

**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.

FIRST AMENDED COMPLAINT

Plaintiffs Wisconsin Interscholastic Athletic Association (“WIAA”) and American-HiFi, Inc. by and through their attorneys submit the following amended complaint for declaratory and other relief against Defendants Gannett Co., Inc. (“Gannett”) and Wisconsin Newspaper Association, Inc. (“WNA”) as follows:

INTRODUCTION

1. The WIAA organizes and sponsors statewide high school athletics tournaments that attract widespread public interest and media attention in Wisconsin and that play an important role in many participants’ athletic experience. Along with policies governing spectator and participant activities during these tournaments, the WIAA issues media guidelines in order to protect athletes, ensure smooth operation of the tournaments, and generate revenues through licensing. As a voluntary association, the WIAA largely depends upon revenue generated from its tournament events, including licensing the rights to broadcast or transmit these tournament games, in order to fund its operations and organize these tournaments.

2. Defendants in this action seek the absolute right to stream live action of WIAA-sponsored tournament games over the Internet and, subsequently, to post these WIAA-sponsored games on their websites, without obtaining a license or otherwise complying with the WIAA's media policies. Defendants have indicated that they will pursue legal action to protect what they believe to be their rights if the WIAA does not change its licensing policy.

3. In response to the threat of litigation, WIAA filed a declaratory judgment action in state court. Defendants removed the action to this Court and filed counterclaims seeking declaratory and injunctive relief against the WIAA's licensing and media policies. The WIAA has filed this amended complaint in order to focus the litigation on the only actual federal controversy. Accordingly, WIAA seeks a declaration that the WIAA has control over the right to transmit WIAA-sponsored tournament games, whether live or delayed, and that the WIAA has the right to grant an exclusive or non-exclusive license to transmit WIAA-sponsored tournament games and to otherwise require compliance with WIAA's reasonable media policies.

PARTIES

4. WIAA is a nonprofit, voluntary and unincorporated association with its principal place of business at 5516 Vern Holmes Drive, Stevens Point, Wisconsin 54481. Its members include public and private senior high schools, public and private middle and junior schools, statewide schools, specialty schools, and religious and independent schools in the State of Wisconsin. WIAA organizes and directs interscholastic athletic competitions and programs for the benefit of its members, the participating students, and the community and public at large.

5. American-HiFi is a Wisconsin corporation with its principal place of business at 501 Moravian Valley Road, Waunakee, WI 53597, and does business in part as When We Were Young Productions (WWWY). WWWWY has signed an agreement with WIAA to produce and

distribute WIAA-sponsored tournament events, including live streaming of tournament games over the Internet. WWY has been joined in this action as a necessary party in light of its interest in the subject of the litigation. *See* Exh. A.

6. WNA is a non-stock organization organized in the state of Wisconsin, with its principal place of business at 1901 Fish Hatchery Road, P.O. Box 259837, Madison, WI 53725-9837. 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.

7. Gannett is a Delaware corporation with its principal place of business at 7950 Jones Branch Drive, McLean, VA 22107. Gannett publishes newspapers across the United States, including 10 daily newspapers in Wisconsin and approximately 19 non-daily newspapers. Many of these newspapers frequently report on Wisconsin high school athletics, including WIAA-sponsored tournaments.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over WIAA's declaratory judgment claim pursuant to 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. Through their attorneys, Defendants have written the WIAA claiming such a right under the United States Constitution. *See* Exhs. B & C. Furthermore, Defendants have filed counterclaims in this Court seeking relief under the United States Constitution and various federal statutes, including 42 U.S.C. § 1983. 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.

9. As described in this Complaint, 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. Defendants' threatened claims and actually asserted counterclaims allegedly arise under federal law, giving this Court the authority to declare the rights and legal relations of the parties.

10. 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.

11. 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.

STATEMENT OF FACTS

The WIAA and WIAA-Sponsored Athletics Tournaments

12. The WIAA seeks to organize, develop, promote, and administer an interscholastic athletic program in Wisconsin for the benefit of its member schools, the student athletes, local communities, and the public at large. To that end, the WIAA organizes regional, sectional, and state athletics tournaments for a wide variety of sports. The WIAA also publishes policies governing these competitions that seek to promote sportsmanship, protect athletes against exploitation, create opportunities for participation, and provide consistent standards for athletes, spectators, and the media.

