SHUT OUT: THE DISPUTE OVER MEDIA ACCESS RIGHTS IN HIGH SCHOOL AND COLLEGE SPORTS

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I. INTRODUCTION

The 2007 Illinois state high school football championship game was a shut-out—of news photographers. While anxious young teenagers prepared to face their opponents, another match was being played on the sidelines as photographers were banned from covering the finals over a dispute regarding the sale of reprints of photos from the game.1 It was a scene that has repeated itself throughout the nation as the changing nature of the news media collides with athletic associations’ attempts to capitalize on games. Earlier that year, several Louisiana photographers had been denied access to a girls’ basketball tournament because their newspapers sold reprints of photos published.2 The following year, an athletic association in Wisconsin sued a newspaper for streaming video of a high school

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1. See IHSA Shuts out Photographers at state football championships, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, November 24, 2007, available at http://www.nppa.org/news_and_events/news/2007/11/illinois03.html (describing how photographers from five newspapers were banned from accessing the football field); see also Amended Complaint at 3, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Jan. 23, 2008) (alleging exclusion from the tournament).

2. See Jared Janes, Newspapers battle LHSAA in Hammond: Photographers walk out of Top 28, The Advocate (Baton Rouge, La.), February 27, 2007 at C1. (“At least four newspaper photographers were banned from taking pictures at the Ladies’ Top 28 Tournament in Hammond after they refused to sign a Louisiana High School Athletic Association consent form.”). See also Scott Ferrell, LHSAA has room for improvement, THE TIMES (Shreveport, La.), March 4, 2007 at 1C (describing how the Louisiana High School Athletic Association demanded that photographers agree not to sell pictures published online. According to Ferrell, after the state’s newspapers refused to sign the agreement and refused to cover the games, the LHSAA backed off of the demand. The ban on selling reprints was due to an exclusive contract with a commercial photographer).
football tournament live on the Internet.\(^3\) In the summer of 2009, newspapers and wire services promised to boycott college football games because of onerous credential restrictions.\(^4\) In late 2009, the Arizona state high school football playoff games were not televised for the first time in over 15 years because of a broadcasting rights dispute between the broadcasters and the state athletic association.\(^5\) Conflicts between news organizations and athletic associations over access to sporting events involving public schools and universities have been a recurring theme over the past several years.\(^5\) Photographers have been denied access, news organizations have been sued, and in some circumstances, news organizations have declined to cover these events because they were unwilling to agree to the terms of credentialing agreements.\(^7\) Caught in the middle are

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5. See Steve Burks, Lack of TV for title games is bad business, THE TRIBUNE (Mesa, Ariz.), Dec. 11, 2009. (“Friday and Saturday will mark the first time since 1993 that the 5A Arizona state football championships won't be on television, at least in the Valley . . . Cox wanted the rights to the games it produced for 25 years.”). Instead the Arizona Interscholastic Association has created a Website, complete with commercial advertising, on which games can be watched. See AIA365, http://www.aia365.com (last visited September 27, 2010).
6. See Jared Janes, Newspapers battle LHSAA in Hammond: Photographers walk out of Top 28, THE ADVOCATE (Baton Rouge, La.), February 27, 2007 at C1. (describing how photographers were banned from the Ladies’ Top 28 Tournament). In the article, Advocate executive editor Carl Redman stated, that “we are a news gathering organization . . . We cannot agree to have limits on our news gathering abilities.” Id. See also, Scott Ferrell, LHSAA has room for improvement, THE TIMES (Shreveport, La.), March 4, 2007 at 1C (describing how the Louisiana High School Athletic Association demanded that photographers agree not to sell pictures published online.) According to Ferrell, after the state’s newspapers refused to agree to the restrictions and refused to cover the games, the LHSAA backed off of the demand. Scott Ferrell, LHSAA has room for improvement, THE TIMES (Shreveport, La.), March 4, 2007 at 1C. See also Wis. Newspaper, Sports Group Face Off Over Rights to Webcast Games, ASSOCIATED PRESS, June 8, 2009 (describing how the Wisconsin Interscholastic Athletic Association (WIAA) has sued media company Gannett and the Wisconsin Newspaper Association). A newspaper broadcasted four games live on the Internet against the wishes of WIAA and the WIAA is seeking a ruling that it owns web broadcast rights. The initial lawsuit filed by the WIAA sought a ruling that it owned “writing, photography, video and any Internet form of journalism from live blogging to Webcasts,” however all but the Webcast rights issue were dropped. Wis. Newspaper, Sports Group Face Off Over Rights to Webcast Games, ASSOCIATED PRESS, June 8, 2009. Cf. Newspapers, IPA, Sue IHSAA For Free Press Rights, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, November 2, 2007 http://www.nppa.org/news_and_events/news/2007/11/illinois.html (describing the suit between the Illinois Newspapers and the Illinois High School Association).
7. See Scott Ferrell, LHSAA has room for improvement, THE TIMES (Shreveport, La.), March 4, 2007 at 1C (explaining that after the state’s newspapers refused to sign the agreement and refused to cover the games, the LHSAA backed off of the demand. The ban on selling reprints was due to an exclusive contract with a commercial photographer); Wis. Newspaper, Sports Group Face Off Over Rights to Webcast Games, ASSOCIATED PRESS, June 8, 2009 (describing how the Wisconsin Interscholastic Athletic Association (WIAA) has sued media company Gannett and the Wisconsin
student athletes, whose successes and triumphs fall by the wayside while media companies and athletic associations debate intellectual property, access, and of course, money.

High school athletic associations typically sponsor, organize and promote state championship tournaments between high school teams in a broad range of athletic and other competitive events. For years, the coverage of these events by news organizations has been mutually beneficial, but recent developments, discussed below, have made it profitable for the associations to limit such coverage. In the ensuing conflicts between newspapers and state high school athletic associations, rights asserted by the associations have ranged from attempts to claim the ownership of descriptions of games — in which there is no property right — to the closer question of broadcast rights. Of primary concern typically are three related issues: The rights of newspapers to sell reprints of photographs that appear on their websites; the rights of television stations and newspapers to broadcast extended video clips or live broadcasts of the games; and rights of the teams and associations to demand licensing privileges regarding photographs and videos taken during

Newspaper Association. A newspaper had broadcast four games live on the Internet against the wishes of WIAA and the WIAA sued. The initial lawsuit filed by the WIAA sought a ruling that it owned “writing, photography, video and any Internet form of journalism from live blogging to Webcasts,” however all but the Webcast rights claim were dropped.); see also Mickey H. Osterreicher, Illinois Press Association Asks To Withdraw Preliminary Injunction, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, (Nov. 16, 2007), (on file with author), available at http://www.nppa.org/news_and_events/news/2007/11/illinois02.html (describing the conflict between the sports association and the newspapers).


9. Complaint, Wis. Interscholastic Athletic Ass’n v. Gannett, No. 08-cv-629 (Wis. Portage County, filed Dec. 5, 2008) (seeking a declaratory judgment “that it has ownership rights in any transmission, internet stream, photo, image, film, videotape, audiotape, writing, drawing or other depiction or description of any game, game action, game information . . . of an athletic event that it sponsors.”).

10. See 17 U.S.C. § 102(a) (1990) (defining the subject matter of copyright); see also NBA v. Motorola, 105 F.3d 841, 846 (2d Cir. 1997) (finding no copyright in the statistics of the game); WCVB-TV v. Boston Athletic Ass’n, 926 F.2d 42, 43 (1st Cir. 1991) (denying a preliminary injunction to prevent a TV station from broadcasting the Boston Marathon when another had contracted for “exclusive” broadcast rights with the race organizers). But see Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co., 510 F. Supp. 81, 84 (D. Conn. 1981) (finding a proprietary right). The court held: “It is clear that the ISU has a legitimate commercial stake in this event, and they, like Zacchini, are entitled to contract regarding the distribution of this entertainment product.” Id. It is worth noting that in Travelers, the state actor’s proprietary activity was leasing the facility to a private entity, not hosting an event themselves. Id.

11. Scott Ferrell, LHSAA has room for improvement, THE TIMES (Shreveport, La.), March 4, 2007 at 1C (describing how the Louisiana High School Athletic Association demanded that photographers agree not to sell pictures published online).
games, and stories written about the games.\textsuperscript{12} While access issues exist in professional sports as well, these issues are unique in high school and college athletic associations because of the overwhelming public nature of the schools involved, and the likelihood that the associations will be determined to be state actors by the courts.\textsuperscript{13} As a result, the various questions boil down to one main concern: How much can a state actor limit the editorial output of a news organization covering a state sponsored event, and can it deny or grant access based on an agreement to comply with limitations on such output?

The question of media rights in high school and college sports is a complex one involving an intersection of property rights, intellectual property rights, contract rights and First Amendment rights. Unjust enrichment, anti-trust and unfair competition all have the potential to enter the equation. And of course, none of the above would be important if financial interests of the schools, associations, and members of the media were not involved.\textsuperscript{14} Case history indicates a strong presumption against the government’s ability to restrict truthful publication, such that any interest the associations have in the financial benefits of restrictions must be balanced against the cost to society of denying the First Amendment rights of the news organizations.\textsuperscript{15}

\textsuperscript{12} Id.; see also Wis. Newspaper, Sports Group Face off Over Rights to Webcast Games, ASSOCIATE PRESS, June 8, 2009 (dispute over Web broadcast rights); Joe Strupp, SEC Revises Controversial Credential Policy — Most Restrictions Lifted, EDITOR & PUBLISHER, (Aug. 27, 2009) (on file with author) (describing initial terms of controversial credential agreement for the Southeastern Conference which included restrictions on website video and audio footage, limits on live blogging and required newspapers to grant the SEC and universities permission to use photographs taken at the games. After several news organizations threatened to boycott the games, most of the restrictions were eased).

\textsuperscript{13} See Wis. Interscholastic Ath. Ass’n v. Gannett Co., 2010 U.S. Dist. LEXIS 55137, at * 28 n.6 (W.D. Wis.) (noting that the parties stipulated that the WIAA is a state actor, and declining to rule on the matter). See also Wakefield v. Wis. Interscholastic Athletic Ass’n, No. 2008CV003423 at 7 (Wis. Milwaukee County Sep. 12, 2008) (noting that nearly every state that the court looked at found similar associations to be state actors). There is some argument for imposing public openness standards on professional sports that receive tax breaks or subsidies from cities, but that is for another article.

\textsuperscript{14} First Amended Complaint at 7–8, Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (“Fees generated through the granting of transmission and broadcast licenses, including over the Internet, serve the important purpose of generating revenue for the WIAA.”).

\textsuperscript{15} See Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) (“As a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards.”); Carey v. Brown, 447 U.S. 455, 462 (1980) (“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (“Any system of prior
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Because of the enormous public pressure to provide a visual report of these events, only one of the conflicts above has reached a court of law; the others have typically been settled through negotiations. In the one case that did receive a ruling, a question about the right to restrict reprint sales was dropped from the case, and a judge determined that the only issues remaining related to the dispute over live Web streaming of games, ultimately deciding that the athletic association had the right to control this activity. In Illinois, a settlement between the Illinois High School Association and the Illinois Press Association provides that the newspapers can sell reprints, the association will give full access, and there will not be preferential access given to an “official” photographer. Pending state legislation in Illinois, which would have prevented bans on newspaper reprint sales, was dropped after the settlement was reached. Legislation was also brought in Wisconsin, but ultimately failed.

restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.

16. See Wis. Interscholastic Athletic Ass'n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137, (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (limiting the court’s ruling to four issues related to the Webcast of football games); Scott Ferrell, LHSAA has room for improvement, THE TIMES (Shreveport, La.), March 4, 2007 at 1C (describing how the Louisiana High School Athletic Association demanded that photographers agree not to sell pictures published online. According to Ferrell, after the state’s newspapers refused to sign the agreement and refused to cover the games, the LHSAA backed off of the demand. The ban on selling reprints was due to an exclusive contract with a commercial photographer); Mickey H. Osterreicher, Illinois Press Association Asks To Withdraw Preliminary Injunction, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, (November 16, 2007), (on file with author), available at http://www.nppa.org/news_and_events/news/2007/11/illinois02.html.


