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# COLLEGE ATHLETIC DEPARTMENTS AS MEDIA ORGANIZATIONS AND THE REGULATION OF CONTENT: ISSUES FOR THE DIGITAL AGE

STEPHEN W. DITTMORE\*

## I. INTRODUCTION

Way back in the early days of social media and smartphones, the era between 2008 and 2010, sport organizations feared social media and how it would impact their revenue-generating property rights. College athletic organizations and professional leagues alike adopted reactionary content restrictions that demonstrated a general misunderstanding and fear of social media's role in the consumption of sports content.<sup>1</sup> From shrinking newspaper subscriptions to pay television cord-cutting, the way individuals consume content has been evolving rapidly in the past few years.

Today, college athletic departments are attempting to stay current with this evolution. No longer do departments need the media to carry their messages to consumers; they can do that through their own websites and social media channels. At the same time, athletic departments are becoming increasingly restrictive in providing access to traditional media, creating a controversial and, at times, confusing environment. Members of the traditional media believe these restrictions by state universities are inappropriate and suggest athletic programs belong to the people of the state, much like state government.<sup>2</sup> Athletic departments counter that they are providing a service to

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1. See, e.g., Adam Ostrow, *Social Media Banned from College Stadiums*, MASHABLE (Aug. 17, 2009), <http://mashable.com/2009/08/17/sec-new-media-policy/>.

2. See, e.g., Wally Hall, *UA Shouldn't Be in Competition with Media*, ARK. DEMOCRAT-GAZETTE, Aug. 15, 2013, at 17.

their fan base while protecting their property rights. However, in so doing, are athletic departments now functioning as media organizations?

A recent article in *Athletic Management* magazine underscored the issues at play in today's college athletic environment.<sup>3</sup> Chris Freet, Senior Associate Athletic Director at the University of Arkansas, suggested his department's digital strategy is one of supplementing traditional media.<sup>4</sup> He suggested the department

identif[ies] where we can be unique and where we can fill a void left by the traditional media . . . [W]e can offer expert opinions and more behind-the-scenes access while providing a greater level of consistent engagement . . . Most coaches don't want outside media covering their practices and potentially giving away game plans, but they don't mind if we're there.<sup>5</sup>

Freet's quote begs the obvious question of whether the athletic department is performing a public relations function or working as a media company? Either way, the department is engaged in providing messages through media-like channels, often at the expense of restricted access for traditional media. This could raise the concern of a reduction in the number of objective accounts of news and information.

Additionally, it appears athletic departments are increasingly imposing restrictions on content and access to members of the traditional media. If an athletic department is granted exclusive access to an event, such as a practice—which is not afforded to traditional media organizations—is this a legal enforcement of the department's property right?

The purpose of this Article is not to make judgments regarding the legality of how athletic departments manage information and content. Rather, the goal is to survey the current issues in the dynamic social media digital era, while reviewing the potential legal areas at play, from copyright law to First Amendment issues.

First, the Author will review the definition of professional journalism and gatekeeping, focusing on whether individuals and organizations engaged in blogging are journalists. If they are, could that imply a college athletic department simultaneously functions as a media organization? Second, the

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3. See generally Dennis Read, *Looking to Connect*, ATHLETICMANAGEMENT (Aug. 11, 2015), <http://athleticmanagement.com/content/looking-connect>.

4. *Id.*

5. *Id.* (internal quotation marks omitted).

Author examines the protection of an athletic department's property right and the challenge new media platforms present in enforcing unauthorized use of copyright. Finally, the Author will explore the current restrictions athletic departments place on information, particularly game statistics and non-game content such as practices.

## II. PROFESSIONAL JOURNALISM AND GATEKEEPING

Some debate exists as to when the rise of professional journalism began. Betty Winfield suggests 1908 as a watershed year in which sensationalized journalism, known as yellow journalism or muckraking, dominated.<sup>6</sup> President Theodore Roosevelt believed these reporters went too far and that journalists needed to be accountable to critics.<sup>7</sup> Commonly cited characteristics of this professional accountability include objectivity, impartiality, neutrality, and autonomy.<sup>8</sup>

These characteristics provide the lenses through which professional journalists sort through volumes of information and phenomena that could qualify as news to create narratives, which are then published to audiences.<sup>9</sup> The determination of what news is published is commonly acknowledged as the gatekeeping function of the media. By selecting which stories receive attention, the media has the power to define and shape the discussion of public events.<sup>10</sup> Several factors influence media decision-making, including journalistic norms and routines, media ownership and corporate culture, the impact of advertisers and sponsors on decision making, and characteristics of decision makers, such as gender and social roles.<sup>11</sup>

Traditional mainstream media has long maintained that it provides a service to the public through this gatekeeping role, even suggesting it is "the watchdog of the people."<sup>12</sup> By providing objective, unbiased accounts of news and events, the media is helping shape an informed public. Should the media be controlled by only one or two message providers, as was the case in the Cold

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6. Betty Houchin Winfield, *Introduction: Emerging Professionalism and Modernity*, in *JOURNALISM 1908: BIRTH OF A PROFESSION* 1, 3 (Betty Houchin Winfield ed., 2008).

7. *Id.*

8. Mark Deuze, *What Is Journalism?: Professional Identity and Ideology of Journalists Reconsidered*, 6 *JOURNALISM* 442, 448 (2005).