13. The vast majority of public and private high schools in Wisconsin voluntarily belong to the WIAA and participate in many of its 25 separate athletics tournaments. Each of these tournaments provides important opportunities for participating athletes and generates significant interest among some members of the public, whether because of their relationship to participants or their general interest as spectators in the entertainment value of athletic competition. In particular, WIAA-sponsored football, basketball, and hockey tournaments generate widespread public interest and media attention throughout the state.

14. The organization, administration, and promotion of this athletics program requires significant funding. Although member dues provide some WIAA funding, revenue generated at WIAA-sponsored state tournaments through ticket sales and licensing fees constitutes the vast majority of the WIAA's annual budget. WIAA-sponsored football, basketball, and hockey tournaments play an especially important role in generating revenue: the widespread interest in these three tournaments generates significant gate receipts through public attendance, and the audience for media broadcasts of these three tournaments permits the WIAA to generate revenue through license fees on broadcasts of those games. Revenue from these three sports constitutes the majority of the WIAA's annual revenue stream.

15. Revenue received from these tournaments is used to fund WIAA operations, including the administration and organization of all 25 state tournaments and the leasing of facilities needed to hold the tournaments. The WIAA also transfers a portion of its tournament revenue to host schools who provide facilities or other necessities for certain phases of each tournament.

16. The WIAA has expended significant time, energy, and resources in developing, organizing, administrating, and promoting its WIAA-sponsored tournament events since 1896, or

more than one hundred years. Through consistent administration and promotion, including numerous awards ceremonies, publications, and other promotional opportunities surrounding the tournaments, as well as through the development of rigorous standards for athletics, spectators, and the media, WIAA-sponsored tournaments have grown into popular and successful events. WIAA-sponsored tournaments now involve thousands of student athletes and draw more than a million total paying spectators, in addition to the large number of spectators who view or listen to transmissions of tournament events.

17. The WIAA operates independently of the state Department of Public Instruction, and the WIAA does not remit tournament revenue to the DPI or any state general revenue fund.

18. In order to facilitate administration and control of tournaments and promote sportsmanship among coaches, athletes, cheerleaders, and fans, the WIAA publishes spectator and crowd conduct policies prohibiting offensive banners, excessively loud noisemakers, alcohol and tobacco products, and other potentially disruptive items or behaviors. Spectators and participants are expected to abide by these policies as a condition of entry or participation. *See* Exh. D.

19. Spectators may record live action from their seats on personal recording devices but may not make any commercial use of a recording without written consent of the WIAA.

WIAA's Media Policies

20. The WIAA has also published policies governing the coverage of WIAA-sponsored tournament games by the media, including newspapers, television, radio, and Internet-based media. These policies apply as appropriate to regional, sectional and state WIAA-sponsored tournament games but do not apply to other competitions, including regular season games held at member schools. *See* Exhs. D & E.

21. The WIAA's media policies govern a range of topics including, *inter alia*, the issuance of credentials and parking permits, the provision of communication lines (such as telephone lines, high-speed lines and wireless connections), potential interference with spectator viewing, and availability for post-game interviews. These policies generally apply to all credentialed media reporting from the tournament games, though members of the media may also attend any game as a member of the general public, subject to the same policies as the general public.

22. The WIAA permits any member of the media to report on any tournament event. Such reporting may include use of up to two minutes of taped footage of any tournament event. However, members of the media who seek to transmit the event itself, whether live or tape delayed, must obtain a license from the WIAA or one of its contractual partners, such as WWVY, and, if granted, must pay a reasonable license fee and agree to abide by WIAA broadcast and media policies.

23. As with other forms of transmission and broadcast, the WIAA requires media outlets seeking to stream live tournament action over the Internet, whether instantaneously or in delayed form, to obtain a license and pay a license fee. Media personnel may request this permission from WIAA's contractual partner WWVY, and as a condition of the license, must pay the requisite license fee and agree to abide by WIAA's media policies.

24. WWVY has provided substantial consideration to WIAA in exchange for its rights over Internet streaming of WIAA-sponsored tournaments and has agreed to provide Internet coverage for tournament events from all 25 WIAA-sponsored tournaments.