20. Assem. B. 520, 2009–10 Leg., 99th Sess. (Wis. 2009) (failed to pass, April 28, 2010) (proposing that school districts be prohibited from “being a member of an interscholastic athletic association unless the association agrees to be governed by the public records and open meetings laws.”); Editorial: Public deserves a window on decisions, GREEN BAY PRESS-GAZETTE (Wis.), January 17, 2010 at A12.
As this Article will explain, there is plenty of case law to provide an examination of the issues. Many courts have found that it is a violation of the First Amendment for a state actor to restrict a news organization from publishing truthful, legally obtained information. Although the athletic associations apparently consider reprints to be commercial activity, the sale of photographic prints, especially when they are sold in connection with First Amendment activities, have repeatedly been protected by the First Amendment.

This Article will first establish the associations as state actors and clarify the relationship of copyright law to reporting sporting events. In Parts IV and V, it will discuss the relationship of equal protection to the First Amendment, and the rights of the government to impose restrictions on the media, including the application of “time, place, and manner” restrictions. Part VI will spotlight the various controversial terms in the Wisconsin credentials. Parts VII and VIII will explore what kind of restrictions on coverage are permissible and defenses that might be raised.

II. BACKGROUND

Newspapers have traditionally sold copies, called “reprints,” of photographs that appear in their publications, as a service to the community. For decades, subjects who appear in the newspaper have been able to obtain reprints for their own personal use. More recently, as newspapers transitioned to the Internet, the space limitations of the printed product have disappeared and photographs that do not appear in the physical newspaper can be displayed on a

21. See Montana v. San Jose Mercury News, 34 Cal. App. 4th 790 (Ct. App. 1995) (finding that posters reproducing newspaper front pages that had a photograph of quarterback Joe Montana were entitled to First Amendment protection, just as the original newspaper accounts were. The posters were a “form of public interest presentation to which protection must be extended.”); see also Nussenzweig v. DiCocia, 814 N.Y.S.2d 891 (Sup. Ct. 2006), aff’d, 832 N.Y.S.2d 510 (App. Div.), aff’d 9 N.Y.3d 184 (2007) (holding that the sale of photographic prints of a Hassidic Jew who asserted a privacy claim was protected by the First Amendment because it was art). The court explained: “In recent years, some New York courts have addressed the issue whether an artistic use of an image is a use exempted from action under New York State’s Privacy Laws. They have consistently found “‘art’ to be constitutionally protected free speech, that is so exempt. This court agrees.” Id.

22. Amended Complaint at 3–4, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Jan. 23, 2008) (“Plaintiffs . . . provide photos, either at no charge or at nominal charge . . . to families of athletes . . . and sell reprints of photographs and stories to parties who request those products.”).

23. Id. at 2 (“The use of the Internet has allowed newspapers to publish galleries of photographs for their communities.”).
publication’s Website. Extensive online “photo galleries” have become standard features on news websites, due in part to the high “click-through” numbers that bring in online advertising dollars. Often using a printing partnership, but sometimes handling the reprints in-house, images in photo galleries, just like images in the printed edition, are available for reprint purchase.

At the same time as newspapers have expanded the number of images available for reprint purchase, private commercial photographers have made exclusive deals with high school athletic associations to photograph tournaments and games and provide their own extensive online photo galleries for student athletes to purchase reprints of images from the games. As the official tournament photographers, the commercial photographers demand exclusive access, and in exchange, provide compensation to the associations.

This compensation is often monetary but can be in the form of licensing rights to images used for marketing and promotion.

In addition to still photographic coverage, there is extensive

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24. Jared Janes, Newspapers battle LHSAA in Hammond: Photographers walk out of Top 28, THE ADVOCATE (Baton Rouge, La.), February 27, 2007 at C1 (explaining that “a newspaper typically could only print two photographs in its printed edition but provide 15 to 20 photographs on its Web site, giving its audience a better perspective of the event.”).

25. See, e.g., Old idea, new media ink may fade, but thirst for news won’t, THE TORONTO STAR December 12, 2005, at D1 (explaining how the newspaper is “embellishing the site with staff photo galleries of community news and sports events.”).


27. See Exhibit A, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Dec. 5, 2007) (outlining the 2005–2006 licensing agreement between commercial photography company Visual Image Photography, Inc., and the Illinois High School Association, including “[e]xclusive photographic exclusivity to VIP. No other photography company to be permitted to photograph State Final events with the intent to sell. This includes all award ceremonies and action photography.”). See also Exhibit A at 2, Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (outlining agreement for the WIAA to grant “the exclusive right to produce, sell, and distribute all WIAA tournament series and championship events for all WIAA sports” to a production company).

28. See Exhibit A, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Dec. 5, 2007) (explaining the “photographic exclusivity” that the commercial photographer has); see also Exhibit A at 2, Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (extending exclusivity to a video production company).

29. See Exhibit A at 3, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Dec. 5, 2007) (explaining how the images will be made available to the IHSA at no charge); see also Exhibit A at 2, Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (explaining the revenue sharing agreement).
television coverage of state tournaments. Important games have been broadcast through agreements with television stations. Again, the Internet complicates matters as the ability to stream games live over the Internet is now a reality and new media, as well as traditional newspapers with new platforms are getting involved in broadcasting events online. To combat concerns that this will impact exclusive broadcast deals, state athletic associations are imposing various limits on live and “real-time” reporting of tournaments, as well as time limits on the length of video being broadcast after the games.

In March of 2007, newspaper photographers in Louisiana walked out of a basketball tournament when they were denied access for refusing to sign a credential agreement that would restrict the right to sell reprints from the game. Later that year, photographers in Illinois were similarly blocked from covering the state football championships because their newspapers would not agree to stop selling reprints. The Illinois High School Association (IHSA) had entered into an exclusive contract for photography with a private party and newspaper reprints allegedly ran afoul of this agreement.

With similar concerns, the Wisconsin Interscholastic Athletic Association (WIAA) filed suit against newspaper corporation Gannett, and the Wisconsin Newspaper Association (WNA) in late

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30. See Steve Burks, Lack of TV for title games is bad business, THE TRIBUNE (Mesa, Ariz.), Dec. 11, 2009 (describing how the championship game had been televised since 1993).

31. Id.


33. See id. at 6–8 (explaining WIAA media policies).

34. See, e.g., Scott Ferrell, LHSAA has room for improvement, THE TIMES (Shreveport, La.), March 4, 2007 at 1C (describing how the Louisiana High School Athletic Association demanded that photographers agree not to sell pictures published online. According to Ferrell, after the state’s newspapers refused to sign the agreement and refused to cover the games, the LHSAA backed off of the demand. The ban on selling reprints was due to an exclusive contract with a commercial photographer); see also Jared Janes, Newspapers battle LHSAA in Hammond: Photographers walk out of Top 28, THE ADVOCATE (Baton Rouge, La.), February 27, 2007 at C1. (“At least four newspaper photographers were banned from taking pictures at the Ladies’ Top 28 Tournament in Hammond after they refused to sign a Louisiana High School Athletic Association consent form.”).

35. Amended Complaint at 3, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Jan. 23, 2008) (“In November 2007, Defendant excluded some Illinois newspapers from the IHSA State Football finals because those newspapers would not abide by Defendant’s rule concerning secondary use.”).

36. Counterclaim and Third-Party Complaint at 4, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Dec. 5, 2007) (describing the exclusive contract and the corresponding media policy).
2008, asserting that WIAA owned “the transmission, internet stream, photo, image, film, videotape, audiotape, writing, drawing or other depiction or description of any game, game action, game information, or any commercial used of the same of an athletic event that it sponsors.” The WIAA suit came about after a newspaper owned by Gannett broadcast a live “Webcast” of a football game that was sponsored by the WIAA. The case was removed to federal court, and the complaint was amended to include fewer assertions. The district court ultimately ruled against the newspapers, but also determined that the only issues remaining were four issues related to the right of the newspapers to broadcast Webcasts of games without permission from the athletic association and the right of the athletic association to prevent such activity.

Continuing this conflict, media organizations threatened to boycott coverage of the 2009 college football season in the Southeastern Conference (SEC) because the restrictions on coverage were too onerous. The objectionable conditions included: A total ban on video coverage on newspaper websites; limits on the use of photographs after the game coverage ended; and a requirement that news organizations grant the SEC and the universities licensing rights to images obtained at the games. The SEC eventually eased most of these restrictions, including removing limits on post-game use of photos and removing the licensing privileges requirement.

37. Complaint, Wis. Interscholastic Athletic Ass’n v. Gannett at 5–6, No. 08-cv-629 (Wis. Portage County, filed Dec. 5, 2008) (describing the declaratory judgment being sought by WIAA in state court).
38. Wis. Newspaper, Sports Group Face off Over Rights to Webcast Games, ASSOCIATED PRESS, June 8, 2009 (describing how the Wisconsin Interscholastic Athletic Association (WIAA) has sued media company Gannett and the Wisconsin Newspaper Association. A newspaper had broadcast four games live on the Internet against the wishes of WIAA and the WIAA filed suit seeking a ruling that it owns web broadcast rights. The initial lawsuit filed by the WIAA sought a ruling that it owned “writing, photography, video and any Internet form of journalism from live blogging to Webcasts,” however all but the Webcast rights claim were dropped in subsequent pleadings.); see Complaint, Wis. Interscholastic Athletic Ass’n v. Gannett, No. 08-cv-629 (Wis. Portage County, filed Dec. 5, 2008) (describing the declaratory judgment being sought by WIAA in state court).
42. Id.
43. Id. (describing how after several news organizations threatened to boycott the games, most of the restrictions were eased).
III. Threshold Issues Critical to Framing the Debate

A. State Athletic Associations are State Actors

State athletic associations are generally state actors. This standard has been repeatedly met with athletic associations whose membership involves public schools, as long as it is properly asserted. The Supreme Court of the United States has held at least one state athletic association to be a state actor, and many lower courts have found similar status. State actor status of athletic associations is often addressed in equal protection cases based on race or gender, or due process claims. However, the status as a state actor cannot be taken for granted. In any case involving a First

44. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295 (2001) (finding state action in a First Amendment case involving a state athletic association); Griffin High School v. Ill. High School Ass’n, 822 F.2d 671, 674 (7th Cir. 1987) (“The overwhelmingly public character of the IHSA membership is sufficient to confer state action for the purposes of § 1983.”); Libby v. South Inter-Conference Ass’n, 728 F. Supp. 504, 506 (N.D. Ill. 1990) (“In any event, IHSA clearly is a state actor.”); Wakefield v. Wis. Interscholastic Athletic Ass’n, No. 2008CV003423 at 7 (Wis. Milwaukee County Sep. 12, 2008) (“[T]his court holds that there is a sufficient basis to consider the WIAA a state actor in reviewing its decisions about student interscholastic athletics eligibility.”). In WIAA v. Gannett, it was stipulated by both parties that the WIAA is a state actor. Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137, at *28 n.6 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010).

45. See Wakefield v. Wis. Interscholastic Athletic Ass’n, No. 2008CV003423 at 7 n.1 (noting that nearly every state that the court looked at found similar associations to be state actors). But see, Kelly v. Wis. Intersch. Athletic Ass’n., 367 F. Supp. 1388, 1390 (E.D. Wis. 1974) (dismissing an equal protection claim against the WIAA because the plaintiff failed to allege facts that would find state action).

46. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295 (2001) (finding state action in a First Amendment case involving a state athletic association). The Court explained: “[S]tate action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” Id. The court went on to explain that “[i]f a defendant’s conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action “under color of state law” for § 1983 purposes.” Id. at 294. See also Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad., 551 U.S. 291, 295 (2007) (re-stating the state action element of the same case). The Tennessee association involves “public schools located within the State, acts through their representatives, draws its officers from them, is largely funded by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority.” Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 290 (2001). The court held that the group’s “regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association.” Id. at 291.