9. See NICHOLAS CARAH & ERIC LOUW, *MEDIA & SOCIETY: PRODUCTION, CONTENT & PARTICIPATION* 129 (2015).

10. See Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 *PUB. OPINION Q.* 176, 177 (1972).

11. See PAMELA J. SHOEMAKER & TIM P. VOS, *GATEKEEPING THEORY* 31–107 (2009).

12. Hall, *supra* note 2.

War Soviet Union, for example, the public would be exposed to only certain points of view, many of which may have had corporate or political agendas influencing their discourse.<sup>13</sup>

How mediated messages are positioned is the function of framing, or the process of “select[ing] some aspects of a [message] and mak[ing] them more salient in a [communicating] text, [thereby] . . . promot[ing] a particular problem [definition], causal interpretation, moral evaluation, and/or treatment [recommendation] for the item described.”<sup>14</sup> Collectively, this process is occasionally referred to as the agenda-setting function of media.<sup>15</sup> Any increase in the number of message-providers should reduce the impact of this agenda-setting function. This may be particularly true in college sports, where media attention is largely focused on football and men’s basketball, leaving many sports, particularly women’s sports, desperate for media coverage.<sup>16</sup>

Technological advances have enabled anyone, or any organization, to function in the activity of journalism and thereby help set the agenda, whether or not he or she is a professional journalist. Scott Gant noted, “The lines distinguishing [professional] journalists from other people who disseminate information, ideas, and opinions to a wide audience have been blurred . . . . [I]t is harder than ever to tell who is a journalist.”<sup>17</sup>

#### A. ARE BLOGGERS JOURNALISTS?

The news landscape changed with the advent of new media, particularly through blogging and the rise of independent bloggers, in sports and other segments of society. Originally referred to as a web log, but shortened to blog, a blog is merely a free-form web post on any topic, often personal and subjective, which allows for interaction among an author and readers of a blog. Blogging has changed not only how people communicate, but it has had a profound impact on the way traditional sports media approaches its craft.<sup>18</sup>

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13. For an excellent treatise on the issue of objectivity in the media, *see generally* ROBERT W. MCCHESENEY, *THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE TWENTY-FIRST CENTURY* (2004).

14. Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 *J. COMM.* 51, 52 (1993) (emphasis omitted).

15. *See* McCombs & Shaw, *supra* note 10.

16. For a thorough discussion of the impact of new media on women’s sport, *see* Nicole M. LaVoi & Austin Stair Calhoun, *Digital Media and Women’s Sport: An Old View on ‘New’ Media?*, in *ROUTLEDGE HANDBOOK OF SPORT AND NEW MEDIA* 320, 320–30 (Andrew C. Billings & Marie Harden eds., 2014).

17. SCOTT E. GANT, *WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* 3 (2007).

18. For an overview of the impact blogging has had on sports journalism, *see* Brad Schultz & Mary

The distinction between a professional journalist and blogger is an important consideration when applying First Amendment principles. Gant argues, “From the standpoint of the Constitution, anyone engaged in disseminating information and ideas is exercising freedom of the press.”<sup>19</sup> The Supreme Court in *Branzburg v. Hayes*, stated, “The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”<sup>20</sup> Drawing a connection between historic pamphleteers referenced in *Branzburg*<sup>21</sup> to the modern-day blogger is not as challenging as it seems. Blogs function as “a vehicle of information and opinion,”<sup>22</sup> generating the conclusion that “blogs are entitled to no less First Amendment protection than is accorded to printed material.”<sup>23</sup>

Thus far, courts have implied that individuals or organizations that engage in blogging activities may be considered journalists under certain circumstances.<sup>24</sup> In *Obsidian Finance Group, LLC v. Cox*, the defendant, a self-described investigative blogger, was sued for defamation after she posted unflattering comments about the plaintiff on her blog.<sup>25</sup> United States District Judge Marco Hernandez wrote in a 2012 opinion and order that Cox was not considered media because she subsequently offered to repair the damages she caused through her blogging for a fee.<sup>26</sup> However, Hernandez was clear in his assertion that his finding was specific to Cox: “I did not state that a person who ‘blogs’ could never be considered ‘media.’ I also did not state that to be considered ‘media,’ one had to possess all or most of the characteristics I recited.”<sup>27</sup>

Cox appealed the ruling to the Ninth Circuit, which reversed the lower court’s decision, ruling in early 2014 that bloggers are journalists, at least with

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Lou Sheffer, *Local TV Sports and the Internet*, in ROUTLEDGE HANDBOOK OF SPORT AND NEW MEDIA, *supra* note 16, at 110–18. See generally Edward M. Kian, Joe W. Burden, Jr. & Stephanie D. Shaw, *Internet Sport Bloggers: Who Are These People and Where Do They Come from?*, 3 J. SPORT ADMIN. & SUPERVISION 30 (2011).

19. GANT, *supra* note 17, at 165.

20. 408 U.S. 665, 704 (1972) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

21. *Id.*

22. *Id.* (quoting *Lovell*, 303 U.S. at 452).

23. Christian J. Keeney, *Kentucky Fried Blog: How the Recent Ejection of a Blogger from the College World Series Raises Novel Questions About the First Amendment, Intellectual Property, and the Intersection of Law and Technology in the 21st Century*, 13 J. TECH. L. & POL’Y 85, 97 (2008).

24. See, e.g., *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014); *Comins v. VanVoorhis*, 135 So.3d 545, 557–59 (Fla. Dist. Ct. App. 2014).

25. No. CV-11-57-HZ, 2011 WL 2745849, at \*1, \*3 (D. Or. July 7, 2011).

26. *Obsidian Fin. Grp., LLC v. Cox*, No. 3:11-cv-57-HZ, 2012 WL 1065484, at \*7 (D. Or. Mar. 27, 2012).

27. *Id.*

respect to their First Amendment rights, particularly in defamation cases.<sup>28</sup> Leaning on language from the Supreme Court in *Citizens United v. Federal Election Commission*,<sup>29</sup> Judge Andrew Hurwitz wrote in his opinion, “The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities.”<sup>30</sup>

In a similar case in 2014, *Comins v. VanVoorhis*, the Florida District Court of Appeals ruled that bloggers are protected as media.<sup>31</sup> However, in this decision, the court defined bloggers as media more broadly: “In employing the word ‘blog,’ we consider a site operated by a single individual or a small group that has primarily an informational purpose, most commonly in an area of special interest, knowledge or expertise of the blogger, and which usually provides for public impact or feedback.”<sup>32</sup>

The two cases illuminate the idea that, in the eyes of the courts, the definition of who constitutes media is evolving. Bloggers are afforded the same First Amendment rights as institutional press, particularly in cases involving defamation. Blogs primarily serve an informational purpose; a blogger can be a single individual or a small group. This, of course, begs the question of whether organizations—particularly college athletic departments—are media organizations through their publishing of information on their websites.

