's 2008 budget. *Id.*

On the other hand, the more popular sports – basketball, wrestling, football, hockey, and soccer – generated $2,546,874 in revenue. Of that amount, $235,000 appears to have come directly from the licensing contracts with Fox, Quincy, WWWY and a related sponsor. Hoyt Affidavit, ¶¶ 39-41. While tournaments are not the WIAA's only sources of revenue and expenses, they make up a significant portion the WIAA's budget. Even though, viewed as a whole, the tournaments were profitable, the WIAA

itself still lost $34,779 in 2008. Thus every source of revenue is vital to the WIAA's survival and to its ability to fulfill its mission of organizing and promoting education-based high school athletics.

The WIAA's experience mirrors that of other state associations throughout the country. Affidavit of Robert F. Kanaby, attached hereto as Exhibit A, ¶ 4. Although these associations strive to organize and promote championship contests in *all* sports, the reality is that some sports are far more popular than others. *Id.*, ¶ 5. Without the ability to use revenue from popular sports to subsidize less-popular ones, high school sports as a whole, and American secondary education, will suffer. *Id.*, ¶¶ 4-8.

Not only do the challenged licensing agreements make it possible for state associations like the WIAA to organize state-wide events in all sports, they also increase the public's access to these events, thereby highlighting and promoting the valuable role athletic competition plays in the lives of high school students. For example, as Dr. Hoyt explains, the WWWY was willing to broadcast *all* WIAA events over the internet. Hoyt Affidavit, ¶ 20. But neither the WWWY, nor any other media outlet, would invest the resources necessary to produce this internet content if they were not granted the exclusive licensing rights. *Id.* at ¶¶ 45-48. In fact, in 2004-2005, before the WWWY contract was executed, *no* WIAA events were available on the internet. In 2008-2009, after the WWWY contract was executed, *82 live contests* could be seen through internet streaming. *Id.* This, too, is consistent with the experience of state high school associations throughout the country. Kanaby Affidavit, ¶¶ 4, 8.

Allowing the WIAA and similar state associations to use exclusive licensing agreements to control video streaming not only helps them maintain and promote competitions in less-popular sports, but it serves a number of other important goals. Among these are:

- Avoiding commercial exploitation of student-athletes
- Avoiding any association between high-school sports and advertisements of inappropriate goods and services like gambling, alcohol or tobacco
- Avoiding any association between high-school sports and unvetted internet streamers, who may create an inferior product, or have a negative image in the community
- Avoiding confusion as to the source of internet-streamed games
- Reducing administrative and organizational costs for schools and athletic associations that would otherwise need to negotiate with and accommodate multiple internet streamers
- Giving internet streamers a financial interest in investing in their enterprise and doing a more professional job
- Avoid overcrowding and conflicts between internet streamers vying for limited physical space and resources in which to record and stream games—which might otherwise threaten the physical safety of spectators and student-athletes, disrupt the flow of games, and lead to streaming from less-than-desirable vantage points

Granting defendants the unrestricted access they now demand threatens every one of these important goals. From the perspective of the American high school community, this case concerns not just video streaming, but also the ability of educational institutions to protect young people. The WIAA's exclusive licensing agreements foster this latter, paramount goal, and the Court should not invalidate them.

2. The WIAA's exclusive contracts do not restrict defendants' ability to report on WIAA events.

The Newspapers and Gannett specifically complain that the WIAA's exclusive licensing agreements restrict their ability to "report" on WIAA-sponsored events. Essentially, they argue that because these contracts force them to obtain licenses from third parties to stream video over the internet or sell photographs taken at the events, the freedom of the press is somehow being hindered. But the WIAA's contracts do no such thing.

To begin with, the exclusive licensing agreements do not in any way prevent the defendants from "reporting" on WIAA-sponsored events. They only limit the unlicensed *broadcast* of more than two minutes of a game at a time. Reporters and journalists are free to show clips of the game, write stories, interview coaches and players, summarize and disseminate statistics, and perform all the other tasks that true reporting entails. The same is true of photographs taken at the games. Defendants are free to publish or otherwise disseminate the photos they take as part of their coverage so long as they refrain from separately selling the pictures.

The only limitations defendants face arise when they attempt to go beyond their traditional province of reporting. If media companies like defendants now wish not just to report on, but to actually broadcast high-school events over the airwaves or the internet, they admittedly must obtain a license from WWWY. They must similarly seek a license from VIP if they wish to separately profit from selling any of the photographs they take. But these are hardly restrictions on defendants' traditional free press roles. And even if they somehow were, any restrictions are inconsequential. They are all the more inconsequential when weighed against the benefit of the contracts to the state athletic associations and to high school sports as a whole.

There is nothing new or offensive about exclusive licensing contracts in this context. *See, e.g., Home Box Office, Inc. v. F.C.C.*, 587 F.2d 1248, 1253 (D.C. Cir. 1978) (upholding Federal Communications Commission rule allowing exclusive licensing contracts in television). "Contracts conferring the exclusive right to broadcast sporting events and artistic or theatrical performances are commonplace." *Id.* While exclusive contracts can implicate the antitrust laws (an argument defendants do not make here), they are nevertheless seen as reasonable where "they permit the creation and transfer of exclusive rights that reasonably serve to maintain or enhance the value of an artistic or intellectual product." *Id.* (citing *United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323 (S.D.N.Y. 1946), *modified*, 334 U.S. 131 (1948)).

State high school associations and similar athletic associations "exist primarily to enhance the contribution made by amateur athletic competition to the process of ...

education," not to realize the maximum return on it as an entertainment commodity. *See Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n*, 558 F.Supp. 487, 494 (D.C.D.C. 1983). As the Supreme Court has recognized, high-school athletic programs play an "integral" role in the educational mission of American secondary schools. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531, U.S. 288, 289 (2001). The WIAA and other state organizations should be allowed to continue using exclusive licensing arrangements to promote and protect the secondary school athletic experiences of all student-athletes.

CONCLUSION

The contracts the WIAA entered into with Fox, Quincy, and WWWY for the exclusive rights to all of the competitions it organizes are valid and do not offend the freedom of the press. The minimal intrusion on defendants' ability to also profit from videos and photographs generated by the events is insignificant when compared to the crucial role played by the revenue these licensing agreements provide for promoting and protecting high school athletics. If state associations like the WIAA are to effectively promote interscholastic athletics for all sports and all student-athletes, they as a practical matter must be allowed to raise revenue by entering into exclusive contracts like those at issue here. These same contracts have important additional benefits both in expanding public access to contests and protecting student-athletes and their schools from exploitation and other adverse influences. The NFHS urges the Court to grant the WIAA's motion for summary judgment.

Respectfully submitted,

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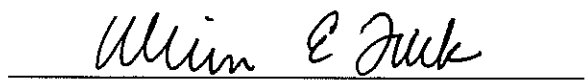

Attorneys for Amicus Curiae National Federation of State High School Associations

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 09-cv-0155
GANNETT CO., INC. and WISCONSIN NEWSPAPER ASSOCIATION, INC.,	)	
Defendants.	)	

AFFIDAVIT OF ROBERT F. KANABY

The undersigned, Robert F. Kanaby, of lawful age, being first duly sworn, deposes and says:

1. I am the Executive Director of the National Federation of State High School Associations ("NFHS"). The following facts are based on my personal knowledge, and are true to the best of my knowledge, information and belief.

2. The NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. The plaintiff Wisconsin Interscholastic Athletic Association ("WIAA") is the NFHS member for the State of Wisconsin. As part of my duties as NFHS Executive Director, I have general familiarity with the budgets and practices of the state associations that are NFHS members.

EXHIBIT A

3. I have reviewed the Expert Report and Addendum of James L. Hoyt, Ph.D. filed in the above action.

4. Dr. Hoyt's observations concerning the experience of the WIAA with high school sports comport generally with my understanding of the experience of our other state association members. Those other state association members, like the WIAA, typically organize, conduct and promote state championship contests in a wide variety of high school sports and activities, and perform other educational functions for the benefit of the young people of their respective states.

5. It is common throughout the country for some of the more popular high school sports, like basketball, football, hockey, soccer and wrestling, to either be self-sustaining or generate positive revenue in their championship events. Most other high school sports, however, typically are not sufficiently popular to cover the costs incurred by state associations in organizing and conducting championship events in those sports.

6. In my experience, it is also common for a significant portion of the revenues of NFHS state association members to come from the more popular sports so that, like the WIAA, those associations have a significant interest in protecting the economic value of those more popular championship events in order to carry out their mission of organizing and promoting championship events for students in as many sports and activities as possible.

7. It is common for state associations to enter into media contracts in which they sell the licensing rights to broadcasts of sporting events. To maximize their value, associations often grant exclusive licensing rights in these contracts.

8. The revenue state associations derive from these contracts is critical to their ability to organize championship events in less popular sports. Exclusive contracts also help state associations promote the educational benefits of high school athletics by exposing the events to a broader audience.

Further affiant saith not.

Robert F. Kanaby, Executive Director
National Federation of State High School Associations

STATE OF Indiana)
)ss:
COUNTY OF Marion)

Subscribed and sworn to before me this 27 day of January, 2010.

Notary Public

My commission expires:
6-12-2011

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, AMERICAN HI-FI, INC.,

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

The Declaration of Mary Bennin Cardona and attached exhibits (Dkt. #78-1 to 78-4) contain admissible evidence that the defendants have introduced to clarify the plaintiffs' selective presentation of how other media entities who had previously transmitted tournaments responded to the WIAA's grant of exclusive rights to WWWY. The plaintiffs' objections have no merit and their motion should be denied.

Evidence submitted in summary judgment briefing must be admissible at trial. Under Seventh Circuit precedent, this requirement is met when the *substance* of the evidence would be admissible at trial:

> The evidence need not be in admissible form….[b]ut it must be admissible in content, in the sense that a change in form but not in content, for example a substitution of oral testimony for a summary of that testimony in an affidavit, would make the evidence admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S. Ct. at 2553; *United States v. 1 Parcel of Real Property,*

> 904 F.2d 487, 491 (9th Cir. 1990). Occasional statements in cases that the party opposing summary judgment must present admissible evidence, e.g., *Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 224-25 (7th Cir. 1993), should be understood in this light, as referring to the content or substance, rather than the form, of the submission.

Winskunas v. Birnbaum, 23 F.3d 1264, 1267-68 (7th Cir. 1994). The evidence contained in Cardona's letter to the WIAA (Ex. A) and in the press release issued by the Wisconsin Association of PEG Channels ("WAPC") (Ex. C) meets this standard.

As the author of the letter, Cardona clearly has personal knowledge of each statement made in the letter and she testifies that she could and would so testify if called upon to do so. Cardona Decl., ¶ 1. Because oral testimony at trial of the facts contained in the letter would be admissible evidence, the plaintiffs' objection that the letter constitutes hearsay in its present form has no merit. The same analysis is true for the press release. As the Executive Director of WAPC, ¶ 2, Cardona's oral testimony about the Board of Directors' actions and conclusions, including the factual grounds for those conclusions which the Board of Directors stated in the press release, would be admissible at trial. As a result, both the letter and press release are properly part of the summary judgment record.

Moreover, the evidence in the letter and the press release is not hearsay because it is not being offered for the truth of the matter asserted. *See* Memo. of Law in Support of Pls.' Second Motion to Strike Portions of The Cardona Declaration (Dkt. #99) ("Pls.' Br.") at 3, 5. The Cardona declaration and exhibits were submitted to flesh out the selective history of the affiliate program the plaintiffs produced by affidavit and proposed in their findings of fact. Affidavit of Tim Eichorst, Jan. 15, 2010 (Dkt. #55), ¶ 26; Pls.' Proposed Findings of Fact (Dkt. #51) ("Pls.' FOF"), ¶¶ 147-56. Cardona's testimony and exhibits rebut the otherwise reasonable inference to be drawn from the plaintiffs' evidence that local public access channels were uniformly satisfied

with the WIAA's decision to funnel the production of (and resulting revenues from) most post-season events through WWWY. *Compare* Pls.' FOF, ¶ 153 ("No PEG station has complained about or refused to provide the master copy of the film [produced by the PEG station] to WWWY.") *and* Cardona Decl., Ex. C at 1-2 ("Master copies of games produced must be turned over to WWWY[] for their commercial use, including the sale of DVD's…in the end, the WAPC Board decided that the contract was fundamentally flawed, as it asks publicly-funded facilities to use its resources for public gain."). The record shows that the evidence has not been offered, or used, as evidence that the WIAA's grant of exclusivity to WWWY and the resulting affiliate agreement have resulted in actual unfairness to independent media. Accordingly, it is not excludable as hearsay.

The plaintiffs misconstrue the Seventh Circuit's precedent on the admissibility of so-called "self-serving" affidavits.

> The defendant points to a number of cases from this Circuit for the proposition that self-serving, uncorroborated, and conclusory statements in testimony are insufficient to defeat a motion for summary judgment…It is not the self-serving nature of the affidavits, however, that sealed their fate in these cases. After all, most affidavits submitted for these purposes are self-serving. Instead, these affidavits fail to thwart summary judgment because they are not based on personal knowledge as required by both the Federal Rule of Civil Procedure on summary judgment, Rule 56(e)…and by Federal Rule of Evidence 602….

Payne v. Pauley, 337 F.3d 767, 772 (7th Cir. 2003) (citations omitted). The case the plaintiffs cite confirms this principle. *Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) ("Mr. Albiero puts forth only his own affidavit that no violations existed…based not on a personal inspection but on a policy of repairing any violations within 72 hours."). Pls.' Br. at 2.

The plaintiffs do not challenge Cardona's personal knowledge of any of the challenged evidence. Nor could they. She testifies that the Board of Directors reviewed WWWY's draft affiliate agreement, ¶ 3[1]; that she, in her capacity as Executive Director, attended a meeting with WWWY and WIAA officials to discuss the affiliate program, ¶¶ 4-5; and that the Board of Directors met to discuss the revised affiliate agreement attached to her declaration as Exhibit B, ¶ 7. This is ample foundation to support the Board of Directors' opinions and conclusions to which Cardona testifies, both directly and through the exhibits.

Lay opinion testimony is admissible, in relevant part, when it is rationally based on the witness' perception and is helpful to the determination of a fact in issue. Fed. R. Evid. 701. As explained in the previous section, the WAPC Board of Directors' opinions are clearly based on an adequate foundation of personal knowledge of the functioning of the affiliate program WWWY proposed to their members and the needs and history of public access channels' production of high school sports and WIAA tournament events.

The plaintiffs suggest, without explanation, that these opinions are inadmissible because Cardona does not demonstrate she has "knowledge of all of the facts and circumstances relevant to the WIAA's decision to enter into" the WWWY contract. Pls.' Br. at 3. This misstates the standard. That foundation would be necessary if Cardona was testifying to the WAPC Board of Directors' opinions and conclusions about the benefits to the WIAA, if any, of the WWWY contract. She is not. She is testifying to the Board of Directors' perception of a lack of benefit to the WAPC membership, and their perception of potential problems related to WWWY's

[1] The Cardona Declaration has two paragraphs number 3. The citation is to ¶ 3 on page 2.

for-profit status. The foundation described in Section 2 above provides ample basis for this testimony.

The plaintiffs further object that this opinion evidence is inadmissible because it "attempts to answer the very question raised in this litigation." Pls.' Br. at 4; *see id.* at 5. The plaintiffs fail to note, however, that otherwise admissible opinion evidence is not objectionable simply because it "embraces an ultimate issue." Fed. R. Evid. 704. Moreover, whether the WAPC opinions even embrace an ultimate issue, is debatable at best. The defendants are raising issues related only to the constitutionality of some of the WIAA's policies and are not asking the Court to determine the reasonableness of the WIAA's contract with WWWY, or the resulting affiliate agreement for public access channels. None of the affiliate agreement facts the plaintiffs proposed (and the defendants challenged) are material to any determination under the defendants' theories.

The plaintiffs on the other hand, appear to believe that facts related to the affiliate agreement, and in particular its reasonableness, are material to their theory of the case. *See* Pls.' Reply Brief in Support of Pls.' Motion for Summ. J. (Dkt. #109) at 2 ("the WIAA believes the Constitution can and does embrace the balance already struck through the WIAA's policies."); Pls.' FOF, ¶ 153 ("No PEG station has complained about or refused to provide the master copy of the film [produced by the PEG station] to WWWY."). Perhaps they are. As explained above, however, the WAPC Board of Directors' opinions are not being introduced to prove the truth of the matter asserted, that is, that the affiliate program is, in fact, fundamentally flawed or unfair.

The plaintiffs' objection simply has no merit. They opened the door to this evidence when they introduced selective facts about the affiliate program from which the Court could have

reasonably inferred that public access channels were uniformly satisfied with the affiliate program. The defendants are entitled to present evidence that raises contrary inferences.

The Court should find that Cardona's oral testimony about the facts contained in her declaration and exhibits would be admissible at trial, and hence, is admissible evidence in summary judgment briefing, and deny the plaintiffs' motion.

Dated: March 1, 2010.

s/Monica Santa Maria

Robert J. Dreps
Monica Santa Maria

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Attorneys for Defendants, Gannett Co., Inc. and Wisconsin Newspaper Association, Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010, I caused a copy of the following document:

- **Defendants' Brief in Response to Plaintiffs' Second Motion to Strike Portions of Cardona Declaration**

to be electronically filed with the Clerk of Court using the ECF system which will send notification to the following ECF participants:

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Dated this 1st day of March, 2010.

/s/ Matthew P. Veldran
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4720136_1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION and AMERICAN-HIFI, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 09-cv-0155
GANNETT CO., INC. and WISCONSIN NEWSPAPER ASSOCIATION, INC.,	)	
Defendants.	)	

AFFIDAVIT OF ROBERT F. KANABY

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EXHIBIT A

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8. The revenue state associations derive from these contracts is critical to their ability to organize championship events in less popular sports. Exclusive contracts also help state associations promote the educational benefits of high school athletics by exposing the events to a broader audience.