47. See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295 (2001) (“If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action ‘under color of state law’ for § 1983 purposes.”).

48. See, e.g., Kelly v. Wis. Intersch. Athletic Ass’n., 367 F. Supp. 1388, 1390 (E.D. Wis. 1974) (dismissing an equal protection claim against the WIAA because the plaintiff failed to allege facts that
Amendment or Equal Protection claim, it is critical to establish the status as a state actor first. Failure to do so could lead to dismissal for failure to state a claim. As state actors, the associations have a right to act in some proprietary capacity, but not to the same extent as a private business.

B. Photography is a First Amendment Activity

Photography and videography are First Amendment activities, both as an expressive activity, and as newsgathering. While sporting events are often considered entertainment, they are also news. Sports played by public schools and universities are particularly newsworthy because schools are funded by taxpayer dollars, regulated by elected lawmakers and are an integral part of the lives of most American children. While reasonable time, place,

would find state action).

50. United States v. Kokinda, 497 U.S. 720, 725 (1990) (stating that while “[t]he Government's ownership of property does not automatically open that property to the public … [t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business”). In Kokinda, a case about the right to petition on U.S. Post Office property, the Supreme Court found (in a plurality opinion) that regulation of speech activity on government property, unless it was a public forum, required reasonableness. Id. Kokinda was a speech case, not an access case and so a traditional public forum analysis applied. Id. See also D'Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1543 (D.R.I. 1986) (commenting in an access case that “the state's rulemaking power is not absolute … the limitations upon access must serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted (or lesser-restricted) access.”).

51. See, e.g., Regan v. Time, Inc., 468 U.S. 641, 646 (1984) (finding that a statute banning the use of images of currency based on the purpose of the use was an unconstitutional content-based restriction); Jacobellis v. Ohio, 378 U.S. 184, 187 (1964) (“Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press.”); ETW Corp. v. Jirich Pub'l'n, Inc., 332 F.3d 915, 938 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”); Bery v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996) (“[P]aintings, photographs, prints and sculptures. . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.”).


53. Morris Commc'n v. PGA Tour, Inc., 364 F.3d 1288, 1293 n.9 (11th Cir. 2004) (explaining that PGA had no problem journalists disseminating the news of the game); see also Post Newspapers Stations-Conn., Inc. v. Travelers Ins. Co., 510 F. Supp. 81, 84 (D. Conn. 1981) (calling a World Figure Skating competition an “entertainment product”).

54. See Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 257 (1974) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”).
and manner restrictions can be imposed on the media by the government, those restrictions are typically related to conduct during
newsgathering, and do not generally permit restrictions on how the
information can later be used.55

C. There is no Copyright in a sporting event itself

Although some teams have attempted to assert intellectual
property rights to the games themselves,56 there is no copyright in a
sporting event, the facts of the game or even the statistics and
scores.57 Copyright is only available for a work of authorship that is
“fixed in a tangible medium.”58 It does not vest in ideas, facts or
events.59 Thus while a broadcast of a football game is protected by
copyright law,60 it is the broadcast or film itself, not the game which
is protected.61 This is important because a photographer is not
intruding on the copyright of the game by taking photos of the game.
If access to the game were not required, the photographer would not
need to deal with the team at all.62 There have been some successful

55. Compare Houchins v. KQED, 438 U.S. 1 (1978) (permitting restrictions on access) with Regan
v. Time, Inc., 468 U.S. 641, 646 (1984) (finding that a content-based restriction was unconstitutional)
and N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (finding prior restraint on publication
unconstitutional).

56. Complaint, Wis. Interscholastic Athletic Ass’n v. Gannett, No. 08-cv-629 (Wis. Portage
County, filed Dec. 5, 2008) (asking for a declaratory judgment that WIAA “has ownership rights in any
transmission, internet stream, photo, image, film, videotape, audiotape, writing, drawing or other
depiction or description of any game, game action, game information . . . of an athletic event that it
sponsors.”).

57. See 17 U.S.C. § 102(a) (1990) (listing the subject matter which can be copyrighted and not
listing sporting events, or anything close to it); Feist Pub’g, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340,
350 (1991) (“Facts, whether alone or as part of a compilation, are not original and therefore may not be
copyrighted.”); NBA v. Motorola, 105 F.3d 841, 846 (2d Cir. 1997) (“In our view, the underlying
basketball games do not fall within the subject matter of federal copyright protection because they do
not constitute ‘original works of authorship.’”).


59. 17 U.S.C. § 102(b) (1990) (“In no case does copyright protection for an original work of
authorship extend to any idea.”).

60. See 17 U.S.C. § 102(a) (1990) (“Works of authorship include the following categories: . . . motion pictures and other audiovisual works”); see also NBA v. Motorola, 105 F.3d
841, 847 (2d Cir. 1997) (explaining that “it is the broadcast, not the underlying game that is the subject
of copyright protection.”).

61. See 17 U.S.C. § 102(a) (1990) (“Works of authorship include the following categories… motion
pictures and other audiovisual works”).

62. See Detroit-Base Ball Club v. Deppert, 61 Mich. 63 (Mich. 1886) (finding that a neighbor to a
baseball field could legally sell tickets to stands he erected which had a view of the game); see also
NBA v. Motorola, 105 F.3d 841, 847 (2d Cir. 1997) (explaining that “it is the broadcast, not the
underlying game that is the subject of copyright protection.”). But see Pittsburgh Athletic Co. v. KQV
misappropriation claims involving events and facts, but they all involved private entities. 63

The United States Court of Appeals for the Second Circuit has held specifically that there is no copyright in a sporting event. 64 In
NBA v. Motorola, the Second Circuit declined to grant the professional basketball league exclusive rights to the facts and statistics surrounding their games. The United States Court of Appeals for the Eleventh Circuit did grant a sports league, the PGA Tour, a right to charge for licensing the use of real-time statistics in Morris Communications v. PGA Tour, Inc. However, that suit was based on an antitrust claim and decided in part based on the complex nature of obtaining the statistics themselves. The PGA had created an elaborate system for determining the real-time statistics — which could not be replicated by simply viewing the game by one or two reporters — and because the real-time statistics were only accessible from inside the PGA-controlled press box, the PGA Tour had a right to control the conditions under which the statistics were used. Such control didn’t violate antitrust laws, and was permissible even though there was no copyright in the statistics (PGA did not assert copyright ownership of the statistics). Morris Communications does not conflict with Motorola and it does not stand for the proposition that an athletic association — public or private — has a right to control information or content that the journalist herself gathers. There is not likely to be a proprietary interest akin to that in Morris Communications, (or like the proprietary interest in Zacchini v. Scripps-Howard Broadcasting Co.) in a basketball or football

(2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” 17 U.S.C. § 102(a) (1990). This concept holds true regarding other public events as well. See, e.g., Producers Contractors, Inc. v. WGN Cont’l Broad. Co., 622 F. Supp. 1500, 1504 (N.D. Ill. 1985) (finding that a parade was not a “work of authorship”).

65. 105 F.3d 841 (2d Cir. 1997).
66. NBA v. Motorola, 105 F.3d 841 (2d Cir. 1997).
67. Morris Comm’n v. PGA Tour, Inc., 364 F.3d 1288, 1291 (11th Cir. 2004).
68. Id. (describing the complex nature of developing the real-time statistics).
69. Id. at 1291 (“The nature of a PGA golf tournament makes it impossible for one person to physically follow all the players at once. First, the average golf course spans approximately 150 acres and various golfers play numerous holes simultaneously. In addition, the PGA does not allow its invitees to use cell phones and hand-held devices on the course because such devices might disrupt play. Therefore, the only source of compiled golf scores for all tournament players is RTSS. Likewise, the only physical location at which to obtain compiled golf scores is the media center.”). As the court noted, “PGA agreed that once the golf scores are posted on its website, they are in the public domain.” Id. at 1291 n.2 (11th Cir. 2004).
70. Morris Comm’n v. PGA Tour, Inc., 364 F.3d 1288, 1293 n.6–9 (11th Cir. 2004) (agreeing that “facts such as golf scores” are not protectable by copyright, but explaining that this is not a copyright case, but rather an anti-trust case and that PGA counsel, when asked, stated that they had no problem journalists disseminating the news of the game).
tournament sponsored by a state actor.\textsuperscript{72}

IV. EQUAL ACCESS RIGHTS OF THE MEDIA TO PUBLIC EVENTS

In order to evaluate credential agreements, it is helpful to consider what occurs if a journalist does not want to abide by an agreement. First, the journalist might decline to sign the agreement, which would then lead to the question of whether or not the state actor has a right to deny access to a journalist covering a public event.\textsuperscript{73} Second, the media might violate the media policies of an association and then be later denied access, as was the case in Illinois,\textsuperscript{74} or be sued for violating the terms, as happened in Wisconsin.\textsuperscript{75}

A. Equal Access and Journalists

While it is generally relevant to know that the media has access rights to areas traditionally open to the public and the media has at least as great of a right to access as the general public,\textsuperscript{76} what is more

\begin{itemize}
\item \textsuperscript{72} See, e.g., United States v. Kokinda, 497 U.S. 720, 725 (1990) (stating that while “[t]he Government's ownership of property does not automatically open that property to the public…[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business.”).
\item \textsuperscript{73} Jared Janes, Newspapers battle LHSAA in Hammond: Photographers walk out of Top 28, THE ADVOCATE (Baton Rouge, La.), February 27, 2007 at Cl. (“At least four newspaper photographers were banned from taking pictures at the Ladies' Top 28 Tournament in Hammond after they refused to sign a Louisiana High School Athletic Association consent form.”).
\item \textsuperscript{74} Amended Complaint at 3, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Jan. 23, 2008) (explaining how IHSA excluded some Illinois newspapers from events).
\item \textsuperscript{75} First Amended Complaint at 9, Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (filing suit against a Wisconsin newspaper, its parent company and the state newspaper association).
\item \textsuperscript{76} See, e.g., Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (finding that there was a First Amendment right to attend criminal trials); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (acknowledging that “without some protection for seeking out the news, freedom of the press could be eviscerated.”). It is often said that the First Amendment is not a guarantee of access, in the sense that it does not provide the media access that goes beyond that of the general public. See e.g. Houchins v. KQED, 438 U.S. 1 (1978) (finding that the press did not have a greater right of access than the general public to prisons). For example, a federal court in Rhode Island found that a photographer did not have a First Amendment right to unlimited access to rock concerts. See D’Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1543 (D.R.I. 1986). As that court said, “the press cannot command access wherever, whenever and however it pleases,” adding that it is also true that the government cannot “arbitrarily shroud genuinely newsworthy events in secrecy.” Id. Ultimately, the government’s right to restrict First Amendment activity depends in part on the type of place involved. For the purposes of the First Amendment, a location could be a “traditional” public forum, a “designated” public forum or a “nonpublic” forum. See Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 182 n.2 (3d
important in these cases is whether conditions can be imposed on the coverage that flows from that access and whether the state actor can selectively allow access based on financial arrangements.

The First Amendment is a ban on government restrictions, not a command for government action and access cases are treated differently than straight speech cases. While the U.S. Supreme Court has developed a clear approach to cases involving restrictions on speech in public places — usually by designating the level of public forums and applying time, place, and manner tests — there is no similar framework for cases involving access. Typically, a state actor may not deny access to one member of the media while granting access to another (the other journalist might be one who has signed the agreement, or might be the official photographer or television station). Ultimately, the Supreme Court has repeatedly

Cir. 1999) (distinguishing between the different “fora” of speech). The court in Whiteland Woods explained:

The government’s ability to restrict speech is limited in speech fora. The Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Traditional public fora are defined by the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and debate. Designated public fora, in contrast, are created by purposeful governmental action. The government does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse. Other government properties are either nonpublic fora or not fora at all.