#### B. ARE COLLEGE ATHLETIC DEPARTMENTS PROFESSIONAL MEDIA ORGANIZATIONS?

Conventional wisdom would suggest college athletic departments are not professional media organizations, but an argument can be made that athletic departments engage in the activity of journalism through journalistic-style content published on departmental websites and social media platforms, similar to blogging. Indeed, one can argue technological changes have enabled any individual or organization to behave in a manner consistent with citizen or grassroots journalists, whose rise has been well-documented.<sup>33</sup>

However, as sport organizations become more sophisticated in their media skills, there is evidence that traditional media outlets now compete with

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28. *Obsidian Fin. Grp., LLC*, 740 F.3d at 1291, 1294.

29. See generally 558 U.S. 310 (2010). “With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.” *Id.* at 352.

30. *Obsidian Fin. Grp., LLC*, 740 F.3d at 1291.

31. *Comins v. VanVoorhis*, 135 So.3d 545, 559 (Fla. Dist. Ct. App. 2014).

32. *Id.*

33. See generally GANT, *supra* note 17; DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE (Allen Noren, ed., 2d ed. 2006).

athletic departments for access to players, coaches, and practices, which athletic departments may not provide.<sup>34</sup> Tactically, this is accomplished through organizational blogs, the production of live webcasts of games, news conferences and other events, and the hiring of professional journalists to write unique content for athletic department-owned platforms.<sup>35</sup> Auburn University, for example, hired two beat writers away from local media organizations to create content about Auburn athletic teams for the university's in-house digital presence.<sup>36</sup>

Additionally, athletic departments increasingly push unique visual content to their social media platforms. The presence of these resources has led some to question whether athletic departments are, in fact, competing with traditional mass media.<sup>37</sup> As Paul Pedersen noted, "Sport organizations can now control their own message, break their stories to the public on their own terms, release proprietary [information] as they wish, and circumvent sports reporters."<sup>38</sup>

Given evidence that athletic departments are competing with traditional media outlets by creating unique content exclusive to their own platforms, is it too much of a stretch to consider athletic departments as engaging in, as Gant described, the activity of journalism? Would an athletic department blogger be guaranteed the same First Amendment privileges as independent bloggers? What happens when a content producer also restricts distribution of its content or limits access to traditional media organizations? A central consideration when answering these questions is an athletic department's position as a state actor.

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34. For a discussion of these issues, see Paul Farhi, *In Internet Age, Sports Teams Are Increasingly in the News Business*, WASH. POST (Mar. 15, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/14/AR2011031404673.html>. Bryce Miller, Executive Sports Editor of the Des Moines Register, stated, "We used to compete against other news organizations . . . . Now it seems like we're competing against the university." *Id.*

35. See generally Stephen W. Dittmore, *The NACDA Report: Becoming Our Own Media Company*, ATHLETICS ADMIN., June 2014, at 26.

36. *Id.* at 27.

37. *Id.* Jason Matheson, Auburn University Assistant Athletic Director for Digital Media stated, "Now that we have our own media platforms, we communicate our story directly to our stakeholders unfiltered." *Id.* Chris Yandle, Assistant Athletic Director of Communications and Public Relations at Georgia Tech stated, "In some ways we're in competition, because we're trying to provide some of the same content." Read, *supra* note 3.

38. Paul M. Pedersen, *The Changing Role of Sports Media Producers*, in ROUTLEDGE HANDBOOK OF SPORT AND NEW MEDIA, *supra* note 16, at 101, 104.

## C. ATHLETIC DEPARTMENTS AS STATE ACTORS

Courts have asserted that athletic associations, both at the high school and collegiate levels, are state actors.<sup>39</sup> This provides for the possibility of traditional media organizations pursuing constitutional law challenges for discrimination, meaning invoking the First Amendment. As state actors, college athletic departments are required to consider due process when creating policies, procedures, and rules. If, as discussed in the previous section, college athletic departments are functioning as media organizations, then implementing policies that restrict media access to certain media outlets while permitting access to in-house media operations may be against the law because, as a state actor, “the newsgathering of video or photographs can only be regulated or limited based on compelling government interests.”<sup>40</sup> Further, as Calzada notes, “Typically, a state actor may not deny access to one member of the media while granting access to another.”<sup>41</sup>

As will be discussed later in the Article, the reasons for athletic departments to limit media access to, say, football practice, vary from competitive advantage to revenue considerations. However, “the interests of public relations and raising revenue are not compelling [government] interests . . . [to invoke] the First Amendment.”<sup>42</sup> By applying time, place, and manner tests, courts have developed fairly clear guidelines for these restrictions in public places.<sup>43</sup> These “restrictions may be upheld as lawful if they are [administered] even[ly] and do not favor some kinds of content over other[.]” content.<sup>44</sup>

However, no such guidelines exist for cases involving access.<sup>45</sup> Sporting events are public events because attendees are invited on site through either a ticket or special pass, like a media credential. Therefore, time, place, and manner restrictions would not apply to games. Practices, however, are not generally public events.

It may be possible to conclude, therefore, that athletic departments engaging in the activity of journalism by posting unique content not available

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39. GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 197 (3d ed. 2002); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 298–301 (2001).

40. Alicia Wagner Calzada, *Shut Out: The Dispute over Media Access Rights in High School and College Sports*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 42 (2010).

41. *Id.* at 16.

42. *Id.* at 42.

43. DWIGHT L. TEETER, JR. & BILL LOVING, *LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA* 90 (12th ed. 2008).

44. *Id.*

45. Calzada, *supra* note 40, at 16.

to traditional media qualify as media. If that is what is occurring, it is also possible that state institutions, functioning as state actors, are illegally discriminating against traditional media outlets. Calzada notes that this is an area yet to be defined: “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.”<sup>46</sup> Indeed, a university owns the content around its athletic programs, so athletic departments engaged in unique content generation may be merely exercising their property rights.