Further affiant saith not.

Robert F. Kanaby, Executive Director
National Federation of State High School Associations

STATE OF Indiana)
)ss:
COUNTY OF Marion)

Subscribed and sworn to before me this 27 day of January, 2010.

Notary Public

My commission expires:
6-12-2011

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, AMERICAN HI-FI, INC.,

Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

DEFENDANTS' RESPONSE TO THE AIA'S AND NFHS' AMICUS CURIAE BRIEFS

The amicus curiae briefs filed by the Arizona Interscholastic Association, Inc. ("AIA") and the National Federation of State High School Associations ("NFHS") touch on the issues before the Court in only broad, conclusory terms. Although both organizations claim to have an independent interest in the outcome of this case, neither organization provides the Court with a legal or factual framework for the Court to evaluate those interests.

ARGUMENT

I. THERE ARE NO FACTS BEFORE THE COURT ABOUT THE CONSTITUTIONAL STATUS OF OTHER INTERSCHOLASTIC ASSOCIATIONS.

The NFHS describes itself as the "national service and administrative organization of high school athletics." Brief of Amicus Curiae National Federation of State High School Associations in Support of Plaintiffs' Motion for Summary Judgment (Dkt. #111) ("NFHS Br.") at 2. Its membership, with one interscholastic athletics or activities association from each of the 50 states and the District of Columbia, supports that description. *Id.* As such, it would have

been the ideal party to provide the Court with comprehensive legal and factual background about the potential scope of the Court's decision in this case. It did not.

> The NFHS will leave it to the parties to address the legal issues raised by these [constitutional] arguments. This brief will instead focus on the practical reasons why contracts like those at issue here should be valid, and the consequences of holding otherwise.

Id. at 3-4.

But the "consequences of holding otherwise" cannot be determined in a vacuum. The determination that an interscholastic athletic association is a state actor, for example, is a fact-intensive inquiry that depends on the association's revenue sources, the identity of its membership, and the recognition, if any, it receives from the state. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291-92 (2001). The WIAA has admitted state actor status for purposes of this case only, leaving itself free, somehow, to dispute the issue in another case against another party.

The NFHS does not address or even acknowledge, as a preliminary matter, that only its state-actor members are subject to constitutional restrictions so that only its state-actor members could be affected, in any way, by the Court's decision in this case. How many other NFHS members deny state actor status? How many have considered constitutional requirements in establishing their media policies? The NFHS doesn't say. The AIA similarly sidesteps this fundamental first step and merely implies, without actually admitting, that it is a state actor by claiming to have an interest in the outcome of this case. Brief of Amicus Curiae Arizona Interscholastic Association, Inc. in Support of Plaintiffs' Motion for Summary Judgment (Dkt. #95) ("AIA Br.") at 3.

The "practical" benefits of a contract have a different legal significance for a state actor than for a private entity. Not only do the AIA and the NFHS not address state actor status, they

also do not acknowledge that a state-actor association is bound by the Constitution and is fundamentally different from a private entity. The Court should reject the amici's invitation to consider their alleged interests in protecting the value of "the product they have produced" in the absence of sufficient facts and legal analysis to clarify the AIA's and other associations' respective constitutional status and organization. AIA Br. at 7.

II. THE AMICI DO NOT EXPLAIN THE TRUE FINANCIAL VALUE OF EXCLUSIVE MEDIA CONTRACTS.

The AIA does not operate under the same business model as the WIAA. Unlike the WIAA, for example, the AIA uniformly prohibits *all* media organizations from live broadcasting from the event venue and, in particular, from live Internet streaming. AIA Br. at 3, 5. Because the AIA does not discriminate among media companies, the outcome in this case would not shed light on the constitutionality of its policies.

Currently, the AIA does not have any exclusive media contracts and the only productions of AIA events available to the public are those the AIA transmits on its own website.[1] *Id.* at 5-6. Those productions have some commercial value for the AIA and it calculates that it has made close to $150,000 from sponsors and advertisers to its website since September 2009. *Id.* at 6.

That revenue, however, is not a true indication of the value to the AIA of preventing other parties from entering the market and "diluting AIA's viewership." *Id.* at 7. To determine that real-world value, the AIA would have had to disclose to the Court its gross annual revenues at the very least. The value to the WIAA of all its exclusive rights contracts together, for example, is only 3.3% of its total revenue and the value to the WIAA of its WWWY contract is a

[1] In the absence of exclusive contracts, the AIA's fear that it could be harmed by the outcome of this litigation is speculative. The AIA's interest in the outcome of this litigation appears to be limited to its desire to reenter the exclusive contract marketplace at some undisclosed point in the future. *See* AIA Br. at 8.

mere 2.0% of its total revenue.[2] Pls.' Resp. to Defs.' Supplemental Proposed Findings of Fact (Dkt. #103) ("Pls.' Resp. to Defs.' SFOF"), Fact and Resp. No. 15. "Exclusivity adds value," the AIA claims. AIA Br. at 7. How much value is added, however, and how much economic distress the association would suffer, if any, from losing that value, is left to speculation.

The NFHS' brief is even less helpful in this regard. Other than facts about the WIAA that are already part of the record in this case, the NFHS does not address any member's experiences with Internet streaming or exclusive media contracts. The association merely asserts that state associations are increasingly "trying to maximize revenue…by selling the licensing rights to…popular state-wide sporting events." NFHS Br. at 4. The NFHS fails to cite the basis for this fact, but it appears to be found in a single two-sentence paragraph of the Affidavit of Robert F. Kanaby:

> It is common for state associations to enter into media contracts in which they sell the licensing rights to broadcasts of sporting events. To maximize their value, associations often grant exclusive licensing rights in these contracts.

Dkt. 114, ¶ 7.[3] But the NFHS offers no facts to show how many of its members have media contracts; how many of those contracts are exclusive rights contracts; what technologies are covered by those contracts; whether there are any other NFHS member associations with

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[2] This figure actually overstates the value to the WIAA of the WWWY contract. The figure was calculated by including an $80,000 sponsorship payment only an unspecified portion of which is attributable to WWWY. Pls.' Resp. to Defs.' SFOF, Fact and Resp. 12; Affidavit of Todd C. Clark, Jan. 19, 2010 (Dkt. #54), ¶ 10.

[3] It would be charitable to call the foundation for Kanaby's testimony in ¶¶ 4-8 of his affidavit thin. The only testimony that he asserts as a basis for his conclusions about state associations' experience with exclusive contracts and revenue motivations is that he is the NFHS Executive Director, ¶ 1, and that he reviewed Dr. Hoyt's affidavit, ¶ 3. Kanaby also qualifies his testimony as being "true to the best of my knowledge, information and belief." Such a qualification raises questions that some of the testimony, whose foundation is thin at best, was made on information and belief instead of personal knowledge as required by Rule 56(e). Testimony made on information and belief is not admissible in support of a summary judgment motion. *Murphy v. Ford Motor Co.*, 170 F.R.D. 82, 84-85 (D.Mass. 1997) (striking portions of affidavit based on information and belief rather than personal knowledge).

exclusive Internet streaming contracts; whether any members bid those contracts; or how NFHS member associations raised revenue before they entered into exclusive rights contracts.

The significance of these facts is hard to overstate. The record suggests that mobile Internet streaming technology has only recently become available. For example, Gannett did not make such technology available to its local newspapers until Summer 2008, Declaration of Joel Christopher, Jan. 22, 2010 (Dkt. #36), ¶¶12-13; WWWY was apparently unable to live stream until Spring 2007, two years into its contract with the WIAA, and claims that to date it makes no money from its streaming, Affidavit of Tim Eichorst, Jan. 15, 2010 (Dkt. #55) ("Eichorst Aff."), ¶¶ 20-21; finally, the AIA only began live Internet streaming to its website about six months ago, in September 2009, Schmidt Decl., ¶ 12.

In the absence of any concrete facts about other NFHS members' restrictions on the use of such a new technology or any members' new-found reliance on revenue that is enhanced because of those restrictions, the NFHS' conclusions about exclusive Internet streaming contracts are speculative. The NFHS asserts, without any factual support, for example, that state associations' use of licensing agreements such as those challenged by the defendants make state-wide events in all sports possible. NFHS Br. at 7; *see also id.* at 6 (without exclusive rights revenue, the WIAA would be "hard-pressed to afford championship events for all sports"). The NFHS further implies that without such revenue associations would be unable to subsidize less popular sports and "high school sports as a whole, and American secondary education, will suffer." *Id.* at 7. This is groundless hyperbole that adds nothing to an understanding of the issues before the Court or to the NFHS' interests in the outcome of the case.

Not only does the NFHS fail to bring any new facts to the Court's attention, the NFHS misstates the record and issues. The NFHS attempts to support its conclusion that exclusive

media contracts highlight and promote the value of high school athletic competition, by increasing the public's access to those events, by asserting that Dr. Hoyt has explained that "WWWY was willing to broadcast *all* WIAA events over the internet." NFHS Br. at 7 (citation omitted). This is false. Rather, Dr. Hoyt correctly stated that WWWY obtained exclusive "internet streaming rights to all…regional and sectional events…and all State Tournament events (i.e., finals) excluding football, basketball, and hockey finals." Declaration of James L. Hoyt, PhD in Support of Pls.' Motion for Summary Judgment, Jan. 12, 2010 (Dkt. #56), ¶ 20. WWWY's contract with the WIAA gives WWWY the rights to all those events, but does not obligate WWWY to actually produce any. Eichorst Aff., Ex. C at II(a) (setting forth production "goals"). As the record shows, WWWY's coverage of WIAA events has been paltry: during the 2008-09 academic year, only 3.7% of events covered by WWWY's contract were produced by WWWY or an affiliate. Pls.' Resp. to Defs.' SFOF, Fact and Resp. 32.

The NFHS also misstates that the defendants are seeking "unrestricted access" to WIAA events. NFHS Br. at 9. They are not. The defendants are merely seeking an opportunity to use the reporting technologies and techniques of their choice on an equal basis with other media. Finally, the NFHS also mischaracterizes the status of the defendants' challenge to the WIAA's photography policies. *Id.* The WIAA no longer has, or enforces, a policy to restrict the media companies' sale of photographs taken at events. *See* Brief in Support of Defs.' Mot. for Summ. J. on Their Counterclaim (Dkt. #32) at 3 (discussing status of photography policy).

III. NEITHER AMICI IDENTIFIES A VALID NON-FINANCIAL REASON FOR LIMITING TRANSMISSION RIGHTS.

It is not the place of a state actor to define what "true reporting entails." NFHS Br. at 9. The First Amendment leaves those judgments to editors. The NFHS' opinion that exclusive licenses such as those at issue are at most "inconsequential" restrictions on the defendants' rights

is irrelevant. *Id.* at 10. The NFHS provides no support for its claim that these restrictions "are all the more inconsequential when weighed against the benefit of the contracts to the state athletic associations and to high school sports as a whole." *Id.* The amici's failure to bring forth enough facts to justify their claim of a financial benefit from these contracts was discussed above; the amici equally fail in their attempt to prove legitimate non-financial benefits.

First, the AIA's and NFHS' safety concerns simply have nothing to do with exclusive media contracts. NFHS Br. at 8; AIA Br. at 9-11. The AIA can impose numerical limits on the number of reporters permitted at an event through its credentialing requirement, to promote safety, and allocate the credentials to interested reporters by applying neutral criteria equally to all without entering into an exclusive contract. Some of the AIA's other safety concerns are simply not developed enough factually to understand what steps, if any, the AIA might take to minimize potential risks to its student-athletes. An image from an AIA-sponsored event that could result in a potential stalking threat, for example, can come as easily from a rogue photographer as from a screen capture of a broadcast produced under an exclusive contract. AIA Br. at 10-11.

Second, other benefits, such as advertising restrictions, are not valid restrictions for a state actor. NFHS Br. at 8; AIA Br. at 8-9. The AIA argues that an exclusive rights contract allows an association to extract promises from the rights holder to play public service announcements or restrict the content of their advertising. AIA Br. at 8-9. The AIA does not cite any legal authority to support this startling claim that a state actor may leverage exclusivity to force or restrict speech about public events it sponsors. Other examples include NFHS members' alleged interests in avoiding an association between high school sports and internet streamers "who may create an inferior product," or members' alleged interests in giving an

exclusive licensing partner "a financial interest in investing in their enterprise and doing a more professional job." NFHS Br. at 8. Although a private actor may undoubtedly be able to pursue those goals, the NFHS fails to address the legal basis for asserting that a state actor may do the same.

CONCLUSION

The amici briefs filed by the AIA and NFHS contain erroneous and largely irrelevant arguments that add little value to the parties' extensive briefing in this case. The amici do not bring forth facts that would allow the Court to determine how broad the effect of a ruling in this case would be nor do they explain the real-world value of an exclusive Internet streaming contract like the one the defendants are challenging in this case. Whatever unique interests and perspectives these organizations may have on the issues and on the magnitude of this case, the AIA and NFHS have failed to bring those to the Court's or the parties' attention.

Dated: March 5, 2010.

s/Monica Santa Maria
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Plaintiffs,

Case No. 09-CV-155

v.

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

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2010, I caused a copy of the following document:

- **Defendants' Response to the AIA's and NFHS' Amicus Curiae Briefs**

to be electronically filed with the Clerk of Court using the ECF system which will send notification to the following ECF participants:

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Dated this 5th day of March, 2010.

/s/ Matthew P. Veldran
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

IN RE:

ORDER

CASE REASSIGNMENTS

Pursuant to 28 U.S.C. § 137, the following actions are hereby REASSIGNED to Acting Chief Judge William M. Conley:

08-cv-536	David J. Clark v Karen Leitner, et al.
09-cv-374	April Yaunkee v Chula Vista Resort
09-cv-375	Heather Rose v Chula Vista Resort
08-cv-721	DelaRae McHugh v Jo Skalski, et al.
08-cv-677	Willie Mosby v Julie Cavey, et al.
09-cv-117	Richard Hoeft v John Clark, et al.
09-cv-121	Richard Hoeft v Corrections Officer Llewellyn, et al.
09-cv-298	Sheila Schulz v Green County, WI
09-cv-390	Jeannette Pfiel v Edward Kraemer and Sons, Inc.
09-cv-183	Peter Fischer, et al. v Dale G. Schroeder, et al.
09-cv-155	WIAA v Wisconsin Newspaper Association, Inc.
09-cv-500	Wenfang Liu v Timothy Mund
09-cv-254	Terry Jackson v Rick Raemisch, et al.
09-cv-466	Michael L. McGee v Steven Shaw, et al.
09-cv-342	Charles E. Lukasek v United States of America, et al.
09-cv-447	Jeffrey D. Schira v Joe Sit, et al.

09-cv-382	Jarrot Bundy v Wal-Mart Stores East, L.P.
09-cv-395	Susan Blue v IBEW Local 159
09-cv-350	Scott Hegwood, et al. v City of Eau Claire, et al.
09-cv-404	Total Wall, Inc. v Wall Solutions Supply, LLC
09-cv-408	Kelly S. Mahnke v Daniel Garrigan
09-cv-323	James Jenkins, III v James Freeman
09-cv-237	Manuel Salas v Gregory Grams, et al.
09-cv-479	William D. Klaus, Jr. v Eau Claire Area School District, et al.
09-cv-351	Cory W. Goecks v Scott E. Pedley
09-cv-421	Scott Kingston v Wing Enterprises Inc., et al.
09-cv-542	North Central States Regional Council of Carpenters' Pension Fund v SLP Builders, Inc., et al.
09-cv-376	Mark Kromrey v U.S. Department of Justice, et al.
09-cv-138	Richard Hoeft v Tim Anderson, et al.
09-cv-343	Uri Fried v Surry Vacation Resorts, Inc.
09-cv-346	B.A., et al. v Brian Bohlmann, et al.
09-cv-401	Paul R. Cote, et al. v United States of America
09-cv-516	Dakota, Minnesota & Eastern Railroad Corp. v WI & Southern Railroad
09-cv-617	Asbury United Methodist Church v City of La Crosse, et al.
09-cv-443	Tina Pond, et al. v City of Edgerton, et al.
09-cv-467	Brian Schweinert v Michelle McCray, et al.
09-cv-448	Rodney C. Moore v Dawn Landers, et al.
09-cv-601	Kevin Scheunemann, et al. v Palisades Collection, LLC

09-cv-564	Regal-Beloit Corp v Aon Risk Services Central, Inc.
09-cv-497	Sub-Zero, Inc., et al. v General Electric Company
09-cv-398	Carl R. Marschke, et al. v Barry-Wehmiller Companies, Inc.
09-cv-674	Barry-Wehmiller Companies, Inc. v Carl R. Marschke
09-cv-474	American Trust & Savings Bank v Philadelphia Indemnity Insurance Co.
09-cv-531	Lee Knowlin v Julianne Wurl-Koth, et al.
09-cv-553	Wisconsin Laborers Health Fund, et al. v Swanson Spray Systems, Inc.
09-cv-250	United States of America v Real Property Located at 7838 County Highway JJ, Bancroft, Portage County, Wisconsin
09-cv-261	Douglas Dynamics, LLC v Buyers Products Company
09-cv-773	Brian K. Bub v Marine Tech, LLC
09-cv-143	Dani Jo McLean v James A. Studenec
09-cv-451	Michael J. Zuege, Jr. v Daniel Knoch, et al.
09-cv-520	Peter Speerstra v Fort Dearborn Life Insurance Company
09-cv-482	EEOC v Biewer Wisconsin Sawmill, Inc.
09-cv-635	Curtis J. Dauer v Roman Kaplan, et al.
09-cv-99	Christopher Dorman v DHL Express (USA), Inc., et al.
09-cv-485	Derek Williams v William Pollard, et al.
09-cv-224	Tally Ann Rowan v Natalie Stockwell, et al.
09-cv-613	Tally Ann Rowan v Judy Ortwerth, et al.
09-cv-592	Wisconsin Laborers Health Fund v Urban Construction Administration
09-cv-439	Freedom From Religion Foundation, et al. v Stephen Ayers
09-cv-594	Midrad, LLC v Dane County, Wisconsin, et al.

