FIGHTING OVER THE PROFITS OF PROFESSIONAL SPORTS: USING THE
LAW OF ANTITRUST AND INTELLECTUAL PROPERTY TO EXAMINE
MEDIA RESTRICTIONS BY THE NATIONAL FOOTBALL LEAGUE

By

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Abstract

The NFL has become a multi-billion dollar industry due to the popularity of the league, which has grown immensely in large part due to the media’s voluminous coverage of it. Instead of reciprocating that generosity, the NFL has developed its own Web site and cable television network while restricting the amount of multimedia coverage traditional media outlets can put online. This thesis analyzes what the law says about antitrust and intellectual property issues and how they relate to the restrictions the NFL puts on the media outlets that cover it. The evolving media landscape complicates matters with the journalism industry moving online and using the Internet to stay relevant. It remains to be seen what would happen if a media outlet challenges this policy in court, demanding to be able to show more than the 45 seconds of unarchived video content allowed by the league for more than 24 hours. In this new age of online media, the NFL should not be able to restrict Internet coverage of the league because of the laws of antitrust and intellectual property.
Introduction

Media publicity helped the National Football League grow into one of the most popular professional sports leagues in America. But as the NFL saw the abundant amount of ad revenue media organizations earned, the league wanted a piece of this pie to add to the over $6 billion it makes annually.¹ That led to the creation of the league’s own television network, the NFL Network, and the expansion of the league’s official Web site, NFL.com. The site employs beat writers to cover the teams and enjoys an advantage in multimedia access to the sport due to league restrictions on the amount of video content a traditional media outlet can post. In fact, in order to be granted credentials, the league requires news stations that shoot video of the game to sign a form that grants royalty-free access of the video to NFL Films, the league’s video archive.²

The NFL became a league popular enough to command a multi-billion dollar television deal because of the media attention it received, which made the league a big hit with fans and an advertising cash cow. However, the NFL does not respect that relationship by restricting the length of the videos that can be uploaded to a media entity’s Web site as well as the time they can remain up on top of typical policies concerning access to players and coaches. That’s in contrast to NFL.com and the NFL Network, which carry no such restrictions and represent another source for the league to make money while teetering into the territory typically reserved for traditional media outlets. It remains to be seen if a news organization will challenge this power for the long-term good while risking missing out on NFL coverage in the short term.

The first two sections of this thesis describe the NFL’s media policies before going into detail about the league’s media entities. The next part discusses how intellectual property law says the league cannot copyright the bare facts of the games, although it’s questionable how much copyright protection the league has over the interviews that would be in these videos. The following section goes over the issues of antitrust and monopoly, as the NFL grants access to the teams while also serving as a competitor in the media market. After that there’s a brief section on control over facilities. The next part touches on how the evolving media market – in which blogs and multimedia are changing the way journalism exists – clouds these concerns. The thesis statement says the league should not be able to restrict online coverage of the NFL in this era of increasing Internet coverage due to the laws of antitrust and intellectual property.

**NFL Media Policies**

The NFL’s media policy clearly states that Web sites cannot put more than 45 seconds of video footage up on their sites every day, or 90 seconds in two-team markets with 45 seconds going to each team. This time includes both interviews and practice footage. These videos can only be available online for a maximum of 24 hours and there cannot be any permanent archive of the video or audio so fans who do not see the package originally cannot view it later. These broadcasts cannot be filmed live, and they must link back to NFL.com and the team sites. This presumably whets the appetite of regular consumers of the team’s news to want to take a look around the galleries of video content provided by NFL.com and the team sites which are not restricted by these rules. Also, the videos can only be used as editorial content, so there must be no sponsorship or advertising around them. This rule makes it so the NFL is the only entity that can benefit

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from the league’s multimedia content through sponsorship or advertising. However, there is no limit on “talking head” videos of reporters speaking about the team that has no interview content mixed in. “We’re trying to balance protection of our business assets with the equally important need to receive extensive news media coverage and communicate with as many fans as possible on a regular basis,” NFL senior vice president of public relations Greg Aiello told the *Washington Post*.\(^4\) “We have no interest in controlling or limiting what news Web sites do, except limiting the use of video that undermines our own Internet operations. We have important business interests on the Internet, and we have to be careful about that.”

The NFL seems to understand the reciprocal relationship between the league and the media. In its policy on the use of online video content, the league writes, “The success of the National Football League is due in part to substantial news media coverage throughout the season and entire year. News media outlets have also benefited from their NFL coverage, as NFL news and commentary attracts fans to all forms of media, including emerging distribution platforms. The NFL recognizes the importance of the Internet to traditional media organizations in expanding their news reporting and distribution operations.”\(^3\) The NFL takes a glass half-full approach by saying the league is letting the media put 45 seconds of footage up, but a *Houston Chronicle* parody in which a reporter cuts off interviews right when he gets to the interesting part shows how restrictive having only 45 seconds can be, as it is hard for any story to be told in that

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length of time. Media organizations could provide more comprehensive coverage with more allotted time in the videos.

When a news organization violates the league policy the first time it is asked to comply, and if the organization refuses to follow the policy after repeated requests, its credentials will be pulled. This threat is serious enough for newspapers to follow the policy, as there have been no published reports of repeated abuses that have led to the pulling of credentials. The league and the teams monitor the Web sites, according to USA Today, and media organizations themselves could be encouraged to report a violation because it puts them at a competitive disadvantage if a rival newspaper is showing more multimedia content than is allowed. The article also noted that newspaper editors – including representatives from the Associated Press Sports Editors and American Society of Newspaper Editors – protested the policy in a June meeting with league officials.