25. Fees generated through the granting of transmission and broadcast licenses, including over the Internet, serve the important purpose of generating revenue for the WIAA.

The WIAA's media policies also serve other important functions, including ensuring the smooth operation of the tournament, protecting participants from unauthorized commercialization and unwanted association with inappropriate advertising, and promoting the transmission and broadcast of all WIAA tournaments in addition to the most popular sports.

26. WIAA's media policies do not restrict the ability of Defendants to report on the games in their newspapers or on their Internet sites. Defendants may report the outcome of the games, describe events that occur during the games, and provide the public with any factual information relating to the games, so long as that "report" does not include live play-by-play coverage or transmission of live game action, including through Internet streaming. Defendants may also use any photographs taken at the games as part of their reporting.

27. Under WIAA's media policies, the public has had access to multiple sources of information about WIAA-sponsored tournament events, including television broadcasts, radio broadcasts, live Internet streaming, newspaper reporting, and other sources.

28. WIAA believes that its policy of requiring those who wish to transmit WIAA-sponsored tournament action over the Internet to request a license and to comply with WIAA's media policies is necessary in order to protect its revenue sources, including both direct revenue from Internet transmission licenses and the value of its television and radio licenses. Defendants' unlicensed transmission of WIAA-sponsored tournament action would compete directly with the transmission of WIAA's licensees and would lessen the value of all of WIAA's broadcast and transmission licenses, including Internet, television and radio licenses.

The Current Dispute

29. On October 31, 2008, shortly before the WIAA-sponsored state football tournament began, WNA informed WIAA through WNA's attorneys that WNA rejected

WIAA's media policies and its arrangement with WWY, citing constitutional objections. *See* Exh. B.

30. On November 8, 2008, the Appleton Post-Crescent, a newspaper owned by Gannett and a member of WNA, live streamed a WIAA-sponsored tournament game between Appleton North High School and Stevens Point Senior High School without permission of the WIAA or WWY. On information and belief, the Appleton Post-Crescent streamed at least three other WIAA-sponsored high school football tournament games in October and November 2008 without permission of the WIAA or WWY. On information and belief, the Athletic Directors of the host schools were unaware of this streaming activity.

31. On information and belief, Gannett requested permission to stream additional WIAA-sponsored tournament games in November 2008. On information and belief, Gannett was told that they would be able to stream those games upon payment of the rights fee and agreement to abide by WIAA media policies. Gannett did not agree to those terms.

32. Subsequent letters from WNA's attorneys indicated that the legal dispute remained unresolved, and that WNA would not agree to abide by WIAA's current media policies or arrangement with WWY. WIAA therefore filed this declaratory judgment action to clarify the legal rights of the two parties.

CLAIM FOR RELIEF

(Declaratory Relief)

33. WIAA incorporates Paragraphs 1 through 32 as if fully set forth here.

34. WIAA contends that it may require Defendants to obtain a license in order to transmit game action from WIAA-sponsored tournament 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.

35. WIAA has the right to control the transmission of its WIAA-sponsored tournament games over the Internet, whether live or tape delayed, through its licensing requirement, including the payment of a reasonable license fee and compliance with reasonable media policies. The WIAA organizes, administers, promotes and controls the tournaments at issue, and the WIAA depends heavily on the revenue generated by these tournaments through gate receipts, license fees, and the value of the broadcasting contracts entered into with its broadcasting partners. As a voluntary organization, WIAA also has the right to ensure that its tournaments function smoothly and that its member schools and participating athletes are protected against commercial exploitation or other potential consequences of unlicensed broadcasts. Furthermore, WIAA's media policies do not restrict the ability of the Defendants to report on WIAA-sponsored tournaments.

36. Pursuant to the federal declaratory judgment statute, this Court should declare: (1) that the WIAA controls the right to transmit WIAA-sponsored tournament games over the Internet; (2) that the WIAA has the right to grant an exclusive or non-exclusive license to transmit WIAA-sponsored tournament games; (3) that the WIAA may require payment of a licensing fee and compliance with the WIAA's media policies as a condition of any license to transmit WIAA-sponsored tournament games; and (4) that WIAA's current policies concerning the Internet transmission of its WIAA-sponsored tournament games do not violate Defendants' rights under the First or Fourteenth Amendments to the United States Constitution, or any other Constitutional, statutory, or other legal doctrine.

