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TECHNOLOGY & COPYRIGHT LAW - THE NFL’S ABILITY TO PROTECT ITS COPYRIGHTS IN GAME BROADCASTS

I. Introduction

Copyright is critical to protecting sports broadcasts and new technology has evolved to disseminate these broadcasts to the many people that enjoy professional sports. The purposes of copyright are two-fold: first, authors, such as the National Football League (NFL), are given a financial incentive to create works, \(^1\) and second, the public is able to have access to works of authorship for their enjoyment and use. \(^2\) Copyright laws protect sports broadcasts when they are fixed, \(^3\) and fixation can occur simultaneously with transmission. \(^4\) Sports leagues, such as the NFL, derive revenue from the sale of television and Internet broadcasting. The NFL has very lucrative contracts with TV stations, Internet sites, and satellite television providers. The question is how far copyright protection extends to cover the NFL’s works, the football games, and to what extent that protection can be enforced.

The NFL implements “blackout” procedures if games are not sold out within 72 hours of game time for a 75-mile radius outside of certain stadiums in order to increase ticket sales at the games. \(^5\) In *NFL v. Mc Bee & Bruno’s, Inc.*, owners of a sports bar violated the “blackout” rule by

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\(^1\) Authors should be able to have an economic and moral claim to the fruits of their unique intellectual efforts. PATRYSOCRITY § 3:19 “Authors”-Who may be an ‘author?’” March 2010; Int’l News Serv. v. Associated Press, 248 U.S. 215 (1918) (holding that the creator of an athletic game or event has an exclusive property right in its commercial value).

\(^2\) The public benefits from granting authors limited monopolies in their works because it incentivizes authors to supply these works in the marketplace. PATRYSOCRITY § 3:19 “Authors”-Who may be an ‘author?’” March 2010.

\(^3\) See Midway Mfg. Co. v. Artic Int’l, Inc., 704 F.2d 1009 (7th Cir. 1983) (finding the audiovisual aspects of the Pac-Man game were copyrightable because they were fixed in a tangible medium and the work was capable of being reproduced).


showing the St. Louis Cardinals game within the area where the game was not supposed to be shown. The court found this was an infringement of the NFL’s exclusive public performance right. This paper will analyze *McBee & Bruno’s, Inc.*’s implications in the 2010 context. The NFL has even stronger exclusive rights in their broadcasts today than in 1986 because of additional protections granted by digital rights. However, with new technological advances and associated piracy of broadcasts, the NFL needs to be careful in implementing policies such as the “blackout” rule.

A “blackout” blocks certain programs from being broadcast in a particular market.\(^6\)

Attempting to incentivize fans to come to football games, the NFL “blacks out” games that are not sold out within 72 hours of game time within a 75-mile radius of the stadium. The NFL seeks to increase ticket sales at games because a greater number of fans at games increases excitement and makes broadcast rights more valuable.\(^7\) The “blackout rule” has been widely criticized by professional sports fans. Some people blame the teams’ poor performance for “blackouts.”\(^8\) Others blame the fans for “blackouts.”\(^9\) Some teams, such as the Oakland Raiders and the Detroit Lions, had many games “blacked-out” in the 2009-2010 season.\(^10\) The NFL responded in September 2009 by showing “blacked-out” games on NFL.com on a delayed basis.

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\(^6\) In addition to the NFL, the MLB and NHL also have “blackout” policies, but they are not based on attendance.

\(^7\) NFL v. McBee & Bruno’s, Inc., 792 F.2d 726, 728 (8th Cir. 1986). If the home game is “blacked-out,” the NFL can show another game from another market, for example the Dallas Cowboys game. These games are often the most popular and the NFL still makes money broadcasting them.

\(^8\) Jamie Samuelsen, “Ford Field Attendance is About Performance.” available at: http://www.freep.com/article/20090923/SPORTS01/90923043/Ford-Field-attendance-is-about-performance. It seems like a downward spiral, because the worse the team is, the less people want to buy tickets to games. Then there is a greater chance of home games getting blacked out. In areas that are economically depressed, fans may not be able to afford to support teams by spending $100 per person or family on attending games. Then the team may simply lose morale and perform even more badly.