### III. PROTECTING A PROPERTY RIGHT

Generally, college athletic departments are presumed to have the same property rights as professional sports organizations. While sport organizations have attempted to maximize financial gain from the broadcast rights to their athletics contests since 1921, the ownership of that right has not always been clear. As Glenn Wong notes, “The courts and the government initially had difficulty deciding who owned the property rights to sports broadcasts: the team, the broadcasting station, the players, or the league.”<sup>47</sup>

In the 1930s, the Pittsburgh Pirates successfully barred radio station KQV from broadcasting descriptions of games based on information from KQV observers stationed outside Forbes Field.<sup>48</sup> The Pirates previously entered into an exclusive, paid agreement with KDKA for the rights to its games.<sup>49</sup> The Copyright Act of 1976<sup>50</sup> extended protection to live sports broadcasts as original works of authorship because it was determined each sporting event represents a unique script with an unknown result and original interpretation in the form of commentary and camera angles.<sup>51</sup>

As property rights were clarified through a number of court cases, sport organizations have sought to control the free dissemination of their property

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46. *Id.* at 43.

47. WONG, *supra* note 39, at 664.

48. Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 491 (W.D. Pa. 1938).

49. *Id.* at 492.

50. *See generally* 17 U.S.C. §§ 101–1332 (2016).

51. For a discussion of these issues, *see* Chris Garmire, *The Super Bowl III Problem: A Review of the Development of the Property Right in Live Professional Sports Broadcasts and a Practical Application of Copyright Law to an Infringement Action for the Unauthorized Reproduction and Distribution of a Taped Broadcast of Super Bowl III*, 2 CHI.-KENT J. INTELL. PROP., 3, xlvii, xlvi–lvi (2000). *See generally* J. Gordon Hylton, *The Over-Protection of Intellectual Property Rights in Sport in the United States and Elsewhere*, 21 J. LEGAL ASPECTS SPORT 43 (2011).

rights in primary ways.<sup>52</sup> Sport organizations license the right to broadcast their competitions to different media technologies and seek to maximize that right for financial gain. In the event of unauthorized use, courts have determined such use is a misappropriation of an organization's property rights.<sup>53</sup>

A majority of the cases involving the unauthorized use of property rights in sports has occurred in professional sports and range from seemingly innocuous sharing of images on social media to illegal streaming of copyrighted sporting events.<sup>54</sup> In October 2015, the NFL exercised its property rights by filing Digital Millennium Copyright Act (DMCA) takedown notices<sup>55</sup> to the microblogging site Twitter, directed at sites run by Gawker Media's Deadspin.<sup>56</sup> The notices were focused on the sharing of graphics interchange format (GIF) files and video highlights of NFL games without permission.<sup>57</sup> At the same time, "XOS Digital, which owns various college football digital broadcasting rights," sent DMCA notices to Vox Media's SB Nation, although GIFs and video highlights of both the NFL and major college football are still easily accessible on the Internet.<sup>58</sup>

The NFL receives billions of dollars annually from broadcast partners, such as CBS and ESPN, for the use of highly rated programming to generate substantial advertising and subscriber fee revenues. As such, the NFL's desire to protect its property rights is understandable from a business perspective, but this protection presents a dilemma from a public relations standpoint. By issuing takedown notices for its content distributed on third-party platforms, the NFL is limiting access to the league's product and potentially upsetting its fan base, which purchases tickets and merchandise and watches the league's product on the broadcast partners' networks. An additional benefit to exercising property right claims is to direct more traffic to league-owned platforms.

What is less clear is the position of a college athletic department as it relates to property rights for all sports, not just highly rated football and men's

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52. See Gary R. Roberts, *The Scope of the Exclusive Right to Control Dissemination of Real-Time Sports Event Information*, 15 STAN. L. & POL'Y REV. 167, 168-83 (2004).

53. WONG, *supra* note 39, at 664.

54. For a discussion of the challenges associated with illegal streaming, see generally Brett Hutchins & David Rowe, *From Broadcast Scarcity to Digital Plentitude: The Changing Dynamics of the Media Sport Content Economy*, 10 TELEVISION & NEW MEDIA 354 (2009).

55. See § 512(c)(3).

56. Noah Kulwin & Kurt Wagner, *Twitter Suspends Deadspin, SBNation Accounts for Violating Copyrights*, RE/CODE (Oct. 12, 2015), <http://recode.net/2015/10/12/twitter-suspends-accounts-of-well-known-sports-publishers-for-violating-copyrights/>.

57. *Id.*

58. *Id.*

basketball. *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.* sheds some possible light into potential issues with college athletic organizations granting one company exclusive rights to its content.<sup>59</sup> In 2005, the Wisconsin Interscholastic Athletic Association (WIAA), a state actor, entered into an exclusive licensing agreement with American Hi-Fi to produce and distribute broadcast quality videos of specific state tournament events.<sup>60</sup> This agreement had two purposes: (1) it allowed the WIAA to increase its revenues, and (2) it “increas[ed] exposure to sports, like wrestling or swimming, that traditionally have received less coverage.”<sup>61</sup>

In 2007, the WIAA and American Hi-Fi began live streaming the events, and the WIAA simultaneously issued a revised media policy, limiting media reporting to two minutes of video without paying rights fees.<sup>62</sup> In 2008, a newspaper owned by defendant Gannett Company streamed four playoff football games in their entirety on the newspaper’s website, in violation of the WIAA’s media policy.<sup>63</sup> Gannett argued that “the First Amendment entitled [it] to broadcast the events without . . . pay[ing] a fee.”<sup>64</sup> The Seventh Circuit affirmed the district court’s decision to grant summary judgment for the WIAA.<sup>65</sup>

The court in *Wisconsin Interscholastic Athletic Ass'n* leaned heavily on the Supreme Court’s decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, where the Court differentiated among reporting that an act took place, describing an act after it occurred, and showing an entire act without consent.<sup>66</sup> The Supreme Court also acknowledged the economic value of the performance in its ruling.<sup>67</sup> Applying that decision in *Wisconsin Interscholastic Athletics Ass'n*, the court ruled that “state actors . . . must be given the discretion to use exclusive contracts to protect the economic value of their products and . . . generate revenue in the same way as private actors.”<sup>68</sup> The court stated, “Gannett’s argument boils down to an assertion that a

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59. 658 F.3d 614, 619 (7th Cir. 2011).