The NFL’s 2007 media access policy requires the teams to make their offensive and defensive coordinators available for 10-15 minutes “at least” every other week of the regular season. Teams also are not allowed to “unreasonably withhold permission for primary position coaches or coordinators to speak to the media.” The head coach must be made available “on a regular basis” to home media, which the league defines as “at least” four days per practice week throughout the season. Players must be available after every game and “regularly” during the week, as the rules state players cannot boycott the media. At the very least, star players with demanding schedules must talk “at least” once

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a practice week to the home media, not to mention potential conference calls with visiting media, national media interviews and interviews with the network broadcasting the game. Local media members have the opportunity to speak to a player from their home market’s upcoming opponent, but a player is not required to do this more than five times during the course of the season, although they’re encouraged to do so every time they’re requested. Finally, the rules stipulate that “violations of the above procedures will be considered conduct detrimental to the league and will subject the club and/or individuals to disciplinary action by the commissioner.”

The 2005 version of the league’s media policy included more specific guidelines. After “a reasonable waiting period” defined as 10-12 minutes after a game, the locker room must be opened to accredited members of the press, who have “immediate access” to all players and coaches. The head coach and at least one of the stars of the game for each team must go to an interview room so as to clear up some of the congestion in the locker room. The policy also stipulates that each teams’ locker room must be open “for a minimum of 45 minutes” every Monday, Wednesday, Thursday and Friday on a normal week’s schedule with a Sunday game, with Tuesday acting as the players’ weekly off-day. It also notes that “several clubs” provide access both before and after practice. If access is granted before practice, then the coach “should” be available afterward for post-practice questions and the team “should make its best effort” to have players available at that time as well if requested. Although teams have different particulars involving practice, the 2005 policy says starting in Week 2 of the preseason practices have to be open to local media “for at least the first 30 minutes or until the start of team work.”

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Beyond the NFL’s blanket policy that all teams are required to follow, some squads write out more specific media policies while others choose to have the league’s policy double as their own without any additions. After reviewing a number of team policies, all organizations follow the league’s rules in general in terms of coach and player availability during practice as well as general manager and owner availability when requested. All players must be available to speak at least once during the week and after the team’s game or be subjected to disciplinary action. The Miami Dolphins’ policy asks media members not to call players at home, and the New York Giants tell their players not to provide numbers to reporters.

Some teams differ a bit on how practice is allowed to be attended by the media, but they follow similar guidelines in that department as well. The Dolphins and Kansas City Chiefs open practice for the first 15 minutes on Wednesday, Thursday and Friday to local media, with this time covering the stretching period and the individual part of practice for Miami; some teams open Monday as well. In Miami, no other media may attend except for the national broadcasters, and the Green Bay Packers require visiting media to receive authorization before attending. This policy is in place to ensure no spies are watching. Visiting media members may bring observations up to the opposing coaching staff that gives them a competitive advantage either intentionally or unintentionally if they’re just trying to get some insight on something noteworthy they saw. The St. Louis Rams allow all of training camp to be shot except for 7-on-7 and 11-on-11 drills. The team opens practice for the first 30 minutes during the regular season.

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except to visiting media.\textsuperscript{12} Also, cell phones are not allowed so updates cannot be made at that time.\textsuperscript{12} As for shooting video in-game, the league’s amended 2007 sideline video policy allows access to the field to shoot the game only to local television reporters, meaning newspaper Web sites, national sports networks besides the one with broadcast rights, magazines and online-only sites cannot be on the sideline, leaving them credentialed just for pre-game and post-game access.\textsuperscript{13}

The Dolphins have a “zero tolerance policy” regarding “game strategy, positions players worked, number of repetitions taken by any player (and) conversations that take place on the field between players and/or coaches.”\textsuperscript{8} The Chiefs’ policy calls the open practice “a good-faith understanding between the team and accredited reporters” so that reporters can have greater insight on situations not necessarily for public consumption. The Chiefs’ policy provides the example that “on offense, whatever the team is doing cannot be reported or referenced. This includes, but is not necessarily limited to, trick plays, new formations and repeated attempts to get the ball to a particular player. On defense, this applies to alignments, blitzes, specific coverages and strategies to cope with specific opposing personnel.”\textsuperscript{8} Reporters are allowed to write about who is and isn’t practicing and at what positions, but if a player is at a different position than usual the media can report he’s playing a new position but not what he’s specifically doing. This seems like quite a number of restrictions, but it is a fair tradeoff for media members to really know what’s going on while keeping the team happy by not giving away secrets.

The team should be able to keep its game plan safe while giving media members an extra

\textsuperscript{12} 2007 St. Louis Rams Media Access Policy. St. Louis Rams. 2007.
window inside the game so they will have a broader base from which to describe the action on Sunday knowing the genesis of it in practice.

Many teams – including the Dolphins, Giants, Rams and Atlanta Falcons – have in their policy for only the head coach to talk about injuries. The Giants also want the head coach to be solely responsible for talking about personnel changes and coaching decisions. The Giants advise their players to speak solely about football and to “speak positively about your teammates.” Many teams want reporters to go through the media relations department before speaking with a coordinator, including the Packers, who even specify that position coaches will only be available to speak about specific players, the unit they coach or themselves. The Packers also ask media members not to report, record or film “any team communication meant solely for the team.” This includes anything from the huddle when the coach addresses the players and communication during practice, especially that which is particularly reprimanding or negative as can be the case at times in football. It is acceptable to report that the incident took place, but not details, either through hearing it directly or by asking the player about the situation, even if the player answers the question. The Falcons specify that photographers and videographers cannot shoot injured players during practice.