But many fans do not use the NFL’s authorized tools to watch games but use Internet streaming and other technologies to watch live games within the “blacked-out” area. Therefore instead of increasing the value of its game broadcasts, the NFL’s “blackout” rule may actually decrease the value of game broadcasts.

II. Thesis

In NFL v. McBee & Bruno’s, Inc., the Eighth Circuit held that defendant sports bar’s display of “blacked-out” games did not fall under an exemption regarding common use since satellite dishes were not commonly found in private homes and they infringed despite their use of the “clean feed” to the satellite. Today there are roughly 30 million satellite dishes in use in homes in the United States, which is thirty times more than the case says that there were in 1986. Thus satellite televisions are commonly found in U.S. homes. However, DishNetwork and DirecTV are the primary providers of satellite TV, and these companies make licensing agreements with the NFL. Thus the games within the “blacked-out” zone are also “blacked-out” on satellite TV.

Because of new digital rights in the copyright statute, the NFL has very strong copyright protections that cover Internet, satellite, television, and radio licensing of its broadcasts. However, many new satellite and video pirating technologies have become available, such as

11 “NFL.com to show blacked-out games free in local markets on delayed basis.” available at: http://www.nfl.com/news/story?id=09000d5d8127eb87&template=without-video-with-comments&confirm=true. This was part of the NFL Game Rewind package that made games available on-demand through subscriptions to NFL.com. Id.
12 NFL v. McBee & Bruno’s, Inc., 792 F.2d 726 (8th Cir. 1986).
14 McBee & Bruno’s, 792 F.2d at 731 (utilizing the district court’s finding that there were less than 1,000,000 dish systems in use, many of which were in to commercial establishments. The dishes do have residential use when the home is so situated that access to TV stations by antenna is poor. The TV’s cost around $100 whereas the satellite dish systems cost from $1,500 to $3000, and could go up to $6000).
SlingBox.\(^{16}\) People may also use Internet streaming technology within the 75-mile “blackout” radius to watch games. People using pirating technologies are likely infringing the NFL’s exclusive rights to control public performances of their games, but they may not be easily caught. Therefore the “blackout” rule itself should be reevaluated in light of new rights and technologies to ensure that the NFL, as the copyright holder, is able to reap the fruits of its work and continue producing high-quality games.

**III. The Case: McBee & Bruno’s**

**A. Facts of the Case**

In *McBee & Bruno’s Inc.*, defendants were showing “blacked-out” Cardinals home games in the St. Louis area within the 75-mile “blackout” radius. The NFL, an unincorporated non-profit association of member clubs that schedules games and manages clubs’ affairs, sued owners of bar-restaurants within 75-miles of Busch Stadium.\(^{17}\) The NFL used the “blackout rule” to block the broadcast of the St. Louis Cardinals football game inside a 75-mile radius. Defendants used C-band satellite dish antenna\(^ {18}\) to receive transmissions of a “clean feed” of the Cardinals game and showed it in their establishment.\(^ {19}\)

Witnesses at trial described the process by which live football games were telecast by networks, here CBS.\(^ {20}\) Television cameras captured the visual portion of the game and the audio of announcers describing and discussing the game in the sound booth was recorded.\(^ {21}\) The simultaneous audio and video signals combined at an Earth station outside the stadium. This combined signal, called an “uplink,” was transmitted to a satellite, which then sent the signal

\(^{16}\) [http://www.slingbox.com/](http://www.slingbox.com/)

\(^{17}\) *McBee & Bruno’s*, 792 F.2d at 728.

\(^{18}\) Today these antenna are considered bulky and outmoded, but they are still in use. They are also called “TRVO,” short for “television receive-only.” [http://broadcastengineering.com/news/top-stories-2009/index.html](http://broadcastengineering.com/news/top-stories-2009/index.html)

\(^{19}\) *McBee & Bruno’s*, 792 F.2d at 728-29.

\(^{20}\) *Id.* at 728.

\(^{21}\) *Id.*
back, through a “downlink,” to a network control point on Long Island, New York. This signal was a “clean feed,” meaning it was purely game footage without commercials and interruptions added. CBS Studios in New York added commercials and station breaks, creating a “dirty feed.” The process of creating a dirty feed and sending it out to local affiliates, who sent it into peoples’ homes, took only two seconds. Defendants in this case were able to pick up two “clean feeds” from the Cardinal’s stadium and show them.