09-cv-615	Tally Ann Rowan v Sheriff Nancy Hove, et al.
09-cv-616	Donna L. Egerstaffer v Bluegreen Corp
09-cv-646	The Cincinnati Insurance Co., et al. v Elkay Manufacturing Co., et al.
09-cv-675	Sean C. Quast, et al. v State Farm Fire & Casualty Company
09-cv-552	Dennis Richardson v Jodine Deppish, et al.
09-cv-279	Amminadab Yisreal-Ben Levy v C. Holinka, et al.
09-cv-670	Goetz v Allouez Marine Supply
09-cv-764	Right to Life PAC v Brennan
09-cv-493	Duane W. Hutter v Daniel J. Daly, et al.
09-cv-607	Bentura Martinez v C.O. II P. James
09-cv-719	Paul Seidler v Valerie Parsons
09-cv-193	Miriam Briggs-Muhammad v Wal-Mart Associates Inc., Store 2335
09-cv-702	Kuryakyn Holdings, Incorporated v Just In Time Distribution Company
09-cv-746	Blain Supply, Inc. v Running Supply, Inc.
09-cv-641	Derek Williams v William Pollard, et al.
09-cv-698	Wayne Thomas v City of Wisconsin Dells, et al.
09-cv-713	Peggy L. McKnight v Family Dollar Stores, Inc., et al.
09-cv-86	Paul Fritz v DHL Express (USA), Inc., et al.
10-cv-50	Jacob Apelbaum v Networked Insights, Inc., et al.
09-cv-440	Joel Wittemann, et al. v Wisconsin Bell, Inc.
09-cv-743	Kendra A. Joseph, et al. v Randall J. Wolter, et al.
09-cv-413	Carol Chesemore, et al. v Alliance Holdings, Inc.
09-cv-632	Grice Engineering, Inc. v JG Innovations, Inc., et al.

09-cv-763	Renaissance Learning, Inc. v QOMO Hite Vision, LLC
09-cv-774	Richard Hoeft v Tom Renz
09-cv-740	Cheap Real Estate Wisconsin, LLC v Nanya Pentell, LLC, et al.
09-cv-776	Mark Woodward v U.S. Treasury
10-cv-36	United States of America v Ostrander
10-cv-38	United States of America v $84,686.88, et al.
09-cv-761	United States of America v $6,050.00
10-cv-39	United States of America v Mary C. McCloskey, et al.
10-cv-53	United States of America v Celeste M. Kirkland
10-cv-62	Anthony Smith, et al. v John Wilson, et al.
10-cv-66	Allied Systems, LTD(L.P.), et al. v International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local No. 95
10-cv-69	Genetic Technologies Limited v Beckman Coulter, Inc., et al.
10-cv-72	Cheryl Dearth v American United Life Insurance Company, et al.
10-cv-73	United States of America v Steven Olah
09-cv-621	Douglas C. Stafford v GenExel-Sein, Inc.
10-cv-79	United States of America v William P. Kratwell, et al.
10-cv-88	United States of America v Housing Enterprises of Shullsburg II
10-cv-98	Raphael Maddox v Penny Dennison, et al.
10-cv-100	Monica Parent v The CBE Group, Inc.
10-cv-101	Plumbers & Steamfitters Local No. 434 Health and Welfare Fund, et al. v ACE Plumbing & Heating Supply, Inc.

10-cv-104	Robert W. Tessen v Steve Helgerson, et al.
10-cv-106	United States of America v Robert L. Rule
10-cv-118	Eagle Cove Camp & Conference Center, Inc., et al. v Town of Woodboro, Wisconsin, et al.
10-cv-127	Sierra Club v Lisa P. Jackson
09-cv-427	Jackie Carter v Sgt. Sickenger, et al.
09-cv-437	Jackie Carter v Peter Huibregtse, et al.
09-cv-463	Jackie Carter v Peter Huibregtse, et al.
09-cv-464	Jackie Carter v Peter Huibregtse, et al.
09-cv-715	William M. Buckley v Warden Ana Boatwright
10-cv-131	Fort Dearborn Life Insurance Company v Mark Daniels, Sr., et al.
09-cv-90	Rodney Kyle v Marion Feather, et al.
09-cv-580	Robert E. Alexander v Michael Thurmer
09-cv-662	Robert Harry Kunferman v Board of Regents of the University of Wisconsin System, et al.
09-cv-687	Ronald Stewart v Karen Timberlake, et al.
09-cv-767	Randy R. Koschnick v James Doyle, et al.
10-cv-130	Milissa Rick, et al. v Geraldine McCluskey
09-cv-573	Odrey E. Rasmussen v Internal Revenue Service
09-cv-393	Kimberly Kilpatrick v Michael J. Astrue
09-cv-556	Betty J. Brown v Michael J. Astrue
09-cv-606	David J. Strecker v Michael J. Astrue
09-cv-762	Michael D. Wennersten v Michael J. Astrue

10-cv-9	Michael H. Lee v Michael J. Astrue
10-cv-25	Virginia K. Kurth v Michael J. Astrue
10-cv-43	Guy A. Vallier v Michael J. Astrue
10-cv-51	Michael Ray Hessler v Michael J. Astrue
10-cv-57	Jamie L. Holen v Michael J. Astrue
10-cv-74	Joel W. Wocelka v Michael J. Astrue
10-cv-120	Dudley Robinson v Michael J. Astrue
09-cr-142	United States of America v Gail L. Mendez
09-cr-150	United States of America v Trevor Lucas
10-cr-2	United States of America v Robert H. McCallie and Steven R. Willard
10-cr-9	United States of America v Romaine A. Quinn
10-cr-11	United States of America v Joy Ann Wyss
10-cr-14	United States of America v Daniel Hoy
10-cr-18	United States of America v John Wolenec
10-cr-28	United States of America v Elena Smith
10-cr-30	United States of America v Raymone Houston and Dennis G. Rogers
10-cr-33	United States of America v Jose Luis Moreno-Zuniga
10-cr-35	United States of America v Santos Luciano-Saldana
10-cr-36	United States of America v Stevendale M. Barrett
10-cr-38	United States of America v Jake M. Barttelt, Shawn C. Alby, Daniel L. Bohman
10-cr-41	United States of America v Gerardo Villagomez and Hector Raul Ordonez
10-cr-42	United States of America v Georgina Ponce Mendoza

10-cr-50 United States of America v Chuck Groff

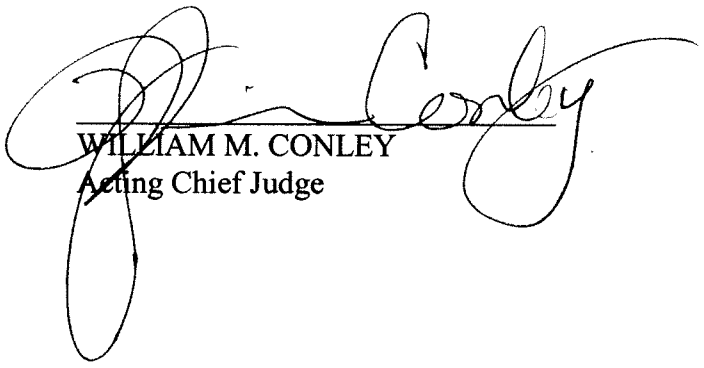
10-cr-52 United States of America v Luis Fernando Marcelino-Reyes

10-cr-53 United States of America v Samuel Holmes

10-cr-56 United States of America v Arnulfo Romero-Gonzales

Entered this 31st day of March, 2010.

BY THE COURT:



WILLIAM M. CONLEY
Acting Chief Judge

IN THE UNITED STATES DISTRICT COURT
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Plaintiffs,

v.

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

Defendants.

OPINION AND ORDER

09-cv-155-wmc

This case turns on whether plaintiff Wisconsin Interscholastic Athletic Association violated the First or Fourteenth Amendment rights of defendants Gannett Co., Inc. and Wisconsin Newspaper Association, Inc. by selling to plaintiff American-Hi-Fi, Inc. an exclusive license to stream over the internet certain WIAA-sponsored tournament events. Before the court are the parties' cross-motions for summary judgment (dkt. ##31 and 39).[1] For the reasons stated, declaratory judgment will be entered for plaintiffs.

Ultimately, this is a case about commerce, not the right to a free press. The exclusive

[1] The National Federation of State High School Associations and the Arizona Interscholastic Association, Inc. have also filed amicus briefs in support of plaintiffs' summary judgment motion (dkt. ## 95 and 111). Plaintiffs also filed two motions to "strike" portions of affidavits filed by defendants (dkt. ##72 and 98), ignoring the repeated admonishments by the Seventh Circuit and this court that such motions are not the appropriate vehicle for challenging another party's summary judgment submissions. *See Wiesmueller v. Kosobucki*, 547 F.3d 740, 741 (7th Cir. 2008); *Redwood v. Dobson*, 476 F.3d 462, 470-71 (7th Cir. 2007); *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (7th Cir. 2006); *Stocker v. Kalahari Dev., LLC*, 2007 WL 1140246, * 1 (W.D. Wis. 2007). The filing of these motions is particularly perplexing given that plaintiffs' response to defendants' proposed findings of fact objected to the disputed portions of the affidavits and defendants concede that "it would make little difference to the resolution of this case even if [plaintiffs'] motion was granted." Defs.' Br., dkt, #107, at 4. For all these reasons, the motions to strike are denied.

license American Hi-Fi purchased from WIAA does not violate the First or Fourteenth Amendment because it poses no threat to the rights and values embodied in those constitutional provisions. The events sponsored by the WIAA are not public forums; the principal reason WIAA granted an exclusive license to stream its games over the internet is not to promote discourse, but to create and grow an additional source of revenue. WIAA has made a business decision that it will be more lucrative to give one company the rights to broadcast its tournament games, a decision that does not stifle speech or discriminate on the basis of viewpoint. Moreover, the public does not lose meaningful access to these games under the plaintiffs' agreement because other media companies are permitted to stream any tournament game American Hi-Fi declines to produce. Even with respect to those games for which American Hi-Fi holds exclusive rights, defendants remain free to (1) publish stories on the games, (2) express opinions about them and (3) offer limited live coverage. While WIAA has limited defendants' ability to use its tournament events to generate advertising dollars on other companies' websites, the Constitution does not require the government to assist private entities in making a profit.

UNDISPUTED FACTS[2]

I. The Parties

Plaintiff Wisconsin Interscholastic Athletic Association is a nonprofit organization

[2] From the parties' proposed findings of fact and the record, the court finds that the following facts are undisputed.

that organizes, develops, directs and controls high school interscholastic athletic programs and sponsors tournament series. Its constitution includes the following threefold, purpose statement:

> A. To organize, develop, direct, and control an interscholastic athletic program which will promote the ideals of its membership and opportunities for member schools' participation.
>
> B. To emphasize interscholastic athletics as a partner with other school activities in the total educational process, and formulate and maintain policies which will cultivate high ideals of good citizenship and sportsmanship.
>
> C. To promote uniformity of standards in interscholastic athletic competition, and prevent exploitation by special interest groups of the school program and the individual's ability.

Members of WIAA include 506 public and private high schools and 117 junior high and middle schools. WIAA sponsors events for sports such as baseball, softball, basketball, football, golf, hockey, gymnastics, soccer and tennis, among many others. Plaintiff American Hi-Fi, Inc. does business as When We Were Young Productions, a video production company ("WWWY").[3]

Defendant Gannett Co., Inc. publishes newspapers across the United States, including 10 daily newspapers and 19 nondaily newspapers in Wisconsin. Defendant Wisconsin Newspaper Association, Inc. is a group of newspapers in Wisconsin that reports frequently on high school athletics, including tournaments sponsored by WIAA.

WIAA hosts and administers 25 State Championship Tournaments, which includes

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[3] All parties here generally refer to plaintiff American Hi-Fi as WWWY, as will the court for the remainder of this opinion.

both boys' and girls' individual and team competitions. WIAA leases the facilities or venues for most tournaments through long-term contracts of three to five years. WIAA has use of the facilities or venues for the duration of the athletic competition as specified in the leases, but does not otherwise have any control over or obligation with respect to the management or operation of the facilities or venues when not used for WIAA athletic events. Some of these venues do not have areas large enough to accommodate more than one camera crew for an event. WIAA permits members of the public to attend a tournament upon payment of an admission fee.

II. WIAA's Contract with WWWY

Beginning in the 1980s, WIAA had an exclusive contract with Quincy Newspapers, Inc. to broadcast basketball tournaments and hockey finals. In 2004, Quincy reduced its payment from $140,000 a year to $40,000 a year. As a result, WIAA began to look for other sources of revenue. WIAA asked its existing contractual partners whether they might be interested in broadcasting additional events, but all declined.

In early 2005, WWWY made a proposal to WIAA for the production and distribution of "broadcast quality" video of WIAA athletic events through all physical, electronic and broadcast media, including the internet. At that time, no other media or production company had expressed interest in transmitting WIAA's games over the internet.

In May 2005, WIAA entered into a 10-year contract with WWWY called a "Production Rights and Distribution Agreement." The agreement gives WWWY the

exclusive right to produce, sell and distribute all WIAA tournament series and championship events for all WIAA sports, except for football and hockey state finals, and the entire state boys and girls basketball tournaments, all of which were already covered by existing contracts. This includes the exclusive rights to internet stream WIAA tournament events. WWWY in turn entered into a contract with Fox Sports Wisconsin under which all WIAA events are distributed for delayed television through Fox.

The Agreement identifies "production goals" of various events: 100% of state tournaments, 50% of sectional events and 25% of regional events. The Agreement also provides for a multi-platform distribution strategy under which WWWY agrees to produce and distribute directly (or by contract with a distribution agent) WIAA events by live broadcasting, live or delayed streaming, video on demand, tape-delayed production and physical media. Examples of distribution platforms include internet-based video on demand (webstreaming), DSL/Broadband based video on demand, cable-based video on demand, satellite based video on demand, cable (live or delayed), satellite (live or delayed), network (live or delayed) and other physical media.

The Agreement requires WWWY to make payments to the WIAA under the following formula:

> i. [WWWY] will establish a tournament/event production cost that encompasses all business related expenses to produce the tournament or event.
>
> ii. [WWWY] will receive 100% of all revenues generated by the distribution of the tournament/event up until all of the costs have been recaptured.
>
> iii. All revenues generated after the tournament/event cost has been recaptured will be split 50% to the WIAA and 50% to [WWWY] with the exception of physical

media sales.

iv. All sales of physical media after the initial cost has been recaptured will be split 20% to the WIAA and 80% to [WWWY].

In 2008, WWWY paid WIAA $60,000 for these rights. In addition, WIAA received $80,000 from a "sponsorship partner," a portion of which came from advertising in programming produced by WWWY. WIAA keeps all of the revenue from the Agreement for its own internal operations; it does not transfer any of that revenue to the State of Wisconsin, to any state agency or to general state funds.

WIAA and WWWY created a web portal located at http://wiaa.tv/ and, in the Spring of 2007, WWWY started live streaming WIAA athletic events. The wiaa.tv web portal contains all live and archived videos produced by WWWY of all WIAA-recognized sports and other WIAA events, such as meetings for specific sports, rules meetings, press conferences and the annual meeting. WWWY operates and manages the wiaa.tv web portal for WIAA as part of its contractual responsibilities and at no cost to WIAA. WIAA has control over the content that is placed on wiaa.tv to ensure it supports and is consistent with the mission and purpose of WIAA, including what is displayed, when, and how.

In addition to placing WIAA tournament games on wiaa.tv, WWWY provides the following video production resources to the WIAA at no cost to WIAA:

- films, edits and makes available on wiaa.tv the WIAA's sports meetings, the WIAA's Annual Meeting and the annual scholar athlete award ceremony held in the spring in Wausau, Wisconsin;

- produces an annual video that compiles highlights of all state WIAA tournaments throughout the year, which WWWY films, edits, and makes available on wiaa.tv;

- films interviews of the presenters at the WASC Spirit of Excellence Award ceremony, which it includes in the final production of the award ceremony tape;
- provides live game feed to the video board at venues where the WIAA hosts championship tournaments;
- produces highlight segments from other WIAA sponsored sectionals or tournaments, does recaps with video from other WIAA state championship tournaments; and presents and feeds highlights to the video board at WIAA championship tournaments;
- films starting line-ups, introduction videos and/or team videos that it shows on the video board at all tournaments that have video board capability; and
- creates public service announcements that the WIAA and member schools can display on video boards at events and on wiaa.tv.

WWWY does not make any money directly from the streaming of WIAA events on wiaa.tv. The expenses that WWWY incurs to operate wiaa.tv are offset by WWWY's distribution contracts. WWWY has determined that it costs $508,806 annually to fulfill its contractual commitments to the WIAA, which include the following categories: state tournament event production costs in the field; state tournament event post-field production costs; channel production; state tournament venue production; web hosting and management; web live streaming; sports meeting production; and production of other meetings.

No WIAA events were offered on the internet in 2004-05. By 2008-09, the wiaa.tv web portal transmitted 82 live WIAA events and 175 on archived stream and DVD.

III. WIAA's Media Policies for State Competitions

WIAA publishes a "Media Policies Reference Guide," which is "produced to inform statewide media of WIAA policies in effect for all levels of State Tournament Series competition and assist members of the media in providing comprehensive coverage to their communities." (The policies do not apply to regular season games.) The 2009-2010 guide provides in relevant part:

Requesting Credentials

* * *

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

* * *

Credential Provisions

1. The WIAA authorizes the number of credentials issued to any media organization. The WIAA media credential is issued to members of legitimate media outlets and/or Internet sites that have a professional working function (as determined by the WIAA) at WIAA State Tournament events. The credential provides access to specified locations, venues and events for which the credential was issued.