Id. Whiteland Woods held that a municipal government did not violate the First Amendment by prohibiting videotaping of public meetings. Id. at 184. However, the ruling in Whiteland Woods distinguished the case from others where videotaping was traditionally permitted and yet other cases where state access laws were violated. Id. When bringing a cause of action regarding access, it is important to consider state access laws and open meetings laws in addition to the First Amendment because some states’ open meetings laws exceed the limited framework of the First Amendment, particularly regarding access. See Csorny v. Shoreham-Wading Cent. Sch. Dist., 305 A.D.2d 83, 91 (N.Y. App. Div. 2003) (finding that although a ban on videotaping public meetings did not violate the First Amendment, it did violate the state’s open meetings law since there was “no legitimate reason to prohibit [video cameras] from public meeting rooms of school boards.”).

77. See Gaubert v. Denton, 1999 U.S. Dist. LEXIS 8207 (E.D. La. May 28, 1999) (“At the outset, it is important to note that the First Amendment reads in the negative”); see also U.S. CONST. amend. I (“Congress shall make no law…abridging the freedom of speech, or of the press”).

78. See S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553, 559 (6th Cir. 2007) (“Access cases have developed along distinctly different lines than have freedom of expression cases. Although the Supreme Court has established general principles with respect to access claims, what is missing from these cases is a clearly defined framework in which to analyze these claims.”).

79. The First Amendment protects expressive communication when it involves “an intent to convey a particularized message” and a “likelihood was great that the message would be understood by those who viewed it.” See Texas v. Johnson, 491 U.S. 397, 404 (1989). In the case of an official event photographer, that photographer is communicating a message to the parents who bought the photographs. It seems clear that a photograph of an event would convey a memory for a child who participated in that event, or information about the event to a parent who could not attend. Thus the association would be discriminating between the “official” photographer who has paid for access and
recognized the notion that the press has at least the same access rights as the general public.\textsuperscript{80} Of course, the right of access does not automatically equal the right to make photographs or videotape,\textsuperscript{81} but even if the government had the discretion to close sporting events to photographers entirely, they may not exclude some members of the media while allowing others.\textsuperscript{82} Once the government creates a public forum, there is an equal right of access, and access to a class of speakers cannot be restricted without a compelling interest.\textsuperscript{83} It is important to note that a typical public forum analysis is not the sole


\textsuperscript{80} In a 4 to 3 decision, a divided court found that the media did not have a First Amendment right, beyond that of the general public, to access the jails in \textit{Houchins v. KQED}, 438 U.S. 1 (1978). The plurality agreed that the First Amendment did not guarantee the public a right of access to government sources. \textit{Id.} at 15. But in a concurrence, Justice Stewart found that there was a constitutional need to be flexible with the level of access accorded to the media as compared to the public in general. \textit{Id.} at 16–17. Three dissenting justices found that media access to the prison system was required by the First Amendment, particularly since there was no alternative way to learn truthful information about the conditions of the jails. \textit{Id.} at 19–20. Thus a majority of that Court actually felt that the media was due a greater level of access than they were given. Just a couple of years later the Court overwhelmingly ruled in favor of access to criminal trials. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). Many district and circuit court cases addressing access rely on statements made in \textit{Richmond Newspapers v. Virginia}, 448 U.S. 555 (1980), a case which found that the media had a right of access to the courts, and \textit{KQED}. However, it is critical to any analysis of access to recognize that both opinions were divided opinions, with plurality decisions in which only seven members of the court participated. \textit{See generally} Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Houchins v. KQED, 438 U.S. 1 (1978).

\textsuperscript{81} \textit{See generally} Houchins v. KQED, 438 U.S. 1 (1978) (declining to find a right to videotape the prison system); Whitehead Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 184 (3d Cir. 1999) (finding that the “right of access to Planning Commission meetings did not create a federal constitutional right to videotape the meetings”); D’Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, (D.R.I. 1986) (finding no right to photograph concerts in city facility); Johnson v. Adams, 629 F. Supp. 1563, 1564 (E.D. Tex. 1986) (finding that the Titus County Commissioners Court had a right to ban videotaping of its meetings, and that such a ban did not violate the First Amendment).

\textsuperscript{82} \textit{See Am. Broad. Cos. v. Cuomo}, 570 F.2d 1080, 1083 (2d Cir. 1977) (“[O]nce the press is invited . . . there is a dedication of those premises to public communications use . . . . The issue is not whether the public is or is not generally excluded, but whether the members of the broadcast media are generally excluded.”); Sherrill v. Knight, 569 F.2d 124, 129 (D.C. Cir. 1977) (finding that once access to White House press facilities was opened to the media, access could not be denied arbitrarily); Stevens v. N.Y. Racing Ass’n, 665 F. Supp. 164, 175 (E.D.N.Y. 1987) (“When some members of the press are given access to cover an event, the state cannot arbitrarily impose limits on other press representatives’ access to the news.”); Lewis v. Baxley, 368 F. Supp. 768, 779 (M.D. Ala. 1973) (finding that applying an ethics statute to the media was unconstitutional on its face).

\textsuperscript{83} Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 55 (1983), (noting, “In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”); \textit{see also} Carey v. Brown, 447 U.S. 455, 461–62 (1980) (“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”).
analysis for these cases because the goal is not to restrict speech within the forum, rather the goal of the journalists is to speak outside of the forum about events that took place within that forum.

Rulings declaring that once the government invites the media and the public, they cannot deny access to specific members of the media, or provide preferential access to media favorites are a hybrid of First Amendment and Equal Protection principles. The Supreme Court has not specifically dealt with equal access cases involving the media, but in *Perry Education Ass'n v. Perry Local Educators’ Ass'n*, the Court ruled that equal access in a public forum is a constitutional right, and “the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.” Lower courts have clearly and strongly applied Equal Access principles to the media.

When a sheriff discriminated against a newspaper based on the belief that it had made a factual error, a federal court in Louisiana found it unconstitutional, stating: “The selective denial of access to a governmental forum based on content is unconstitutional regardless of whether a public forum is involved unless the government can

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84. See, e.g., Am. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) (finding that once access was opened to some media, it must be granted to all media); Stevens v. N.Y. Racing Ass’n, 665 F. Supp. 164, 177 (E.D.N.Y. 1987) (enjoining association from keeping magazine photographer from paddock area of racing facility); Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977) (ruling that the White House could not arbitrarily discriminate allowing access to White House press facilities).

85. See *Carey v. Brown*, 447 U.S. 455, 461–62 (1980) (“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”); see *id* at 460 Times-Picayune Publ’g. Corp. v. Lee, No. 88-1325, 1988 U.S. Dist. LEXIS 3506 at *25–28 (E.D. La. Apr. 15, 1988) (finding that a sheriff’s policy of providing different levels of access to different news organizations was unconstitutional); Borreca v. Fasi, 369 F. Supp. 906, 911 (D. Haw. 1974) (prohibiting the mayor of Honolulu from excluding a certain reporter from his press conferences); Telemundo of L.A. v. City of L.A., 283 F. Supp. 2d 1095, 1103–04 (C.D. Cal. 2003) (deciding in an equal protection claim that the city of Los Angeles could not form an exclusive partnership with Univision which forced Telemundo to delay its broadcast of the city’s official *El Grito* ceremony); Stevens v. N.Y. Racing Ass’n, 665 F. Supp. 164, 176 (E.D.N.Y. 1987) (finding that even if discrimination against photographer was content neutral, it likely violated equal protection).


88. Times-Picayune Publ’g. Corp. v. Lee, No. 88-1325, 1988 U.S. Dist. LEXIS 3506 at *25–28 (E.D. La. Apr. 15, 1988) (requiring a sheriff to provide equal access); Am. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) (requiring a political candidate to allow equal access); Telemundo of L.A. v. City of L.A., 283 F. Supp. 2d 1095, 1103 (C.D. Cal. 2003) (requiring the city of Los Angeles to provide equal access). But see *Wis. Interscholastic Athletic Ass’n v. Gannett Co.*, No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (finding that the WIAA did not have to provide equal access to members of the media who wanted to stream video over the internet, in part because of a finding of proprietary activity).
show a compelling state interest [that] is the least restrictive means available to achieve the asserted governmental purpose." The goal of encouraging accurate reporting or objectivity was not enough of a compelling state interest to make the sheriff’s actions constitutional, particularly because he was seeking to control what was said about his own actions.90

Similarly, a federal district court in New York found that “once the press [was] invited” to a campaign event (even though it was on private property) “there [was] a dedication of those premises to public communications use,” and mayoral candidates Andrew Cuomo and Ed Koch could not exclude one television station while inviting others.91 Likewise, a court in Hawaii granted a preliminary injunction to a reporter after the Honolulu mayor had repeatedly excluded him from press conferences.92

In Sherrill v. Knight,93 the United States Court of Appeals for the District of Columbia Circuit found that when the White House voluntarily chose to open press facilities to the media, access could not be denied arbitrarily unless there was a compelling reason.94 In other words, because they had opened up the White House press facilities to members of the press, the government could not arbitrarily deny access to some members of the press without providing them due process, even when the security of the president was the stated reason behind the denial.95 In Sherrill the White House

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90. Id. at *26.
91. Se & Me. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) (finding that excluding a television station from campaign activities based on their labor dispute violated the First Amendment Rights of the television station, and issuing an injunction banning the arrest for trespassing of reporters who crossed a picket line).
93. 569 F.2d 124 (D.C. Cir. 1977).
95. Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977) (ruling that the White House could not arbitrarily discriminate allowing access to White House press facilities).
granted media access beyond that of the general public, just like the school sports associations in the contemporary cases at issue. It was in fact allowable for the government in Sherrill to discriminate on the basis of the security of the president, by any account a compelling interest, but merely stating that journalist Robert Sherrill was excluded for “reasons of security” was vague and impermissible. Due process required that the secret service provide a factual basis for denial, an opportunity to respond and a final statement of the reasons for denial.

A federal court in California found that the City of Los Angeles could not exclude the Spanish-language television station Telemundo from the city’s official El Grito ceremony when it had made an exclusive deal with competing Spanish-language station Univision.

Turning again to the facts of photographing a sporting event, if the government permits access to one news organization because of an agreement or deal, but denies access to another news organization because of the refusal to make that agreement, there is likely to be a hybrid First Amendment/Equal Protection violation. The government may in fact deny access to one journalist while allowing it to another, but not if the exclusion is arbitrary, or impermissibly content-based. This concept is also supported by United States v. Kokinda, in which the Supreme Court held that while the government has some proprietary right over public property, it does not have the same right to limit First Amendment access that a

96. Id. at 130 (“Clearly, protection of the [p]resident is a compelling, ‘even an overwhelming,’ interest”).
97. Id. (“we think that the phrase ‘reasons of security’ is unnecessarily vague and subject to ambiguous interpretation.”).
98. Id. at 131 (noting that due process was required in denying a First Amendment right, evaluating “what process was due”).
100. See Sherrill v. Knight, 569 F.2d 124, 131 (D.C. Cir. 1977) (“notice to the unsuccessful applicant of the factual bases for denial with an opportunity to rebut is a minimum prerequisite for ensuring that the denial is indeed in furtherance of Presidential protection, rather than based on arbitrary or less than compelling reasons”).
101. See, e.g. Times-Picayune Publ’g. Corp. v. Lee, No. 88-1325, 1988 U.S. Dist. LEXIS 3506 at *25 (E.D. La. Apr. 15, 1988) (“A policy that discriminates against particular reporters or news organizations by public officials who are dissatisfied with the contents of news coverage is unconstitutional unless the policy furthers a compelling state interest and is the least restrictive means available to achieve the asserted governmental purpose.”); Stevens v. N.Y. Racing Ass’n, 665 F. Supp. 164, 168 (E.D.N.Y. 1987) (finding that it was likely that the plaintiff could prove that the discrimination was content-based, and granting an injunction against discrimination).
private property owner would. 103

In a closely on-point case, after a state racing association, which was found to be a state actor,104 opened an area to the press, it could not restrict the access of a journalist because the association disliked the content of that journalist’s publication.105 The court held: “When some members of the press are given access to cover an event, the state cannot arbitrarily impose limits on other press representatives’ access to the news.”106

The Telemundo case is also very instructive. In that situation, the city of Los Angeles sponsored an official ceremony on the eve of Mexican Independence Day, marked by a cry known as El Grito.107 For twenty-two years, the city had an exclusive partnership with television station KMEX-TV (KMEX), a Univision station, in relation to the event.108 In 2003, KMEX planned to produce forty-five minutes of entertainment, and then the official city El Grito reenactment was to take place.109 The city gave exclusive access to the event, which was on public property, to KMEX. KMEX, in turn, planned to provide a pool feed110 to other television stations, with the condition that they embargo the footage until KMEX broadcast it. The broadcast was not live.111 Telemundo of Los Angeles sought to cover the event itself, rather than relying on the delayed pool feed, and the city wouldn’t permit it.112 Granting an injunction against the city, a federal court found that 1) the city-sponsored event was a public forum;113 2) the city was not acting in a commercial or

103. See United States v. Kokinda, 497 U.S. 720, 725 (1990) (“The Government’s ownership of property does not automatically open that property to the public...[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business.”).