B. Issues in the Case

The first issue was whether the “clean feed” of the NFL broadcast was copyrightable since only the “dirty feed” was registered with the Copyright Office. In terms of the first issue, the district court found plaintiff NFL’s “clean feed” was copyrightable. The second issue in the case was whether the showing the NFL’s “clean feed” at the establishment fell within a statutory exemption to the NFL’s exclusive public performance rights. The district court found that defendant’s performance was not exempt.

C. The Eighth Circuit’s Decision

In terms of the “clean feed” versus the “dirty feed,” the Eighth Circuit Court of Appeals affirmed the lower court’s finding that the live broadcast was protected and the game itself was the work protected. The Eighth Circuit agreed that the NFL obtained a copyright in the

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22 Id.
23 Id.
24 Id.
25 McBee & Bruno’s, 792 F.2d at 729.
26 Id. at 732.
27 Id. at 730. “To perform or display a work “publicly” means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101 (2009).
28 McBee & Bruno’s, 792 F.2d at 731.
29 Id. at 732.
noncommercial elements of the game. The Eighth Circuit analyzed the legislative history on fixation, deciding that the plain purpose of fixation was consistent with protecting this game.

The Eighth Circuit analyzed the home-use exemption by looking at how likely it was for average patron who watches a “blacked-out” Cardinals game at one of defendant’s restaurants to be able to watch the same game at home. Unlike in music cases where no royalties were paid when music was intercepted, here, it was absolutely not possible to obtain a license to watch these games within the “blacked-out” zone. The district court found that satellites dish antennas were outnumbered by TV’s 100:1. The district court found it unlikely that average customers could watch the “blacked-out” games at home because there were less than one million dish systems in use and most were in commercial establishments. Home satellite systems were used mainly in homes that lacked access to TV broadcasting stations. Also, the district court found that TV’s cost one hundred dollars or more, but satellite systems cost between $1,500 and $6,000. Therefore the Eighth Circuit found that the district court’s finding that satellite systems were not commonly found in peoples’ homes was not clearly erroneous.

IV. The Statute: 17 U.S.C.

A. Definitions from the Copyright Act

30 Id. Today, TRIPS, § 1101 of the Copyright Act protects live musical broadcasts from bootlegging, even if they are not fixed. 17 U.S.C. § 1101 (1009).
31 Id. at 731.
32 McBee & Bruno’s, 792 F.2d at 731.
33 Rogers v. Eighty-Four Lumber Co., 617 F.Supp. 1021, 1022-23 (W.D. Pa. 1985); Sailor Music v. The Gap Stores, Inc. 516 F.Supp. 923, 924-25 (S.D.N.Y), aff’d 668 F.2d 84 (2d Cir. 1981) (finding the “enhancement factor” that focuses on the extent to which sound or visual quality will be improved is relevant to whether the home-use exemption applies).
34 McBee & Bruno’s, 792 F.2d at 731.
35 Id.
36 Id. at 731-32.
37 Id. at 731.
38 Id.
39 Id.
The applicable statute is the Copyright Act, Title 17 of the United States Code. The NFL’s live broadcast of the football game consisting of sounds, images, or both, was being fixed simultaneously with its transmission.\(^{40}\) A copyrightable work is an original work, which means that it is independently created and has a modicum of creativity, which is fixed in a tangible medium of expression.\(^{41}\) This includes audiovisual works and motion pictures. Thus taping a football game constitutes fixing the performance by the players.

\textit{B. Exclusive Rights}

Section 106 of the Copyright Act provides for six exclusive rights: reproduction, the right to prepare derivative works based upon the copyrighted work, distribution, public performance, public display, and public performance of sound recordings by means of digital audio transmission.\(^{42}\) These rights may be divided or assigned in the negative, through prohibition of uses of the work.\(^{43}\) Public performance rights only apply to literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works.\(^{44}\) Public display rights only apply to literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a

\(^{40}\) A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission. 17 U.S.C. § 101 (2009).

\(^{41}\) 17 U.S.C.

\(^{42}\) 17 U.S.C. § 106. The exclusive rights are: “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106.

