

STATE ACTION, PUBLIC FORUM AND THE NCAA:  
FIRST AMENDMENT RIGHTS OF THE CREDENTIALLED MEDIA

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## ABSTRACT

In 2007, the NCAA revoked the press credentials of a newspaper reporter for blogging during a tournament baseball game. The association was concerned that it would infringe on broadcast rights granted to ESPN and violate their copyright. This paper will make the case that the revocation was an infringement on the newspaper's First Amendment right of a free press to disseminate the news and will examine it through copyright law, state action and forum analysis.

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INTRODUCTION

In 2007, the National Collegiate Athletic Association (NCAA) revoked press credentials from a newspaper reporter for blogging during a tournament baseball game. The association was concerned that it would infringe on broadcast rights it had granted to ESPN and violate their copyright. While there may be some question as to whether this would be competition to ESPN, this paper will make the case that what the revocation did was infringe on the newspaper's First Amendment right of a free press to disseminate the news.

The NCAA is a membership organization that was formed more than 100 years ago to "protect young people from the dangerous and exploitive athletics practices of the time."<sup>1</sup> Membership is composed primarily of "four-year, higher education institutions and collections of institutions known as conferences. Representatives from those institutions and conferences create NCAA rules and policies."<sup>2</sup>

While the NCAA, as a private association, may set the standards by which the media will be credentialed to cover events it organizes, when the sanctioning takes place at a state-funded university, this paper will suggest that the NCAA becomes a state actor and thus subject to constitutional regulation. To address this issue, three areas need to be

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<sup>1</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *History*(2010), at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history>.

<sup>2</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Rules and Committees*(2010), at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/how+we+work/about+the+ncaa+rules+and+committees>.

examined. First, can media coverage of a sporting event be copyrighted? Second, the NCAA is a private association. Does its sanctioning of a tournament at a state-supported university constitute state action? Third, are tournaments sanctioned at state universities considered a public forum?

### THE SITUATION

Newspaper blogging and the business side of sports have come in conflict over the changing journalistic reporting practices. Brian Bennett, a sports reporter for the Louisville *Courier-Journal*, was ejected from a tournament baseball game for blogging because the NCAA was concerned that his posts would infringe on broadcast and Internet rights they sold to ESPN.<sup>3</sup> The reporting environment has changed with the explosion of the Internet and the evolution of what used to be delayed publication due to newspaper deadlines. It has become common practice for many media organizations to blog live during events. The NCAA claims it, or those it grants license to, own the copyright to NCAA sanctioned events, but one cannot copyright facts or sporting events. Reportage of an event is different than a complete recreation of the event, even if the reportage is live.

Bennett was filing blog reports live from the 2007 super-regional NCAA baseball tournament in Jim Patterson Stadium at the University of Louisville (U of L). About an hour prior to the game, the NCAA sent U of L a memo stating that nobody would be allowed to blog during the game and asked that it be circulated in the press box. The NCAA pressured U of L to revoke media credentials of anyone violating this policy or risk losing the ability to host future NCAA events. Bennett blogged through the bottom of the fifth inning until an NCAA representative came to Bennett's seat in the press box,

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<sup>3</sup> BRIAN BENNETT, *Ejected and Dejected*, *Courier-Journal.com*(2007), at <http://www.courier-journal.com/blogs/bennett/2007/06/ejected-and-dejected.html>.

revoked his credential and asked him to leave.<sup>4</sup> After hearing about the brouhaha with the *Courier-Journal*, the *Portland Oregonian* decided to avoid the issue of being ejected from the press box by blogging from radio coverage in the newsroom of the newspaper.