* * *

Terms

* * *

3. **Live or real-time play-by-play** – A live or real-time play-by-play is defined as transmitting a live (while the event/game is in progress from beginning to conclusion) written, audio or visual description (identifying competitors with descriptions or

results of game action) of all or a significant number of plays/events occurring sequentially during a game/event.

* * *

Regulations

Comprehensive Policies

1. The WIAA reserves the right to grant, issue, revoke and deny credentials to any media or Internet site organizations based on the interpretation and intent of these policies determined by the WIAA. In cases deemed unique by the Association, these policies may be amended. The WIAA and its exclusive rights partners retain the rights to all commercial use of video, audio, or textual play-by-play transmitted at a WIAA Tournament Series event. Furthermore, the WIAA owns the rights to transmit, upload, stream or display content live during WIAA events and reserves the right to grant exclusive and nonexclusive rights or not to grant those rights on an event-by-event basis.

2. All "Real-time," or tape-delayed audio, video or textual transmission of play-by-play, is exclusive property of the WIAA and rights-granted entities. Any account/transmitting of real-time video, audio or textual play-by-play is prohibited on-site or off-site without consent of the WIAA.

3. The WIAA also reserves the right to revoke or deny the video, audio or text transmission rights of any media or Internet sites that include in any part of its transmission of WIAA Tournament events, including pre-game and post-game shows, content or comments considered inappropriate or incompatible with the educational integrity of the tournament or host institution from which the transmission is originated.

* * *

Video

* * *

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

4.

A. . . . Stations or Web sites may use a backdrop of live action for reports from a tournament facility provided there is no play-by-play commentary and the report is limited to regularly scheduled news or sports programs and are no more than **two** minutes of a program which is any length.

* * *

6. Video of Tournament Series action may not be sold without written consent from the WIAA and its respective licensed video production partner.

* * *

Text

* * *

2. Internet blogs, forums or twitters not posting continuous play-by-play accounts of game or event action are permitted and are not subject to rights fees unless determined by WIAA to be a live, play-by-play depiction of event action . . ., are not in compliance with the mission and media policies of the WIAA or are associated with any promotion, reference or link material surrounding the content is deemed inappropriate or not in the best interest of the WIAA. Real-time play-by-play accounts of WIAA Tournament Series events are subject to text transmission rights fees.

* * *

Video Transmissions

* * *

Production and distribution rights include, and are not limited to, live or delayed television through network or cable outlets, video on demand, content streaming through any platform and/or physical media. All permission granted, policies enforced and fees required will be at the sole discretion of the WIAA and the rights holder. Detailed information regarding polices and fees are available upon request from When We Were Young Productions (608) 849-3200.

* * *

Applying for Regional & Sectional Transmission Rights

Video

1. All media and/or Internet parties interested in video transmission of WIAA Tournament Series events must make arrangements with When We Were Young Productions (608) 849-3200 to inquire about video transmission or Internet transmission permission prior to the date of the contest. Entities not adhering to permission policies are subject to fines imposed by the rights holder. Live or tape-delayed video transmission rights of regional and sectional events by television stations, cable operators and Internet sites is prohibited without consent of the WIAA and When We Were Young Productions.

* * *

Advertising

. . . The WIAA strictly prohibits the sponsorship and advertising of tobacco products, lottery/gambling, alcoholic beverages, mood-altering substances, or lewd subject matter.

Under these policies, if WWWY chooses not to produce an event, others may pay WWWY to do so. WWWY has never rejected a request to produce an event for another entity. Under the current fee structure, it costs $250 to stream an event over the internet with one camera; if multiple cameras are used, the cost is $1250 or $1500.[4]

WIAA and WWWY considered several factors in determining these prices:

> First, it was consistent with or lower than the fees charged by other state athletic associations. Second, we looked at the value of the production and the resources devoted to the production: a one-camera production with no announcer is much different then a multi-camera production, which usually involves a mobile television broadcast truck and announcer, and requires more resources at the venue itself (there is a cost to the host venue to have to accommodate the extra individuals and to provide power for the production

[4] In his first affidavit, dkt. #54, Todd Clark, WIAA's Director of Communications, testified that the rate for multiple cameras was $1250. In his second affidavit, dkt. #83, he testified that $1250 was "inaccurate" and that $1500 was the correct amount. The difference is immaterial.

> truck which is much different than for an individual cameraperson). We also considered the medium, whether internet or TV, and how wide the distribution would be, whether local or world-wide. We determined that the multi-camera production lends itself to a wide internet distribution platform that people are able to see world-wide, whereas a single camera local PEG station production is shown only through the television medium for distribution to the local community.

Eichorst Aff. ¶39, dkt. #55. Neither WIAA nor WYYY have a written policy limiting the fee to a particular amount.

WIAA charges $20 for permission to transmit "play-by-play" text in a regional or section game; it charges $30 for a state game. "Blogging on the Internet not transmitting a play-by-play description (as determined by the WIAA) is not subject to rights fees." Media companies may carry live audio streams of tournament games by paying WIAA an additional rights fee of $40-$50. WIAA policy permits the taking of photographs for reporting purposes, post-game interviews of players and coaches, radio and other broadcasts of WIAA events. WIAA has not denied a legitimate media organization entry to a tournament, entry to designated media facilities of WIAA-sponsored events or media credentials.

IV. WIAA's Budget

Most of WIAA's annual revenue is generated by the State Tournament Series, which WIAA organizes, sponsors, and administers. In 2007-2008, the tournaments brought in $6,202,963, which was 86% of the WIAA's total operating revenue of $7,177,115. The remaining 2007-2008 WIAA revenue came from membership dues, which amounted to .5% of revenue; sports fees, which amounted to 5.5% of revenue; officials dues, which amounted

to 5% of revenue; and miscellaneous revenue such as subscriptions and rule book orders, which amounted to 3% of revenue. All of WIAA's revenue is used to support its programs, including paying for the expenses of operating the tournaments in all WIAA recognized sports. The WIAA's tournament revenues come primarily from ticket sales.

Some of the WIAA recognized sports generate a profit, and others generate a loss for the WIAA. WIAA uses the money made in more profitable programs to support less profitable ones.

During the 2008-09 academic year, there were at least 3,585 WIAA-sponsored tournament events covered by the WWWY contract. Of these events, 134 were produced by WWWY or its affiliates under the WWWY contract with WIAA.

V. Games Streamed without Plaintiffs' Consent

The Post-Crescent, a newspaper published in Appleton, Wisconsin by the Gannett chain transmitted the following WIAA-sponsored tournament games through live internet streaming, without the consent of WIAA or WYYY:

- October 28, 2008, Green Bay Preble High School v. Appleton North High School, at Appleton North High School;
- October 28, 2008, New London High School v. Waupaca High School, at Waupaca High School;
- November 1, 2008, Appleton North High School v. Bay Port High School, at Bay Port High School; and
- November 8, 2008, Appleton North High School v. Stevens Point Area High

School, at Stevens Point Area High School.

In November 2008, WWWY contacted defendant Gannett and requested that it remove the unauthorized games from its website, pay the associated rights fee and provide WWWY with the DVD of the game. Gannett refused.

OPINION

I. Scope of the Lawsuit

Determining which claims are still properly before the court is not the obvious exercise it should be. The parties do not clearly delineate their claims in the briefs and some of the arguments seem to evolve from one brief to the next.

In their amended complaint, plaintiffs seek a declaratory judgment that they have the right to control the live streaming and play-by-play of WIAA-sponsored tournament games over the internet, to grant licenses for such transmission and to require payment for receiving a license. Pls.' Am. Compl., dkt. #7, ¶ 36. In their answer and counterclaim, defendants challenge that right, as well as three aspects of the WIAA's media policies: (1) restrictions on taking photographs at tournament games and an exclusive contract WIAA has with Visual Image Photography regarding sales of photographs taken at those games (Defs.' Answer and Countercl., dkt. #2, ¶¶ 25-32); (2) restrictions on streaming tournament games over the internet and an exclusive contract WIAA has with WWWY regarding internet streaming (*id.* at ¶¶ 33-43); and (3) restrictions on "blogging" about tournament games while

they are happening (*id.* at ¶¶44-48).[5]

The parties' submissions in support of cross-motions for summary judgment do not track these pleadings. The sole issue plaintiffs' address in their motion for summary judgment is whether the limitations on internet streaming violate the First and Fourteenth Amendments to the United States Constitution. Plaintiffs raise no arguments regarding their rights under any other federal or state laws. To the extent plaintiffs ever intended to assert claims beyond those arising under the First or Fourteenth Amendment, they have abandoned those claims.

In defendants' motion for summary judgment, they drop their challenge to one policy and add another. In particular, defendants say nothing in their briefs about the photography policy. In light of this silence and the parties' stipulation to drop Visual Image Photography as a party (dkt. #6), defendants have effectively abandoned their challenge to that policy. Defendants' new claim on summary judgment is that plaintiffs are violating the First Amendment by retaining the right to revoke a media company's credentials for making "inappropriate" comments. Defs.' Br., dkt. #32, at 13. Defendants now assert that this "policy" is vague, gives plaintiffs too much discretion and discriminates on the basis of content.

A party may not raise a claim at summary judgment if it did not provide notice of the claim in the pleadings as required by Fed. R. Civ. P. 8. *Grayson v. O'Neill*, 308 F.3d 808, 817

[5] Defendants filed an amended answer to plaintiffs' amended complaint, but did not amend their counterclaims. *See* dkt. #13.

(7th Cir. 2002) (plaintiff "'may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment'") (quoting *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir.1996)). *See also EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438, 443 (7th Cir. 2008) ("The very first mention of [the new claim] came in the EEOC's response to Log Cabin's motion for summary judgment, and the [district] court was entitled to regard this as 'too late' to change so basic a factual premise in the case.") Defendants do not deny failing to provide any advance notice of their challenge to WIAA's standards for revoking media credentials, but argue that plaintiffs' complaint seeks a "broad declaration" of the constitutionality of WIAA's media policies, making it fair game for defendants to challenge any aspect of those policies. Defs.' Reply Br., dkt. #107, at 3.

While plaintiffs' amended complaint includes general references to "Media Policies," the only policies they identify as part of their claim are those relating specifically to internet streaming. Plaintiffs did not ask for a declaration or any other relief related to the standards for awarding or revoking media credentials. Even if plaintiffs had raised that issue in their original complaint, defendants are not necessarily entitled to judgment on a claim plaintiffs initially asserted but abandoned on summary judgment. A party's own pleading frames the affirmative relief it may seek in a case. If plaintiffs had included a claim about revoking credentials in their complaint and asserted it at summary judgment, defendants could have raised the First Amendment as a defense, but they cite no authority for the proposition that a defendant may seek affirmative, declaratory relief on matters omitted from its own pleading. Perhaps most important, the parties' summary judgment materials do not develop

sufficient facts, nor adequately join issue, on the actual standards used in revoking media credentials, either as a general proposition or as applied. Given the complexity of the claims properly developed by the parties with regard to the unauthorized streaming of games, this court declines to take up an undeveloped challenge to the WIAA's "Media Policies."

Similarly, defendants appear to raise a half-hearted challenge to plaintiffs' definition of "live or real time play-by-play" in WIAA's Media Policies on the ground that it is unconstitutionally vague. Defendants have, however, forfeited that claim by failing to develop a meaningful argument in support of it. *See Fabriko Acquisition Corp. v. Prokos*, 536 F.3d 605, 609 (7th Cir. 2008) ("Nor does Fabriko present any caselaw supporting its theory. It is not the job of this court to develop arguments for appellants."); *Gen. Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 1006 (7th Cir. 2008) (concluding that two-paragraph "cursory argument" was "so brief that [plaintiff] ha[d] waived it"); *Pruitt v. City of Chicago, Ill.*, 472 F.3d 925, 930 (7th Cir. 2006) ("[I]nsufficient development forfeits all of these arguments. Appellate counsel must recognize that scattergun contentions are doomed to failure."). Defendants devote a single paragraph to that argument in their opening brief, dkt. #32, at 15, and another in their reply brief, dkt. #107, at 7-8. The argument in both briefs is undeveloped, conclusory and includes no citation to authority beyond the general standard for vagueness. If a party wishes to challenge the constitutionality of a state policy, it must do more than say generally that "[t]he regulation [is] unconstitutionally vague." Dkt. #32, at 15.

Finally, the parties briefed the potential preemptive impact of the Copyright Act, 17

U.S.C. §§ 101, *et seq*., on plaintiffs' since abandoned request for a declaration of its right to require Gannet to remove from its website video of four WIAA-sponsored tournament games, previously recorded and streamed live over the internet by Gannet without WIAA's permission. Defendants still seek a declaration of the Gannet's copyrights to these videos in its third counterclaim. In their response, however, plaintiffs argue in part that having dropped its affirmative claim to these videos, there is no present case or controversy with respect to ownership. Moreover, the parties' responsive briefs on the copyright issues devolve mainly into criticism of the other side's claim, misstatements of the issues, and misunderstandings of the other's arguments.

In the end, plaintiffs appear to acknowledge defendants right to copyright in its own work, but not its right to stream live events without the WIAA's authorization and payment of a fee; for their part, defendants concede that its claimed copyrights to its own work does not preempt WIAA's otherwise valid exclusive media rights. Thus, the only remaining question on this claim appears to be whether defendants acquired a copyright with respect to broadcasts of WIAA events that it filmed without the consent of WIAA or WYYY.

Stripped of claims not raised or sufficiently developed, therefore, the parties' summary judgment submissions present the following issues:

> (1) whether WIAA's exclusive contract with WYYY regarding internet streaming of tournament games violates the First or Fourteenth Amendments;
>
> (2) whether the fee charged to defendants to stream games that WYYY declines to produce violates the First Amendment;
>
> (3) whether plaintiffs retain too much discretion to refuse licenses to media companies who wish to stream games WYYY declines to produce;

(4) whether defendants have a copyright with respect to the games they streamed without plaintiffs' permission.

These four claims are addressed below.[6]

II. Exclusive License

A. First Amendment

Defendants argue that WIAA violated their First Amendment rights by giving WYYY an exclusive license to stream certain tournament games, but have an uphill battle on many fronts. To begin with, a well-crafted argument is no substitute for supporting case law. It is telling of the merits' of defendants' claim that they have failed to uncover a single case in which a court concluded that a public entity violated the First Amendment under circumstances bearing any resemblance to this case. Defendants instead resort to citing a number of Supreme Court cases for general principles that shed little light on the question before this court. Moreover, in many of those cases, the Court found no constitutional violation. In fairness though, neither side -- or either of the *amici* -- has identified a case that has addressed the constitutionality of an exclusive contract for internet streaming between a public sponsor of a sporting event and a private company. A review of the most closely analogous cases, however, confirms that the First Amendment does not prohibit WIAA from generating revenue to support its sports programs by entering into an exclusive contract over the right to stream the games it sponsors over the internet. Defendants argument to the

[6] Because the parties have stipulated that WIAA is a "state actor" for purposes of the First and Fourteenth Amendment, that issue will not be addressed.

contrary depends upon a series of tenuous premises: (1) WIAA has created a "designated public forum . . . for media coverage of tournament events"; Defs.' Br., dkt. #32, at 24; (2) the designated public forum extends to internet streaming; (3) any restrictions on access to that forum are subject to strict scrutiny; and (4) plaintiffs do not have a narrowly tailored compelling interest justifying the exclusion of defendants from the forum. None carry the day.

1. Public versus nonpublic forum

In a recent Seventh Circuit decision, Judge Posner summarized the Supreme Court's increasingly nuanced, if not always helpful, list of public and non-public fora as follows:

> The Supreme Court distinguishes a "traditional public forum" from a "designated public forum" and both from a "nonpublic forum."
>
> A traditional public forum is a street or park, or some other type of public property that like a street or park has long ("time out of mind," as some cases put it, or "from time immemorial," as others say) been used for expressive activity, such as marches and leafletting.
>
> A designated public forum, illustrated by a public theater, is a facility that the government has created to be, or has subsequently opened for use as, a site for expressive activity by private persons. Usually, as in the case of a public theater, it is available only for specified forms of private expressive activity: plays, in the case of a theater, rather than political speeches. . . .
>
> The third category–the "nonpublic forum"–consists of government-owned facilities like the Justice Department's auditorium that could be and sometimes are used for private expressive activities but are not primarily intended for such use. The government can limit private expression in such a facility to expression that furthers the purpose for which the facility was created.
>
> Some decisions recognize a fourth category, a variant of the second, variously called a "limited designated public forum" (what Shakespeare's Polonius would

> have called "a vile phrase"), a "limited public forum," or a "limited forum." The terms denote a public facility limited to the discussion of certain subjects or reserved for some types or classes of speaker.

Illinois Dunesland Pres. Soc'y v. Illinois Dep't of Natural Res., 584 F.3d 719, 723 (7th Cir. 2009) (citations omitted).

If a forum is "public" or "designated public," "the rights of the State to limit expressive activity are sharply circumscribed"; the state may only enact content-neutral "time, place, and manner" restrictions or content-based rules that are "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In a nonpublic forum, the government may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

a. regulatory versus proprietary capacity

In arguing that WIAA has designated the venues for its sporting events as public fora, defendants point out that the events "are open generally to the public and the news media." Defs.' Br., dkt. #32, at 24. But the government does not create a public forum simply by allowing the public in. *United States v. Kokinda*, 497 U.S. 720, 729 (1990) ("Postal entryways . . . may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment."); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (rejecting argument that "whenever members of the public are

permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment."). *See also United States v. Hastings* 695 F.2d 1278, 1280 (11th Cir. 1983) (press has a right of access to observe criminal trials, but that right does not extend to "right to televise, record, and broadcast trials"). Rather, heightened scrutiny is appropriate for a particular forum when its "purpose . . . is the free exchange of ideas." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

WIAA invites the public to its members' games not for the purpose of fostering debate, but in substantial part to make money. Both the general public and the media must pay for a ticket to gain admission to an event. The media pays extra if it wishes to have text or audio transmissions during the game. This is not simply a matter of making a profit; those funds are needed to help sustain the WIAA and the high school sports it supports. WIAA is a self-sustaining organization, using the revenue it generates from ticket sales and other sources, including its exclusive contract with WYYY, to pay the expenses of its various sports programs. Thus, WIAA is always looking for additional sources of revenue to maintain the quality of those programs.