60. *Id.* at 615–16.

61. *Id.* at 617–18.

62. Barbara Osborne & Paul J. Batista, *Time Out! Federal Court Decision Clarifies Ownership of Broadcast Rights in High School Sports Events*, 21 *SPORT MARKETING Q.* 53, 53 (2012) (citing *Wis. Interscholastic Athletic Ass'n*, 658 F.3d at 617–18).

63. *Wis. Interscholastic Athletic Ass'n*, 658 F.3d at 618.

64. Osborne & Batista, *supra* note 62; see *Wis. Interscholastic Athletic Ass'n*, 658 F.3d at 616.

65. *Wis. Interscholastic Athletic Ass'n*, 658 F.3d at 629; Osborne & Batista, *supra* note 62, at 55.

66. See 433 U.S. 562, 569 (1977).

67. *Id.* at 575.

68. Osborne & Batista, *supra* note 62, at 55 (citing *Wis. Interscholastic Athletic Ass'n*, 658 F.3d at 628).

government actor cannot, under any circumstances, act like the NFL, FIFA or NCAA. But the First Amendment does not require such a draconian rule.”<sup>69</sup>

#### IV. NEW MEDIA PLATFORMS

In many ways, the process by which sports fans consume events has been permanently altered by new media. Fans are encouraged to engage with league and network social media platforms during game broadcasts. New media technologies allow fans watching a live broadcast to simultaneously obtain information, such as statistics, which are not included in a broadcast. In addition, multiple new media platforms permit fans to consume sports content from any location, even when games are not being aired.<sup>70</sup> By enabling fans to consume more content on more platforms whenever a fan wants, sport organizations generate tremendous engagement with their products. However, by exercising property right claims, these organizations may also be alienating those same fans.

Fundamental differences exist between the ways in which professional sports and college athletics approach new media platforms. Professional sports leagues are sport-specific and have one governing body, while college athletic organizations compete in multiple sports and are regulated by a conference as well as an umbrella governing body—the NCAA. Professional leagues, specifically the NFL and NHL, have compelled member clubs to conform to certain Internet content standards that benefit the league as a whole. These standards include requirements for member clubs to provide localized non-game content, interviews, and more.

The New York Rangers expressed concern regarding the NHL’s New Media Strategy adopted in late 2005 on the heels of the 2004–2005 lockout season. The Rangers argued the content management system process benefitted small market clubs at the expense of large market clubs because the clubs would, essentially, share revenues generated by the league.<sup>71</sup> Madison Square Garden, L.P. (MSG), owner of the Rangers, sued the NHL in September 2007, alleging the league was violating antitrust laws.<sup>72</sup> MSG and

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69. *Wis. Interscholastic Athletic Ass’n*, 658 F.3d at 628–29.

70. For a thorough discussion of new media impacts on fanship, see Walter Gantz & Nicky Lewis, *Fanship Differences Between Traditional and Newer Media*, in ROUTLEDGE HANDBOOK OF SPORT AND NEW MEDIA, *supra* note 16, at 19, 19–31.

71. Michael Huntowski, Case Note, *Blades of Steel? The Fight for Control of Sports Clubs’ Websites and Media Rights in Madison Square Garden, L.P. v. National Hockey League*, 16 VILL. SPORTS & ENT. L.J. 123, 127 (2009) (citing *Madison Square Garden, L.P. v. NHL*, No. 07 CV 8455(LAP), 2007 WL 3254421, at \*3 (S.D.N.Y. Nov. 2, 2007)).

72. *Madison Square Garden, L.P. v. NHL*, 270 Fed. Appx. 56, 58 (2d Cir. 2008).

the NHL settled the antitrust suit in March 2009 without releasing details.<sup>73</sup>

The NFL implemented a similar system in 2014 with its broadband network NFL Now.<sup>74</sup> Individual clubs began to push back on the expectation that they would supply content to the new venture, for fear it would redirect consumer traffic to the league platform and away from their individual sites.<sup>75</sup>

College sport conferences exert no such control over this type of localized content, creating an environment in which individual athletic departments are free to be as creative as they would like to be. This localized content, increasingly in the form of video, audio, or images, has economic value to an athletic department, leading athletic departments to become increasingly more cognizant of their ability to generate revenues by driving traffic to their websites.

Given the increased sensitivity toward fiscal challenges in college athletics, athletic departments are more interested than ever in maximizing revenue sources.<sup>76</sup> The ability to monetize content, which athletic departments have previously distributed to stakeholders free of charge (through the media), is appealing. For example, the University of Southern California “sends . . . a dozen or more sponsored messages each week across [various social media] platform[s].”<sup>77</sup> As the university’s Athletics’ Director of Social Media, Jordan Moore said, “We’ve tried to use [a large following] to sell tickets, but we’ve seen only limited success with that. It’s really in the area of corporate sales where we’ve seen the most progress.”<sup>78</sup>

At the same time athletic departments are increasing the amount of unique content on their websites, they are simultaneously, and possibly in a related manner, imposing restrictions on traditional media outlets. These restrictions

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73. Jocelyn Allison, *Madison Square Garden, NHL Settle Antitrust Suit*, LAW360 (Mar. 26, 2009), <http://www.law360.com/articles/93879/madison-square-garden-nhl-settle-antitrust-suit>; Tripp Mickle & Eric Fisher, *NHL and MSG Winding down Fight over Web*, SPORTSBUSINESS J. (Mar. 16, 2009), <http://www.sportsbusinessdaily.com/Journal/Issues/2009/03/20090316/This-Weeks-News/NHL-And-MSG-Winding-Down-Fight-Over-Web.aspx>.

74. See *NFL Announces Creation of NFL Now Personalized Video Service*, NFL (Jan. 30, 2014), <http://www.nfl.com/news/story/0ap2000000320287/article/nfl-announces-creation-of-nfl-now-personalized-video-service>.