The memo issued by Jeramy Michiaels, NCAA's manager of broadcasting, stated that blogs are considered a "live representation of the game" and that any blog containing action photos or game reports would be prohibited. "In essence, no blog entries are permitted between the first pitch and the final out of each game." At the heart of the conflict is an attempt to control access to information about the event. Jon L. Fleischaker, an attorney for the *Courier-Journal* said, "Once a player hits a home run, that's a fact. It's on TV. Everybody sees it. (The NCAA) can't copyright that fact. The blog wasn't a simulcast or a recreation of the game. It was an analysis."<sup>5</sup> The 2<sup>nd</sup> U.S. Circuit Court of Appeals ruled, in *NBA v. Motorola (1997)*, that athletic events do not fall under copyright protection.<sup>6</sup>

Newspapers are evolving and the use of the Internet is an integral part of their portfolio of services. Bennie L. Ivory, the executive editor of the *Courier-Journal* said "This is part of the evolution of how we present the news to our readers. It's what we did during the Orange Bowl. It's what we did during the NCAA basketball tournament. It's what we do."<sup>7</sup>

As the industry evolved, both media professionals and sports organizations attempted to examine how Internet reporting should be treated. A 2001 Associated Press

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<sup>4</sup> Id.

<sup>5</sup> RICK BOZICH, *Courier-Journal Reporter Ejected From U of L Game*, *Courier-Journal.com*(2007), at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20070611/SPORTS02/706110450/1002/sports>.

<sup>6</sup> *NBA v. Motorola*, 105 F.3d 841, 846 (2d Cir. 1997).

<sup>7</sup> BOZICH.

Sports Editors (APSE) Internet Committee Report examined credentialing policies of various sports organizations and found several common themes. Most were concerned whether the reporters were part of a national news-gathering agency, whether they were full time journalists, if the site developed original content, if the report reached a broad audience and whether the news organization routinely covered the sport throughout the season. Some organizations did not specifically differentiate between print and online journalists, but the policy was to issue a set number of credentials to a media outlet and it was up to the individual outlet to decide whether to use the credentials for a sports columnist, a sports reporter or a sports blogger.<sup>8</sup>

Media groups across the country criticized the NCAA after the ejection but Lucy Dagleish, executive director of the Reporters Committee for the Freedom of the Press, said she was not surprised. “The television networks pay a lot of money for the rights to live reporting, and the NCAA makes a whale of a lot of money. This is all about the money and not about the First Amendment.”<sup>9</sup> If this issue ever reaches the courts, legal experts say that the issue would likely focus on how similar blog entries are to play-by-play announcements by those with broadcast rights. Fleischaker argues that blogs and play-by-play are not alike because blogs mix opinions with fact and they are not posted simultaneously with the action.<sup>10</sup> It should be noted that ESPN had nothing to do with the NCAA action. ESPN spokesman Mike Hulmes said, “This wasn’t at our behest.”

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<sup>8</sup> ELISSA LEIBOWITZ & CELESTE WILLIAMS, *State of the Internet: Credential Policies*, Associated Press Sports Editors(2001), at <http://apse.dallasnews.com/mar2001internet/2credentials.html>.

<sup>9</sup> ANDREW WOLFSON, *NCAA Criticized for Ejecting Reporter Who Blogged at Game*, Courier-Journal.com(2007), at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20070612/SPORTS/706120464/1002>.

<sup>10</sup> Id.

After the firestorm of criticism, the NCAA issued a clarification about blogging. Bob Williams, the NCAA managing director of public and media relations, said bloggers may say “the score is 3-0 in the bottom of the third” as long as they do not include live play-by-play depictions.<sup>11</sup> The NCAA, as well as all the other sports-sanctioning bodies, seek publicity of their events. They actively monitor what is published and rely on media coverage to promote their product. However, the media do not consider sporting events a product to be marketed and promoted; they consider the reportage they provide as news.

It is ironic that now as the media environment is evolving, the NCAA’s attitude toward cooperation with the media is changing.