When the government acts in a commercial or proprietary capacity, as WIAA does with respect to the tournament games it sponsors, it weighs strongly against finding that the government has created a public forum or that regulation of speech within that forum is subject to strict scrutiny. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("Where the government is acting as a proprietor, managing its internal

operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."); *Kokinda*, 497 U.S. at 725-26 (plurality) (in finding that sidewalk in front of Post Office not public forum, the Court emphasized that ("[t]he Government [is] acting in its proprietary capacity"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality) (city did not create public forum by allowing some advertising in public transit system; "[T]he city is engaged in commerce. . . . The [advertising] space, although incidental to the provision of public transportation, is a part of the commercial venture."); *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 79 (1st Cir. 2004) ("[A] lower level of scrutiny usually applies when the government acts as proprietor.").[7]

A lower level of scrutiny is often appropriate in this context because the risk that a speech limitation "will impermissibly interfere with the marketplace of ideas" is more "attenuated" when the government is not acting as a regulator. *Davenport v. Washington Educ.*

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[7] *See also Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir. 1986) ("[The Metrodome] is a commercial venture by the city constructed to meet the need for a major sports facility in the Twin Cities area and, at the same time, to provide economic benefits to the area. It follows that the Metrodome does not come within the scope of a traditional public forum."); *KTSP-TAFT Television & Radio Co. v. Arizona State Lottery Comm'n*, 646 F. Supp. 300, 309 (D. Ariz.1986) ("Where commercial activity is the state action at issue, conscious limitations on access are permissible where the limitations are consistent with the activity and are not arbitrary in their implementation."); *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 85 (D. Conn. 1981) ("The degree of scrutiny focused upon the contract provisions depends upon the capacity in which the city is functioning as it operates the Civic Center."); *HippoPress, LLC v. SMG (A Pennsylvania Partnership)*, 837 A.2d 347, 357 (N.H. 2003) (in dicta, concluding that city arena was not public forum because defendant "did not open the arena for public discourse" but "to provide the downtown area with economic stimulus").

Ass'n, 551 U.S. 177, 188 (2007). Further, imposing heightened scrutiny on the government's proprietary activities may place undue burdens on the government in its attempt to compete with private entities. *Gilles v. Blanchard*, 477 F.3d 466, 470 (7th Cir. 2007) ("[c]ourts hesitate to impose in the name of the Constitution extravagant burdens on public [entities] that private [entities] do not bear.")

Defendants argue that the WIAA's sponsorship of tournament events is not properly classified as a proprietary activity because WIAA events are "educational, not commercial, activities." Defs.' Br., dkt. #76, at 14. As proof, defendants cite WIAA's mission statement, which states that its purposes are to further noncommercial goals such as "promot[ing] the ideals of its membership," "emphasiz[ing] interscholastic athletics . . . in the total education process" and "promot[ing] uniformity of standards in interscholastic athletic competition." In addition, defendants point out that WIAA receives a sales tax exemption for its ticket sales under Wis. Admin. Code § Tax 11.03(2)(a)5.

Defendants cite no authority for their view that an entity with broader purposes and tax exempt status can only operate in a public forum for First Amendment purposes. The question is whether the entity is participating in the marketplace to sustain itself, not whether the state decides to give the entity a tax break to make the task a little easier. *See Lee*, 505 U.S. at 682 ("[a]irports [are proprietary operations because they] are commercial establishments funded by users fees and designed to make a regulated profit"); *Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 775 (2d Cir. 1984) (concluding that "the management of station facilities is a proprietary, not a governmental

function" because "[p]roviding commuter service is economically burdensome and the New York legislature established MTA as a self-sustaining entity"). Further, as plaintiffs point out, an entity may act in a proprietary capacity even if it has purposes other than generating revenue. Hence, public airports serve many important functions unrelated to generating revenue, but the Court concluded in *Lee* that they were commercial establishments nonetheless. 505 U.S. at 682-83.

Defendants correctly observe that the forum analysis does not necessarily come to an end if a court determines that the public entity is acting in a proprietary capacity. *Air Line Pilots Ass'n, Intern. v. Dep't of Aviation of City of Chicago*, 45 F.3d 1144, 1158 (7th Cir. 1995) ("The fact that the government acts as a proprietor does not negate the need to engage in public forum inquiry."). Defendants fail, however, to cite any cases in which a court determined that the government created a public forum when principally acting as a proprietor.[8]

b. government's intent and nature of the forum

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[8] The First Circuit has observed that "[p]ublic forum analysis itself has been criticized as unhelpful in many contexts, and particularly this one where the government is operating a commercial enterprise." *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 75-76 (1st Cir. 2004) (citing Laurence H. Tribe, *American Constitutional Law* § 12-24, at 992 (2d ed. 1988), *and* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 97 (1998)). *See also Illinois Dunesland Preservation Soc'y v. Illinois Dept. of Natural Res.,* 584 F.3d 719, 723 (7th Cir. 2009) ("[I]t is rather difficult to see what work 'forum analysis' in general does.") This court nevertheless applies a forum analysis because that is the predominant test applied by the Supreme Court and the Seventh Circuit, as well as the test used by the parties in their briefs.

The reason courts rarely find that the government has created a public forum in a commercial context may be related to the importance of the government's intent in the analysis. The government cannot create a public forum "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. While this seems to make First Amendment rights contingent on the whim of the government, the Supreme Court has explained that, "[b]y recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998).

When the government is conducting business, its intent is more likely directed toward creating a forum that will maximize its revenue rather than maximize public discourse. *Lee,* 505 U.S. at 682 ("As commercial enterprises, airports must provide services attractive to the marketplace. In light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting 'the free exchange of ideas.'"). In the context of a contractual relationship, it may not only make bad business sense to offer everyone the same deal, but logistical limitations could make it impossible to do so.

Also relevant is the nature of the speech at issue. Some events, such as political events, by their very nature foster free discourse regardless of the intent of the event's sponsor. *See American Broad. Companies, Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1978) (post election activities of governor in which some members of media were invited). On the other hand, a typical sporting event -- even one played for a state championship -- has little

expressive content for purposes of the First Amendment, save for entertainment and, perhaps, inspiration. *Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 86 (D. Conn. 1981) (in the case of figure skating championships, "the exposition of an athletic exercise. . . . is on the periphery of protected speech"). While [i]t is . . . true that entertainment itself can be important news," *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977), the same First Amendment scrutiny to limitations on access to a political event do not necessarily apply to limitations on a sports tournament.

Defendants' argument appears to be that once the WIAA makes the decision to let the media in, it must let members of the media do anything that is part of their own view of the "journalistic function," Defs.' Br., dkt. #76, at 21, unless the government can justify the restriction with a narrowly-tailored, compelling state interest. But a forum is defined not just by the physical setting where the speech takes place, but by "the access sought by the speaker." *Cornelius*, 473 U.S. at 801. Defendants are not seeking access to the sporting events generally; it is undisputed that they already have that access. Rather, defendants are seeking much broader access so that they may stream the games over the internet at no charge for their own commercial purposes.

In this respect, this case is similar to that considered by the Supreme Court in *Cornelius,* where the question was whether the federal government violated the NAACP Legal Defense and Educational Funds' First Amendment rights as an advocacy group by excluding it from a charitable program run by federal employees. The Court concluded that the relevant forum was not the "federal workplace," but the charitable program itself because the

plaintiffs were "seek[ing] access to a particular means of communication." *Id.* at 801. *See also Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir. 1986) (when plaintiff's claim was that city violated First Amendment by refusing its advertising in Metrodome, "the crucial question is not whether the Metrodome, as a whole, is a public forum but whether the Commission designated advertising space within the Metrodome a public forum"). Here, too, defendants are seeking unfettered access to "a particular means of communication" -- transmitting the game over the internet.

There is no genuine dispute that WIAA never intended to open up its events for internet streaming by the general public or the media. Before 2005, *no one* streamed WIAA games and it does not appear that there was any interest in doing so. *Air Line Pilots*, 45 F.3d at 1152 (in determining government's intent, "we must look to the policy and practice of the government with respect to the underlying property"). Defendants ask the court to infer an intent by WIAA to "open the venues to internet streaming" because it granted WYYY such access. Defs.' Br. dkt. #76, at 21. Allowing one company access to a newly-created forum need hardly be construed as the government's intent to make the forum public. Rather, in cases in which courts have concluded that the government intended to create a public forum, it is because the government provided access to a large group of speakers and then attempted to exclude one speaker within the group. *See*, *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102-03 (C.D. Cal. 2003) (citing cases).

Granting access to one individual or even several individuals or groups, is not sufficient to show that the government intended to designate a public forum. *Arkansas*, 523

U.S. at 670 ("To create a [public] forum . . ., the government must intend to make the property 'generally available.'. . . A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers."); *Hubbard*, 797 F.2d at 556 ("When, as here, the city, acting in a proprietary capacity, has allowed a small number of commercial advertisers access to a limited amount of advertising space on government property in order to generate revenue, the city has not created a public forum.")

Perhaps even more important, WIAA could not have intended to create unlimited media access for streaming tournament games because it would be impossible to do so. Defendants acknowledge that streaming a game over the internet requires space for the camera and a crew. Obviously, the venues for WIAA events have limited space particularly for those sight lines most conducive to viewing all the actions. The record shows some venues would not be able to accommodate more than one broadcaster, and no venue would accommodate everyone who wishes to set up cameras for streaming. Defendants fail to explain how WIAA could have intended to create a public forum under those circumstances. *Air Line Pilots*, 45 F.3d at 1152 (in determining government's intent, "we must examine the nature of the property and its compatibility with expressive activity"). *Cf. Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (scarcity of radio frequencies is adequate justification for regulation of radio broadcasting).

Just as there is a long history of licensing exclusive radio and television broadcasts by public, quasi-public and private entities, so too must internet streaming allow for such rights.

2. Review for reasonableness

Because WIAA did not create a public forum for streaming its games over the internet, the exclusive license is reviewed for reasonableness. *Cornelius*, 473 U.S. at 809. Under this standard, the government's reason for the restriction need not be compelling; a restriction may survive even if other reasonable alternatives are available; and the government is free to restrict access on the basis of "subject matter *and speaker identity,*" so long as the restriction is consistent with the purpose of the forum and does not discriminate on the basis of viewpoint. *Id.* at 806-09 (emphasis added).

There can be little doubt that plaintiffs' exclusive license passes constitutional muster under this standard. In the cases cited by the parties involving First Amendment challenges to exclusive licenses, no court found a constitutional violation. *See Jacobsen v. City of Rapid City, S.D.*, 128 F.3d 660, 663-65 (8th Cir. 1997) (small airport did not violate First Amendment by giving gift shop exclusive right to sell newspapers on premises); *Hubbard Broad.*, 797 F.2d at 554-57 (government did not violate First Amendment by selling 10-year exclusive advertising contracts for public arena); *KTSP-TAFT Television & Radio*, 646 F. Supp. at 311-13 (state did not violate First Amendment by giving exclusive contract to one television station to broadcast lottery); *Post Newsweek Stations-Connecticut*, 510 F. Supp. at 86 (city did not violate First Amendment by allowing only one media company to broadcast ice skating championships held at civic center); *HippoPress*, 837 A.2d at 356-58 (in dicta, assuming that management company for city arena was a "state actor," it did not violate

First Amendment by contracting with one company for exclusive newspaper distribution rights in arena).

Defendants put forth a heroic effort in arguing that each of these cases is distinguishable, and are correct to the extent that none of them involved a high school athletic association granting an exclusive license for certain types of media, but that is not a salient difference. Like the entities in *Jacobsen*, *Hubbard, KTSP, Post Newsweek* and *HippoPress*, WIAA has entered into an exclusive contract with one company for the primary purpose of generating revenue to support itself and incidentally limited the speech activities of another company in the process.

a. WIAA's interests

Other federal circuits have recognized that generating revenue is a reasonable interest when the government is acting in its proprietary capacity and that a contract is significantly more valuable when it is exclusive. *See, e.g., Jacobsen*, 128 F.3d at 663-64 ("If the City must allow Jacobsen and other vendors to sell First Amendment protected materials in newsracks outside the gift shop, the concessionaire will lose revenues, making its exclusive contract less valuable. That in turn will reduce the City's leverage in bargaining for terms such as minimum annual concession fees and pro rata utility charges."); *Hubbard,* 797 F.2d at 556 (deferring to government's assertion "that the most effective way to raise revenue from advertising on the scoreboard within the Metrodome was to sell exclusive ten-year contracts in designated product categories"); *Gannett Satellite Info. Network*, 745 F.2d at 775 ("When

a government agency is engaged in a commercial enterprise, the raising of revenue is a significant interest.").[9]

None of these cases establish binding authority and neither side cites any cases on point from the Supreme Court or the Seventh Circuit. Nevertheless, the courts' reasoning in these cases is persuasive and the uniformity in their holdings cannot be ignored. Further, the Seventh Circuit has recognized that the government has a legitimate interest in "limiting competition with the city's own money-making activities, such as the granting of exclusive licenses to vend in exchange for a percentage of the vendor's revenues or some other form of fee," even when it limits activities protected by the First Amendment. *Ayres v. City of Chicago*, 125 F.3d 1010, 1015 (7th Cir. 1997). The Supreme Court, too, has recognized that it is legitimate for the government to restrict access to a forum when it is acting in a proprietary capacity and expanding access could jeopardize its ability to earn revenue. *Lehman*, 418 U.S. at 303-04.

Defendants attempt to diminish the importance of WIAA's interest in raising revenue by pointing out that the money it receives from the exclusive license is only a small part of

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[9] *See also KTSP-TAFT Television & Radio*, 646 F. Supp. at 311-12 ("[U]nrestricted and uncompensated broadcasts of the Pick drawing would affect adversely the economic posture of the Lottery. If all Lottery publicity must be purchased, then maximum net revenue from the Lottery will be reduced."); *Post Newsweek Stations-Connecticut*, 510 F. Supp. at 86 ("Any approach other than upholding this limited restriction could jeopardize the revenue derived from future entertainment contracts."); *HippoPress*, 837 A.2d at 358 ("The contract between SMG and Union Leader is reasonable because it is wholly consistent with SMG's interest in operating a financially viable commercial arena. Without the ability to enter into exclusive contracts for advertising and distributing products, SMG would be severely hampered in its ability to compete in the marketplace.").

its budget. That may be so, but defendants cite no authority for the proposition that an interest is not legitimate unless the government can show that it would not survive without the regulation. Defendants do not challenge plaintiffs' claim that an exclusive contract is more lucrative than one that would allow all media companies an equal chance to stream each game. That proposition is patently obvious and sufficient under a reasonableness standard.

Alternatively, defendants argue that WIAA could raise the same amount of revenue by raising ticket prices on the general public. This may be defendants' boldest argument, as well as the least sympathetic one. In a nonpublic forum, the government does not have to rule out other alternatives before limiting speech in order to further a legitimate interest. *Cornelius*, 473 U.S. at 809. It was reasonable for WIAA to grant an exclusive license to WYYY so that it could keep ticket prices more affordable, rather than require the public to pay more so that other media companies could use the tournaments to generate advertising revenue on their own websites.

Finally, defendants argue that an interest in raising revenue "is never sufficient, by itself, to justify restrictions on the press." Defs.' Br., dkt. #76, at 25. The Supreme Court case they cite for this proposition, however, relates to a *tax* placed on a narrow subset of the press in the government's capacity as a regulator. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987). The rationale for the rule was "the censorial threat implicit in a tax that singles out the press." *Id.* at 232 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983)). For this reason alone, *Arkansas*

Writers' Project is hardly instructive in a context where the government has granted an exclusive license in its capacity as a proprietor.

In any event, plaintiffs also rely on interests other than raising revenue. For example, WIAA asserts a reasonable interest in trying to ensure that more of its games make it onto the internet. *Cf. KTSP-TAFT Television & Radio Co.*, 646 F. Supp. at 310 ("In the case at bar the significant governmental interest is the opportunity of the public to see the drawing live every week."). While defendants argue that the exclusive license undermines that goal by limiting the number of companies that can carry the game, this view is unnecessarily myopic. The right defendants seek is to stream or not stream any game they wish after making their own determination about the game's newsworthiness and, no doubt, the directly proportional advertising revenues it will generate.

Under WYYY's agreement with WIAA, the goal is for WYYY to produce 100% of state tournaments, 50% of sectional events and 25% of regional events. While these are not mandatory percentages, defendants do not suggest that they are able, much less willing to produce the same number of games that WYYY does. On the contrary, it is reasonable to assume that defendants and other news outlets will seek to "cream skim" the most popular games, leaving the WIAA and WYYY with less profits to apply toward covering less popular games. Thus, while particular games may be not be as widely available as a result of the exclusive license, WIAA could reasonably believe that, overall, the license would increase the exposure of its games overall.

Even for those games not covered by the license, defendants have not shown that

permitting additional carriers would significantly increase the viewing audience. Anyone with access to defendants' websites would also have access to WIAA's website. Thus, those interested in the game can view it online, regardless of whether defendants are allowed to carry it or not.

b. reasonableness in light of purpose of the forum

Defendants argue that their exclusion from the forum "is not reasonable because allowing others to [stream games over the internet] is not incompatible with the forum's purpose." Defs.' Br., dkt. #32, at 26. This is incorrect for at least two reasons. First, plaintiffs do not have to show that allowing access would be "incompatible" with the forum, only that the restriction is one reasonable way to serve the forum's purposes. *Cornelius,* 473 U.S. at 808 ("In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated."). Second, defendants' argument assumes without record support that a major, if not exclusive, purpose of the forum is to allow the media unlimited access to film WIAA games, when the record shows that the forum's primary purpose is to create another source of revenue for WIAA. Allowing defendants access *is* inconsistent with that purpose, because it would take away a guaranteed source of revenue for plaintiffs.

