



Publications

CASES OF INTEREST

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IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

September 9, 2011

Table of Contents

- Wisconsin Interscholastic Athletic Association, et al. v. Gannett Co., et al.
- Oracle USA, Inc. v. SAP AG

Wisconsin Interscholastic Athletic Association, et al. v. Gannett Co., et al., USCA Seventh Circuit, August 24, 2011

 [Click here for a copy of the full decision.](#)

- Seventh Circuit holds that state governing body for middle and high school athletic programs does not violate the First Amendment rights of Gannett Co. and other newspapers, by granting an exclusive license to a third party to stream entire post-season tournament games.

Plaintiff, Wisconsin Interscholastic Athletic Association (WIAA), the state governing body for middle and high school athletic programs in Wisconsin, granted exclusive licenses to a third party to stream transmissions of entire games of post-season tournaments online. Gannett objected to the granting of the exclusive license, claiming that because the WIAA was a “state actor,” the granting of an exclusive license violated the First Amendment rights of other news organizations to stream the events in their entirety. WIAA filed a declaratory judgment action to obtain a declaration that the exclusive license did not violate the First Amendment. The district court entered summary judgment in favor of WIAA, and Gannett appealed. The Seventh Circuit Court of Appeals affirmed the judgment of the district court, finding that WIAA’s exclusive contract was neither a gag order nor a prior restraint on speech about government activities. The media – including defendant newspapers – were free to talk and write about the games, but could not appropriate the entertainment product – the entire game – that WIAA as the governing body had created without paying for it. WIAA, even though a “state actor,” had the same right to package and exclusively distribute its performances as private packagers of entertainment product such as the NFL, and the First Amendment did not confer on the media an affirmative right to broadcast the games in their entirety.

WIAA contracted with American-HiFi, a video production company, to give the company the exclusive right to stream nearly all of WIAA’s post-season tournament games in their entirety online. Under this contract, if American-HiFi declined to stream a game, other broadcasters could obtain permission and pay a fee to stream the game. The exclusive broadcast agreement only concerned transmissions of entire games and did not prohibit media coverage, photography or interviews before or after games, which were covered by WIAA’s Media Policies. Media could also broadcast up to two minutes of a game, and write or blog about the game, as long as they did not engage in “play-by-play” transmission. The Media Policies, including specific Tournament Transmission Policies applicable to radio, television, cable and internet transmissions, reflected WIAA’s contracts with private companies for the exclusive broadcasts. The Media Policies provided that WIAA owned the rights to transmit, upload, stream or display content live during WIAA events and reserved the right to grant exclusive and nonexclusive rights on an event-by-event basis. Defendant Gannett, asserting that WIAA’s exclusive license agreement violated the media’s First Amendment right to broadcast entire performances, streamed four WIAA tournament games without obtaining permission and refused to pay WIAA’s fees.



Publications

CASES OF INTEREST

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The district court in the declaratory judgment action entered summary judgment in favor of WIAA, holding that media access at WIAA tournaments was a "nonpublic forum," and finding the exclusive contracts easily met the First Amendment standards of reasonableness and viewpoint neutrality.

On appeal, the Seventh Circuit noted that the parties had stipulated that WIAA was a state actor and therefore its actions are constrained by the First Amendment. Gannett argued that WIAA, as a state actor, could not enter into exclusive contracts with a private company for the purpose of broadcasting entire events online, or to raise revenue. The circuit court disagreed. Noting that the implications of defendants' theory were "staggering" – that state actors may never earn revenue from something that the press might want to broadcast in its entirety – the court concluded that WIAA had the right to package and distribute the games and that the First Amendment did not confer on the media any affirmative right to broadcast entire performances.

Noting the distinction between the government's action as "proprietor," as in the case before it, and the government as "lawmaker," the court found that the First Amendment mandated that WIAA's conduct be "reasonable" – that is, not "arbitrary, capricious, or invidious." Rejecting Gannett's argument that the WIAA must meet the heightened standard of "viewpoint neutrality," the court nonetheless found that WIAA's actions when granting exclusive license contracts or in determining whether to approve a request to stream a game not being broadcast by American-HiFi lacked any viewpoint bias.