**NFL-Operated Media**

But traditional media members are not the only people covering the league these days. The NFL has developed a media empire that includes a Web site and television network. The NFL.com site includes top headlines, an NFL Network tab where visitors

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14 Atlanta Falcons Media Policy. Atlanta Falcons. 2007.

can view player interviews from the past week and a game clips tab to watch highlights from the last week’s games, ranging from about two to six minutes. There’s also preview content for the week ahead, a photo gallery and a multimedia section with player interviews, video highlights and coaching press conferences – all things that cannot be posted on a newspaper Web site for more than 45 seconds. By restricting what newspapers can do while providing blowout multimedia coverage of the league, NFL.com has a monopoly of sorts over its content. From a business perspective it makes sense for the league to do this, but it is not fair to competing papers that do not have the ability to match NFL.com’s online content due to the restrictions the NFL as a corporation has put on them. In a perfect world both traditional media outlets and NFL-related media would have the opportunity to provide such coverage of the league. That way the fans would choose what they want, and the super fan would be able to view enough content to assuage his or her interest in the NFL. Because the NFL is both responsible for the content on its league sites and for providing and restricting access to games, media outlets would be likely able to argue that this is a monopoly.

Many NFL.com reporters also provide content in blog form, such as azcardinals.com reporter Darren Urban, who updates his blog with Cardinals news or tidbits from around the league. The site also features videos concerning the team and photo galleries. Other typical NFL.com sections include a depth chart, injury reports, game notes, a community section, a cheerleaders section, stadium information, a fan zone, a history section, a kids section and a link to the team’s online pro shop.

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The NFL Network features shows such as NFL Total Access, a program with daily news and highlights; NFL Gameday, which wraps up the previous week during the season; Playbook, where experts debate the upcoming week; NFL Replay, where old games are replayed; and Super Bowl Classics, which replays Super Bowls from prior seasons. It also offers major coverage of the NFL Combine and had the rights to the 2007 Texas, Insight and Senior bowls as well as eight regular-season NFL games and 52 preseason games. An “About Us” section on NFL.com’s Web site says, “With a camera at each of the 32 NFL team facilities, plus tremendous cooperation from the NFL players, coaches, owners, officials and executives, the unique access allows viewers to get closer to the NFL experience than ever before.”

According to its fact sheet, the NFL Network offers nearly 2,000 hours of original programming, having grown quite a bit since being launched on Nov. 4, 2003, to 11.5 million homes, making it the most widely-distributed sports network in cable and satellite television history. Securing more subscribers is a big reason why the NFL made sure to keep eight games for its network’s package. During the 2007 season, that included a matchup between a pair of 10-1 teams, the Dallas Cowboys and Green Bay Packers, a game that aired in less than 40 percent of Americans’ homes, according to a USA Today report. Many national fans missed the game, although local fans still got to watch it on local TV.

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The situation resurfaced during the final week of the season when the New England Patriots brought their undefeated record to New York to face the Giants for a game with massive national interest, besides the fact it ended up being a preview of the Super Bowl. After much debate in the media and complaining by fans, the NFL decided to allow CBS and NBC to simulcast the game, the first time such a situation has come up since Super Bowl I. Sens. Patrick J. Leahy (D-Vt.) and Arlen Specter (R-Pa.) wrote a letter to NFL Commissioner Roger Goodell promising to question the NFL’s antitrust exemption if the game was not made available to more viewers. In the end, the NFL caved in by showing the game on free TV despite the fact it did not help the NFL Network grow, which was the original plan for putting the game on the network in the first place. Not only fans but the U.S. government cared enough about the game being on television for all to see that the NFL decided the backlash from the public relations hit would not be worth the NFL Network having exclusive rights to the game. If the general public cared enough about the 45-second rule to pressure the league like what happened with the Patriots-Giants game, change would likely occur.

The argument can be made that NFL.com is a direct competitor with newspapers because each of the NFL teams’ home sites covers the squad like a typical newspaper would. Each NFL team is in charge of running its sites, in contrast to Major League Baseball’s home sites, which are run by MLB Advanced Media – the communications arm of MLB – and all have a similar look and feel to them. Just before the start of

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training camp in 2007, the Arizona Cardinals hired Urban, who had been working as the Cardinals’ beat writer for the *Scottsdale Tribune*, to be the beat writer for the team site. Urban left his post at the paper for the online world because of a pay raise and since it would be a more stable situation for him with the trend of newspapers suffering financially.

Urban did nearly the exact same thing at azcardinals.com as he did at the *Tribune* as far as content goes. That means following a schedule of Sunday game story, notes and a column, follow-up stories on Monday, a catch-all column on Tuesday, a story and notes on Wednesday, a story and notes on Thursday, notes on Friday and then a story for the weekend heading into the game. Even better, instead of answering to an editor, he made the decisions on what content to run while also taking on the increased responsibilities of posting stories and pictures. Before Urban took the job, azcardinals.com never had a reporter on staff with a background in journalism. Some of the men and women who run the team sites have a background in marketing or computers, for example, instead of journalism, which makes the stories more of press releases than actual journalism.