Defendants also cite *Perry* for the proposition that, "[w]hen speakers and subjects are similarly situated, the state may not pick and choose." 460 U.S. at 55. Defendants argue

they are "similarly situated" to WWWY because both defendants and WWWY are vying for the same right to stream the games, but the question is not simply whether two speakers wish to use a forum for the same purpose. "[G]overnment may draw permissible status-based distinctions among different classes of speakers in order to preserve the purpose of the forum, even when the proposed uses by those inside the permitted class of speakers and those outside the permitted class of speakers are quite similar." *Gilles*, 477 F.3d at 470 (quoting *Goulart v. Meadows*, 345 F.3d 239, 254 (4th Cir. 2003)). In fact, the government may exclude a speaker from a forum even if it is "wonderfully suited" for the speaker's asserted purpose. *Id.* The question is whether the government has a reasonable basis for concluding that one speaker better serves the forum's purpose.

Moreover, defendants are *not* similarly situated to WWWY. To begin with, WWWY is not merely acting as a media company in this circumstance, but as an agent of WIAA. Defendants do not argue that the First Amendment would *require* WIAA to permit defendants to stream games if it chose to reserve the exclusive right to stream for *itself*. Rather, the focus of defendants' argument is that having allowed one company to stream its games, WIAA must give all media companies an equal chance to do so. As explained above, this argument incorrectly assumes that the government must treat all private speakers the same in a nonpublic forum. But even assuming that the First Amendment required WIAA to treat all private media companies the same, it is inaccurate to lump WWWY in with other media companies. WWWY does not stream tournaments for use on its own television station or website. Rather, all games streamed by WWWY appear on *WIAA*'s website and

nowhere else. Further, it is undisputed that WWWY receives no revenue as a direct result of that website. WWWY generates its revenue from other distribution contracts. In this context, WWWY is more akin to a third-party vendor of services that WIAA does not have the technical skills to provide for itself, than it is just another media company. Even defendants acknowledge that WWWY, as a production company, can provide many services to WIAA. Defendants do not even suggest that they are willing or able to provide these services even if WIAA were to give it the chance to do so.

c. effect on speech

Finally, plaintiffs' policy does not discriminate on the basis of viewpoint and is not directed at limiting any particular idea from entering into the marketplace. In most cases in which courts have held that a state actor violated the First Amendment by excluding a speaker from a particular forum, a primary consideration is that the government's conduct: (1) resulted in suppressing an unpopular viewpoint, (2) generally limited the diversity of views that could be expressed, or (3) created an unacceptable risk of future censorship. *See Warner Cable Commc'n, Inc. v. City of Niceville*, 911 F.2d 634, 640 (11th Cir. 1990) (cable company's exclusive license with city violates First Amendment because it "imposed a direct limit on the number of speakers and thus prevented an increase in the quantity and variety of speech available to the Los Angeles cable audience"); *Am. Broad. Companies, Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1978) (concluding that political candidates violated First Amendment by deciding to exclude one television network from post-election coverage: "If

choice were allowed for discrimination in a public event of this magnitude in the various media . . . the danger would be that those of the media who are in opposition or who the candidate thinks are not treating him fairly would be excluded.").

Similarly, courts upholding such a restriction on speakers often emphasize that the government is not attempting to suppress any particular point of view. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229-30 (2000) ("[T]he viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students."); *Perry*, 460 *U.S.* at 49 ("There is, however, no indication that the school board intended to discourage one viewpoint and advance another."); *Greer*, 424 U.S. at 838-39 ("[T]here is no claim that the military authorities discriminated in any way among candidates for public office based upon the candidates' supposed political views."); *Arsberry*, 244 F.3d at 564 (upholding government surcharge on telephone usage, noting, "[t]here is no suggestion that the scheme of which the plaintiffs complain is motivated by a desire to limit free speech").

In *Illinois Dunesland*, Judge Posner even suggests that the entire forum analysis could be chucked in favor of a context-sensitive inquiry regarding the purpose and effect of a regulation on speech:

> 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. . . . The constant is that regulation is not to be used as a weapon to stifle speech.

584 F.3d at 724.

In this case, neither the purpose nor the effect of WIAA's exclusive license with

WWWY is to stifle speech. Plaintiffs are not attempting to suppress any information about its games from being disseminated to the public or the media; "[n]o part of the [games] has been closed from public scrutiny." *Hastings,* 695 F.2d at 1280. In fact, the license does not prohibit defendants or anyone one else from saying anything about the games; it simply prohibits them from filming and transmitting the game live. Further, the only games that defendants are prohibited from streaming are games that WWWY is already streaming, so there is no loss of information to the public. With respect to viewpoint discrimination, the WWWY's agreement with WIAA and its media policies do not favor or disfavor any particular opinion. And defendants have adduced no evidence showing that WIAA chose WYYY as a partner because it would provide more favorable coverage, nor that WYYY has engaged in self censorship in order to "please" WIAA.[10]

In some cases, even policies that are neutral on their face may be problematic because of the possible "effect of excluding unpopular or minority viewpoints." *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 593 (7th Cir. 2002). *See also Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998). Defendants argue that the exclusive license creates such a risk here, but they fail to explain how. In fact, defendants fail to identify with any specificity how an exclusive license has or will have any effect on the

[10] Defendants do allude to the possibility that WYYY *might* have an incentive over time to dampen comments that could be viewed as critical of WIAA, its members or its product. Defendants offer no examples of such favoritism and, while it may exist or develop over time, crediting this possibility as grounds to strike down WIA's policy under the First Amendment would effectively preclude any state actor from entering into an exclusive license.

diversity of views expressed about WIAA events. This is not surprising in light of the fact that the simple act of live streaming a game on the internet does not necessarily lend itself to the expression of a "popular" or "unpopular" viewpoint. In light of the generally nonpolitical, nonideological nature of the speech at issue and the absence of any evidence of a history of viewpoint discrimination or censorship on the part of plaintiffs, it is not reasonable to infer that the exclusive license will be used as a weapon for silencing adverse opinions.

Nor can defendants credibly complain that they have no alternatives for news gathering. *See Perry*, 460 U.S. at 53 ("[T]he reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place."). Plaintiffs do not purport to prohibit defendants from reporting on WIAA-sponsored, tournament games. Defendants are free to publish accounts of the tournaments in newspapers and television, to interview the players and coaches and even to display up to two minutes of live video coverage of any game. In fact, the internet streaming policy does not prohibit defendants from expressing a single thought, opinion or analysis about a game. *Post Newsweek Stations-Connecticut*, 510 F. Supp. at 86 (upholding exclusive contract with ABC to broadcast ice skating; noting that "[t]he general public has ready access to the event, the event will be reported by newspaper and radio media without any time or manner restriction, and the plaintiff, itself, may attend and report on the championships") (footnote omitted).

B. Fourteenth Amendment

The resolution of the First Amendment claim in plaintiffs' favor leaves little room for argument on defendants' equal protection claim. As defendants acknowledge, the standard of review for this claim is whether the esclusive license at issue "rationally further[s] a legitimate state purpose." *Perry*, 460 U.S. at 54. This is not a difficult standard to meet and plaintiffs do so here.

Rational basis review is forgiving of regulations that prohibit more or less conduct than is justified by the government's interest. *Idris v. City of Chicago, Ill.*, 552 F.3d 564, 567 (7th Cir. 2009) ("[R]eview under the rational-basis doctrine tolerates an imprecise match of statutory goals and means. Broad ('overinclusive') categories are valid even if greater precision, and more exceptions or subcategories, might be better."). Under rational basis review, a regulation "will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of" the government's legitimate interest. *McDonald v. Bd. of Election Comm'r of Chicago*, 394 U.S. 802, 809 (1969).

As with challenges under the First Amendment, courts have rejected claims that the government violates the equal protection clause simply by granting an exclusive license despite an incidental effect on speech. *Foto USA, Inc. v. Bd. of Regents of Univ. Sys. of Fla.*, 141 F.3d 1032, 1036-37 (11th Cir. 1998) (public university did not violate Fourteenth Amendment by entering into exclusive contract with photographer for graduation ceremony); *Hubbard*, 797 F.2d at 554-57 (city did not violate Fourteenth Amendment by entering into exclusive advertising contract).

Unlike some of the other cases in which a court upheld an exclusive license, defendants point out that WIAA's decision to give an exclusive license to WWWY did not involve an open bidding process. *See Foto USA*, 141 F.3d at 1037; *KTSP-TAFT Television & Radio*, 646 F. Supp. at 312. While some courts have noted openness in bidding in determining that the government acted reasonably, defendants cite no decision in which a court has suggested that the validity of the license turned on that fact.

WIAA does not have a duty under the Constitution to notify all possible interested parties before it enters into a business agreement. The relevance of an open bidding process is simply that it shows the government is not discriminating on the basis of viewpoint. WIAA may not have held a formal bidding process in this case, but, as discussed above, defendants point to no evidence suggesting that WIAA awarded WWWY the contract for any ideological or political reason. WIAA simply accepted what appeared to be a lucrative proposal from WWWY after no other company expressed interest.

The facts here are little different from those in *Hubbard*, in which a city sold exclusive 10-year advertising contracts "on a first-come/first-served basis." 797 F.2d at 556. In any event, it would have accomplished nothing for WIAA to have a bidding process -- at least as far as defendants are concerned -- because defendants do not suggest that they could or would have made an equal or better offer than WYYY, in terms of services provided or price. To the contrary, defendants' position is that they should not have to pay at all. *See* discussion, *infra*.

Since WIAA has a legitimate interest in raising revenue to support its programs, it

could rationally conclude that it was better served by a guaranteed, annual payment under an exclusive license than by a collection of free-riding media companies.

III. Fees

WIAA permits media companies to stream games over the internet when WWWY declines to produce a game, but any interested party must pay WWWY a fee for doing so. Defendants' challenge to this part of plaintiffs' streaming policies requires little discussion.

If the First Amendment does not prohibit WIAA from granting an exclusive license to WWWY to stream tournament games, it is difficult to see how the lesser restriction of allowing defendants access in exchange for a fee could be problematic.[11] Defendants rely again on cases in which the Supreme Court invalidated taxes and fees imposed on the press or others engaging in free speech activities. *E.g.*, *Follett v. McCormick*, 321 U.S. 573 (1944) (striking down tax on door-to-door bookseller); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down license tax on right to solicit door-to-door).

These cases do not stand for the principle that fees may never be imposed on the press or on speech activities. As the Supreme Court explained in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), "the fact that a law singles out a certain medium, or even the press as a whole, is insufficient by itself to raise First Amendment concerns." *Id.* at 660 (internal quotations omitted).

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[11] The fee is paid to WWWY, rather than WIAA, but neither side argues that the First Amendment should not apply to the fee because WWWY is a private entity, so the court does not consider that question.

The Seventh Circuit has explained in more detail why a contrary position would be unworkable:

> Communications protected by the amendment are . . . frequently made by printing words on paper, yet no one supposes that the consequence is to bring the corporate income tax, when imposed on manufacturers of paper, within the purview of the First Amendment, or even to forbid taxing those manufacturers more heavily than manufacturers of products that are less important as inputs into the production of communications media. Any regulation direct or indirect of communications can have an effect on the market in ideas and opinions, but that possibility in itself does not raise a constitutional issue. Otherwise the entire tax and regulatory operations of American government would be brought under the rule of the First Amendment.

Arsberry v. Illinois, 244 F.3d 558, 564 (7th Cir. 2001) (citations omitted). Thus, "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." *Leathers v. Medlock*, 499 U.S. 439, 453 (1991).

"In those cases in which licensing fees were prohibited," other courts have recognized that "the government was acting in a governmental capacity and was raising general revenue under the guise of defraying its administrative costs." *Gannett Satellite Info. Network*, 745 F.2d at 774. In the context of a commercial enterprise (in which raising revenue is an expected and required function of the government) fees are permissible even if they go beyond the government's administrative costs. *Id.* at 775 (in context of fee on newspapers for placing newspaper racks in train station, "licensing fees are permissible manner restrictions which serve the significant governmental interest of raising revenue for the self-sufficient, efficient operation of commuter lines").

As discussed above, plaintiffs' sponsorship of the tournament games is a commercial activity, so the cases defendants cite are not instructive. The fee here is not directed at a small subset of speakers or even necessarily at the press generally; any party other than WWWY must pay the fee if it wishes to stream a tournament game over the internet. Defendants are paying for the privilege of using a facility leased by WIAA so that they may stream the game on their own websites with the intent of generating advertising dollars. Defs.' Br., dkt. #107, at 1 (conceding that they "hope to someday profit, through increased website traffic and selling advertisements, by streaming tournament events"). Defendants cannot argue plausibly that they have a First or Fourteenth Amendment right to force plaintiffs to open up and reserve space in a WIAA facility simply to provide defendants with a free source of revenue.

Although defendants are not challenging the fees plaintiffs impose for various other privileges, such as media credentials, there is no principled way to distinguish those fees. If defendants' argument were accepted, even an admission price would be suspect because it is a "tax" on the public's First Amendment right to see the game live.

IV. Standard for Granting Licenses

The last aspect of the internet streaming policies challenged by defendants is that they give plaintiffs too much discretion in deciding who gets permission to stream games that WWWY declines to produce and in setting the price for such a limited license. Again, if defendants can outright prohibit defendants from streaming certain games by granting

WYYY an exclusive license, there would appear little room left to argue that the First Amendment requires plaintiffs to adopt particular standards for those games not covered by the license. *But see City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988) (rejecting argument that "the greater power to prohibit a manner of speech entirely includes the lesser power to license it in an official's unbridled discretion"). Even if it is assumed that the greater power does not necessarily include the lesser, defendants have not shown here that the discretion retained by plaintiffs violates the First Amendment.

Defendants cite several cases in which the Supreme Court concluded that the government violated the First Amendment by failing to publish adequate standards for issuing a license or a fee for access to a public forum. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-33 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 760 (1988); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51 (1969). "[T]he Supreme Court has not yet had occasion to apply the unbridled discretion doctrine outside the context of a traditional public forum," *Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 386 (4th Cir. 2006), but the Seventh Circuit has assumed that the doctrine may apply even to nonpublic forums. *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-73 (7th Cir. 2001).

This does not mean, however, that the same requirements apply in every instance in which the government restricts access to its property. *Child Evangelism Fellowship*, 457 F.3d at 386 (rejecting proposition "that the unbridled discretion analysis is precisely the same when a limited public or nonpublic forum, rather than a traditional public forum, is

involved"); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002) ("We do not believe, however, that we are compelled to apply the unbridled discretion doctrine mechanically . . . without inquiry into the characteristics of the relevant forum."). "Because 'selectivity' and 'discretionary access' are defining characteristics of non-public fora, the requirements are more lenient in that context." *Ridley*, 390 F.3d at 95. Again, the key question is whether there is an appreciable risk that the lack of more specific standards will lead to the censorship of a particular viewpoint. *Child Evangelism*, 457 F.3d at 386 ("The danger of such boundless discretion, therefore, is that the government may succeed in unconstitutionally suppressing particular protected speech by hiding the suppression from public scrutiny."); *DeBoer*, 267 F.3d at 574 ("ambiguity in the [policy] provides too great a risk that it could be used to engage in prohibited censorship of speech"). When "there is no serious concern about either notice or chilling effects," more specific standards are not required. *Ridley*, 390 F.3d at 94.

Turning to plaintiffs' policy, defendants challenge one sentence stating that "[a]ll permission granted, policies enforced and fees required will be at the sole discretion of the WIAA and the rights holder." Defendants interpret this to mean that plaintiffs may deny a request for any or no reason. Plaintiffs disagree, arguing that the provision must be read in context of the entire policy, which "set out in detail the standards expected from media organizations who seek to . . . transmit live broadcasts of tournament events." Pls.' Br., dkt. #86, at 13. Thus, plaintiffs' view is that anyone who complies with the media policies will be granted permission to broadcast a game, but that plaintiffs have the "sole discretion" to

determine whether an applicant has complied with those policies.

Plaintiffs' view is supported by history. It is undisputed that plaintiffs have never rejected a request to produce an event that WWWY declined. *Cf. Griffin*, 288 F.3d at 1326 ("Even unwritten speech policies may survive constitutional challenge if uniformly enforced.") Perhaps even more important, defendants have identified no reason to believe that, in the future, plaintiffs will begin issuing licenses to media companies on the basis of viewpoint. *Gannett*, 745 F.2d at 776 (declining to require transportation authority to publish standards for granting licenses to place newsracks in stations because "there is no evidence or finding that [the transportation authority] has arbitrarily denied licenses or imposed unreasonably discriminatory terms on anyone, or that there is any threat of such conduct").

In fact, defendants fail to identify how "viewpoint" would be relevant to a request to broadcast a game. In the cases cited by defendants, the court was concerned about a risk that the government would discriminate on the basis of the viewpoint the applicant wished to express *in the forum at issue.* In this case, streaming a game in and of itself does not necessarily involve the opinions of the media company. Thus, the only way that a media company's viewpoint could become relevant would be if plaintiffs disapproved of commentary that had accompanied a previous broadcast or more generally disapproved of positions taken by the media company. In light of plaintiffs' consistent acceptance of requests to stream games in the past and defendants' failure to adduce any evidence that suggest a change in the future, court-ordered relief is premature. *Griffin*, 288 F.3d at 1326

("We . . . deny Mr. Griffin's petition to invalidate [the regulation] because we do not believe a real and substantial threat to expression flows from the alleged unbridled discretion vested in" defendant.) In the event that defendants *are* denied a license in the future for a reason that violates the First Amendment, they are free to bring an as-applied challenge at that time.