PRAYER FOR RELIEF

37. **WHEREFORE**, WIAA requests that the Court:

A. Declare (1) that the WIAA controls the right to transmit WIAA-sponsored tournament games over the Internet; (2) that the WIAA has the right to grant an exclusive or non-exclusive license to transmit WIAA-sponsored tournament games; (3) that the WIAA may require payment of a licensing fee and compliance with the WIAA's media policies as a condition of any license to transmit WIAA-sponsored tournament games; and (4) that WIAA's current policies concerning the Internet transmission of its WIAA-sponsored tournament games do not violate Defendants' rights under the First or Fourteenth Amendments to the United States Constitution, or any other Constitutional, statutory, or other legal doctrine.

B. Award WIAA reasonable fees, costs and expenses incurred herein; and

C. Award WIAA all other relief the Court deems just and equitable.

Dated this 13th day of April, 2009.

Respectfully submitted,

PERKINS COIE, LLP

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*Attorneys for the Plaintiffs Wisconsin
Interscholastic Athletic Association*

EXHIBIT A



Production Rights and Distribution Agreement between the Wisconsin Interscholastic Athletic Association (WIAA) and American-HiFi, Inc. dba When We Were Young Productions (WWWYP)

General Terms of Agreement

I. RIGHTS

- (a) American-HiFi/When We Were Young Productions will be granted 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. These rights also include the existing WIAA film library housed in Stevens Point.
- (b) American-HiFi/When We Were Young Productions will be granted the joint right to produce, sell, and distribute, on a delayed basis, all WIAA tournament series and championship events for all WIAA sports under an existing contract as of the date of this contract. These joint rights require approval from both the WIAA and the existing contract holder as of the date of this contract.
- c. American-HiFi/When We Were Young Productions will be granted the right to market this partnership and to use the WIAA trademark, logo, and name to promote these efforts.
- d. American-HiFi/When We Were Young Productions will be granted the right to establish an online property containing the name WIAA for use of marketing and distributing WIAA tournament series and championship content.
- e. American-HiFi/When We Were Young Productions will be granted the right to legally enforce any violation of these production, sale, and distribution rights by a third party.
- f. American-HiFi/When We Were Young Productions will be granted the right to authorize affiliate production partners for the production of WIAA tournament series and championship events.

II. CONTENT PRODUCTION

- a. 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
- b. Event production will vary and may include any of the following:
 - i. Single camera high location
 - ii. Single camera low location
 - iii. Multiple camera mixed
 - iv. Special edit

Production enhancements may include play-by-play commentary, slow motion replay, and special graphics. Each event strategy will be spelled out in advance and budgeted out as noted in the Revenue section of this contract.

- (c) American-HiFi/When We Were Young Productions will act as an agent of the WIAA in the event that a third party expresses interest in the production, sale, or distribution of any WIAA tournament series or championship event that American-HiFi/When We Were Young Productions holds rights to.

- d. American-HiFi/When We Were Young Productions will agree to actively seek out and affiliate all qualified production resources that have a history of producing WIAA tournament series or championship events.
- ✓ e. American-HiFi/When We Were Young Productions will agree to actively involve local student resources in our production efforts, whether directly by us or through an affiliate, to ensure educational and cooperative benefits for the individual students and their schools.

III. CONTENT DISTRIBUTION

- a. American-HiFi/When We Were Young Productions will agree to establish a multi-platform distribution strategy and will agree to directly distribute or contract with a distribution agent for all WIAA tournament series and championship events. These agreements would include live production, live or delayed streaming, video on demand, tape delayed production, and physical media. Examples of distribution platforms are as follows:
 - i. Internet based video on demand (web streaming)
 - ii. DSL/Broadband based video on demand
 - iii. Cable based video on demand
 - iv. Satellite based video on demand
 - v. Cable (live or delayed)
 - vi. Satellite (live or delayed)
 - vii. Network (live or delayed)
 - viii. Physical Media
- Ⓛ The WIAA will reserve the right to review, modify, or reject any terms of these distribution agreements, which do not support the purpose and mission of the WIAA and our mutual partnership.