**Intellectual Property/Copyright Issues**

With the NFL developing a strong media presence, it is important to understand what kind of property rights it has over the intellectual property involved with the league’s media entities. One of the earliest cases dealing with such issues is *International News Service v. Associated Press*\(^2^4\). In that case, the court claimed that a news organization cannot copyright facts, thus ruling in favor of AP. INS would re-write reports that AP had sent out and publish them after AP spent a lot of time and money on

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these stories by sending reporters overseas to obtain the fresh reports.\textsuperscript{24} However, the Court ruled that if AP could not be guaranteed property rights there would be no reason for the organization to pursue the news at all, which would negatively impact the public good.\textsuperscript{24} News organizations need the incentive that their organization will reap the benefits of their reports to make it economically viable to spend their time and effort on reporting.

In *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,\textsuperscript{25} General Mills signed a contract with the Pittsburgh Pirates’ owners, the Pittsburgh Athletic Company, for the exclusive right to broadcast their baseball games.\textsuperscript{25} However, KQV broadcasted games as well by stationing reporters outside Forbes Field to provide simultaneous broadcasts and thus infringe on General Mills’ exclusive rights.\textsuperscript{25} The court ruled that since the Athletic Company maintains the Pirates and the stadium at a profit, it has the “legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies which value them as affording advertising mediums for their merchandise.”\textsuperscript{25} The Copyright Act takes this a step further by allowing for copyright protection of a game broadcast.\textsuperscript{26}

This ruling relies partly on the judgment in *International News Service v. Associated Press*, because just like the AP, the station employed by the Pittsburgh Athletic Co. will not have an economic incentive to spend the money to get the rights if another news service can get a similar account of the game without securing broadcast rights. This situation provided an early building block for access to sporting events for

\textsuperscript{25} *Pittsburgh Athletic Co. V. KQV Broadcasting Co.* United States District Court, Western District of Pennsylvania, 1938, 24 F.Supp. 490.
competing news mediums. “Pittsburgh Athletic establishes that the team owns the property right to the broadcast of a sporting event. The Copyright Act codifies this by providing copyright protection for the broadcast of an athletic event.”

In modern days, only one local radio station can secure rights to a game. It gets a little complicated in that there’s also a visiting radio booth as well as foreign-language broadcasts and sometimes national broadcasts. But this case set the precedent that two stations in competing markets cannot broadcast the same game on the same medium at the same time because it would be unfair for one station to pay for broadcast rights when the other station can get the game as well.

Copyrighting facts in sporting events came up in National Basketball Association v. Sports Team Analysis and Tracking Systems (STATS) and Motorola (Sportstrax). The Court of Appeals rejected the NBA’s copyright claim, being that the “expression” of a game can be copyrighted in sound and picture but not base “facts.” For $200 per pager, Motorola’s StatTrax compiled updates every few minutes that could be sent out to phones. These compilers watched or listened to broadcasted game and typed the information into their computers. The Court essentially found a distinction between copyrighting broadcasts and copyrighting the actual sporting event. The actual broadcast cannot be taken for any purpose other than viewing the game. But since one cannot copyright facts, the Court ruled in favor of Motorola. Judge Winter wrote, “Sports events are not ‘authored’ in any common sense of the word. ... What ‘authorship’ there is in a sports event, moreover, must be open to copying by competitors if fans are to be

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attracted.”  

Essentially all reporters copy the same bare facts of a sporting event while putting their own unique spin on it. The authorship comes in the actual article, photo or video they produce through the bare facts they can legally copy. With the ruling that facts cannot be copyrighted, the NFL will have to fall under this guideline in any future case, making sure only to copyright the expression rather than base facts. Media organizations could argue their raw footage constitutes base facts, which should not be restricted on their Web sites.

With the *STATS* case being decided in 1997, a more recent case that built off the decision was *Morris Communications Corp v. PGA Tour, Inc.*  Much like in *STATS*, this case questioned to how much the PGA Tour can limit the access of Morris and other media companies to private golf courses. Unlike basketball scores, which can be easily compiled by one person, golf scores must be recorded by a number of different people at the different holes, which the PGA Tour does through its Real-Time Scoring System. The PGA Tour argued that it has a legal business justification to protect its property rights of keeping score since it controls the right of access to these courses and can impose restrictions on those attending the events.  

Morris argued that the PGA Tour has monopoly power of access to golf tournaments, which it has used in an unfair way to hurt competition involving syndicated golf scores.  

The Court found the PGA Tour is justified in its effort because Morris free rides on the Tour’s compilations.  

The Tour has a property right to the scores before they are public domain and the Tour can license or sell broadcasting rights of its products over the Internet. This means that even a monopolist company that expends time and money to create a valuable product stays

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away from antitrust violations when it does not provide a free product to competitors.\footnote{The company creating the product would have no economic incentive to create said product if it knew another company could get the fruits of the labor without expending any capital, like in \textit{INS v. AP}. However, this does not directly relate to the NFL’s situation because making videos longer than 45 seconds would not free ride on the NFL’s work in any way, especially since media outlets would be using their own staff-produced video for the interviews and only the network feed for game footage they are not allowed to shoot themselves.}

According to the Copyright Act of 1976,\footnote{Copyright Act of 1976. No. 17 U.S.C.a. 101, et. Seq.} only the owner of a broadcast can use it or license anybody else to do so. The owner has the “exclusive rights to reproduce, adapt, publish and sell copyrighted work.”\footnote{“Sports Law Cases and Materials” Ray Yasser, James R. McCurdy, C. Peter Goplerud, Maureen A. Weston. Sixth Edition. Matthew Bender & Company, Inc. Newark, N.J.} This protection exists in “[o]riginal works of authorship fixed in any tangible medium of expression.”\footnote{Copyright infringement requires a two-part test: there must be “ownership of a valid copyright” and “copying of copyrighted work.” As has been alluded to earlier, the NFL cannot copy the actual facts of the games, it can only copy the way it is transmitted.} This explains why leagues such as the NFL include a segment in the broadcast of all games saying, “This telecast is the property of (the NFL) ... any rebroadcast, retransmission or other use of the events of this game, without the express written consent of the owner, is hereby prohibited ... .”