75. See Daniel Kaplan, *Clubs Worry over Dynamics of NFL Now*, SPORTSBUSINESS J., Feb. 17, 2014, at 1.

76. This topic has been well covered by the media. As a starting point, see Erik Brady, Steve Berkowitz & Christopher Schnaars, *College Athletics Finance Report: Non-Power 5 Schools Face Huge Money Pressure*, USA TODAY (May 26, 2015), <http://www.usatoday.com/story/sports/college/2015/05/26/ncaa-athletic-finances-revenue-expense-division-i/27971457/>.

77. Michael Smith, *Colleges Find Revenue Stream in Social Media*, 18 SPORTSBUSINESS J., Oct. 12, 2015, at 1.

78. *Id.*

have generally manifested in two ways: restrictions on dissemination of game statistics and limitations on access to non-game information.

#### V. GAME STATISTICS AND NON-GAME INFORMATION

The earliest legal case to examine ownership of real-time information dates back to World War I, in a case involving two wire services.<sup>79</sup> International News Service (INS) would lift factual stories from Associated Press (AP) bulletins and send them by wires to INS papers.<sup>80</sup> The Court affirmed the appellate court ruling of injunctive relief to AP, citing the unique nature of hot news.<sup>81</sup> Justice Mahlon Pitney, writing for the majority, stated that a news “article, as a literary production, is the subject of copyright . . . . But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day.”<sup>82</sup>

Courts have held that statistics and information produced during an event are facts—therefore, not copyrightable.<sup>83</sup> Still, sport organizations have sought to control the distribution of such information if it mimics play-by-play descriptions or accounts of games. This is especially the case when sport organizations are attempting to maximize their own business interests.<sup>84</sup> For example, the PGA Tour threatened to pull credentials from journalists who tweeted during the Farmer’s Insurance Open in early 2013, citing the Tour’s credential regulations, which “prohibit the use of real-time, play-by-play transmission in digital outlets.”<sup>85</sup> The PGA Tour preferred that fans who were interested in the event attend the event in person, watch it on television with the official rights holder, or visit the official websites of the association or the tournament.

Indeed, the PGA Tour restriction on real-time information makes business

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79. *See generally* Int’l News Serv. v. Associated Press, 248 U.S. 215 (1918).

80. *Id.* at 231.

81. *Id.* at 232, 234, 241, 246.

82. *Id.* at 234.

83. *E.g.*, NBA v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997); *see also* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991).

84. Tim Frank, an NBA spokesperson, stated, “We want to have as much [news media] coverage as we can have . . . [b]ut at the same time, we have to walk a fine line between giving the media what it wants and running our business.” Farhi, *supra* note 34 (first alteration in original).

85. Jason McIntyre, *The PGA Is Threatening to Pull Credentials from Journalists Who Tweet at the Farmer’s Insurance Tournament in La Jolla*, BIG LEAD (Jan. 25, 2013), <http://thebiglead.com/2013/01/25/the-pga-is-threatening-to-pull-credentials-from-journalists-who-tweet-at-the-farmers-insurance-tournament-in-la-jolla/>.

sense. Gary Roberts notes the sale of this information about sporting events hinges on an organization's ability "to retain the exclusive ability or legal right to control that information long enough to exploit its real-time value."<sup>86</sup> The PGA Tour's restriction was hardly the first attempt by a sport organization to impose conditions on the media covering an event in which an organization has a proprietary interest. A review of several legal challenges in this area, many of them involving college athletics, reveals the complicated nature of these regulations, both from game statistics and play-by-play representations.

#### A. *Game Statistics and Play-by-Play*

The court in *NBA v. Motorola, Inc.* relied heavily on *International News Service* and the lack of case law following the Copyright Act of 1976, when making its determination about whether the defendant was infringing on the NBA's copyright when it transmitted score updates and statistics from NBA games via subscription pagers.<sup>87</sup> Because Motorola transmitted only facts, and not descriptions or expressions of games, the court dismissed the misappropriation claim.<sup>88</sup> Judge Ralph K. Winter wrote, "We believe that the lack of caselaw is attributable to a general understanding that athletic events were, and are, uncopyrightable."<sup>89</sup>

A similar case arose two years prior to *NBA v. Motorola, Inc.* in which the NFL challenged Stats, Inc.'s creation of a text play-by-play description of NFL games distributed over the Internet.<sup>90</sup> That case was settled prior to *Motorola*, whose impact is, as Wong notes, "Internet sports sites are able to provide real-time sports scores for their visitors without fear of infringing upon copyrights."<sup>91</sup>

Because owners of a property right generate revenues by licensing that right to broadcast entities, misappropriation of that right is a major concern for a licensee and a licensor. As technology advances, college athletic organizations become increasingly concerned about protecting game content beyond facts and statistics.

Similar to the decision in *Pittsburgh Athletic Co.*, the court in *National Exhibition Co. v. Fass* had to consider the difference between facts and

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86. Roberts, *supra* note 52, at 168.

87. 105 F.3d at 843–44, 847.

88. *Id.* at 847, 855.

89. *Id.* at 847.

90. *See generally* NFL v. Stats, Inc., 95 Civ. 8547 (1995).

91. WONG, *supra* note 39, at 700.

descriptions.<sup>92</sup> The defendant Martin Fass would listen to radio broadcasts of baseball games and teletype details to other radio stations.<sup>93</sup> The court found for the owner of the property right, suggesting the defendant had deprived the plaintiff “in respect of the creation and production of baseball games and public dissemination of descriptions and accounts thereof.”<sup>94</sup>

The idea of play-by-play representation was at issue when Brian Bennett was ejected from the press box of an NCAA Baseball Tournament game in 2007.<sup>95</sup> Bennett was a *Louisville Courier-Journal* sports reporter covering the NCAA Baseball Tournament when he was removed for simulating a play-by-play of the event in violation of NCAA media guidelines.<sup>96</sup> The Bennett incident raised questions about credential policies and play-by-play representation. In particular, an NCAA memo issued to media organizations stated implicitly, “blogs are considered a live representation of the game.”<sup>97</sup> After the NCAA tried unsuccessfully to have Bennett stop blogging, the organization removed his credentials and ejected him from the press box, claiming it was preserving the valuable revenue it receives as a result of broadcast rights it licensed to ESPN.<sup>98</sup> The negative publicity surrounding the event led the NCAA to amend its policy for the following year, permitting blog updates limited to score and time remaining.<sup>99</sup>

Two years later, the Southeastern Conference (SEC) enacted a short-lived policy, which initially would have prohibited spectators from producing or disseminating material about an SEC event, including descriptions, pictures, videos, and other information.<sup>100</sup> The policy also contained restrictions on the amount of content traditional media organizations covering SEC events could use, prompting criticisms from major news organizations, including Gannett and the Associated Press Sports Editors.<sup>101</sup> The policy was amended within twenty-four hours to include less restrictive language.<sup>102</sup>

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92. *See* 143 N.Y.S.2d 767, 768 (N.Y. Sup. Ct. 1955).