\(^{43}\) Salinger v. Random House, Inc., 811 F.2d 90, 100 (2d Cir. 1987). By “blacking out” games, the NFL is prohibiting public performance of the games in a certain market.

motion picture or other audiovisual work. Since the NFL’s work is an audiovisual work and a motion picture, the NFL get the exclusive rights of reproduction, preparation of derivative works, distribution, public performance, and public display (for individual images). There is an argument that the NFL also has a sound recording in the audio portion of the broadcast, as implied from the language in *McBee & Bruno’s*. The NFL would have all five exclusive rights and the § 106(6) digital right in its sound recording.

A “digital transmission” is a transmission in whole or in part in a digital or other non-analog format. The digital right in § 106(6) was not in place when *McBee & Bruno’s* was decided in 1986. It was added in 1995 by Public Law 104-39 § 2. The Digital Millennium Copyright Act (DMCA) was passed in 1998 and added additional digital rights. These include the anti-circumvention right from Section 1201 that allows copyright holders to release works in digital form.

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46 *McBee & Bruno’s*, 792 F.2d at 727. “‘Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” 17 U.S.C. § 101. One could argue that the audio portion of games is coupled with the visual portion, which would make the audio portion an “accompanying” part of the audiovisual work that does not get a sound recording copyright. However, parts of the NFL’s audio, such commentators describing the game, are created separately from the visual portion of the game. The audio portion is played on the radio. Thus, since the audio portion can stand alone and apart from the visual portion, it could get a sound recording copyright.
digital format, but encrypted or locked up, with assurances that they can obtain relief against those who would decrypt or unlock these works without permission.\footnote{Melville Nimmer, Paul Marcus, David A. Myers, and David Nimmer, \textit{Cases and Materials on Copyright and Other Aspects of Entertainment Litigation Including Unfair Competition, Defamation, Privacy} 278 (7th ed. 2006).}

Unauthorized streaming of games on the Internet is harming the NFL.\footnote{Michael J. Mellis, “Internet Piracy of Live Sports Telecasts,” \textit{Marq. Sports L. Review}, Spring 2008, at 259-83 (describing the increasing problem of Internet piracy for professional sports organizations).} Now, digital rights management, which seeks to stop or control end-users use of digital media, is in place. Unauthorized distribution of games on the Internet constitutes digital piracy and is a violation of the NFL’s digital right.\footnote{Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 119 (4th Cir. 1997) (finding a library distributed a work by placing an authorized copy in a library, although copies may not have changed hands).} Only some courts acknowledge that public distribution is the same as “making a work available.”\footnote{http://nfl.fanhouse.com/2007/03/19/is-the-nfl-abusing-copyright-law/; 17 U.S.C. § 107 (2009).} However, the person who actually decrypts and transmits the digital work is probably liable, but the end user may not actually own a “copy” of the game. The NFL has tried to get clips taken down from sites like YouTube.com under the DCMA, but these clips may be considered educational and fair use under Section 107 of the Copyright Act.\footnote{See Matthew J. Mitten, Timothy Davis, Rodney K. Smith & Robert C. Berry, \textit{Sports Law and Regulation, Cases, Materials, and Problems} 1052 (2d ed. 2009). Also, retransmissions of a signal embodying a copyrighted work are public performances. 17 U.S.C. § 111 Limitations on Exclusive Rights: Secondary Transmissions (2009).} The Section 110(5) exemption limits the copyright holder’s ability to control rebroadcasts of their work.\footnote{17 U.S.C. § 110 (2009). “Limitations on exclusive rights: Exemption of certain performances and displays: (5) [(A)] Communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—(i) a direct charge is made to see or hear the transmission; or (ii) the transmission thus received is further transmitted to the public; (B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission,
This section was enacted to allow certain performances by small establishments whose proprietors merely bring small radio or TV equipment onto their premises but do not have commercial sound systems.\(^{58}\) In *Bruno & McGee’s*, defendants argued that their performance of “blacked-out” games fell into the category of non-infringing acts under Section 110(5) where no copyright liability can be imposed for communication of a transmission embodying a performance by public reception of the transmission on a single receiving apparatus of a kind commonly found in private homes.\(^{59}\) However, the court found that since satellite dishes are not commonly found in private homes, the exemption did not apply.\(^{60}\)

by a cable system or satellite carrier, if—
(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—
(1) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; (ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—
(1) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; (iii) no direct charge is made to see or hear the transmission or retransmission; (iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and (v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed.” 17 U.S.C. § 110(5).