There’s no question that the owner of the broadcast rights to a particular game solely owns the ability to broadcast that contest live, but the situation becomes murkier with increased technology concerning the ability of the copyright owner to restrict other media. How much are bloggers allowed to blog? What about post-game interviews?
According to 17 U.S.C. 102(b), copyright does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” This reaffirms the finding in *NBA v. Stats* that bare facts cannot be copyrighted, just expressions and ideas. For NFL purposes, the way in which a game or situation is described cannot be copied by competing organizations, but those essential facts can. This is regardless of the way the network’s announcers or NFL.com’s video crew transmit the game. The Copyright Act goes on to say that the “fair use of a copyrighted work is not infringement where it is for purposes such as criticism, news reporting, teaching, scholarship, or research.” With news reporting, if one news organization breaks a story it cannot copyright the story so that no other organization can report it. Obviously one newspaper cannot copy another’s exact story, but the bare facts can be used by different organizations in whatever creative way they see fit. As for the NFL, the league cannot copyright the facts of the games. It must allow all reporters from credible news organizations to take the bare facts of the league’s games and mold them into stories for their audiences.

In *NFL v. TVRadioNow Corp.*, the NFL and NBA accused TVRadioNow of violating the Copyright Act. According to the complaint, the defendant sent copyrighted programming from Toronto to American computer users. This content includes streamed basketball and football games, with their own advertisements, by taking TV signals from Buffalo and putting it on their Web site, iCraveTV.com. The defendants argued that the content was only intended for Canadian viewers and thus their liability should be limited to Canada, but 1.6 million page views came from the United States.

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The court ruled that the defendants cannot infringe on the plaintiff’s copyrighted works through the use of streaming video. Regardless of what country it is meant for, Canadians cannot violate American copyright law when the content is shown in a medium available to Americans.\textsuperscript{33} That’s because of section 337 of the United States International Trade Commission, which says “antitrust claims relating to imported goods may be asserted” under this code.”\textsuperscript{34} This law regulates antitrust issues across the border, which makes TVRadioNow guilty of copyright infringement regardless of the fact that it is based in Canada.

One of the reasons the NFL Network and NFL.com have become so big is that the NFL owns the copyright to every game and sells it to the league’s networks through contracts that net the clubs income they split equally among themselves.\textsuperscript{35} This was affirmed in NFL v. Insight Telecomm.\textsuperscript{36} Having the copyright gives the league power to restrict the use of live game footage by other media outlets that do not pay for the rights. Although the case was eventually vacated, in Cable News Network, Inc. v. Video Monitoring Serv. of Am., Inc.,\textsuperscript{37} the court discussed the issue of “the elimination of the requirement of publication as a condition for statutory copyright, thereby ensuring public access.” That is one of the issues this NFL situation will come down to: how much copyright protection does the league have for its personnel interviews posted on the Internet? The journalism industry is going online, as media analysts question the life span of newspapers. It’s possible that in 10 years newspapers will go completely online to save

\textsuperscript{36} Cable News Network, Inc. v. Video Monitoring Services of America, Inc., 949 F.2d 378 (11th Cir. 1991), vacated, reh’g en banc granted, 949 F.2d 378 (11th Cir. 1991), appeal dismissed, 959 F.2d 188 (11th Cir. 1992).
the printing costs it takes to publish a physical newspaper. In the years before online newspapers became so prevalent the question of publication made more sense because print organizations mainly relied on the physical product. However, now with the industry striving to stay above water by relying on online newspapers, it’s imperative for the online product to receive as much protection as the physical newspaper. Surely, media competitors will never be able to use game footage live, undercutting the league’s copyright rights as decided in *Insight*. But can the NFL legally decide how much multimedia content competitors can put on their Web sites to maintain the league’s control over such material?

**Antitrust/Monopoly Issues**

Some of the cases discussed in the intellectual property section touched on antitrust issues as well. The Sherman Antitrust Act and the ensuing Clayton Act aim to make sure that commerce remains competitive. Section II, or Sherman II of the Sherman Act, attempts to prevent monopolies that lead to uncompetitive situations, as it says, “It is all right for a monopoly to exist for natural reasons, as long as the monopoly then does not attempt to drive out competition through illegal means.” Antitrust law includes two major tests to see if the practice restrains trade in an unreasonable way. Things can be “per se illegal,” such as price fixing, which has no defense or justification. The NFL is in the clear in terms of this type of antitrust. The other test involves a “rule of reason” analysis, which determines the reasonableness of the action by weighing the anti-competitive issue to see if it is for a legitimate reason. The NFL could argue it limits the

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amount of footage other media organizations can use because the league owns exclusive rights to the content that it does not want to be undermined. The league would say it is not being anti-competitive because it lets media organizations use what it determines to be a fair amount of material.\textsuperscript{40} On the other hand, a media entity could argue that the NFL’s exclusive rights apply only to live game footage and also disagree on what can be defined as a fair amount of footage.