IV. SPONSORSHIPS

- a. American-HiFi/When We Were Young Productions will be granted the right to solicit and contract with sponsors that adhere to the WIAA guidelines as published.
- b. American-HiFi/When We Were Young Productions will be granted the right to place and promote these sponsors on all forms of content distribution and market them as joint WIAA and WWWYP sponsors.

V. REVENUE

- a. American-HiFi/When We Were Young Productions agrees to pay the WIAA a rights fee based on the following formula:
 - i. WWWYP will establish a tournament/event production cost that encompasses all business related expenses to produce the tournament or event.
 - ii. WWWYP 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 WWWYP 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 WWWYP.
- b. The WIAA shall be the sole overseer of any funds distribution (if any) to participating schools.
- c. American-HiFi/When We Were Young Productions will be responsible for the collection and clearing of revenues generated for content distribution.

when we were
young
PRODUCTIONS

- d. Monthly status reports will be delivered to the WIAA. Collected funds will be distributed to the WIAA on a monthly basis.
- e. All revenues generated by solicitation of sponsor contracts will be split 30% to the WIAA and 70% to WWWYP. Funds will be distributed immediately upon collection.

VI. MISCELLANEAUS

- a. American-HiFi/When We Were Young Productions will agree to provide video production resources to the WIAA upon request and at no additional cost to the WIAA. These would include:
 - i. Taping and duplication of WIAA meetings and corporate events
 - ii. WIAA promotional videos
 - iii. Tournament highlight trailers
 - iv. Video board content
- b. The WIAA will agree to provide free advertising in all tournament materials and verbally promote our partnership and products at all venues and the WIAA website.
- c. The WIAA will agree to provide preferred credentials and access to American-HiFi/When We Were Young Productions at all WIAA tournament series and championship events and venues.
- d. The term of this agreement will be for 10 years from the date of signing.

Please signify your acceptance of these General Terms of Agreement by signing below.

Acknowledged and agreed:

By: TEA Date: 5/26/05
Tim Eichorst
President
American-HiFi/
When We Were Young Productions

BY: Doug Chickering Date: 4-26-05
Doug Chickering
Executive Director
WIAA

EXHIBIT B

October 31, 2008

**BY FACSIMILE 715-344-4241
AND U.S. MAIL**

Douglas E. Chickering, Executive Director
Wisconsin Interscholastic Athletic Association
P.O. Box 267
Stevens Point, WI 54481-0267

RE: Internet Streaming Policies

Dear Mr. Chickering:

We represent the Wisconsin Newspaper Association ("WNA") and its members. We are writing on their behalf to demand that the Wisconsin Interscholastic Athletic Association ("WIAA") rescind its media policies on internet streaming of state high school tournament events. Those policies purport to grant a private company, When We Were Young Productions ("WWWY"), the exclusive right to control internet streaming of tournament events. That policy is unconstitutional on its face and as applied.

As you know, the WIAA's claimed right to control the news media's use of photographs taken at tournament events first came to the WNA's attention in 2007. The WNA protested at that time the following provision of the WIAA's Media Policy Reference Guide:

Photographs taken with the authoritative use of the media
credential by newsgathering media outlets are strictly for editorial,
non-commercial use only.

Based on this policy, the WIAA claimed the right to prohibit newspapers from selling photographs taken at tournament events. Indeed, the WIAA claimed it had granted WWWY the exclusive right to do so.

Responding to the WNA's objection, the WIAA first clarified that its policy and exclusive contract with WWWY did not prohibit the sale of photographs that newspapers had published in print. When this did not satisfy the WNA, many of whose members sell photographs published on their internet web sites, the WIAA wisely decided not to enforce its stated policy. Speaking at the WNA's conference that summer, you said the WIAA preferred to see how a similar dispute was resolved in our neighboring state of Illinois, where it was already in litigation, and where the news media's position ultimately prevailed.