104. Stevens v. N.Y. Racing Ass’n, 665 F. Supp. 164, 172 (E.D.N.Y. 1987) (“[I]t is likely that plaintiff will establish state action under the symbiotic relationship test at trial.”).

105. Id. at 175 (“[T]he [F]irst [A]mendment prohibits government from restricting a journalist’s access to areas otherwise open to the press based upon the content of the journalist’s publications.”).

106. Id.


108. In effect, KMEX was the “official” station of the ceremony. Id. at 1098.

109. Id.

110. A “pool” coverage arrangement is an agreement among members of the media to share source material, whether video feed, photographs or notes. Pool coverage arrangements are typically used when the number of journalists interested in an event exceeds the space available, such as in a courtroom or political debate. See generally Estate of Rosenbaum v. City of New York, 1993 U.S. Dist. LEXIS 15908 (E.D.N.Y. Aug. 13, 1993); WPix, Inc. v. League of Women Voters, 595 F. Supp. 1484 (S.D.N.Y. 1984); Cable News Network, Inc. v. Am. Broad. Cos., 528 F. Supp. 365 (N.D. Ga. 1981).


112. Id. at 1098–99 (C.D. Cal. 2003).

113. Id. at 1102 (C.D. Cal. 2003) (“For at least three years, the entertainment and official ceremony
 proprietary capacity with respect to the official ceremony;\(^{114}\) 3) there was no compelling (or other) reason why one television station should be granted access over the other;\(^{115}\) 4) the sharing of “pool” footage was not enough to overcome the First Amendment harm done by denying access to Telemundo;\(^{116}\) and 5) the commercial interests of KMEX did not outweigh the First Amendment interests of Telemundo.\(^{117}\)

**B. Equal Access and Commercial Photographers**

The dynamics change a bit if the photographer challenging the access policy is considered a commercial photographer, without consideration to First Amendment activity. The Fourth and Eleventh Circuits have both ruled that public schools and universities have a right to make exclusive contracts with commercial photographers to the exclusion of other commercial photographers, but First Amendment equal access issues were not at play in those cases.\(^{118}\) In neither case did the agreement operate to exclude the news media from events or have an impact on the rights of private individuals to have taken place on government property, transforming publicly owned property into a public forum for expressive activity.”).

114. Id. (distinguishing the case from *D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, (D.R.I. 1986) and *Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81 (D. Conn. 1981)). The court noted that the events in those cases were produced by private entities and were purely commercial while *El Grito* was sponsored by the city, funded in part by the city and featured the mayor. Id. at 1099. The city had committed $95,000 to the event. Id.

115. Id. at 1103 (“Defendants have not presented one reason, compelling or otherwise, why they initially decided that KMEX's cameras should be granted access to the official ceremony while Telemundo should be required to use a pool feed.”).

116. Id. (rejecting an argument that providing pool footage was sufficient to meet Telemundo's First Amendment rights “because embodied in Telemundo's First Amendment rights is its right to decide what to film, what to emphasize, and what images to relay to viewers. Moreover, Defendants have not persuasively argued that pooling is necessary.”).


118. See *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988 (4th Cir. 1990) (holding that an exclusive contract for commercial yearbook photographer was not an anti-trust violation); *see also* Foto USA, Inc. v. Bd. of Regents of the Univ. Sys., 141 F.3d 1032 (11th Cir. 1998) (finding that an exclusive contract for commercial photography rights at a graduation ceremony was not a First Amendment commercial speech violation and did not violate equal protection rights).
make their own photographs.\textsuperscript{119} In\ Foto USA, Inc. v. Board of Regents of the University System of Florida\textsuperscript{120} the Eleventh Circuit found that exclusive contracts between public universities and graduation photographers were not improper, even though they prevented a third party commercial photographer from photographing the graduations and soliciting sales at the events.\textsuperscript{121} The judge in Foto USA addressed the First Amendment, but Judge Hill was only presented with, and only examined, the commercial speech of the photographer soliciting business.\textsuperscript{122} The Foto USA court’s First Amendment holding was not based on photography as expressive activity, nor was it based on the free speech or free press aspect of photography.\textsuperscript{123} Plaintiff Foto USA made a claim based on its right to solicit “the sales of photographs” but did not make a claim that the photography itself was protected First Amendment activity.\textsuperscript{124} While holding against the photographer’s right to solicit business during the graduation, the court recognized that “the general public (parents and anyone else with an invitation), the official photographers, and Foto are all permitted access to university graduation ceremonies. All are permitted to take photographs of the graduates.”\textsuperscript{125} Thus, Foto USA does not stand for the principle that a state actor can prohibit a news photographer from taking photographs at a public event. Nor does it provide that a state actor can restrict what a photographer does with images after they are taken lawfully.

The Fourth Circuit case of\ Stephen Jay Photography, Ltd. v. Olan Mills, Inc.,\textsuperscript{126} an antitrust case, was brought by a commercial photographer as well, and the Fourth Circuit ruled that the photographer had failed to show that competing commercial photographers engaged in antitrust violations by paying school districts to be the “official photographers.”\textsuperscript{127} The First Amendment,

\begin{itemize}
\item \textsuperscript{119} Foto USA, Inc. v. Bd. of Regents of the Univ. Sys., 141 F.3d 1032, 1035 (11th Cir. 1998).
\item \textsuperscript{120} id.
\item \textsuperscript{121} id.
\item \textsuperscript{122} id. (holding that an exclusive contract for commercial photography rights at a graduation ceremony was not a First Amendment issue and did not violate equal protection rights).
\item \textsuperscript{123} id. at 1034 (noting that Foto USA “asserts that the commercial act of soliciting the sale of photographs it intends to create there is the expressive activity which is protected by the First Amendment.” (emphasis added)).
\item \textsuperscript{124} id. at 1035 (noting that Foto claimed that it intended “to solicit graduates to sell its photographs, and it is this solicitation that is the critical and protected activity.”).
\item \textsuperscript{125} id.
\item \textsuperscript{126} 903 F.2d 988 (4th Cir. 1990).
\item \textsuperscript{127} Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 995 (4th Cir. 1990).
\end{itemize}
however, was not addressed in *Stephen Jay Photography.*

In conclusion, the government clearly has some proprietary rights to restrict access when public places are converted into private, commercial use. The government also has a right to contract with photographers for commercial work if it doesn’t impact the First Amendment rights of others. But once the government creates a public forum, or converts a private forum to a public one, it cannot restrict press access. In particular, once the government opens up a forum to members of the media, the government may not provide discriminatory access to different members of the media without a compelling government interest that is narrowly tailored to serve that interest. Based on the *Telemundo* ruling, while a government actor can have an “official” photographer, they cannot use that as a reason to exclude other journalists.

V. DOES THE GOVERNMENT HAVE A RIGHT TO IMPOSE RESTRICTIONS ON THE MEDIA AS A CONDITION OF ACCESS?

Participation in First Amendment activity is not a license to violate a contract or to violate an otherwise constitutional law. Therefore, it would seem that a journalist who made a contract or signed a credentialing agreement would be held to that contract. In *Cohen v. Cowles Media Co.*, the Supreme Court ruled that the First Amendment did not protect a reporter from the consequences of breaking an agreement of confidentiality with a source who demanded anonymity in exchange for information. When the newspaper revealed the confidential source’s name, the newspaper

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128. Even the issue of exclusive photography contracts by public schools was not fully reached in *Stephen Jay Photography* because plaintiffs failed to meet the elements of restraint of trade because they had made no effort to bid on becoming the official photographer and because the schools did not prevent the plaintiff’s photographs from being used in the student yearbook. *Stephen Jay Photography*, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 994–95 (4th Cir. 1990).

129. *Telemundo of L.A. v. City of L.A.*, 283 F. Supp. 2d 1095, 1103 (C.D. Cal. 2003) (“embodied in Telemundo’s First Amendment rights is its right to decide what to film, what to emphasize, and what images to relay to viewers. Moreover, Defendants have not persuasively argued that pooling is necessary.”).

130. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (finding that a news organization was subject to damages for violating a confidentiality contract, and “enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”).


132. *Id.*

133. *Id.* at 665–66.
was liable for damages resulting from the breach of the agreement.\textsuperscript{134}

However, \textit{Cohen} is not entirely on point and does not end the analysis of what happens if a newspaper breaches a credentialing agreement. An important distinction is that the confidential source in \textit{Cohen} was not a state actor. Although not specifically discussed in the analysis of \textit{Cohen}, the condition of anonymity was imposed by a private individual in exchange for giving information that the individual did not have a constitutional obligation to provide.\textsuperscript{135}

In addition to a contract potentially being invalid if the terms were impermissible government restrictions, a contract can be held invalid for other reasons.\textsuperscript{136} For example, a contract based on fraudulent assertions is voidable.\textsuperscript{137} It is therefore possible that if a journalist made an agreement based on an assertion by an athletic association that the association has exclusive rights to the facts or descriptions of the game, the related elements of that agreement might be voidable as a material misrepresentation, because no such right exists.\textsuperscript{138}

Assuming for the sake of argument that an access agreement is not void based on material misrepresentation, the questions remain whether the restrictions are legitimate time, place, and manner restrictions; whether government can impose a fee on gathering news; and whether restrictions can be imposed on the way that the media uses information that the media gathers. The government does have the ability to impose some restrictions and conditions on access, namely reasonable time, place, and manner restrictions.\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{134} Id. at 672.
  \item \textsuperscript{136} C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P., 505 F.3d 818, 825 (8th Cir. 2007) (finding that a baseball company was not bound by certain terms of a prior contract because Major League Baseball had falsely guaranteed that it was the sole and exclusive owner of the rights and titles to baseball players names and statistics, when in fact the league did not have exclusive ownership of such. A lower court had differently found that enforcement of the terms would have violated public policy).
  \item \textsuperscript{137} See, e.g., \textsc{Restatement (Second) of Contracts}, § 164(1) (1981) (“If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).
  \item \textsuperscript{138} See id.; see also C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P., 505 F.3d 818, 825 (8th Cir. 2007) (finding that a baseball company was not bound by certain terms of a prior contract because Major League Baseball had falsely guaranteed that it was the sole and exclusive owner of the rights and titles to baseball players names and statistics, when in fact the league did not have exclusive ownership of such. A lower court had found that enforcement of the terms would have violated public policy).
  \item \textsuperscript{139} Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (“Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample
Time, place, and manner restrictions are content neutral, narrowly tailored, and serve a significant government interest.\footnote{140} In addition, the restrictions must leave other channels of communication open.\footnote{141}