With respect to the fee charged, defendants argue that plaintiffs have not published particular rates and that nothing stops plaintiffs from charging whatever they want. But defendants have adduced no evidence that plaintiffs have charged unreasonable rates to anyone. Currently, the rate is $250 for one camera and $1500 for multiple cameras, rates that defendants do not claim to be unreasonable. Although these rates are not published, plaintiffs have provided the factors they used in calculating the amount, including the fees charged by other state athletic associations. Defendants may be correct that plaintiffs could change their rates if they chose, but this would be true regardless whether plaintiffs published their rates. Ultimately, "[t]he marketplace provides protections against unreasonable licensing fees." *Gannett*, 745 F.2d at 775 n.4. Again, defendants have provided no reason to believe that plaintiffs will begin charging exorbitant fees for streaming.

V. Copyright

Finally, defendants assert as a counterclaim their copyright in four WIAA-sponsored tournament games streamed over the internet without the consent of plaintiffs in 2008. One problem with this claim is that it is premised on an argument that "because it is a state actor, WIAA cannot condition access on such restrictions or discriminate in favor of its exclusive

streaming partner, WWWY." Defs.' Br., dkt. #76, at 32. Defendants appear to agree that private sponsors of events may require attendees to surrender upon admission any intellectual property rights they might have in a broadcast of the game. *Id.* at 36 ("The Brewers can indeed establish entry restrictions by fiat to prevent a newspaper from broadcasting a Brewers game."). The only reason WIAA is not entitled to do the same thing, according to defendants, is that the "First and Fourteenth Amendments do not permit it." *Id.* at 32. Defendants do not explain this statement, but presumably they mean to repeat the arguments made in other parts of their briefs that the exclusive license with WWWY is unconstitutional. Because the court has rejected that argument, this claim fails as well.

ORDER

IT IS ORDERED that

1. The motions to "strike" filed by plaintiffs Wisconsin Interscholastic Athletic Association and American Hi-Fi, Inc., dkt. ## 72 and 98, are DENIED as unnecessary.

2. The motion for summary judgment filed by defendants Gannett Co., Inc. and Wisconsin Newspaper Association, Inc., dkt. #31, is DENIED.

3. The motion for summary judgment filed by plaintiffs, dkt. #49, is GRANTED.

4. It is DECLARED that plaintiff American Hi-Fi's exclusive license with plaintiff WIAA for streaming WIAA tournament events over the internet does not violate the free press clause of the First Amendment or the equal protection clause of the Fourteenth Amendment. It is further DECLARED that plaintiffs do not violate defendants' rights under the free press clause by charging a fee for streaming games over the internet or failing to include more specific standards than those included in WIAA's 2009-2010 Media Policies for granting permission to defendants for streaming games.

5. It is further DECLARED that defendants have not acquired a copyright with respect to the four tournament games they streamed without plaintiffs' permission in 2008.

Entered this 3rd day of June, 2010.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

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

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 09-cv-155-wmc

This action came for consideration before the court with District Judge William M. Conley presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered declaring:

1. Plaintiff American-HiFi's exclusive license with plaintiff WIAA for streaming WIAA tournament events over the internet does not violate the free press clause of the First Amendment or the equal protection clause of the Fourteenth Amendment.

2. Plaintiffs do not violate defendants' rights under the free press clause by charging a fee for streaming games over the internet or failing to include more specific standards than those included in WIAA's 2009-2010 Media Policies for granting permission to defendants for streaming games.

3. Defendants have not acquired a copyright with respect to the four tournament games they streamed without plaintiffs' permission in 2008.

Approved as to form this 8th day of June, 2010.

William M. Conley, District Judge

Peter Oppeneer, Clerk of Court

6/9/10
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs-Respondents,

Case No. 09-CV-155-wmc

v.

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

Defendants-Appellants.

Notice is hereby given that Gannett Co., Inc. and the Wisconsin Newspaper Association in the above-named case appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on June 9, 2010.

The parties to the judgment appealed from and the names and addresses of their respective attorneys are as follows:

and

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Dated this 7th day of July, 2010. **T**

/s/ Robert J. Dreps

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs-Respondents,

Case No. 09-CV-155-wmc

v.

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

Defendants-Appellants.

Gannett Co., Inc. ("Gannett") and Wisconsin Newspaper Association ("WNA") (collectively, the "Defendants-Appellants") provide this joint docketing statement pursuant to Seventh Circuit Rules 3(c) and 28(a).

Gannett is a publicly-traded international news and information company that publishes 85 daily newspapers, including *USA Today* and ten daily newspapers in Wisconsin, and nearly 900 non-daily publications across the United States, including 19 non-daily newspapers in Wisconsin. Gannett is incorporated in Delaware with a principal place of business in Virginia. WNA is an unincorporated press association with a principal place of business in Wisconsin. As of the date of this filing, WNA's voting members consist of 230 Wisconsin daily, weekly or bi-weekly newspapers.

The Wisconsin Interscholastic Athletic Association ("WIAA") is an unincorporated association with a principal place of business in Wisconsin. WIAA's members are each a

Wisconsin public, private, specialty or charter high school or middle school. American-HiFi, Inc. d/b/a When We Were Young Productions ("WWWY") is a Wisconsin corporation with a principal place of business in Wisconsin.

This case was commenced in Wisconsin Circuit Court for Portage County on December 5, 2008. The plaintiffs, WIAA and WWWY (collectively, the "Plaintiffs-Respondents") sought a declaration of rights regarding the WIAA's media policies and exclusive contracts for the high school athletic tournaments it sponsors. On March 17, 2009, Gannett and the WNA removed the case to the District Court of the Western District of Wisconsin on the basis of federal question jurisdiction, 28 U.S.C. § 1331, arguing that the complaint raised issues of federal law under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (Copyright Act).

On March 24, 2009, Gannett and the WNA answered the complaint, and additionally asserted a counterclaim for declaratory and injunctive relief alleging a deprivation of First and Fourteenth Amendment rights under the Constitution in violation of 42 U.S.C. § 1983 and alleging a violation of their rights under the Copyright Act. Gannett and the WNA sought a declaration of rights under 28 U.S.C. § 2201. On April 13, 2009, the WIAA and WWWY filed an amended complaint narrowing, in part, the scope of the declaration they sought, and affirmatively seeking a declaration that the WIAA's then-current Internet streaming policies did not violate Gannett's or the WNA's First or Fourteenth Amendment rights under the U.S. Constitution, or their rights under any other Constitutional, statutory or legal doctrine.

No party in this case has alleged or sought damages.

The case as originally filed had five additional plaintiffs. Those plaintiffs were subsequently dismissed from the case prior to the entry of the final judgment being appealed by Gannett and the WNA.

On January 22, 2010, the parties filed cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On June 9, 2010, the District Court entered summary judgment in favor of the WIAA and WWWY and issued a declaration of rights in their favor. Neither the WIAA nor WWWY moved the District Court for an award of costs or attorneys' fees.

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

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

Gannett and the WNA filed their Notice of Appeal simultaneously with this Docketing Statement in the District Court for the Western District of Wisconsin on June 7, 2010.

There have been no prior or related appellate proceedings in this case nor is there any prior or pending litigation in the District Court that has been designated by the District Court as satisfying the criteria of 28 U.S.C. § 1915(g).

Dated this 7th day of July, 2010. **T**

/s/ Robert J. Dreps

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Attorneys for Defendants-Appellants, Gannett Co., Inc. and Wisconsin Newspaper Association

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I hereby certify that on the 7th day of July, 2010, true and correct copies of the following documents:

- NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT; AND
- GANNETT CO., INC. AND THE WISCONSIN NEWSPAPER ASSOCIATION'S SEVENTH CIRCUIT RULE 3(C) DOCKETING STATEMENT.

were filed with the Clerk of the Court using the CM/ECF filing system which will send notification of such filing to the ECF participants for this case.

I further certify that a hard copy of the above-named documents were mailed via U.S. Mail to the following parties to the appeal:

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s/ Matthew P. Veldran
Matthew P. Veldran

NOTICE TO COUNSEL:

To enable judges and magistrate judges of the court to evaluate possible disqualification or recusal, counsel for a private (non-governmental) business, company, or corporation shall submit at the time of initial pleading this statement of corporate affiliations and financial interest.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Wisconsin Interscholastic Athletic Association and American-Hifi, Inc.

Case No. 09-cv-155-wmc

v.

Gannett Co., Inc. and Wisconsin Newspaper Association, Inc.

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

I, the undersigned counsel of record for Wisconsin Interscholastic Athletic Association, make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

YES ☐ NO ☒

If the answer is YES, list below and identify the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to this case, that has a financial interest in the outcome?

YES ☐ NO ☒

If the answer is YES, list the identity of such corporation and the nature of the financial interest to the named party:

Date: 7/19/2010

Anderson, O'Brien, Bertz, Skrenes & Golla
9/5/08 by Gerald M. O'Brien

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, AMERICAN HI-FI, INC.,

Plaintiffs,

v.

District Court Case No. 09-CV-155
Appellate Court Case No. 10-2627

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

Defendants.

Defendants Gannett Co., Inc. and Wisconsin Newspaper Association, through their counsel Godfrey & Kahn, S.C., request that the records designated below be transmitted to the Court of Appeals for the Seventh Circuit. The defendants note that some of the record items designated below are physical evidence: the items recorded upon filing as Docket No. 36, Exhibits C, D (Parts I and II) and E (Parts I and II) are DVDs which were delivered to the District Court and recorded upon delivery as Docket Nos. 58-62. The defendants respectfully request that the physical DVDs be included in the record transmitted to the Court of Appeals.

Date Filed	WIWD Docket No.	Docket Text
03/17/2009	1	NOTICE OF REMOVAL BY DEFENDANTS from Circuit Court of Portage County, Wisconsin, case number 08-CV-629. (Filing fee $ 350 receipt number 34690003717), filed by all defendants. (Attachments: # 1 Certificate of Service, # 2 JS-44 Civil Cover Sheet) (Dreps, Robert) (Entered: 03/17/2009)
03/24/2009	2	DEFENDANTS' ANSWER to Complaint (Notice of Removal) DEFENSES, COUNTERCLAIM against Wisconsin Interscholastic Athletic Association by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Plaintiff Wisconsin Interscholastic Athletic Association. (Attachments: # 1 Certificate of Service) (Dreps, Robert) (Entered: 03/24/2009)
04/13/2009	5	ANSWER to Counterclaim by Plaintiff Wisconsin Interscholastic Athletic Association, Counter Defendant Wisconsin Interscholastic Athletic Association. (Skilton, John) (Entered: 04/13/2009)
04/13/2009	6	STIPULATION for to Change Caption and Dismiss Parties by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Defendant Wisconsin Interscholastic Athletic Association. (Skilton, John) (Entered: 04/13/2009)
04/13/2009	7	AMENDED COMPLAINT against Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), filed by Wisconsin Interscholastic Athletic Association, American-HIFI, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Skilton, John) (Entered: 04/13/2009)

Date Filed	WIWD Docket No.	Docket Text
04/20/2009	9	** TEXT ONLY ORDER ** ORDER granting 6 STIPULATION to change the caption and dismiss parties. The clerk of court forthwith shall amend the caption. Signed by Magistrate Judge Stephen L. Crocker on 4/20/09. (krj) (Entered: 04/20/2009)
05/05/2009	13	ANSWER to Amended Complaint by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA). (Attachments: # 1 Certificate of Service) (Dreps, Robert) Modified text on 5/6/2009 (jef). (Entered: 05/05/2009)
12/31/2009	23	Limited Joint Stipulation of the Wisconsin Interscholastic Athletic Association, Gannett Co., Inc., and the Wisconsin Newspaper Association, Inc. by Plaintiff Wisconsin Interscholastic Athletic Association. (Walther, Jennifer) Modified text on 12/31/2009 (jef). (Entered: 12/31/2009)
01/21/2010	26	Stipulation of BACKGROUND FACTS by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc.. (Attachments: # 1 Exhibit A - 2008-2009 Media Policies Reference Guide, # 2 Exhibit B - 2009-2010 Media Policies Reference Guide, # 3 Exhibit C - WIAA contract with VIP, # 4 Exhibit D - WIAA contract with WWWY, # 5 Exhibit E - WIAA contract with WIAA State Network, # 6 Exhibit F - WIAA contract with FSNN, # 7 Exhibit G - WIAA 86th Annual Yearbook (2008-2009) Currently in the production process, will be filed as Exhibit G when it becomes available, # 8 Certificate of Service) (Santa Maria, Monica) (Entered: 01/21/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	27	Motion for Leave to File Amicus Brief and Supporting Declaration. (Attachments: # 1 Exhibit A - Brief of Amicus Curiae Arizona Interscholastic Association, Inc. in Support of Plaintiffs' Motion for Summary Judgment (1-12)) (Neider, Barbara) (Entered: 01/22/2010)
01/22/2010	28	Declaration of Charles C. Schmidt filed by Amicus Arizona Interscholastic Association, Inc. re: 27 Motion for Leave to File Amicus Brief and Supporting Declaration filed by Arizona Interscholastic Association, Inc. (Attachments: # 1 Exhibit A - Media Coverage Policy Arizona Interscholastic Association, # 2 Exhibit B - Article re: internet photos, # 3 Exhibit C - Articles re: internet photos. (Neider, Barbara) Added exhibit descriptions on 1/25/2010 (jef). (Entered: 01/22/2010)
01/22/2010	31	MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA). Brief in Opposition due 2/12/2010. Brief in Reply due 2/22/2010. (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	32	Brief in Support by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	33	Proposed Findings of Fact filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	34	Declaration of Monica Santa Maria filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) IN SUPPORT OF re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - Plaintiff, WIAA's Responses to Defendant Gannett Co., Inc.'s First Set of Requests to Admit, # 2 Exhibit B - Plaintiff, WIAA's Responses to Defendant Gannett Co., Inc.'s First Set of Interrogatories, # 3 Exhibit C - Plaintiff's Expert Report of James L. Hoyt, Ph.D., # 4 Exhibit D - Exhibit C of the Expert Report of James L. Hoyt, Ph.D., # 5 Exhibit E - Affidavit of Todd C. Clark, # 6 Exhibit F - Exhibit 2 of the Affidavit of Todd C. Clark, # 7 Exhibit G - Exhibit 3 of the Affidavit of Todd C. Clark) (Dreps, Robert) Modified on 1/26/2010 (jef). (Entered: 01/22/2010)
01/22/2010	35	Affidavit of Ricardo D. Arguello filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	36	Declaration of Joel Christopher filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) IN SUPPORT OF re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - Screen capture of representative Coverit Live conversation posted on www.postcrescent.com, # 2 Exhibit B - Screen capture of representative Coverit Live conversation posted on www.postcrescent.com, # 3 Exhibit C - DVD of 10-28-08 Football Game between GB Preble v. Appleton North, # 4 Exhibit D - DVD of 11-01-08 Football Game between Appleton North v. Bay Port HS - Part 1, # 5 Exhibit D - DVD of 11-01-08 Football Game between Appleton North v. Bay Port HS - Part 2, # 6 Exhibit E - DVD of 11-08-08 Football Game between Appleton North v. Stevens Point - Part 1, # 7 Exhibit E - DVD of 11-08-08 Football Game between Appleton North v. Stevens Point - Part 2) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	37	Affidavit of Brett C. Christopherson filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	38	Affidavit of Michael Davis filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - Excerpt of live text report of high school football tournament game sponsored by WIAA, # 2 Exhibit B - November 25, 2008 Invoice of a second request for payment from WIAA) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	39	Affidavit of John W. Dye filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - Copies of Green Bay Press Gazette articles from the Brown County Public Library, # 2 Exhibit B - October 29, 2008 Email from Tim Eichorst, # 3 Exhibit C - Online Media Credential Request Form) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	40	Declaration of Robert B. Ebert filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	41	Affidavit of Danny L. Flannery filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	42	Affidavit of James R. Matthews filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	43	Affidavit of David Schmidt filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	44	Declaration of Greg Sprout filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit B - November 25, 2008 Invoice for payment from WIAA) (Dreps, Robert) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	45	Affidavit of Matthew P. Veldran filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - Screen capture of the WIAA home page) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	46	Affidavit of Sherman Williams filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - October 28, 2008 email string) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	47	Affidavit of Michael T. Woods filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Dreps, Robert) (Entered: 01/22/2010)
01/22/2010	49	MOTION FOR SUMMARY JUDGMENT by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association. Brief in Opposition due 2/12/2010. Brief in Reply due 2/22/2010. (Skilton, John) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	50	Brief in Support by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 01/22/2010)
01/22/2010	51	Proposed Findings of Fact filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	52	Affidavit of Autumn N. Nero filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit 1: Materials Relied Upon by Hoyt, # 2 Exhibit 2: 2008-2009 Senior High School Handbook, # 3 Exhibit 3: 2009-2010- Senior High School Handbook, # 4 Exhibit 4: 2008-2009 Media Policies Reference Guide., # 5 Exhibit 5: 2009-2010 Media Policies Reference Guide, # 6 Exhibit 6: May 26, 1989 News Release, # 7 Exhibit 7: Radio and Television Broadcast Rates and Requirement, # 8 Exhibit 8: Exclusive Radio Broadcast Rights, # 9 Exhibit 9: June 21, 2006 Press Release, # 10 Exhibit 10: Big Ten Press Release, # 11 Exhibit 11: 2008-09 Western Collegiate Hockey Association Radio and Television Policies, # 12 Exhibit 12: April 13, 2007 UWBadgers.com site Press Release, # 13 Exhibit 13: Learfield Sports Map, # 14 Exhibit 14: 2007-08 WIAA Annual Yearbook, # 15 Exhibit 15: 2008 payments to the WIAA, # 16 Exhibit 16: 2008-09 WIAA State Tournaments Spreadsheet, # 17 Exhibit 17: InsideBADGERSPORTS.com offerings and pricing, # 18 Exhibit 18: Gannett Interrogatory Responses, # 19 Exhibit 19. WNA Interrogatory Responses, # 20 Exhibit 20: 2008-2009 Senior High School Handbook) (Skilton, John) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	53	Affidavit of Douglas E. Chickering filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit A: 2007-08 WIAA Annual Yearbook, # 2 Exhibit B: WIAA Agreement with Fox Sports, # 3 Exhibit C: WIAA Agreement with WIAA State Network, # 4 Exhibit D: WIAA Agreement with WWWY) (Skilton, John) (Entered: 01/22/2010)
01/22/2010	54	Affidavit of Todd C. Clark filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit 1: 2007-08 WIAA Annual Yearbook, # 2 Exhibit 2: WIAA State Tournaments Spreadsheet, # 3 Exhibit 3: Payments to WIAA, # 4 Exhibit 4: VIP Agreement with WIAA) (Skilton, John) (Entered: 01/22/2010)
01/22/2010	55	Affidavit of Tim Eichorst filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit A: Letters of Intent between WIAA and WWWY, # 2 Exhibit B: WWWY PowerPoint Presentation to WIAA, # 3 Exhibit C: WIAA Agreement with WWWY) (Skilton, John) (Entered: 01/22/2010)