Douglas E. Chickering, Executive Director
October 31, 2008
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A similar dispute has now arisen over the WIAA's claimed right to prohibit any live coverage of tournament events by internet streaming, except through its "exclusive" contractor, WWVY. This claim is asserted, without reference to any supporting legal authority, in the WIAA's media guide:

The WIAA owns the rights to transmit, upload, stream or display content live during WIAA events and reserves the right to grant exclusive and non-exclusive rights or not grant those rights on an event-by-event basis.

Worse, the media guide indicates that WWVY has been given the exclusive authority to control, at its sole discretion and without any apparent standards, any live internet streaming of tournament events.

#All parties interested in the production and distribution of any State Tournament or State Tournament Series event via broadcast or internet streaming will be required to obtain rights from current production and distribution rights holder as outlined above.

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

WWVY has informed WNA members of the fees and conditions under which it would permit live streaming of tournament events:

If an entity wants to produce and stream (on its own) a WIAA tournament event, whether live or delayed on its web portal, the fees are as follows:

\$250 -- for a single-camera (with talent) production
\$1500 -- for a multi-camera (with talent) production

The entity must also send us a master copy of the game and is prohibited from selling copies of the game to anyone.

Douglas E. Chickering, Executive Director
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WWWY will produce a master DVD from the tape (that is sent) and market the product on prepfilms.com of which the entity will receive a 20% royalty on gross sales.

Thus, it appears that the WIAA has not only granted WWWY the "sole discretion" to charge whatever it wants to WNA members seeking to utilize internet streaming technology to report on tournament events, but also to demand the right to market their work and retain 80% of any revenue generated. This is patently unconstitutional.

State high school sports tournaments are public, taxpayer-supported events. As such, neither the host schools nor the WIAA has any right to discriminate between members of the news media who wish to report on the events, using whatever technology they choose, subject only to reasonable and non-discriminatory time, place and manner restrictions. Granting exclusive live coverage rights to one news organization, where there are no physical constraints that would prohibit accommodating all news organizations who care to use live streaming technology to report the event, serves no compelling government interest and is not a reasonable time, place and manner restriction.

High school athletic organizations have long been treated as state actors, just like their public school members, for constitutional purposes. See *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S.288 (2001). Although the issue has not yet been decided in Wisconsin, we see no factual or legal basis on which the WIAA's constitutional status can be distinguished from its counterparts in Tennessee, Illinois, Arizona, Missouri, Louisiana, Oklahoma, Indiana, Mississippi, Rhode Island or Pennsylvania, see *id.* at 294 n.1, or any of the other states where the issue has been adjudicated since *Brentwood* was decided. See, e.g., *Communities for Equity v. Michigan High School Athletic Association*, 459 F.3d 676 (6th Cir. 2006); *Christian Heritage Academy v. Oklahoma Secondary School Activities Association*, 483 F.3d 1025 (10th Cir. 2007).

The WIAA lacks the authority, as a state actor, to deny the WNA's members the right to utilize internet streaming technology to report on state high school tournament events on an equal basis with WWWY. See, e.g., *American Broadcasting Companies, Inc. v. Cuomo*, 570 F.2d 1080, 1084 (2nd Cir. 1977) ("[O]nce there is a public function, public comment and participation by some of the media, the First Amendment requires equal access to all of the media."). The WNA does not object to reasonable fees paid to host schools to cover their costs of producing the events, including any costs specifically incurred to facilitate internet streaming coverage. To require them to pay fees to a competing news organization and relinquish ownership of their work product, however, is plainly unconstitutional.

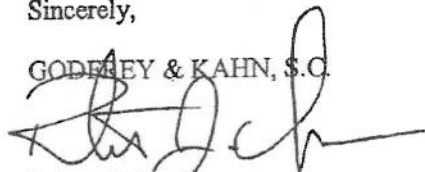
State high school athletic competitions have been part of newspapers' core coverage since before broadcast and internet technology even existed. The WNA's members will not meekly surrender their right to use internet streaming technology to enhance their reporting on

Douglas E. Chickering, Executive Director
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these events: The WNA and its members would welcome a constructive dialogue with the WIAA and its counsel on these issues, and would prefer to avoid litigation, but they will not accept the status quo as set forth in the WIAA's media guide. Please let us know before November 7, 2008, when the next round of the high school football tournament begins, if the WIAA is interested in meeting to discuss resolution of this dispute.