Plenty of restrictions on access by the media have been found acceptable by courts, such as requiring a background check to access the White House press room;\footnote{142} requiring photographers to participate in a media-regulated pool agreement when space is at a premium;\footnote{143} limiting coverage-related conduct that is disruptive;\footnote{144} and even limiting photographic coverage to protect other fundamental rights such as the right to a fair trial and the right to privacy.\footnote{145} Importantly, none of the above-listed restrictions involved what could be done with images or information after it was legally available.

\begin{footnotes}
\item[140] Carey v. Brown, 447 U.S. 455, 462 (1980) (explaining that discrimination “among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”).
\item[141] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”).
\item[142] Sherrill v. Knight, 569 F.2d 124, 130 (D.C. Cir. 1977) (“Clearly, protection of the [p]resident is a compelling, ‘even an overwhelming,’ interest”).
\item[143] WPIX, Inc. v. League of Women Voters, 595 F. Supp. 1484, 1490 (S.D.N.Y. 1984) (denying a preliminary injunction to force the League of Women Voters to allow access to WPIX by concluding that it would not be fair or workable).
\item[144] See Estes v. Texas, 381 U.S. 532, 551 (1965); see also Johnson v. Adams, 629 F. Supp. 1563, 1564 (E.D. Tex. 1986) (finding that the Titus County Commissioners Court had a right to ban videotaping of its meetings, and that such a ban did not violate the First Amendment). The court in Titus County noted that the United States Senate and House of Representatives had also banned videotaping, which is no longer the case. Id. at 1564–65. This is easily distinguishable from a sporting event because the disruptive nature of cameras is not an issue, as evidenced by the presence of official photographers.
\item[145] See Estes v. Texas, 381 U.S. 532, 551 (1965) (finding that an unruly courtroom, including the uncontrolled presence of cameras, violated the defendant’s right to a fair trial); see also In re Miss. Rules for Elec. & Photographic Coverage of Judicial Proceedings, No. 89-R-99031, 2003 Miss. LEXIS 184, at *5 (April 11, 2003) (“Coverage of certain persons prohibited. Electronic coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse.”) It is possible that the Mississippi rules would not be upheld. They are not narrowly tailored because their broad nature excludes coverage of jurors and sex crime victims that consent to electronic coverage. See e.g., Fla. Star v. B. J. F., 491 U.S. 524, 539 (1989) (finding a statute unconstitutional when it made it illegal to publish the names of victims of sexual offenses “regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern.”); see also Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1306 (1983) (noting that a ban on publishing names of jurors was not narrowly tailored, even if it were to serve a compelling state interest, which had not been proven).
\end{footnotes}
gathers.

The government can also restrict access to publicly-owned facilities that are leased by private entities without running afoul of the First Amendment because of the governmental need to protect its proprietary interest and compete in the marketplace with other facilities.146

While some restrictions on coverage are clearly acceptable when there is a compelling government interest, such as the safety of the president,147 some conditions, such as requiring a news organization to pay a licensing fee, strike at the heart of our nation’s historical abolition of prior restraint.148

There are clearly good reasons why the associations are imposing these restrictions, but the question is not whether there is an important purpose, as the Wisconsin Interscholastic Athletic Association claims its fee serves.149 Because this is a direct, rather than incidental restriction on speech, if the restrictions are to be upheld, the question that must be asked is whether the stated interests that the associations have is in fact a compelling interest,150 and whether the restrictions are narrowly tailored to achieve that interest.151 Most of the interests asserted and implied in the cases

146. See Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co., 510 F. Supp. 81, 86 (D. Conn. 1981) (finding that restricting access to a publicly owned sports arena was not unconstitutional when it was rented out to a private entity and the city was operating in its proprietary capacity); D’Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1544 (D.R.I. 1986) (finding that private concert promoters did not have to allow a photographer access simply because the facility was owned by the city).

147. See Sherrill v. Knight, 569 F.2d 124, 130 (D.C. Cir. 1977) (“Clearly, protection of the [p]resident is a compelling, ‘even an overwhelming,’ interest.”).

148. See Ronald J. Krotoszynski, Jr., et al., THE FIRST AMENDMENT CASES AND THEORY 406 (Aspen Publishers 2008) (explaining how “[t]he classic prior restraint is a licensing law — a law that forbids a person from publishing his ideas without first receiving the permission, or ‘license’ of a government official.”).


150. See Ark. Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (finding that discriminating among news organizations (based on content) must be “necessary to serve a compelling state interest” and “narrowly drawn to achieve that end.”); see also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 55 (1983) (holding that “the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”); Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977) (granting that when the White House voluntarily chose to open a facility to the media, access could not be denied arbitrarily unless there was a compelling reason).

151. See Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1306 (1983) (noting that a ban on publishing names of jurors was not narrowly tailored, even if it were to serve a compelling state interest, which had not been proven); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)
involving athletic associations are not compelling enough to justify the restraint on the media. In fact, the majority of these interests have been explicitly rejected by Supreme Court precedent. In *Miami Herald Publishing Co., Division of Knight Newspapers, Inc. v. Tornillo*, the Supreme Court found that a desire for fair and accurate reporting was not a compelling government interest. In *Arkansas Writers’ Project, Inc. v. Ragland*, the Court reminded us that “an interest in raising revenue, standing alone, . . . cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available.” Finally, in *Wilson v. Layne*, the Supreme Court, ruling on a Fourth Amendment issue, found that public relations did not justify the violation of a fundamental right, in that case, a right to privacy.

("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

152. See generally First Amended Complaint at 7–8, Wis. Interscholastic Athletic Ass'n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010). (“Fees generated through the granting of transmission and broadcast licenses, including over the Internet, serve the important purpose of generating revenue for the WIAC.”); Counterclaim and Third-Party Complaint at 2–4, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Dec. 5, 2007) (explaining the reasons for entering into an exclusive agreement, the reasons included a need for photographs to promote the activities of the association and a desire to save money which it previously spent hiring its own photographer).


158. See Wilson v. Layne, 526 U.S. 603 (1999) (finding that the actions of the police, when they allowed the media to enter a private home while a warrant was being executed, violated the Fourth Amendment. The court further found that the government goals of good public relations and accurate reporting did not justify the violation of the fundamental right to privacy. Likewise the goal of accurate publicity was rejected as a justification for violating the First Amendment right of access in *Tornillo*. Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 258 (1974). See also Times-Picayune Publ’g. Corp. v. Lee, No. 88-1325, 1988 U.S. Dist. LEXIS 3506 at *26 (E.D. La. Apr. 15, 1988) (“Promoting the accuracy or objectivity of news reporting is not a compelling governmental interest that cannot be served by less restrictive means must be shown for such use to
VI. A CLOSER LOOK AT THE WIAA CREDENTIALS

There are many examples of controversial restrictions imposed by sports associations, but because the dispute in Wisconsin went to court and many of the documents became public record, it presents the opportunity for a useful case study. This section will evaluate the legality of several kinds of conditions.

A. Vague conditions

The 2008–2009 WIAA Media Policies included a provision that rights would be granted in the case of television, cable and Internet video “at the sole discretion of the rights holder.” This level of discretion may be impermissibly vague. Conditions that leave too much discretion for denying access are impermissible. As discussed above, based on Sherrill, a state actor can exclude a journalist, but the reasons must be specified, there must be a factual basis for denial, and there must be an opportunity to respond. The unfettered discretion argument was made by Gannett in its lawsuit with the WIAA, but it was rejected by the district court in part because the court found that the discretion had not been abused. Of course actual censorship is not required to make a policy unconstitutional, rather it is the potential for censorship, which results in self-censorship, that makes a policy invalid.

meet Constitutional standards. No compelling governmental interest has been shown or even claimed here.

159. Wisconsin Interscholastic Athletic Association, 2008-09 Media Policies Reference Guide at 10 (on file with author). Vagueness was also an issue in the IHSA case, where one of the complaints was the vague prohibition on “secondary use.” Amended Complaint at 3, Ill. Press Ass’n v. Ill. High Sch. Ass’n, No. 07-CH-885, (Ill. 7th Cir. Sangamon County Jan. 23, 2008).

160. See Sherrill v. Knight, 569 F.2d 124, 131 (D.C. Cir. 1977) (ruling that the White House could not arbitrarily discriminate allowing access to White House press facilities.) While it was permissible for the government in Sherrill to discriminate on the basis of the security of the president, the standards by which the security risk is determined had to be published and stating that a journalist was excluded for “reasons of security” was vague. Due process required that the secret service provide a factual basis for denial, an opportunity to respond and a final statement of the reasons for denial. Id.

161. Id. (ruling that when blocking a reporter from White House access, secret service must provide a factual basis for denial, an opportunity to respond and a final statement of the reasons for denial).

162. Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137, at *71- (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (stating, “defendants have identified no reason to believe that, in the future, plaintiffs will begin issuing licenses to media companies on the basis of viewpoint. . . In the event that defendants are denied a license in the future for a reason that violates the First Amendment, they are free to bring an as-applied challenge at that time.”).

“[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.”

B. Requiring a licensing fee in exchange for allowing coverage

At the heart of the WIAA dispute was the group’s television and Internet policies requiring payment for the right to broadcast video, information or photographs of the games in “real-time.” The WIAA lawsuit was filed after a newspaper streamed a football game live on the Internet without the payment of licensing fees. In addition, the pleadings reveal that the WIAA demanded similar licensing fees for merely transmitting information — for example, by “live blogging” — over the Internet during the game. The WIAA asserted no compelling interest for these fees, other than the desire to earn revenue. Despite this, the district court ruled that the licensing fees were constitutional, stating that because the WIAA had decided to make live coverage of the games a commercial effort, it was acting in a proprietary capacity and not subject to strict scrutiny.

The legal system’s treatment of fees on the media has deep historical roots dating back to the origins of our system of freedom of the press, which began in pre-colonial England. After the invention of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.”

164. Id.


166. Id.

167. First Amended Complaint at 7, Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (“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 WWXY, and, if granted, must pay a reasonable license fee and agree to abide by WIAA broadcast and media policies”); Wisconsin Interscholastic Athletic Association, 2008–09 Media Policies Reference Guide at 16 (on file with author) (outlining fees required for broadcasting and “live blogging”).

168. First Amended Complaint at 7–8, Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (“Fees generated through the granting of transmision and broadcast licenses, including over the Internet, serve the important purpose of generating revenue for the WIAA.”).

169. Wis. Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137, at *32-33 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (“WIAA invites the public to its members’ games not for the purpose of fostering debate, but in substantial part to make money. . . . When the government acts in a commercial or proprietary capacity, as WIAA does with respect to the tournament games it sponsors, it weighs strongly against finding that the government has created a public forum or that regulation of speech within that forum is subject to strict scrutiny.”).
of the printing press publishers were required to receive permission, in the form of a license, in order to publish. The license could be rejected at will, and was used to censor or ban work that the government didn’t agree with.\textsuperscript{170} With this backdrop, it is easy to see how a requirement to purchase a license in order to cover a government-sponsored event might be found to be repulsive to the concept of free speech. When combined with vague terms that give discretion to the government to restrict publication entirely, there would be little to distinguish such rules from printing-press era licensing and prior restraint.\textsuperscript{171}

Furthermore, a requirement by a state actor to pay for the privilege of covering an event could be likened to a tax. While the government is not prohibited from taxing the media in a manner similar to other businesses, it is typically unconstitutional to create a tax that singles out the press, or singles out certain publications.\textsuperscript{172} In its pleadings, the WIAA never asserts a particular cost associated with having additional media present; in other words, the fees are not directed at the expenses involved in having the media present.\textsuperscript{173} Rather, what is asserted is the “important interest” of raising revenue.\textsuperscript{174} Thus it appears that the WIAA is singling out the media to fund the operational costs of its events. Even so, the WIAA court found that the fee was a permissible fee.\textsuperscript{175}

A tax or licensing requirement that is imposed only when news is distributed in a certain way, such as when a publication broadcasts on the Internet, or when a news organization runs footage for over two minutes, is content-based, and the Supreme Court has explicitly rejected taxes on the media that are based on content.\textsuperscript{176}

\textsuperscript{170} See Near v. Minnesota, 283 U.S. 697, 713–14 (1931) (describing the struggle in England against the licensing power to restrain publication prior to publication); see also Ronald J. Krotoszynski, Jr., et al., THE FIRST AMENDMENT CASES AND THEORY 406–07 (Aspen Publishers 2008) (describing the origins of prior restraint and the rejection of prior restraint as a threat to press freedom).
\textsuperscript{171} Cf. Near v. Minnesota, 283 U.S. 697 (1931) (explaining the origins of prior restraint).
\textsuperscript{172} Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592–593 (1983) (“A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action.”).
\textsuperscript{174} Id. at 7–8 (“Fees generated through the granting of transmission and broadcast licenses, including over the Internet, serve the important purpose of generating revenue for the WIAA.”) (emphasis added).
\textsuperscript{175} Id. at *32-33 (W.D. Wis. June 3, 2010) (finding that the purpose of the events was to make money, the WIAA was acting in a proprietary capacity).
\textsuperscript{176} See Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (finding that regardless of
An evaluation of taxes on the media once brings us back to the history of the First Amendment, as explained by the Supreme Court in *Grosjean v. American Press Co.* After England abolished the above-mentioned licensing system as a pre-condition for use of the presses, there was a new effort to use taxes as a method of discriminating against criticisms of the crown. As the *Grosjean* Court explained, “these taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government; and that the revolution really began when, in 1765, [the British] government sent stamps for newspaper duties to the American colonies.” A stamp tax on newspapers and magazines by colonial Massachusetts was also violently opposed. Both were part of the inspiration for the First Amendment. The *Grosjean* Court went on to find that a tax, which had been imposed only on newspapers below a certain circulation level, was unconstitutional.