In \textit{United States v. Aluminum Co. of America}\textsuperscript{41} Justice Learned Hand established a two-part test saying that companies violate antitrust law “when they possessed monopoly power in a relevant market, and when they excluded competitors to gain or protect that power.” It could be argued that the NFL possesses monopoly power by maintaining media entities such as the NFL Network and NFL.com in its communications branch while also having the power to issue credentials and make restrictions such as the 45-second rule. The NFL does provide ample media access to locker rooms, but it could be argued that excluding competitors from putting up more than 45 seconds of video content allows the league to gain or protect the monopoly power it has in the NFL multimedia market. After all, what good is access to the players if the media cannot fully do what it wants with the content? It’s not fair for the league to make a rule with one arm that helps the others arm at the detriment of traditional media who have become competitors of the league.

\textsuperscript{40} For more on antitrust issues, see \textit{Professional Sports and Antitrust}. New York: Warren Freedman Quorum Books.  
\textsuperscript{41} \textit{United States v. Aluminum Co. of America}. No. 148 F.2d 416. 2nd Circuit. 1945.
More issues of monopolization are dealt with in *Feist Publications v. Rural Telephone Service*. In this case, Rural easily obtained information for its yellow pages book as the only provider of telephone service in the area, whereas Feist must approach each of the 11 phone companies and pay a fee for access to this information. Rural was the only company that refused to provide the information, hoping to “to extend its monopoly in telephone service to a monopoly in yellow pages advertising.” Without the proper licensing, Feist still used the pages without Rural’s consent, leading Rural to sue for copyright infringement. The court ruled in favor of Feist, saying Rural’s white pages “lack the requisite originality” to constitute infringement because copyright rules reward originality instead of mere effort.

This case means that the NFL cannot copyright mere facts in its games. While the NFL may be able to copyright the accounts of the games authored by particular broadcasters on networks with contracts with the league, this cannot be done with the actual facts of the game. Once a touchdown pass has been thrown and a game won, those details become facts that “lack the requisite originality,” just like in the *Feist* case, to be copyrighted. The NFL can be considered to have a monopoly on its product in that it decides which media organizations get access (although credible ones do always get credentials when they can be reasonably accommodated), how much access they get and what they can do with the video and sound bites they get while on league premises. These interviews could also be considered mere facts since they consist of what the players say. With that being the case, it is not a stretch to say the NFL should not be able to restrict it.

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Monopoly leveraging also came up in *Weinberg v. Chicago Blackhawks Hockey Team*. Weinberg, a publisher of a hockey program, sued the Blackhawks for not allowing him access to credentials to gain admission to the press box, claiming this put him at a competitive disadvantage against the Blackhawks’ game-day program, which has access to the press box and thus the players. The case came down to monopoly leveraging, as a party that has monopoly power in one market cannot use that power in a second market, an issue decided earlier in the *Feist* case. Since the Blackhawks have control of credentials and access to players, coaches and practices, the court ruled that being denied such access makes Weinberg less competitive. With the NFL delving into the media market, its monopoly power of deciding who receives credentials and thus access could be seen as using monopoly power from one market in another if a media organization charges the league with unfairly preventing it from gaining credentials. This scenario could more realistically play out with a blogger. This issue could get interesting if a media organization declines to sign the league’s sideline video access agreement required to obtain credentials and then initiates a lawsuit claiming the NFL is using double monopoly power.

**Issues of Control Over Facilities**

How much control the NFL has over its facilities also could depend on if it’s a publicly- or privately-built stadium. To understand that issue, it’s important to first look at *Southeastern Promotions, Ltd. v. Conrad et al.* In this case a New York theatrical

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45 *Southeastern Promotions, Ltd. v. Conrad et al.* Supreme Court of the United States. 420 U.S. 546.
company called Southeastern Promotions, Ltd. applied to use Tivoli, a private Chattanooga theater leased to the city for the presentation of the musical “Hair.”45 However, the directors of a municipal theater, Chattanooga Memorial Auditorium, decided to reject it having heard reports of nudity and obscenity being part of the show, choosing not to notify Southeastern of the reasons for the rejection.45 The court ruled that not allowing Southeastern access to the public facility amounted to a prior restraint of the content that the theatrical company planned to produce.45 For the NFL, league officials may have a hard time preventing journalists from using public facilities – those stadiums financed by taxpayers’ dollars – even if they do not sign the NFL’s release form because it could represent a prior restraint against their work. A public facility cannot reject potential users for content-based reasons, which would be the case if reporters were denied access and thus could not report stories on the teams playing in the facility.

In *WCVB-TV v. Boston Athletic Association* the court decided that a rival station could use the phrase “Boston Marathon” despite the fact that it was not the “official” broadcaster of the event because the word “Boston Marathon” describes the event as well as calling attention to the program.46 Also, both stations could simultaneously broadcast the event because it was being held on a public street. Despite the exclusive licensing agreement signed by one station it would not be legal to bar the other station from access to the street as well.46 The judge wrote, “[T]he use of words for descriptive purposes is called a ‘fair use,’ and the law usually permits it even if the words themselves also constitute a trademark.”46 It would not be fair to bar other media from the event just because there’s a network agreement, especially when the event took place in a public area. In the NFL, the network with rights to the game is the only one allowed to televise it

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for live broadcasts, but photojournalists like newspaper photographers are also allowed to roam the sidelines to take pictures to capture the game in that form and send the pictures back to their respective papers.