93. *Id.*

94. *Id.* at 777.

95. Keeney, *supra* note 23, at 87–88.

96. *Id.*

97. *Id.* at 88.

98. *Id.* at 88–89.

99. *Id.* at 89 (citing *NCAA Says Live Updates via Blog Limited to Score, Time Remaining Only*, ESPN (June 21, 2007), <http://espn.go.com/ncaa/news/story?id=2912100>).

100. Jason Richard Sheppard, Note, *The Thrill of Victory, and the Agony of the Tweet: Online Social Media, the Non-Copyrightability of Events, and How to Avoid a Looming Crisis by Changing Norms*, 17 J. INTELL. PROP. L. 445, 448–49 (2010).

101. *Id.* at 449.

102. *See* Adam Ostrow, *Common Sense Wins: Social Media to Be Allowed at SEC Games*,

Technology has evolved greatly since the Bennett incident and the SEC policy. No longer is media restricted in the amount or timing of blog posts. And in fact, many athletic departments maintain play-by-play style updates on departmental websites and social media. From roughly 2009 to 2011, college sports information directors regularly engaged in live in-game blogs using a third-party software known as CoveritLive.<sup>103</sup> These blogs included a textual play-by-play and permitted users to simultaneously comment on the action. Fans were also encouraged to share their social media posts during a game.

Concerns sport organizations have expressed regarding play-by-play representation of live events differ slightly from the previously discussed issue of sharing highlights on social media. The value in sports rights lies in the unscripted, live broadcast. Property rights owners believe unauthorized representation of a live event is a threat to their financial stability. Sheppard details both logistical and legal problems with policy enforcement in this area, concluding sports leagues “must adopt a policy based on norms that see fans as partners in protecting the league’s interests, rather than adversaries.”<sup>104</sup>

### B. Non-Game Information Management

Finally, sport organizations are increasingly controlling access to non-game information by restricting access to team practices, limiting student-athlete and coach availabilities, and regulating the amount of content news organizations can distribute to their audiences.<sup>105</sup> Indeed, “[i]nformation management is the name of the game these days in college football.”<sup>106</sup>

Recognizing the rabid fan bases that aggressively seek information about their teams,<sup>107</sup> college athletic departments are able to drive traffic to their media platforms by limiting traditional media access to players and coaches and,

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MASHABLE (Aug. 18, 2009), <http://mashable.com/2009/08/18/sec-social-media-policy/#ioOe1fBDiZq0>.

103. For more detail on how “Sports and CoverItLive are *made* for each other,” see *Sports Solutions*, COVERITLIVE, [http://www.coveritlive.com/index.php?option=com\\_content&task=view&id=318&Itemid=327](http://www.coveritlive.com/index.php?option=com_content&task=view&id=318&Itemid=327) (last visited June 9, 2016).

104. Sheppard, *supra* note 100, at 446.

105. See, e.g., Bud Withers, *Media Access to Pac-12 Football Practices Is Shrinking*, SEATTLE TIMES, <http://www.seattletimes.com/sports/uw-husky-football/media-access-to-pac-12-football-practices-is-shrinking/> (last updated Sept. 18, 2012).

106. Walt Austin, *Modern College Football, Information Management, and the Importance of Spring Games*, C. & MAGNOLIA (Apr. 7, 2015), <http://www.collegeandmagnolia.com/2015/4/7/8360675/modern-college-football-information-management-and-the-importance-of>.

107. See, e.g., Galen Clavio, *Social Media and the College Football Audience*, 4 J. ISSUES INTERCOLLEGIATE ATHLETICS 309, 311–13, 320–23 (2011).

simultaneously, distributing unique content on those platforms, creating a scarcity effect of sorts. Increased traffic on athletic department media platforms could lead to increased advertising and sponsorship revenue for an athletic department. Newcastle United approached generating revenue and restricting access simultaneously in 2013 when it sent letters to national newspaper editors in the United Kingdom indicating the club's plan to make papers pay for access to players.<sup>108</sup> Additional interests may also be present, including maintaining secrecy around game plans and injuries which, if made public by the media or other source, could negate a competitive advantage.

Other factors influencing colleges to impose limitations on access include gambling and match fixing activities and infringement on broadcast contracts,<sup>109</sup> as well as the idea that college athletic departments do not need to abide by collective bargaining agreements with their athletes, as do most professional leagues.<sup>110</sup> These agreements often have formal media availabilities written into the document.<sup>111</sup>

While the aforementioned access restrictions exist, as the quote from Freet earlier suggests, the overwhelming reason for decreasing access appears to be a result of coaches not wanting media present. Prior to the 2015 football season, the University of Tennessee implemented a revised three-page media policy that defined conditions for media covering the football program.<sup>112</sup> Among the restrictions was a rule indicating that if a reporter observed a player not practicing, because of injury or another reason, the reporter could not report the information.<sup>113</sup>

After being denied "media access to football players or assistant coaches for the third consecutive week" in October 2015, *The Clarion-Ledger* newspaper in Jackson, Mississippi, ceased covering Jackson State University (JSU) sports.<sup>114</sup> JSU acknowledged making assistant coaches or players

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108. Mark Douglas, *Plan for 'Exclusive' Paid-For Newcastle United Access Gathering Pace*, CHRON. LIVE, <http://www.chroniclive.co.uk/sport/football/football-news/plan-exclusive-paid-for-newcastle-united-6401153> (last updated Dec. 13, 2013).