Nearly fifty years later, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* the Court clarified that an illicit censorship goal was not required to invalidate a tax that singles out the media. All that is required is the potential for abuse from singling out the press. Finally, in *Arkansas Writers’ Project, Inc. v. Ragland,* the Supreme Court found that a tax that charged media organizations differently based on the content of the publication was unconstitutional, a tax that charged media organizations differently (based on content) was unconstitutional. The fact that that the tax status of a publication was based on its content was repugnant to the First Amendment and “an interest in raising revenue, standing alone . . . cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available.”; *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 592–593 (1983) (invalidating an ink tax that only applied to certain types of publications); *See also Leathers v. Medlock,* 499 U.S. 439, 445–47 (1991) (explaining the line of taxation of the press cases including *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *Minneapolis Star and Arkansas Ragland* and noting that even without an illicit or impermissible intent, a tax that singles out the media is presumptively unconstitutional and is only permissible if there is a compelling justification).

177. 297 U.S. 233 (1936).
179. *Id.*
180. *Id.* at 248.
181. *Id.* at 248–49.
182. *Id.* at 251.
185. *Id.* at 591–593 (1983).
unconstitutional. In that ruling, the Court asserted that “an interest in raising revenue, standing alone... cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available.”

As summarized in *Leathers v. Medlock,* this line of cases stands for the principle that while the press is not immune from taxes and fees shared by all businesses, a “differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press.” By its nature, payment that is imposed only when information is presented at a certain time or beyond a certain length will operate to suppress the expression of that information.

**C. Time limits on video and real-time reporting and live broadcast limits**

The WIAA credentialing restrictions include a two-minute time limit on video coverage. Attempts to impose such time limits on video usage in news broadcasts are becoming more and more common at sporting events. On the college level, the controversial initial 2009–2010 media policies for the Southeastern Conference also included a two-minute limit for use of video and limits on live blogging. As mentioned above, the critical issue in the WIAA suit raised revenue, standing alone. . . cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available.”

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189. First Amended Complaint at 7, Wisconsin Interscholastic Athletic Ass’n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (“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... and, if granted, must pay a reasonable license fee”). See also Wisconsin Interscholastic Athletic Association, 2008–09 Media Policies Reference Guide at 12 (on file with author) (prohibiting use of audio or video tape for longer than two minutes and prohibiting the live coverage).
190. Wisconsin Interscholastic Athletic Association, 2008–09 Media Policies Reference Guide at 12 (on file with author) (“The use of video, audio and tape exceeding two minutes by the originating stations, publication or Web site for any purpose other than highlights on regularly scheduled news or sports broadcasts, or on a Web page, is prohibited.”).
191. *See* Joe Strupp, SEC Revise Controversial Credential Policy — Most Restrictions Lifted, *Editor & Publisher,* (Aug. 27, 2009) (on file with author) (describing initial terms of credential agreement for the Southeastern Conference which included restrictions on Web site video and audio footage, limits on live blogging and required newspapers to grant the SEC and universities permission.
was related to the broadcasting of an entire football game live over the Internet. The WIAA ruling, which found that the broadcast was improper and could be restricted, creates the precedent that a state actor can in fact place limits on the length of coverage and restrictions on the timing of coverage of that state actor and the events it sponsors.

Time limits on video and restrictions on live blogging should both be considered under the concepts of prior restraint and interference with editorial discretion. By their nature, they impose a limit on the reporting of a news organization, and prevent reporting of a certain type (that which may be more than two minutes in length, or that which may be about events that are occurring at the time of the report). In *Near v. Minnesota*, the Supreme Court, in finding a Minnesota statute unconstitutional, held that prior restraint on publication was an infringement of the freedom of the press, and explained that the cornerstone of a free press was the absence of prior restraint. The repulsion of prior restraint was reaffirmed forty years later in *New York Times Co. v. United States* (known as the *Pentagon Papers* case) when the Court stated outright that “[a]ny system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.” In the *Pentagon Papers* case, the government asserted an interest in preventing the publication of the contents of classified documents, surely an interest far higher than raising revenue for a sporting
to use photographs taken at the games. After several news organizations threatened to boycott the games, most of the restrictions were eased.) The Illinois High School Athletic Association also imposed a 30-second-per-event limit for newscasts before a settlement was reached with the newspapers. See Illinois High School Association, 2007–2008 Football State Final Media Arrangements (on file with author).


193. Wis. Interscholastic Athletic Ass'n v. Gannett Co., No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137, at *58, *60 (W.D. Wis. June 3, 2010), appeal docketed, No 10-2627 (7th Cir. July 7, 2010) (“In fact, the license... simply prohibits them from filming and transmitting the game live... Defendants are free to publish accounts of the tournaments in newspapers and television, to interview the players and coaches and even to display up to two minutes of live video coverage of any game.”)

194. 283 U.S. 697 (1931).

195. *Near v. Minnesota*, 283 U.S. 697, 723 (1931) (“[W]e hold the statute... to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment.”).

196. *Id.* at 714–719.


In addition to serving as a prior restraint on publication, the time-limit restrictions on video reports and real-time reporting invade the editorial decision-making process. If a news organization finds a particular game worthy of more than two minutes of coverage, the restrictions would prohibit such a report. Such restrictions on the scope of a news report were explicitly rejected in *Tornillo* when the Supreme Court said that decisions about limitations on the “size and content” of a report constituted the “exercise of editorial control and judgment,” and that regulation of this process by the government is inconsistent with the First Amendment.

**D. Restrictions on the sale of reprints**

The WIAA credentials state that “[a]ny sale of photography, digital image files, videotape or film taken at State Tournament Series events is prohibited without written consent of the WIAA.”

The right of newspapers to sell reprints has yet to be ruled on by a judge. It was at the heart of the dispute between the Illinois newspapers and the Illinois High School Association (IHSA) in *Illinois Press Ass’n v. Illinois High Sch. Ass’n*, but that case settled before reaching a court of law. In the WIAA case, the court did not rule on the reprint issue.

The athletic associations appear to be of the opinion that the sale of reprints is not a First Amendment activity. But as explained

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199. *Id.* (“Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity... the government [has] not met that burden.”).


203. *See* *Wis. Interscholastic Athletic Ass’n v. Gannett Co.*, No. 09-cv-155-wmc, 2010 U.S. Dist. LEXIS 55137, at *22 (W.D. Wis. June 3, 2010), *appeal docketed*, No 10-2627 (7th Cir. July 7, 2010) (“defendants say nothing in their briefs about the photography policy. In light of this silence and the parties' stipulation to drop Visual Image Photography as a party (dkt. # 6), defendants have effectively abandoned their challenge to that policy.”).

below, the sale of photographic prints can be considered First Amendment activity, particularly when it is done in connection with other First Amendment activity. Exerting control over what happens to images after they are obtained goes far beyond time, place, and manner restrictions that regulate behavior during the newsgathering process.

**E. Requirements to include certain advertising in broadcasts**

The 2008–2009 WIAA Media Policies includes a policy that “The WIAA reserves the right to require two minutes of advertising or promotional inventory to be included in any or all radio or television broadcasts, as well as Webcasts of WIAA Tournament Series events as determined by the WIAA.”*205 The Supreme Court ruled in *Tornillo* that an attempt to compel a newspaper to include certain elements in its publication was a Constitutional violation,*206 noting that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment,”*207 and could not be regulated.*208

**F. Summary of the WIAA credential**

Despite the fact that the WIAA court found some conditions and restrictions in the WIAA credentialing agreement to be constitutionally valid, it is easy to see how a different court could find that because WIAA is a state actor, they may not impose vague conditions on the media, charge a licensing fee for covering the event beyond a certain length, or have an exclusive license with a news

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207. *Id.*

208. *Id.* (“It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.”).
outlet. Regardless of whether the forum is public or non-public, commercial or proprietary, these restrictions are prior restraints on speech outside the forum, the content of the news, such as the length of broadcast, the timing of the broadcast, and the medium of the dissemination, which is unconstitutional. The sale of photographic reprints, a constitutionally protected activity, cannot be restricted, and forcing the media to include certain advertisements in its broadcasts, though not ruled on in WIAA, would run afoul of previous Supreme Court holdings.

VII. COULD SOME RESTRICTIONS AND CONDITIONS BE CONSTITUTIONAL?

Given the above evaluations, the question remains: what conditions are permissible? Even in extremely sensitive situations, the government generally has not been allowed to punish the media for using information that it legally obtains. Conditions have been successfully imposed on photography of trials, minors, victims of sexual abuse and jurors. In addition, journalists have been required to pass background checks when national security is an issue.

209. See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592-593 (1983) (finding that a tax that singles out the press is unconstitutional); Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 258 (1974) (finding control of news content which had an impact on length of news to be unconstitutional); WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42, 43 (1st Cir. 1991) (refusing to stop a TV station from broadcasting the Boston Marathon when another had contracted for "exclusive" broadcast rights with the race organizers); Telemundo of L.A. v. City of L.A., 283 F. Supp. 2d 1095 (C.D. Cal. 2003) (finding that the city could not provide discriminatory access, between the "official" television station and another television station, to an official city event); Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977) (ruling that the White House could not arbitrarily discriminate allowing access to White House press facilities).


211. See id. (finding that forcing publications to carry certain content is unconstitutional).

212. See Fla. Star v. B.J.F., 491 U.S. 524, 530 (1989) (upholding a lower court ruling that a newspaper could not be punished for publishing truthful information obtained from a police report that was publicly available, while declining to hold an across-the-board ban on the publication of truthful information); Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) ("this Court has repeatedly held that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.").


214. See Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977) (commenting that security of the president is a compelling interest).
None of these restrictions involved requiring a media organization to pay a fee to a government actor in exchange for the right to broadcast that organization’s own content, or limits on what the media can do with information that does not involve privacy or security interests. Even guidelines for covering sensitive trials cannot “restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice.” It follows that any conditions imposed on journalists as a condition of coverage would have to be similarly narrowly tailored to achieve a compelling government interest. As mentioned above, supporting the public relations interests of a government actor has previously been held to not be a compelling government interest. Raising funds is similarly not a compelling government interest that would justify discrimination between approved and official photographers, and members of the media.

Conditions imposed on what can be done with journalistic content — whether information, photographs or video — should be distinguished from reasonable time, place, and manner restrictions on speech inside a forum. It is perfectly permissible for the

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216. In re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982).