Sincerely,

GODFREY & KAHN, S.C.

A handwritten signature in black ink, appearing to read "R. Dreps", written over the printed name.

Robert J. Dreps

RJD:jlm
3294093_1

EXHIBIT C

November 19, 2008

608 284-2606

**BY FAX (715) 344-1012 AND
U.S. MAIL.**

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

RE: WIAA Internet Streaming Policy

Dear Mr. O'Brien:

Thank you for your November 5, 2008 letter concerning the WNA's objections to the WIAA's internet streaming policy. We have addressed your legal analysis below but wanted first to respond to Mr. Chickering's expressed disappointment with the WNA's approach to this dispute.

The WNA engaged counsel to outline its legal position, before requesting a meeting, to help ensure that any meeting between the parties is productive. The WIAA's claimed right to forbid newspapers from selling photographs taken with media credentials at tournament events or using internet streaming in their reporting of those events, while claiming the authority to grant private companies the exclusive right to do so, raises serious constitutional issues that warrant careful analysis in advance of any meeting. We disagree that the WNA's approach to this dispute is in any way inconsistent with our respective clients' "past practice of a cooperative effort to resolve these various issues," as your letter suggests.

We also must respectfully disagree that those past cooperative efforts have "resolve[d]" anything. While the WNA certainly appreciates the WIAA's decision not to enforce its photography policy, it has not been abandoned. The no-sale policy is still included in the WIAA's media guide and the credentials issued to journalists at tournament events and the WNA will not consider this dispute resolved until it is dropped.

The WIAA now has asserted the authority to award exclusive rights to utilize internet streaming to report tournament events. This practice not only discriminates against the news media, in favor of the WIAA's "exclusive rights partner," WWVY, but it deprives the public whose tax dollars principally fund these events the opportunity to enjoy live coverage when they cannot attend. The WNA has concluded the time has come to challenge and, if necessary, test in

Gerald M. O'Brien
November 19, 2008
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court the WIAA's authority to grant exclusive coverage rights, lest its members' constitutional rights to equal reporting opportunities at these public events continue to erode.

Turning, then, to your legal analysis, we note at the outset that your letter suggests no basis for distinguishing the WIAA from any of the other state high school athletic associations that the courts have held are state actors for constitutional purposes, nor have you identified any court that has found a state athletic association to be a private actor. Accordingly, we will assume for the purposes of our analysis that the WIAA is a state actor subject to the limitations of the First and Fourteenth Amendments.

We agree with the WIAA's position that the news media can be subjected to reasonable time, place and manner restrictions under the First Amendment forum analysis applied in *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45-46 (1983). Yet, the holding in *Perry* does not support the WIAA's position because the expressive activity the WIAA's members wish to pursue is perfectly consistent with the forum's purpose. Indeed, the stadiums at which the state high school football tournament is being held contain facilities specially designed to facilitate and encourage news media coverage of the games. We contend the WIAA's members are entitled to equal access to utilize those facilities, and whatever technology they choose, for their reporting.

The WIAA's internet streaming policy cannot be justified, moreover, as a time, place and manner restriction because it is not applied equally. The WIAA and its members have, in effect, created a forum for news coverage of high school athletic events in which all journalists have an equal right to participate. The WIAA is not claiming, and need not prove, that athletic contests constitute expressive activity, as your letter contends. Rather, the contests are newsworthy, public events, to which the WIAA must permit equal access for all journalists, subject only to reasonable time, place and manner restrictions. Your letter does not contend, and the WIAA cannot prove, that there are any physical constraints that would preclude multiple news organizations from providing live coverage of athletic events over the internet. The WIAA's established policy to prohibit that means of coverage to journalists who refuse to surrender their work product and copyright to a competitor is unreasonable and unconstitutional. It is telling, in this regard, that your letter fails to address the WIAA's reliance on the holding in *American Broadcasting Cos., Inc. v. Cuomo*, 5170 F.2d 1080, 1084 (2d Cir. 1977) ("[O]nce there is a public function, public comment and participation by some of the media, the First Amendment requires equal access to all of the media."). See also *Telemundo v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102-03 (C.D. Cal. 2003).

