

Wisconsin Interscholastic Athletic Association vs. Gannett Co., Inc.
National Federation Meeting
April 14th and 15th, 2011

SHORT HISTORY

The Wisconsin Interscholastic Athletic Association (hereinafter “WIAA”) sponsors and handles the tournaments on all sports for its member schools. In its written media policies guide, it prohibits live streaming without the consent of the WIAA. It has entered into exclusive contracts with three companies (primarily When We Were Young) to televise these contests. In 2008, two local newspapers owned by Gannett brought cameras onto the premises and live streamed three games to their web pages.

Representatives from the WIAA and the Wisconsin Newspaper Association, and the Gannett Newspapers met on a number of occasions to attempt to resolve the differences between the parties. However, the newspapers were adamant in their position that they were entitled to live stream these tournament events, and further, that they were not willing to pay a fee to do this. Therefore, the parties were unable to resolve their differences.

A decision was made by the WIAA that rather than trying to prevent this in the future and have the newspapers bring a legal action, including, most likely, a request for injunctive relief and lots of publicity, that the WIAA would commence a declaratory judgment action asking the court to determine whether or not it had the right to enforce its policy on live streaming. That action was commenced in a local state court but was moved by the defendants to federal court, pleading that it involved copyright issues, and therefore, federal court was appropriate.

The parties agreed to stipulate to the facts since there were really no issues and both moved for summary judgment. Gannett, in its brief, argued primarily its first amendment rights alleging that the WIAA was a state actor, the games involved public schools and for the most part were played in public facilities. Therefore, it should be considered a public forum and protected under the first amendment. The WIAA argued that it was not a first amendment case and that the WIAA was merely sponsoring these events to promote high school sports and for the income that it provided which enabled it to serve its member schools. Over 50 cases were cited by the parties, but significantly, there were no cases that have been decided by any appellate court that are directly on point on this issue. The question of copyright never became an issue in the arguments.

COURT ACTION

The matter was heard in federal court in the Western District of Wisconsin with the Honorable William Conley, presiding. He issued a 51 page decision covering all the issues raised by the parties, but making a final determination that this was not a first amendment case, but was merely a commercial activity conducted by the WIAA stating “ultimately, this is a case about commerce, not the right to a free press. In a rather pointed expression he stated, “while WIAA has limited defendant’s ability to use its tournament events to generate advertising dollars

on other companies websites, the Constitution does not require the government to assist private entities in making a profit.”

Gannett appealed Judge Conley’s decision to the Seventh Circuit. Again, it primarily argued its first amendment rights. An Amicus Brief was filed by the National Federation, another was filed jointly by the states of Arizona, California, Florida, Georgia, Indiana, Michigan, Minnesota, Missouri, New York, Ohio, and one by the University of Wisconsin. The brief from the University of Wisconsin was significant because it acknowledged that the outcome of this case would have a dramatic and significant effect on the ability of the University to enter into exclusive contracts to televise its intercollegiate sports and, of course, inferred that the same effect would be felt by all public universities in the United States.

The oral arguments were heard by a three judge panel in the Seventh District Court in Chicago. The fact is that there was very little time allowed for argument because the judges spent most of the time questioning the attorneys for each side. A copy of the transcript of the Argument and questions and answers has been furnished to all of the federation members by the WIAA. It is pretty apparent from the questions asked that the judges appeared to be sympathetic to the arguments of the WIAA. Federation attorney, John Black, also attended the oral arguments in Chicago.

As of the time of this presentation, no decision has been received from the court. The WIAA has furnished copies of the various briefs and the district court decision to the Federation. If any state wishes copies, they can be obtained from the Federation Office.