217. See Wilson v. Layne, 526 U.S. 603, 613 (1999) (finding that the government goals of good public relations and accurate reporting did not justify the violation of the Fourth Amendment); Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tomillo, 418 U.S. 241, 258 (1974) (rejecting the goal of fair reporting as a justification for violating the First Amendment right of access); Times-Picayune Pub’g Corp. v. Lee, No. 88-1325, 1988 U.S. Dist. LEXIS 3506 at *25 (E.D. La. Apr. 15, 1988) (finding that reporting that conformed to the government’s idea of accurate was not a compelling interest); Borreca v. Fasi, 369 F. Supp. 906, 910–11 (D. Haw. 1974) (noting that a government official attempts to use his office “to intimidate or to discipline the press . . . because of what appears in print, a compelling governmental interest that cannot be served by less restrictive means must be shown for such use to meet Constitutional standards. No compelling governmental interest has been shown or even claimed here.”).

218. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (finding that regardless of motivation, a tax that charged media organizations differently (based on content) was unconstitutional, and “an interest in raising revenue, standing alone . . . cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available.”).

219. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” (emphasis added)). See generally Wisconsin Interscholastic Athletic Association, 2008-09 Media Policies Reference Guide at 6–8 (on file with author) (designating shooting areas and rules for different sports).
associations to impose reasonable restrictions on the location of photographers and the conduct of journalists, particularly when it is for the protection of athletes. In fact the associations have such restrictions, and they are not at issue. These restrictions, however, must not be imposed differentially on different photographers. In addition, while reasonable and evenly applied restrictions on behavior inside a forum is allowed, the Supreme Court has consistently blocked government efforts to control lawfully obtained information.

IIX. A Possible Defense for the Associations: Are the Activities that the Associations Are Trying to Restrict Truly First Amendment Activities?

The final step of a credential analysis involves examining the defenses of the athletic associations. While photography for newsgathering purposes, or for a television broadcast, is protected by the First Amendment, athletic associations have inferred that the sale of reprints is commercial activity and therefore not affected by the same analysis as traditional newsgathering. The associations have also considered Web galleries, Web broadcasts and live blogging as distinct from the protected activities of traditional media. Thus it is critical to examine the question of whether or not these activities are protected by the First Amendment.

220. See generally Wisconsin Interscholastic Athletic Association, 2008-09 Media Policies Reference Guide at 6–8 (on file with author) (designating shooting areas and rules for different sports, for example, for gymnastics, no flash is allowed and photographers cannot move from their location during a routine).

221. Stevens v. N.Y. Racing Ass’n, 665 F. Supp. 164 (D.N.Y. 1987) (finding that differential treatment of different members of the media was impermissible).


223. Schnell v. Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969) (noting that when police prevented photojournalists from gathering news, “[t]here can be no conclusion but that the complaint sufficiently alleges that constitutionally protected activity was and continues to be interfered with by the named defendants and that the defendants have the duty and power to prevent any future interference.”).

224. Am. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) (finding that excluding a television station from campaign activities based on their labor dispute violated the First Amendment Rights of the television station, and issuing an injunction banning the arrest for trespassing of reporters who crossed a picket line).


226. Id.
A. Web Galleries

It is not likely that Web galleries will be excluded from the First Amendment, particularly when they are on a news website, and connected with a story.227 They provide a deeper level of coverage than is possible in a newspaper, permitting the communication of many different moments in the games, and they allow the viewer a deeper understanding of the game.228

B. Reprint Sales

Because the deal that the associations have with their official photographers is a commercial deal, they might argue that reprint sales are not protected by the First Amendment.229 However, there is sufficient precedent to conclude that a sale of a photograph, particularly when the photograph is created and sold in connection with a First Amendment activity, is protected by the First Amendment.230 Even a person’s “right of publicity” does not overcome the protection of the First Amendment.231 When a California newspaper sold posters that reproduced its front page, which included a photograph of Joe Montana winning the Super Bowl, Montana sued, arguing that the poster was a violation of his right of publicity. The court ruled that the poster was protected by the First Amendment, despite Montana’s rights.232 Similarly, a New York court, following other rulings in the state, held that a

227. See Texas v. Johnson, 491 U.S. 397, 404 (1989) (explaining that “[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”).

228. WIAA suit aims too high for control of content, THE POST-CRESCENT (Appleton, Wis.), March 8, 2009, at 1B (explaining that “[a]s a news organization, we're trying to provide the best coverage of this public event that we can, with whatever technology we have at our disposal.”).

229. See Foto USA, Inc. v. Bd. of Regents of the Univ. Sys., 141 F.3d 1032 (11th Cir. 1998) (deciding that an exclusive contract for commercial photography rights at a graduation ceremony was permissible).

230. See Montana v. San Jose Mercury News, 34 Cal. App. 4th 790, 797 (Cl. App. 1995) (“a newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs.”).

231. See id. at 795 (explaining “right of publicity,” as a right “based upon the plaintiff's right to use his own name and likeness for his own benefit,” while noting that “public figures do not retain the right of publicity against the use of name and likeness in the news media.”).

232. See id. (finding that posters reproducing newspaper front pages that had a photograph quarterback Joe Montana were entitled to First Amendment protection, just as the original newspaper accounts were. The posters were a “form of public interest presentation to which protection must be extended.”).
professional art photographer had a right to sell and display a candid photograph of a conservative Jewish man who did not consent to the photo. The man’s belief that the photograph violated his religious beliefs did not overcome the First Amendment right of the photographer. And the United States Court of Appeals for the Sixth Circuit ruled that a painting of Tiger Woods competing in a golf tournament was protected by the First Amendment and the right of the artist to sell posters which reproduced the painting did not violate Woods’ right of publicity. Photographic reprints are creative and artistic expressions, as well as journalistic representations of the event covered, communicating information and ideas to the viewer.

Finally, the mere fact that photographic reprints are sold at a profit (typical a very small one) is not sufficient to remove First Amendment protection. Books, newspapers, magazines, and films are all sold at a profit and that does not affect their level of First Amendment protection.

233. See Nussenzweig v. DiCorcia, 814 N.Y.S.2d 891 (Sup. Ct. 2006) (finding that the sale of photographic prints of a Hassidic Jew who asserted a privacy claim was protected by the First Amendment because it was art: “In recent years, some New York courts have addressed the issue of whether an artistic use of an image is a use exempted from action under New York States Privacy Laws. They have consistently found ‘art’ to be constitutionally protected free speech, that is so exempt. This court agrees.” (citations omitted)), aff’d, 832 N.Y.S.2d 510 (App. Div. 2007), aff’d, 9 N.Y.3d 184 (2007).

234. ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 938 (6th Cir. 2003) (addressing the First Amendment interests of the artist versus the publicity rights of Tiger Woods). The court found: “After balancing the societal and personal interests embodied in the First Amendment against Woods’s property rights, we conclude that the effect of limiting Woods’s right of publicity in this case is negligible and significantly outweighed by society’s interest in freedom of artistic expression… Because Rush’s work has substantial transformative elements, it is entitled to the full protection of the First Amendment. In this case, we find that Woods’s right of publicity must yield to the First Amendment. Id.

235. A published photograph of a sporting event involves significant creativity, talent and a series of creative decisions. The author reaches this conclusion based on the following facts from her personal experience: The photographer must determine which lens to use, where to stand at a particular moment in the game, what camera settings to use, how to frame the image, how to focus the camera and when to fire the shutter to capture what is known as the “decisive moment.” The photographer also engages in creative decisions during the editing process, when selecting which photograph or photographs to publish or offer for publication. A photographer who covers a football game, for example, might take over 500 images but only select the best 10 to 20 to publish to a Web gallery.

236. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.”).
C. Online video, extended broadcasts and live blogging

The WIAA ruling sets the precedent for the concept that an online broadcast of a game is not journalism, but a commercial activity. But while the Internet is a relatively new medium, it is subject to the same rules of copyright and First Amendment as other mediums. In fact, Internet communication was upheld as protected First Amendment communication by the Supreme Court in Reno v. ACLU. Thus a Webcast should not be treated differently by courts than other speech, and like other speech, it should not be restricted without a compelling government interest, and an accompanying narrowly tailored restriction.

IX. Conclusion

Both the high school athletic associations and college athletic associations involved are clearly state actors. As such, the newsgathering of video or photographs can only be regulated or limited based on compelling government interests that would be on par with preserving a right to a fair trial or protecting the privacy of inmates — the interests of public relations and raising revenue are not compelling interests that justify burdening the First Amendment. The sporting events are public events and once the media is invited, the state actors cannot discriminate against members of the media, or impose restrictions on the media regarding the type of editorial product they produce without a narrowly tailored restriction.

238 See N.Y. Times Co. v. Tasini, 533 U.S. 483, 506 (2001) (finding that reproduction of copyrighted material in an electronic database was not covered under the original contract). See also Reno v. ACLU, 521 U.S. 844 (1997) (finding the Communications Decency Act, which regulated indecent and offensive content on the Internet, violated the First Amendment).
239 Reno v. ACLU, 521 U.S. 844 (1997) (finding the Communications Decency Act, which regulated indecent and offensive content on the Internet, to be unconstitutional).
240 Estes v. Texas, 381 U.S. 532, 551 (1965) (reversing a conviction on the grounds that the presence of “at least 12 cameramen” in part because “[c]ables and wires were snaked across the courtroom floor, three microphones were on the judge’s bench and others were beamed at the jury box and the counsel table,” created an unfair trial for the defendant).
241 See Houchins v. KQED, 438 U.S. 1, 5 (1978) (noting the privacy interests of the inmates while finding that media access to a prison could be restricted).
and compelling government interest. If the national security at issue in the *Pentagon Papers* case is not sufficient to outweigh the First Amendment right to report, it is hard to imagine how the profitability of an athletic association, acting under color of law, would outweigh the First Amendment. Absent such a compelling government interest, the media has a right to report any news that it gathers, and any denial of such rights would have to overcome a heavy presumption of unconstitutionality. It is reasonable to conclude that a state actor cannot restrict the First Amendment use of information, photographs, or video and such First Amendment use includes Webcasting, live blogging, and reprint sales from a state sports tournament or a college game involving state universities. If court rulings do not resolve these questions favorably to the news organizations, news organizations are likely to continue to pursue legislation that would ban such restrictions. One thing is certain—as the ways to deliver information and images continue to evolve, news organizations will continue to clash with governments and state actors who want to control the distribution of that information. But as some of these fights have demonstrated, even in the internet age, those who buy ink by the barrel are fierce adversaries, made


244. See N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (finding that the government could not prevent a newspaper from publishing truthful information that may affect international relations); see also Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) ("As a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards.").

245. N. Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.").


Although the bill in Wisconsin failed, the bill in Illinois was progressing well, but was dropped when the parties settled. See *Illinois Press Association, IHSA, Settle Photography Dispute*, National Press Photographers Association, April 8, 2008, available at http://www.nppa.org/news_and_events/news/2008/04/illinois11.html (last visited September 27, 2010) ("The terms of the settlement agreement call for the withdrawal of Illinois legislation, introduced in the state's Senate and House in January and already passed in the House.").

248. The American adage advising against picking a fight with a man “who buys ink by the barrel” has been credited in case law to both Mark Twain and publicist William I. Greener, Jr. See, e.g., Brown v. Kelly Broad. Co., 48 Cal. 3d 711, 744 (Cal. 1989) (crediting Twain as the source of the famous adage); State *ex rel. Plain Dealer Pub'g Co. v. Geauga Cty. Court of Common Pleas, Juv. Div., 90 Ohio St. 3d 79, 89, (Pfeifer, J., dissenting) ("The majority has elevated Greener's law ("Never argue with a man who buys ink by the barrel")"). However, researchers indicate that the true source of the quote is
tougher by the power of the First Amendment. One way or another, news organizations appear to have no intention of being “shut out” for long.