Your letter's claim that the WIAA "is acting in a proprietary capacity" in granting differential news media access must be questioned, as well, since it is not the proprietor of the facilities at which high school tournament events are held. Leaving that problem aside, the proprietary capacity cases the WIAA relies upon involved either the lease of government facilities to private groups for entertainment events, see *Post Newsweek Stations v. Travelers Ins.*

Co., 510 F. Supp. 81 (D. Conn. 1981) (international skating competition); *D'Amario v. The Providence Civic Center Authority*, 639 F. Supp. 1538 (D. R.I. 1986) (rock concerts), or governmental commercial activities authorized by statute, see *Legi-Tech, Inc. v. Keiper*, 601 F. Supp. 371 (N.D. N.Y. 1984) (state legislative news service); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (municipal bus system). The WIAA, by stark contrast, organizes and presents publicly-funded high school athletic competitions at public facilities, involving mostly public high school athletes who are engaged in activities that are part of their public education. We are not aware of any statutory authorization for the WIAA to commercialize these events and, accordingly, cannot agree that the WIAA is acting in a proprietary capacity in granting exclusive coverage rights.

Even if the proprietary capacity analysis you cite were applicable, moreover, the principle does not free public actors of all constitutional limitations. See, e.g., *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) ("The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business."). Indeed, the WIAA's policy of granting WWY unfettered discretion to determine the fees and conditions under which its news media competitors may utilize internet streaming technology is unreasonable and plainly unconstitutional. See, e.g., *Atlanta Journal and Constitution v. City of Atlanta, Department of Aviation*, 322 F.2d 1298, 1310 (11th Cir. 2003) ("A grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional."). Nor does the *D'Amario* court's observation that a state actor exercising its proprietary power "is subject to no greater limitations [than] a private firm conducting the self-same business" support the WIAA's position, as your letter contends, because high school sports is not a business.

Your letter's suggestion that granting WWY the exclusive right to stream tournament events over the internet somehow enhances public access is, at best, speculative. It appears that WWY did not provide live coverage of *any* football tournament games this year, and produced only quarter and semi-final games on a delayed basis. The WNA's members provided live internet coverage of four football tournament games, with the permission of the host schools, and were refused permission to do the same at four other games. How many tournament events might have been presented live over the internet but for the WIAA's exclusive rights policy, moreover, is unknowable until that policy is abandoned. We do know, however, that advancements in the technology have made it increasingly easy and inexpensive to produce live events for the public, virtually guaranteeing that allowing all news media equal rights to utilize this means of reporting, as the First and Fourteenth Amendments require, will further public access to and interest in these public events.

The WNA also disputes your contention that its members consider only "a very limited number of events" worthy of consideration for streaming. Newspapers have long reported virtually *every* game, match and meet of *every* state high school, throughout the year, because their customers are interested in all high school sports activities. When a local team qualifies to

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compete in a state tournament, moreover, local interest becomes intense, as the WIAA well knows. Allowing the WNA's members throughout the state an equal opportunity to report tournament events live over the internet would undoubtedly increase the number available for public viewing beyond what a single company currently provides. But the WNA's members will not provide that coverage if they must pay a competitor and, more importantly, give up their work product and copyright, as the WIAA's current policy requires.

Finally, your letter provides no facts on which to evaluate the WIAA's claimed need to generate revenue to offset lost attendance attributable to live internet coverage. We note, in that regard, that attendance at the girls and boys state basketball tournament semi-finals and finals remains strong even though they have been televised for decades. We doubt that live internet streaming would dampen the public's interest in attending tournament events, but would be happy to consider any studies or records the WIAA can provide to support its position. Even if an effect on attendance can be shown, moreover, it would only entitle the WIAA to impose equal fees on those who choose to report events live over the internet, as the WIAA now does with radio broadcasters.

We appreciate the WIAA's willingness to carefully consider these constitutional issues and meet with the WNA's representatives. We request that you provide us a copy of all exclusive contracts the WIAA has entered into in advance of our meeting. We are available to meet wherever the WIAA chooses on November 24 or 25, or December 4. Please suggest alternate dates if these are not convenient for you or the WIAA.

Sincerely,

GODFREY & KAHN, S.C.



Robert J. Dreps
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