109. Brett Hutchins, *The Acceleration of Media Sport Culture: Twitter, Telepresence and Online Messaging*, 14 INFO., COMM. & SOC'Y 237, 248 (2011).

110. David Welch Suggs Jr., *Tensions in the Press Box: Understanding Relationships Among Sports Media and Source Organizations* 7 (Apr. 8, 2015) (unpublished manuscript) (on file with the *Marquette Sports Law Review*).

111. *Id.*

112. Kendall Morris, *UT Football Media Policy Adds Restrictions*, KNOXVILLE NEWS & WEATHER (Aug. 22, 2015), <http://www.wbir.com/story/sports/college/vols/2015/08/21/ut-football-media-policy-adds-restrictions/32166199/>.

113. *Id.*

114. Antonio Morales, *Clarion-Ledger Halts Beat Coverage of JSU Sports*, CLARION-LEDGER (Oct.

unavailable for interviews following the mid-season dismissal of its head coach.<sup>115</sup> Only the interim head coach was available for interviews, prompting concerns about objectivity and points of view.<sup>116</sup>

These examples of non-game information restrictions prompted a critique from former *Chicago Tribune* sportswriter Ed Sherman on the Poynter Institute website.<sup>117</sup> Sherman points to specific examples of media experiencing reduced access to college athletes, noting, “Access, or a lack thereof, continues to be a major problem for college football reporters.”<sup>118</sup> While Sherman identifies specific anecdotes to support the notion that access is dwindling, he stops short of characterizing the perspective of the journalists and how access impacts their job, something David Welch Suggs endeavors to quantify.<sup>119</sup> In prefacing his research, Suggs argues journalist access equates to legitimacy.<sup>120</sup>

Should reporters get subsidies such as open access to events and individuals and should they be allowed to record and publish whenever they choose? Or should teams limit access to press-box seating and news conferences with coaches? The extent to which journalists can gain access, work independently, and publish in the context of an organizational field can be [conceptualized] as legitimacy. . . . However, if new platforms and [broadcast] partners are providing teams with alternative channels to reach fans and [constituents], then independent journalists may be losing that legitimacy.<sup>121</sup>

Suggs’s research sampled media members of the Football Writers Association of America and the United States Basketball Writers Association,

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19, 2015), <http://www.clarionledger.com/story/sports/college/jackson-state/2015/10/19/clarion-ledger-halts-beat-coverage-jsu-sports/74232126/>.

115. *Id.*

116. *Id.*

117. The Poynter Institute’s mission is to be “the world’s leading instructor, innovator, convener and resource for anyone who aspires to engage and inform citizens in 21st Century democracies.” *A Brief History of the Poynter Institute*, POYNTER, <http://about.poynter.org/about-us/mission-history> (last visited June 9, 2016).

118. Ed Sherman, *The Problem with the Dwindling Media Access to College Athletes*, POYNTER (Dec. 3, 2015), <http://www.poynter.org/news/mediawire/387726/the-problem-with-the-dwindling-media-access-to-college-athletes/>.

119. *See* Suggs, *supra* note 110, at 10–15.

120. *Id.* at 7.

121. *Id.*

as well as members of the College Sports Information Directors of America.<sup>122</sup> Perhaps not surprisingly, he observes statistically significant differences in perceptions of access, particularly as it related to coaches and student-athletes, with media, believing access to be restricted.<sup>123</sup>

## VI. CONCLUSION

The purpose of this Article is to present issues around college athletic departments' move toward increased content restrictions for members of traditional mainstream media. Several focus areas were examined, including an evolving definition of who, or what, constitutes media; whether an athletic department can limit access to traditional media while simultaneously disseminating restricted content on its platforms; and the types of content restrictions imposed by athletic departments.

Conceiving of an athletic department as a media organization is not too difficult given the sophisticated and professionalized ways it produces and disseminates content around its athletic programs. Athletic departments are under intense pressure to find revenue and reduce their reliance on student fees and public funds.<sup>124</sup> Therefore, it makes sense that athletic departments would attempt to enforce their property rights claim to maximize revenue. The court in *Wisconsin Interscholastic Athletic Ass'n* acknowledged that state actors have the same right as private entities to enforce their property rights to games. Whether the same holds for non-game information, or practice, is not clear.

The consequences to the trend of decreased access are alarming. Restrictions on dissemination of content are not consumer friendly. Rather than seeking to grow fan bases and potential customers, these restrictions have the opposite effect of turning fans off from the product. Today's consumer wants to engage with a product at a time when it is convenient for the consumer and on a platform that is convenient for the consumer.

Reduced access to college athletic departments for mainstream media translates to less objectivity in sports coverage, and may, in some ways, be illegal. At a time when athletic departments' budgets regularly soar above \$100 million annually, reduced access is akin to making athletic departments analogous to privately held corporations.

However, more than a decade ago, Roberts raised the larger question concerning the right to control the dissemination of information about athletic

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122. *Id.* at 9.

123. *Id.* at 11–12.

124. See Autumn A. Arnett, *Universities Weighing Impact of Football on Finances*, DIVERSE ISSUES IN HIGHER EDUC. (Aug. 4, 2015), <http://diverseeducation.com/article/76821/>.

contests—whether it makes good public policy sense.<sup>125</sup> He concluded that, except in the case of hot news, no public interest exists.<sup>126</sup> An organization “should have the legally enforceable right to restrict the dissemination of information about (or even the video image of) its events.”<sup>127</sup>

Athletic departments should use the new media platforms and technologies that place them on similar footing as traditional media outlets to engage consumers, rather than shutting out the media or their fan bases. As Jason Sheppard suggests, the process of creating allies instead of adversaries may turn the future from one where “online social media is a grave threat for one in which it is a tremendous asset.”<sup>128</sup>

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125. Roberts, *supra* note 52, at 186.

126. *Id.*

127. *Id.*

128. Sheppard, *supra* note 100, at 477.