For more discussion of sports legal cases see Chicago Professional Sports Limited Partnership v. National Basketball Association, a case eventually settled out of court concerning how many games the Chicago Bulls could televise on superstation WGN, Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, a lawsuit looking for an injunction to prevent a Chicago Bears game from being broadcasted that did not matter after the game was aired, and New Boston Television, Inc. v. ESPN, Inc., a 1981 case that discussed whether using highlights on sports programs – now a common practice – takes away from a new market in sports footage. Also, Board of Regents of University of Oklahoma v. National Collegiate Athletic Ass’n allows colleges to market their football programs for television.

The Future of Online Journalism

Issues between the NFL and the media that covers it hardly represent unmarked territory. In a 1997 conflict between the NFL and the Florida Times-Union, the league threatened to revoke the Times-Union’s credentials if it did not sign a waiver that would prohibit the paper from publishing game pictures on its Web site. The paper refused, arguing that the Web site could be considered its online “newspaper” and saying it would

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48 Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club. 97 F.2d 223.
not let the NFL put any extra control on its online publication than it does on its print product. The NFL eventually backed down, preventing the case from going to court. Now the question is what would happen if another newspaper refuses to accept the NFL’s rules for its Web site, just like the *Times-Union* would not do so with its online product? If a newspaper feels it should be able to put up more than 45 seconds of content it would be interesting if the NFL would back down like it did in this situation. On the other hand, it is questionable if a publication would risk losing NFL credentials due to the importance of the league in a news organization’s sports coverage.

During the 2000 Australia Olympics, a media organization could be considered a “competitor” of the Games in the news business. The International Olympic Committee monopolized broadcast rights by not granting admission to online journalists. The IOC was concerned with live broadcasting, according to Chris Stiepock, the general manager of ESPN’s creation management department, especially with videographers being able to upload content straight to the Internet as it happens before tape-delayed Olympic events are shown on television. This concern seems legitimate because it would not be fair to the networks that shell out big bucks for rights to the Olympics to be undermined by online journalists. The public loses in this situation because it cannot get the most up-to-date coverage that online journalists can provide, but in a big business like the Olympics it’s only fair for the network not to be undermined by them. However, it seems a bit much for these online journalists not to be granted admission altogether. They should be able to film as much content as they want under the condition they run it after the network’s scheduled broadcast, with major penalties and revocation of credentials if they don’t follow through. This way the network preserves its broadcast rights but online

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journalists can still do what they want coverage-wise after the fact. In the NFL’s situation, nobody’s asking for simultaneous broadcasts; the league would never let that happen, and it does not have to do so legally. Archived highlights could be a different story, though.

The IOC also strictly enforced a rule preventing athlete diaries from being published, although some news organizations did not comply. Unless it just restricted athletes from writing about results that had not been televised yet, this does not seem like it would make much sense, and the NFL likely would not get away with making such restrictions if a newspaper wanted a player to write a diary. According to *Feist*, a party with monopoly power in one situation cannot use it in another. If the NFL were to try to use its monopoly power in terms of access to ensure that competitors could not have athletes write journals, it likely would not hold up.

During a super regional college baseball game last year, the NCAA kicked out a blogger, claiming he took away from ESPN’s exclusive rights to broadcast the game. This happened although the *The Courier-Journal* reporter had been blogging throughout Louisville’s run in the college baseball playoffs. The NCAA’s memo regarding his dismissal reads, “Since blogs are considered a live representation of the game, any blog that has action photos or game reports, including play-by-play, scores or any in-game updates, is specifically prohibited. In essence, no blog entries are permitted between the first pitch and the final out of each game.” The reporter responded that he only hoped to augment ESPN’s coverage for people who could not watch the game at that time but had

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access to a computer to follow along with the blog or for fans to read after the fact.\textsuperscript{54} It’s questionable how the NCAA would handle a fan watching a game at home and simultaneously updating a blog. There’s no way this blogger could be punished, since he or she would not be getting access in the first place. The NFL has had no such public issue with bloggers yet, with the \textit{Arizona Republic} featuring a running commentary blog on its Web site during the local team’s games. Still, this issue represents one more way leagues are learning to deal with a media market that’s progressively moving online.

Networks pay big money to broadcast games, with CBS paying $545 million per year just for NCAA Tournament rights,\textsuperscript{55} so the universities do not want to hurt those networks. Therefore, as in-game blogs have become more prominent the NCAA has come up with its own rules for blogging as a requirement for credentials. Credentialed media who blog must submit a link to NCAASports.com Blog Central and “adhere to the conditions and limitations of this NCAA Blogging Policy.”\textsuperscript{56} A blog includes such posts as score and time updates as well as a description of the actual event.\textsuperscript{56}

Each sport has a different policy for the number of blogs allowed during a game. At football games, bloggers can blog three times per quarter and once at halftime, and at basketball games they can blog five times per half, once at halftime and twice per overtime period.\textsuperscript{56} It is important to have different rules for different sports due to their differing timing rules. Football games last longer than basketball games, so one more blog per half makes sense. This seems like a fair compromise between bloggers being able to blog frequently but not to the extent where it can be like providing real-time

scoring updates, which could infringe on the network’s rights to the broadcast of the event. A blogger has the technological capability to provide real-time updates after every play, but from the Louisville incident, the NCAA feels like it takes away from network coverage. Because any fan who cannot watch the game but wants to know what is going on can follow along with a gametracker application provided by ESPN or Yahoo!, this would not be the best use for a newspaper blogger anyways. The blogger should be providing game analysis, which can be accomplished by blogging three times per quarter at college football game while also satisfying the NCAA’s concerns over broadcast rights.