Finding that WIAA was functioning as a creator and disseminator of content, the court held that the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) controlling. *Zacchini* recognized that broadcasting an event in its entirety is not the same as reporting on or covering it. While the media has a First Amendment right to report on and cover an event, it does not have a right to broadcast an entire performance. *Zacchini* also made clear that the producer of entertainment is entitled to charge a fee in exchange for its consent to broadcast that event and the First Amendment does not give the media the right to appropriate, without the producers' consent or without remuneration, the products of others. The principles enumerated in *Zacchini* apply equally to state actors as well as private actors.

The court rejected Gannett's argument that the exclusive licensing agreements were a form of "prior restraint" on media speech, finding that the exclusive streaming provisions of the Media Policies did not censor or regulate the content of the media's coverage. WIAA was appropriately attempting to control its own message and not telling the media what to report about the event. The court noted that, under the Media Policies, a newspaper could record an entire event and edit it down to the two minutes it wanted to broadcast, based on its own editorial discretion. The court also rejected Gannett's argument that the case was analogous to those in which a state official had unbridled discretion to grant or deny a permit to a speaker, and that the Media Policies gave too much discretion to American-HiFi over who was allowed to broadcast the residual games it did not stream. The court reasoned that, in those cases, the speaker has some First Amendment right to engage in the speech activity, whereas, under *Zacchini*, the newspapers did not have a right to broadcast the entire performance.

Finally, the court rejected as "radical and unsupported" Gannett's argument that the First Amendment precluded government actors such as WIAA from raising revenue, even if acting in a proprietary capacity. Noting that the existing law was "180



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

degrees to the contrary,” the Seventh Circuit found that other courts considering exclusive broadcast agreements between a government entity and a private party had universally reached the conclusion that that governments have a legitimate and substantial interest in raising revenue in this way. Defendants identified no case where an exclusive broadcast agreement had been invalidated on First Amendment grounds.

Oracle USA, Inc. v. SAP AG, USDC, N.D. California, September 1, 2011

 [Click here for a copy of the full decision.](#)

- District court reduces \$1.3 billion jury verdict in a copyright infringement case to \$272 million, finding that there was insufficient evidence for the jury to base its award on a “hypothetical copyright license.”

Following a November 2010 trial on copyright infringement damages (defendants had admitted liability), the jury awarded plaintiffs \$1.3 billion, based on plaintiffs’ theory that had a license for the use been granted (a hypothetical copyright license) it would have been in this amount. On a post-trial motion by the defendants, the district court vacated the damages award and ordered a new trial (unless the plaintiffs accepted a damage award of \$272 million based on the evidence of “actual damages”), finding that plaintiffs failed to present sufficient evidence warranting a \$1.3 billion award under a hypothetical license theory. The court found that plaintiffs did not present any evidence that defendants’ infringement deprived them of an opportunity to license their works. The court further found that plaintiffs had never given any entity a license to use the works in question and that plaintiffs failed to submit evidence of comparable licenses for similar products.

Since defendants had conceded liability on plaintiffs’ copyright infringement claims that had not been dismissed as of trial, the jury was only asked to set the amount of actual damages, which the plaintiffs elected to seek in lieu of statutory damages under the Copyright Act. To prove actual damages, the court held, plaintiffs could either show the harm they suffered as a result of defendants’ admitted infringement or show, as a proxy for that harm, what the defendants would have reasonably been expected to pay in order to license plaintiffs’ works.

While most of the evidence that the plaintiffs presented went to this second theory, called the hypothetical license theory, the court found that plaintiffs did not present any evidence that defendants’ infringement deprived them of an opportunity to license their works. In fact, plaintiffs had never given any entity a license to use the works in question. In overturning the jury’s damages award, the court also found that plaintiffs failed to submit evidence of comparable licenses for similar products.

Acknowledging that its decision was not dictated by any Ninth Circuit precedent, the court reasoned that the Ninth Circuit had never upheld a hypothetical license award absent proof of the price of that license. The court also rejected plaintiffs’ suggestion that hypothetical license damages automatically flowed from a finding of infringement, since the hypothetical license was merely a way of determining the damages that a plaintiff actually incurred.

Having invalidated the jury’s damages award, the court granted a new trial, finding that most of plaintiffs’ evidence went to their hypothetical license argument, and that they were entitled to seek actual damages in view of defendants’ admission of



Publications

CASES OF INTEREST

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liability. Alternatively, the plaintiffs could accept remittitur of the award to \$272 million, the maximum amount that the court found sustainable by the proof.

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