#### COPYRIGHT INFRINGEMENT

The Copyright Act of 1976 was enacted to resolve issues that came about from the technological explosion of the 20<sup>th</sup> century. It was the first complete revision of the Copyright Act of 1909, signed into law by President Theodore Roosevelt, that almost immediately became outdated. Efforts at revision started as early as 1924 but were unsuccessful during the 1920s and 1930s and then were interrupted during World War II. Efforts at an international copyright treaty, to which the United States would be a part, took center stage after these efforts failed. Throughout this time the radio, television, motion pictures and sound-recording technologies were developed. Then when the Universal Copyright Convention took effect in 1955, efforts to revise the Copyright Act of 1909 started again, and it took 21 years to accomplish. The result was an act that was described by the Register of Copyrights as an “author’s bill” and that goes to great

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<sup>11</sup> ANDREW WOLFSON, *NCAA Clarifies Blogging Policy*(2007), at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20070621/SPORTS02/706210481>.

lengths to define what kind of material is copyrightable.<sup>12</sup> The Copyright Act of 1976 still provides the basic framework for copyright law today despite several amendments to it, the most prominent being the Digital Millennium Copyright Act.

In 1997, the decision in *Motorola* made a significant statement as to what was *not* copyrightable. The 2<sup>nd</sup> U.S. Circuit Court of Appeals held that facts cannot be copyrighted, sporting events cannot be copyrighted and facts may be reported from copyrighted broadcasts, as long as it does not include the expression or description of the game from that broadcast.<sup>13</sup>

Motorola sold a pager called “SportsTrax” that provided virtually real-time statistics about games in progress. A company called “STATS” provided the “data feed” to Motorola by compiling the information from their reporters who watched the games on television and listened to them on the radio. The NBA filed a lawsuit alleging copyright infringement, commercial misappropriation under New York law, false advertising and false designation of origin under the Lanham Act, and violations of the Communications Act. District Court Judge Loretta A. Preska dismissed all the claims by the NBA except misappropriation. Although the NBA's complaint concerned only the SportsTrax device, the NBA offered evidence at trial concerning STATS's America On-Line (“AOL”) site. After a motion by the NBA, the district court amended the action to include America Online. Motorola appealed, and in a summary, Judge Ralph K. Winter of the Second Circuit Court of Appeals held that:

(1) professional basketball games were not “original works of authorship” protected by Copyright Act; (2) league's misappropriation claims were preempted by

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<sup>12</sup> FRED KOENIGSBERG, *Overview of Basic Principles of Copyright Law*, 238 PLI/Pat (1987).

<sup>13</sup> *NBA v. Motorola.*, 847

Copyright Act; and (3) misstatements in advertising for the pagers were not material, as required to support Lanham Act false advertising claim.<sup>14</sup>

While the lower court dismissed the NBA’s claim of copyright infringement on both the underlying game and the broadcasts, in a summary of his ruling Judge Winter stated that discussion of copyright was necessary in order to provide a foundation for his ruling on the misappropriation. He stated:

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” under 17 U.S.C. § 102(a)...[and] [w]e believe that the lack of case law is attributable to a general understanding that athletic events were, and are, uncopyrightable. Indeed, prior to 1976, there was even doubt that broadcasts describing or depicting such events, which have a far stronger case for copyrightability than the events themselves, were entitled to copyright protection. Indeed, as described in the next subsection of this opinion, Congress found it necessary to extend such protection to recorded broadcasts of live events. The fact that Congress did not extend such protection to the events themselves confirms our view that the district court correctly held that appellants were not infringing a copyright in the NBA games.<sup>15</sup>

Judge Winter’s reasoning is drawn from the Copyright Act, which lists eight categories that qualify as works of original authorship:

1. Literary works
2. Musical works, including any accompanying words
3. Dramatic works, including any accompanying music
4. Pantomimes and
5. Choreographic works
6. Motion pictures and other audiovisual works
7. Sound recordings
8. Architectural works<sup>16</sup>

“Sports events are not ‘authored’ in any common sense of the word,” said Judge

Winter.<sup>17</sup> While preparation may take place, there is no underlying script such as those

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<sup>14</sup> Id. at, 841.

<sup>15</sup> Id. at, 846.

<sup>16</sup> Id.

<sup>17</sup> Id.

found in plays, movies or operas. By its very nature, sporting events are not predictable.