Also, “still picture, motion picture, audio, film/videotape/digital capture or drawing” can only be used 72 hours after the competition and cannot exceed three minutes in length, which while less restrictive than the NFL’s policy shows the NFL isn’t the only league to put in place such guidelines. It does not make much sense for the NCAA to have a policy like this. The NCAA does not power a media entity like NFL.com, so there’s no competition aspect to that. Also, it does not infringe on broadcast rights because the game will be long over 72 hours after the game. Fans should be able to see the archived video whenever they want, and the media outlet should limit itself to three minutes only if it feels that would best convey the story. The choice should be made by the media, not the NCAA.

Other leagues have run into similar issues as the NFL. In March of 2008, Major League Baseball instituted rules that included a seven-photo limit for online display after a game, the prohibition of photo galleries, audio and video recording restrictions from 45 minutes before a game starts until it ends and the need for prior written notice to put up
non-text accounts of a game. Many news organizations responded with statements and
letters of protest on the grounds that these rules make it tougher for journalists to do their
jobs. The media cannot fully depict a game in pictures with a seven-photo limit, which
is less than one per inning, and photo galleries should not be fully restricted. It’s
legitimate for media organizations that do not have rights to a game to not be able to film
during the contest, but it seems a bit excessive to cut this right off 45 minutes before a
game. Also, media entities should be free to put up non-text accounts of a game that
readers would enjoy without needing prior official permission to do so.

Issues concerning media access to sporting events have even seeped down to the
high school level in Illinois. In November of 2007 the Illinois Press Association sued the
Illinois High School Association concerning photographers’ “access to high school
championship events and photo sales.” They were trying to settle the issue out of court
concerning “secondary use” of the pictures, but then several Illinois newspapers were not
allowed to shoot eight championship football games when ISHA said they were “not in
compliance” with ISHA policies. That led IHSA to counter sue IPA for exclusive rights
to sell photos and limit how newspapers use the shots they take. IPA executive director
Dave Bennett made the following points about his side’s position on the IPA’s Web
site:

- The IHSA “cannot grant exclusive access” to public events like the football
games because it’s “a state actor.”

57 “Media Groups Object to New MLB Restrictions.” Reporters Committee for Freedom of the Press
58 “Illinois High School Association Sues IPA, Newspapers, Over Print Sales.” National Press
The sum of money newspapers make from selling photos is small, but a commercial photographer could make a large amount of money by doing the same thing for many high school games.

Newspapers have been “the single biggest promoters of school sports for the past century” and have never sold pictures for “perceived profitability,” as the coverage costs are greater than the money brought back by selling photographs.

**Conclusion**

Joe Pollack of the *St. Louis Journalism Review* writes that he does not understand these increasing online media restrictions. He finds it ironic that a sports establishment made rich by such media technological advances “refuses to lift its organizational blinders long enough to recognize the approaching benefits.” He writes that the league is “stupid and greedy” when it prevents videographers from shooting video that ultimately promotes the league. In some ways the NFL is hurting itself by restricting coverage of events that essentially expand its product and make the NFL better-known and better-liked in the eyes of its consumers. It is a fine line to walk between growing the already-bloated league through the publicity generated by overblown media coverage and advancing its media properties, which also in turn aid the NFL.

As the NFL continues to push for a bigger piece of the media pie, antitrust and intellectual property issues remain as the league controls how much of its product media organizations can show, while funneling fans to the league’s own Web site and cable television network. The league’s rules restricting videos from being online for more than

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45 seconds and for more than 24 hours stifle the creativity and effectiveness of traditional media outlets. Copyright law prevents the NFL from copyrighting the bare facts of its games, but it’s questionable whether it can legally restrict the amount of interview footage that can become part of a video package. Antitrust law involving monopolies raises major issues, as the NFL restricts the media with its access-granting arm while strengthening its other arm representing the league’s media entities. The NFL should not be able to make rules that limit traditional media when it competes with those same outlets online.

This issue does not only concern the NFL, as MLB and the NCAA have put forth similar restrictions. With the media changing how it covers sports through the increased technology involved with blogging and online video produced by newspapers, professional and collegiate sporting associations need to adjust their media rules concerning online material. It is not enough these days just to write previews, recaps and features for the daily newspaper. We’re in a day and age of the 24-hour news cycle in which readers demand content all day and in different forms than originally dreamed of. As the media as a whole adapts to feed this craving, leagues need to be providing more opportunities for multimedia and blogs, not less. The media has done so much through the years to help leagues become the multibillion dollar industries they are today that the priority should be on forming a symbiotic relationship in which the league gets more attention and the dying newspaper industry gets play in another form.

It may take a Supreme Court case in which a news organization gets fed up with these restrictions for there to be any clarity. At this point leagues like the NFL have the attitude that the media needs them more than they need the media. But in this era of
online multimedia and blogs, it is imperative that the NFL and the media get on the same page.

The New York Giants’ message on media relations to its players says, “The National Football League has become the nation’s premier sport league due to the tremendous amount of media coverage it receives. Take advantage of this exposure.”

That’s a lesson the league would be wise to heed as well.\footnote{This author covered the Arizona Diamondbacks in an internship for MLB.com last summer and will cover the Los Angeles Dodgers in an MLB.com internship this summer. Special thanks to Southwestern Law School professor David Kohler, azcardinals.com beat writer Darren Urban, NFL senior vice president of public relations Greg Aiello and KPNX-TV vice president for news Mark Casey for clarifying issues on this topic.}