Date Filed	WIWD Docket No.	Docket Text
01/22/2010	56	Affidavit of James L. Hoyt filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit A: Curriculum Vitae) (Skilton, John) (Entered: 01/22/2010)
01/25/2010	58	Exhibit C (DVD of 10/28/08 football game, GB Preble v. Appleton North) to 36 Declaration of Joel Christopher filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) *DVD placed in open files area in clerk's office.* (krj) Modified on 2/5/2010 (llj). (Entered: 01/25/2010)
01/25/2010	59	Exhibit D, Part 1 (DVD of 11/1/08 football game, Appleton North v. Bay Port HS, part 1) to 36 Declaration of Joel Christopher filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) *DVD placed in open files area in clerk's office.* (krj) Modified docket text on 1/25/2010 (krj). Modified on 2/5/2010 (llj). (Entered: 01/25/2010)
01/25/2010	60	Exhibit D, Part 2 (DVD of 11/1/08 football game, Appleton North v. Bay Port HS, part 2) to 36 Declaration of Joel Christopher filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) *DVD placed in open files area in clerk's office.* (krj) Modified on 2/5/2010 (llj). (Entered: 01/25/2010)
01/25/2010	61	Exhibit E, Part 1 (DVD of 11/8/08 football game, Appleton North v. Stevens Point, part 1) to 36 Declaration of Joel Christopher filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) *DVD placed in open files area in clerk's office.* (krj) Modified on 2/5/2010 (llj). (Entered: 01/25/2010)
01/25/2010	62	Exhibit E, Part 2 (DVD of 11/8/08 football game, Appleton North v. Stevens Point, part 2) to 36 Declaration of Joel Christopher filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) *DVD placed in open files area in clerk's office.* (krj) Modified on 2/5/2010 (llj). (Entered: 01/25/2010)

Date Filed	WIWD Docket No.	Docket Text
01/26/2010	63	Expert Report of James L Hoyt Ph.D. by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit A: Materials Considered, # 2 Exhibit B: Curriculum Vita, # 3 Exhibit C: 2008-09 Senior Handbook, # 4 Exhibit D: 2009-10 Senior Handbook, # 5 Exhibit E: 2008-09 Media Policies, # 6 Exhibit F: 2009-10 Media Policies, # 7 Exhibit G: UW Press Release 5/26/89, # 8 Exhibit H: UW Radio & Television Broadcast Rates & Requirements, # 9 Exhibit I: Exclusive Radio Broadcast Rights, # 10 Exhibit J: Big Ten Press Release 6/21/06, # 11 Exhibit K: Big Ten Conference on Television, # 12 Exhibit L: WCHA Radio & Television Policies, # 13 Exhibit M: UW Press Release 4/13/07, # 14 Exhibit N: Learfield Map, # 15 Exhibit O: 2007-08 WIAA Yearbook, # 16 Exhibit P: 2008 Payments to WIAA, # 17 Exhibit Q: 2008-09 WIAA State Tournaments Spreadsheet) (Skilton, John) (Entered: 01/26/2010)
01/26/2010	64	Supplemental Expert Report of James L. Hoyt Ph.D. by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit AA: InsideBadgerSports.com) (Skilton, John) (Entered: 01/26/2010)
01/27/2010	67	Motion for Leave to File Brief of Amicus Curiae. (Attachments: # 1 Brief of Amicus Curiae NFHS) (Quirk, William) (Entered: 01/27/2010)
02/11/2010	68	Stipulated Motion for Protective Order by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association. (Attachments: # 1 Exhibit 1 - Stipulated Protective Order) (Nero, Autumn) (Entered: 02/11/2010)

Date Filed	WIWD Docket No.	Docket Text
02/11/2010	69	Exhibit G - Part 1 WIAA 2008-2009 Yearbook to 26 Stipulation filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association, Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit G - Part 2 WIAA 2008-2009 Yearbook, # 2 Exhibit G - Part 3 WIAA 2008-2009 Yearbook, # 3 Exhibit G - Part 4 WIAA 2008-2009 Yearbook, # 4 Exhibit G - Part 5 WIAA 2008-2009 Yearbook, # 5 Exhibit G - Part 6 WIAA 2008-2009 Yearbook, # 6 Exhibit G - Part 7 WIAA 2008-2009 Yearbook, # 7 Certificate of Service) (Santa Maria, Monica) Modified text on 2/12/2010 (jef). (Entered: 02/11/2010)
02/12/2010	70	** TEXT ONLY ORDER ** ORDER granting 68 Motion for Protective Order; protective order entered. Signed by Magistrate Judge Stephen L. Crocker on 2/12/2010. (llj) (Entered: 02/12/2010)
02/12/2010	72	Motion to Strike Portions of Defendants' Affidavits Supporting Defendants' Motion for Summary Judgment by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association. (Skilton, John) (Entered: 02/12/2010)
02/12/2010	73	Disregard - refiled as # 91 ; Emailed attorney to refile with the date entered on the signature line on 2/16/2010 (jef).(jef). (Entered: 02/12/2010)
02/12/2010	74	Supplemental Proposed Findings of Fact filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Santa Maria, Monica) (Entered: 02/12/2010)

Date Filed	WIWD Docket No.	Docket Text
02/12/2010	75	Response to Proposed Findings of Fact filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Santa Maria, Monica) (Entered: 02/12/2010)
02/12/2010	76	Brief in Opposition by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Santa Maria, Monica) (Entered: 02/12/2010)
02/12/2010	77	Second Declaration of Monica Santa Maria filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) In Support re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A – Plaintiff's Responses to Defs' First Interrogatories) (Santa Maria, Monica) (Entered: 02/12/2010)
02/12/2010	78	Declaration of Mary Bennin Cardona filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - 9-1-05 Letter to D Chickering, # 2 Exhibit B - Affiliate Agreement, # 3 Exhibit C - 10-21-05 Press Release) (Santa Maria, Monica) (Entered: 02/12/2010)

Date Filed	WIWD Docket No.	Docket Text
02/12/2010	79	Second Affidavit of Matthew P. Veldran filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Exhibit A - Pages from 3-28-08 WIAA Bulletin, # 2 Exhibit B - Pages from 3-27-09 WIAA Bulletin, # 3 Exhibit C - Chart of Subsectional, Regional, Sectional & Final Events, # 4 Exhibit D - Chart of Rounds, Levels, Regionals, Sectionals & Finals Events, # 5 Certificate of Service) (Santa Maria, Monica) Certificate of service refiled as #88 on 2/16/2010 (jef). (Entered: 02/12/2010)
02/12/2010	80	Response to Proposed Findings of Fact filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Skilton, John) (Entered: 02/12/2010)
02/12/2010	81	Supplemental Proposed Findings of Fact filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 02/12/2010)
02/12/2010	82	Disregard - refiled as #90; Emailed attorney to refile with a signature on 2/16/2010 (jef). (Entered: 02/12/2010)

Date Filed	WIWD Docket No.	Docket Text
02/12/2010	83	Second Affidavit of Todd C. Clark filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 02/12/2010)
02/12/2010	84	Declaration of Tim Knoeck filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 02/12/2010)

Date Filed	WIWD Docket No.	Docket Text
02/12/2010	85	Declaration of Sarah C. Walkenhorst filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit 1: Article on 10/28/08 game between Green Bay and Appleton North game, # 2 Exhibit 2: Article on 10/28/08 game between New London and Waupaca, # 3 Exhibit 3: Article on 11/1/08 game between Appleton North and Bay Port, # 4 Exhibit 4: Article on 11/1/08 games between Appleton North and Stevens Point, and Kimberly and Kaukauna, # 5 Exhibit 5: Article on 11/1/08 game between Port Washington and West DePere, # 6 Exhibit 6: Article on 11/1/08 games between Oshkosh North and Kimberly, and Hartland and Oshkosh West, # 7 Exhibit 7: Article on 11/1/08 games between Oshkosh north and Kimberly, # 8 Exhibit 8: Printouts from postcrescent.com, # 9 Exhibit 9: Printouts from jsonline.com, # 10 Exhibit 10: Printouts from thenorthwestern.com, # 11 Exhibit 11: Printouts from greenbaypressgazette.com, # 12 Exhibit 12: Printouts from postcrescent.com, # 13 Exhibit 13: 11/3/09 Knoeck email with Nicksic, # 14 Exhibit 14: 10/20/09 Knoeck email chain with Nicksic , # 15 Exhibit 15: 11/30/09 Knoeck email with Schreiner, # 16 Exhibit 16: 11/10/09 Knoeck email with Fink, # 17 Exhibit 17: Excerpts of Gannett 2008 Annual Report, # 18 Exhibit 18: 09/20/08 Greenbay Gazette printout) (Skilton, John) (Entered: 02/12/2010)

Date Filed	WIWD Docket No.	Docket Text
02/12/2010	86	Brief in Opposition by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Skilton, John) (Entered: 02/12/2010)
02/16/2010	89	Brief in Opposition by Defendant Gannett Co., Inc., Counter Claimant Gannett Co., Inc. re: 27 Motion for Leave to File Amicus Brief and Supporting Declaration filed by Arizona Interscholastic Association, Inc., 67 Motion for Leave to File Brief of Amicus Curiae filed by National Federation of State High School Associations Defendants' Brief in Opposition to Motions of AIA and NFHS for Leave to File Amicus Curiae Briefs (Attachments: # 1 Certificate of Service) (Dreps, Robert) (Entered: 02/16/2010)
02/16/2010	90	Second Declaration of Tim Eichorst filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Sealed Document) (Attachments: # 1 Exhibit D: WWWY Profit and Loss) (Skilton, John) (Entered: 02/16/2010)
02/16/2010	91	Brief in Support by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 72 Motion to Strike Portions of Defendants' Affidavits Supporting Defendants' Motion for Summary Judgment filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 02/16/2010)

Date Filed	WIWD Docket No.	Docket Text
02/16/2010	92	Brief in Support by Plaintiff Wisconsin Interscholastic Athletic Association re: 67 Motion for Leave to File Brief of Amicus Curiae filed by National Federation of State High School Associations, 27 Motion for Leave to File Amicus Brief and Supporting Declaration filed by Arizona Interscholastic Association, Inc. (Walther, Jennifer) (Entered: 02/16/2010)
02/18/2010	94	ORDER granting 27 motion for leave to file an amicus brief; granting 67 motion for leave to file an amicus brief. Responsive briefs due 3/5/10. Signed by Chief Judge Barbara B. Crabb on 2/18/10. (krj) (Entered: 02/18/2010)
02/18/2010	95	Brief in Support by Amicus Arizona Interscholastic Association, Inc. re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Neider, Barbara) (Entered: 02/18/2010)
02/18/2010	96	Declaration of Charles C. Schmidt filed by Amicus Arizona Interscholastic Association, Inc. re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit A - AIA media coverage policy, # 2 Exhibit B - Internet article re: high school athlete photos, # 3 Exhibit C - Internet articles re: high school athlete photos) (Neider, Barbara) Added exhibit descriptions on 2/19/2010 (jef). (Entered: 02/18/2010)
02/22/2010	98	Second Motion to Strike Portions of the 78 Cardona Declaration by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association. (Skilton, John) Modified text to match document title on 2/23/2010 (jef). (Entered: 02/22/2010)

Date Filed	WIWD Docket No.	Docket Text
02/22/2010	99	Brief in Support by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 98 Motion to Strike 78 Declaration, Portions of the Cardona Declaration filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 02/22/2010)
02/22/2010	100	Brief in Opposition by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 72 Motion to Strike Portions of Defendants' Affidavits Supporting Defendants' Motion for Summary Judgment filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Santa Maria, Monica) (Entered: 02/22/2010)
02/22/2010	101	Reply in Support of Proposed Findings of Fact filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Sealed Document) (Santa Maria, Monica) (Entered: 02/22/2010)
02/22/2010	102	Response to Proposed Findings of Fact filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association to Plaintiffs' Additional Proposed Findings of Fact (Sealed Document) (Santa Maria, Monica) (Entered: 02/22/2010)

Date Filed	WIWD Docket No.	Docket Text
02/22/2010	103	Response to Proposed Findings of Fact filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Skilton, John) (Entered: 02/22/2010)
02/22/2010	104	Third Declaration of Monica Santa Maria filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) In Support re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Sealed Document) (Attachments: # 1 Exhibit A - Ex B of Pltf Am-HiFi's Resps to Def Gannetts First Set of Reqs for Interrogatories - Profit & Loss Prev Year Comp, # 2 Exhibit B - Excerpts of 2008 Gannett AR, # 3 Exhibit C - Ext A of Pltf Am-HiFi's Resps to Def Gannetts First Set of Reqs for Interrogatories - WIAA rights-fee invoices) (Santa Maria, Monica) (Entered: 02/22/2010)
02/22/2010	105	Third Declaration of Todd C. Clark filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit 5: Excerpt of 2003-04 Media Policies Reference Guide) (Skilton, John) (Entered: 02/22/2010)

Date Filed	WIWD Docket No.	Docket Text
02/22/2010	106	Declaration of John W. Dye filed by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA), Counter Claimants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Santa Maria, Monica) (Entered: 02/22/2010)
02/22/2010	107	Brief in Reply in Support re: 31 MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM filed by Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) (Attachments: # 1 Certificate of Service) (Santa Maria, Monica) (Entered: 02/22/2010)
02/22/2010	108	Reply in Support of Proposed Findings of Fact filed by Plaintiffs Wisconsin Interscholastic Athletic Association, American-HIFI, Inc., Counter Defendant Wisconsin Interscholastic Athletic Association re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 02/22/2010)
02/22/2010	109	Brief in Reply in Support re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Skilton, John) (Entered: 02/22/2010)
03/01/2010	111	Brief in Support by Amicus National Federation of State High School Associations 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Exhibit A - Affidavit of Robert F. Kanaby) (Quirk, William) Emailed attorney to file affidavit separately on 3/2/2010 (jef). (Entered: 03/01/2010)

Date Filed	WIWD Docket No.	Docket Text
03/01/2010	112	Brief in Opposition by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 98 Motion to Strike 78 Declaration,, Portions of the Cardona Declaration Motion to Strike 78 Declaration,, Portions of the Cardona Declaration filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Certificate of Service) (Santa Maria, Monica) (Entered: 03/01/2010)
03/05/2010	114	Affidavit of Robert F. Kanaby re 111 Brief in Support by Amicus National Federation of State High School Associations, re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association. (Bonuchi, Anthony) Created link to #49 motion on 3/5/2010 (Friedl, Joanne). (Entered: 03/05/2010)
03/05/2010	115	Brief in Opposition Re Response to the 95 AIA's and 111 NFHS' Amicus Curiae Briefs by Defendants Gannett Co., Inc., Wisconsin Newspaper Association, Inc. (WNA) re: 49 MOTION FOR SUMMARY JUDGMENT filed by American-HIFI, Inc., Wisconsin Interscholastic Athletic Association (Attachments: # 1 Certificate of Service) (Santa Maria, Monica) Modified text on 3/8/2010 (Friedl, Joanne). (Entered: 03/05/2010)
06/03/2010	117	ORDER denying 31 Motion for Summary Judgment filed by defendants; granting 49 Motion for Summary Judgment filed by plaintiffs; denying as unnecessary 72 Motion to Strike; denying as unnecessary 98 Motion to Strike; declaring that American Hi-Fi's license with WIAA for streaming events over internet does not violate first or fourteenth amendments; declaring that plaintiffs do not violate defendants' rights under under free press clause by charging fee for streaming games over internet or failing to include more specific standards; declaring that defendants have not acquired copyright with respect to four tournament games streamed without plaintiffs' permission in 2008. Signed by District Judge William M. Conley on 6/3/10. (krj) (Entered: 06/03/2010)

Date Filed	WIWD Docket No.	Docket Text
06/09/2010	118	JUDGMENT entered granting plaintiffs' motion for summary judgment for declaratory relief. (WMC / PAO). Signed by Peter A. Oppeneer, Clerk of Court on 6/9/10. (krj) Modified docket text on 6/15/2010 (krj). (Entered: 06/09/2010)

Dated: July 20, 2010.

s/ Robert J. Dreps

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I hereby certify that on the 20th day of July, 2010, true and correct copies of the following documents:

- GANNETT CO., INC. and WISCONSIN NEWSPAPER ASSOCIATION's DESIGNATION OF RECORD; AND
- SEVENTH CIRCUIT TRANSCRIPT INFORMATION SHEET.

were filed with the Clerk of the Court using the CM/ECF filing system which will send notification of such filing to the ECF participants for this case.

I further certify that a hard copy of the above-named documents were mailed via U.S. Mail to the following parties to the appeal:

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s/ Jacqueline M. Schwartz
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