When considering the claim of copyright infringement on broadcasts of sporting events, Judge Winter stated:

Although the broadcasts are protected under copyright law, the district court correctly held that Motorola and STATS did not infringe NBA's copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast. The “fact/expression dichotomy” is a bedrock principle of copyright law that “limits severely the scope of protection in fact-based works.”... We agree with the district court that the “[d]efendants provide purely factual information which any patron of an NBA game could acquire from the arena without any involvement from the director, cameramen, or others who contribute to the originality of a broadcast.”... Because the SportsTrax device and AOL site reproduce only factual information culled from the broadcasts and none of the copyrightable expression of the games, appellants did not infringe the copyright of the broadcasts.<sup>18</sup>

While some may argue that the decision in *Morris Communication v. PGA* (2004), that prohibited Morris from distributing golf scores from PGA tournaments is a counter argument to *Motorola*, the suit was an antitrust action, not a copyright action. The 11th U.S. Circuit Court of Appeals ruled in favor of the PGA successfully blocking Morris Communications from the syndication of golf scores compiled by a proprietary system from PGA tournaments.<sup>19</sup> There are three important distinctions to be made in this case. First, this is an antitrust case, not a copyright case. Second, the information gathered, the golf scores, were acquired from a proprietary system that the PGA developed at considerable expense to gather the information. And third, Morris Communications was syndicating the information for resale.

Because of the unique nature of professional golf tournaments where numerous golfers play on several holes simultaneously, it is impossible for any one person, or a

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<sup>18</sup> Id. at, 847.

<sup>19</sup> *Morris Communications v. PGA*, 364 F.3d 1288, 1298 (11th Cir. 2004).

member of the media, to maintain all the scores. The PGA developed a Real-Time Scoring System (RTSS) that monitors play throughout the course by using state-of-the-art computer technology and a team of volunteers that supply scores after each hole to a central production center. This information is posted to the PGA website [www.pgatour.com](http://www.pgatour.com), to an onsite media center where members of the media are able to access the information, and to leaderboards throughout the course in nearly real time. In order to be credentialed and gain access to the media center, members of the press must agree to the PGA's Online Service Regulations (OLSR) that require media organizations to delay publication on their websites of scoring information obtained by the RTSS "until the earliest of (1) thirty minutes after the actual occurrence of the shot or (2) the time when such information has become legally available in the public domain, i.e. after the scores are posted on PGA's official website [www.pgatour.com](http://www.pgatour.com)."<sup>20</sup>

There is a pertinent section in the court decision that reflects positively on newspaper reportage. Judge Joel F. Dubina said, *Morris Communications v. PGA* is not at all about "copyright law, the Constitution, the First Amendment, or freedom of the press in news reporting."<sup>21</sup> The PGA's concern was the syndication and sale of compiled golf scores from their proprietary system and there was no discouragement or restriction of news reportage. The court said:

At the hearing regarding the preliminary injunction, the district court asked counsel for PGA if PGA would permit "Morris ... to disseminate this information to its companies, its various news companies, not charging them anything, just disseminating it"? Counsel for PGA responded: "There's no problem because that to us is news coverage, and ... [w]e eagerly, eagerly invite and want the press to do their function, their normal function of gathering and disseminating the news, and because it's so important to us to have them do that, we told Morris a year ago

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<sup>20</sup> Id. at, 1291.

<sup>21</sup> Id. at, 1292-3.

that we would allow them in the media center to sit there and re-key right from there into their own website and any of their related companies as a matter of news coverage, they could have those real-time scores right away for free.... The problem comes in only when Morris wishes to go into another business, which they label the news syndication business....[I]t is not the business of gathering and disseminating news. It is the business of selling a commercially valuable product that we have developed and paid for and we ought to be the ones to sell that.”<sup>22</sup>

These two cases provide support for the argument that sporting events themselves cannot be copyrighted and that, while the broadcast of sporting events may be copyrighted, facts gleaned from those broadcasts may be used by another media outlet as long as the news report does not include any expression of the game. Finally that news reportage of sporting events is expected, desired and encouraged by athletic leagues.

#### STATE ACTION

The next question to be addressed is whether private organizations sanctioning events at state-funded institutions constitute state action.

In *Ludke v. Kuhn*, a female sports reporter from *Sports Illustrated* brought a civil rights action because she was barred from entering the locker room of the New York Yankees in a policy established by Baseball Commissioner Bowie Kuhn.<sup>23</sup>

It is a common journalistic practice to interview athletes immediately after a game because “‘fresh-off-the-field’ interviews are important to the work of sports reporters.” Male reporters were granted access, but Kuhn established a policy that barred female reporters from entering the locker room because athletes may be in various stages of undress. This policy put Melissa Ludke at a distinct disadvantage. She argued:

Women reporters who have been given access to locker rooms in other sports have found that a substantial portion of their material comes from the locker room and thus that access to the locker room is an important part of their job. They are

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<sup>22</sup> *Id.* at, 1293.

<sup>23</sup> *See generally*, *Ludtke v. Kuhn*, 461 F.Supp 86, (D.C.N.Y. 1978).

able to compete fully with the male reporters on their beat because they are given equal access to the news and the newsmakers.<sup>24</sup>

Ludke's claim was that the policy unreasonably interfered with the fundamental right to pursue her profession in violation of the due process clause of the Fourteenth

Amendment.<sup>25</sup> The amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.<sup>26</sup>

This amendment refers to state action, and the court had to decide whether Kuhn's policy constituted state action. The city of New York owns Yankee Stadium and leases it to the New York Yankees. Because the stadium is owned by the city and, even though Major League Baseball is a private organization, its policy was deemed state action because of the intertwined nature of the two entities. After making the determination that implementation of Kuhn's policy was considered state action, the court determined that Ludke's rights of equal protection and due process had been violated. The decision stated:

The right to pursue one's profession is a fundamental "liberty" within the meaning of the Fourteenth Amendment's due process guarantee. . . . [and] the Kuhn policy substantially and directly interferes with the right of plaintiff Ludtke to pursue her profession as a sports reporter.<sup>27</sup>

The decision to grant media access by private organizations is at the discretion of those entities. There is no recourse if they deny access to members of the media, but many sporting events are held at publicly-owned or publicly-financed facilities. At that point,

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<sup>24</sup> Id. at, 91.

<sup>25</sup> Id. at, 93.

<sup>26</sup> Black's Law Dictionary 1777 (Bryan A. Garner ed., Thomson West 2004).

<sup>27</sup> Ludtke v. Kuhn., 98

the private entity becomes entwined with an agency of the state, and the agency must be deemed responsible for the private entity's acts.<sup>28</sup> Once that comes into play, the decision in *Ludke v. Kuhn* supports the argument that any accreditation policy must apply equally to all members of the media.

While the issue considered in *Leudke* dealt with civil rights, the principle of state action would provide persuasive authority in other jurisdictions.<sup>29</sup>

### PUBLIC FORUM

The final question to be addressed is whether a sporting event at a state-funded public institution is a public forum.

The Supreme Court, in *Perry Education Assn. v. Perry Local Educators' Assn.*, (1983) defined three categories for the right of access to public property.<sup>30</sup>

Justice Byron White, who delivered the opinion of the court, outlined the three categories of access stating:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.<sup>31</sup>

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<sup>28</sup> *Id.* at, 93.

<sup>29</sup> AMY E. SLOAN, *Basic Legal Research: Tools and Strategies* 4 (Aspen Publishers 2nd ed. 2003). Persuasive authority refers to authority that a court may follow if it is persuaded to do so, but is not required to follow.

<sup>30</sup> *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983).

<sup>31</sup> *Id.* at, 45.

The second category is defined as:

...[P]ublic property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. ... (university meeting facilities); ... (school board meeting); ... (municipal theater). Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.<sup>32</sup>

The third category is defined as:

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.<sup>33</sup>

The court in *Perry* was concerned with the third category, but it provided a framework to evaluate whether NCAA tournaments at state-funded universities can be considered a public forum. Any regulation would have to meet the strict scrutiny standards set by the Supreme Court.

The second category, typically described as a designated public forum, is where an NCAA sanctioned sporting event at a state-funded university would fall. The venue is opened to the public and anyone with the price of admission may attend as long as there is space available. Fans of the teams cheer and express themselves in regalia that supports their school.

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<sup>32</sup> Id. at, 45-46.

<sup>33</sup> Id. at, 46.

The NCAA grants the media access also and there are standards required to qualify for obtaining media credentials to NCAA events:

At most championships, credentials are available to any agency that wishes to cover the event. Because of high demand at other championships, the committees have developed criteria to determine credentials allocations. Circulation and coverage of regular-season contests are the primary criteria.

At those high-demand championships (e.g., Division I Men's and Women's Basketball, Men's Ice Hockey etc.), media may qualify for credentials in one of two ways:

1. By consistently covering a team during the regular season
2. By meeting NCAA requirements for print-media circulation or electronic-media market size.<sup>34</sup>

None of the criteria for granting credentials evaluates the content of the media coverage.

## DISCUSSION AND CONCLUSION

College sporting events have grown to be a major part of American culture, particularly college football, basketball, hockey and to a lesser extent baseball.

While the traditional fan is primarily interested in the outcome of games, college sports are also big business. All one has to do is look at the coaching changes at the end of a season, who gets fired for having a poor season and who gets lured away to better opportunities and more money.

But because sporting events are such a significant part of our culture and because they are big business, they are also highly newsworthy. The sports section of a newspaper is often the largest one. Coverage ranges from local high school sports to professional teams, and newspapers devote significant human and financial resources to maintain that coverage. While primary reportage will often emphasize local teams, it will also include

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<sup>34</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *NCAA Championships Media Credentials*(2011), at [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/Media%20and%20Events/Press%20Room/Media%20Kit/Credentials/index.html](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media%20and%20Events/Press%20Room/Media%20Kit/Credentials/index.html).

roundups and statistics from many teams from different conferences, particularly when they are ranked in the top ten or top twenty. Because of the proliferation of sporting events, there is rarely a time of the year when there is not some sport in season. When it comes time for playoffs or the road to a championship, news value increases and prominence in coverage and display increases.

In the early days of sports development, conferences sought media coverage to promote the sport. That is why the concept of press credentials came about and why there are press boxes and media centers. Still today the NCAA relies on the media to provide coverage that helps generate public interest. The promotion of sports was successful, and because of this growing public interest, television networks saw value and an opportunity. The networks started negotiating broadcast rights and individual teams started hiring play-by-play announcers and selling radio rights to stations so that fans who could not attend the games in person could still enjoy them.

The fact is that sports leagues need media coverage just as much as the media needs access to sporting events to cover the news. Newspaper blogs provide event reportage that readers can view at their discretion. The public relies on media coverage to get news about the game, and this has evolved into Internet news that can be viewed at work, at home or on the go via cell phones

The NCAA considers the sporting events they host as a commodity, with the ability to sell rights to access. While there is some truth in that concept, it is also true that sporting events are news because fans are interested in how their teams fare, particularly when it involves a tournament or championship.

*Courier-Journal* sports reporter Brian Bennett wrote on his newspaper blog:

I started covering the U of L baseball team almost two weeks ago, following them to Columbia, Mo., and throughout their amazing NCAA Tournament run. I just wish I could have written about them today, when they clinched a spot in the College World Series and capped an unbelievable ride. But I didn't get the chance, because the NCAA decided to revoke my credential and evict me from the press box in the fifth inning of Louisville's 20-2 victory.<sup>35</sup>

The NCAA revoked Bennett's credential because they wanted to prevent him from publishing the news. They claimed it to be a possible copyright infringement of the broadcast and Internet rights it sold to ESPN.

*Copyright:* Newspaper blogging does not violate copyright of broadcast properties, and should not be prohibited from blogging at live events. Copyright law is very clear. The rights to be sold are a complete re-creation in concert with the action of the game. This would be broadcast or play-by-play coverage. News reportage is a completely different thing. Newspaper blogging is a blend of facts, reporting and opinion. The NCAA wanted to control the content of newspaper Internet reportage by attempting to limit what could be reported from the "first pitch to the final out," arguing that the information is copyrightable. The NCAA's concern that blogging may infringe on the broadcast and Internet rights sold to ESPN is without foundation. The decision in *Motorola* states sporting events are not copyrightable, and while simultaneous broadcast of an event may be copyrighted, facts from that broadcast may be reported as long as no expression is included. Furthermore, in *Morris Communication*, testimony from one sports organization stated it actively seeks and encourages news coverage of its events.

What Bennett was doing in his blog was newspaper reportage of the University of Louisville baseball team, playing in a national tournament before a hometown crowd that

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<sup>35</sup> BENNETT.

included atmosphere and opinion about the progress of the game. It was not a simultaneous replication of the underlying event nor a play-by-play broadcast.

*State Action:* It is true that there is no legal right to access by the media and that private entities may grant access and media credentials to whomever they choose.

The NCAA grants media credential requests and has an established policy for issuing credentials based on criteria that have nothing to do with content.<sup>36</sup> The Louisville *Courier-Journal* certainly qualified for media credentials based on the criteria that the NCAA outlines. They had covered the team throughout the year and earlier in the tournament. In addition, they are the newspaper of the host city.

However, in this instance the NCAA becomes a state actor. There is a symbiotic relationship between the NCAA and the host institution – a state-funded public institution. The NCAA sent a memo to U of L stating that nobody would be allowed to blog during the game and asked that it be circulated in the press box and pressured U of L to revoke media credentials of anyone violating this policy or risk losing the ability to host future NCAA events. This is a clear indication of the intertwined nature of the two entities.

Brian Bennett was an employee of a reputable newspaper and his media credential was revoked because he was blogging. The NCAA prevented one reporter from disseminating news because the organization did not like the medium he was using nor the content he was disseminating. When a state actor restricts a member of the press over

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<sup>36</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *NCAA Media Credential Policy*(2011), at [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/broadcast/media/broadcasting/broadcasting+manual/sect4/ncaa+media+credential+policy](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/broadcast/media/broadcasting/broadcasting+manual/sect4/ncaa+media+credential+policy).

content, it becomes a violation of the First Amendment right of a free press and a constitutional matter subject to review.

*Public Forum:* Finally, even though the NCAA sanctions the tournaments and maintains control of the venue, it opens it up to the public for admission, it expects the fans to cheer in support of their team and many fans also show their support by wearing regalia from their school. Both the cheering and regalia are forms of expression.

When this takes place at a state-supported university it becomes a designated public forum. Bennett's blogging is also a form of expression under the First Amendment. Any restriction of expression in a designated public forum is also subject to constitutional review and evaluation by the courts under strict scrutiny:

In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.<sup>37</sup>

There was no compelling state interest and the restrictions the NCAA made were not content neutral. It was at the very heart of their concerns. They did not want Bennett posting his news on the Internet during the game.

To the best of my knowledge, the NCAA has not revoked any media credentials since the incident in Louisville, but the criteria for doing so is still listed in the media credentialing guidelines.

A Bearer may blog during any Event, provided that such blog may not produce in any form a "real-time" description of the Event (i.e., any simulation or display of any kind that replicates or constitutes play-by-play of a material portion of an Event, other than periodic updates of scores, statistics or other brief descriptions

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<sup>37</sup> Perry Education Assn. v. Perry Local Educators' Assn., 45

of the Event) as determined by the NCAA in its sole discretion. If the NCAA deems that Bearer is producing a real-time description of the contest, the NCAA reserves all actions against Bearer, including but not limited to the revocation of the credential.<sup>38</sup>

Should the NCAA revoke credentials at a tournament held at a state-funded institution again, this paper suggests that the media would have a cause of action.

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<sup>38</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *NCAA Media Credential Policy*.

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