\(^{58}\) McBee & Bruno’s, 792 F.2d at 731; *But see* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (finding that the owner of a small fried-chicken restaurant was not performing copyrighted works when he played them through four in-the-ceiling speakers).

\(^{59}\) McBee & Bruno’s, 792 F.2d. 726.

\(^{60}\) *Id.*
In 2008, the number of satellite television subscribers in the U.S. reached over 30 million.61 Since satellite TV’s are now commonly found in private homes, other parts of Section 110(5) would apply.62 Part B(i) might apply to the facts of McBee & Bruno’s if it were decided today.63 However, users at home would not be able to receive feeds from stadiums because of encryption technology. Today’s satellite television customers receive broadcasts on their standard TV sets by subscribing to a Direct Broadcast Satellite (DBS) provider. There are two DBS providers in the U.S., DirecTV and DISH Network.64 Satellite TV in the 1980’s was expensive and the equipment was large and cumbersome. However, now dish sizes have decreased to 18 inches or less and the cost of the service for DBS providers has been greatly reduced.65

In addition to the antenna, the customer has a receiver, or “box,” that is connected to the antenna on one side and to a standard TV set on the other side.66 The signals the box receives are encrypted and need to be de-encrypted by the receiver.67 The NFL’s digital rights make it illegal to decrypt the boxes to enable game viewing. Because of the NFL’s ability to control its

61 “Churn Pressures Drive to Advanced DTH Receiver Adoption in North America,” available at: http://www.talksatellite.com/Americas-A703.htm. A basic package for satellite TV can now be a low as $30.00 per month.
63 Id.; McBee & Bruno’s, 792 F.2d at 727-29.
64 http://electronics.howstuffworks.com/satellite-tv2.htm. Early satellite television in the 1980’s was broadcast in C-band radio (four to six GHZ frequency range). The antenna (dish) capturing the broadcast signals in the C-band frequency was large (up to several meters) and expensive. The radio signals were analog, which used the satellite bandwidth very inefficiently. Two major changes took place in the 1990’s: first, Ku-band frequency (12 to 15 GHZ) began to be used for satellite broadcast transmission and second, the broadcast was digital and not analog.
65 J.V. Evans, “Personal Communications Satellite Systems,” SPACE COMMUNICATIONS, Vol. 4 1997, at 234-60. Because the signals were digitized, the satellite bandwidth can be utilized very efficiently, reducing the cost of the technology. Id.
66 Id.
67 Id. It was much easier to install the smaller size satellite dish on customer premises and, as the price to subscribe to satellite TV services started going down, the number of subscribers increased rapidly in the last several years. S.J. Savage and M. Worth, “Price, Programming, and Potential Competition in U.S. Cable Television Markets,” JOURNAL OF REGULATORY ECONOMICS, 2005, at 100-12.
broadcasts on satellite TV through “blackout” procedures, a sports bar or restaurant within the “blackout” zone could only get the broadcast via satellite through the illegal means of decryption.

V. Analysis

The NFL’s ability to “blackout” games may not increase its copyright’s value. This is because many fans miss out on games and casual or newer fans may lose interest in football altogether. However, it is clear that the NFL does have the ability to control broadcast rights in games. The NFL controls licensing of television, radio, Internet, and satellite broadcasts. The problem is that it is difficult to enforce the copyright laws upon individuals who may be streaming games from the Internet or using complex decryption technologies to bypass the “blackout” rule in their homes. Since the Internet and satellite technologies today are global in coverage, a geographical restriction on where games are shown may not make much sense.

Caselaw shows the strength of professional sports organizations’ copyrights in their game broadcasts. In Stoutenborough v. Nat’l Football League, Inc., plaintiffs alleged that the NFL’s “blackout” rule discriminated against the hearing-impaired by preventing them from enjoying a game (via television) that hearing individuals could enjoy via radio-broadcast. The court held that the blackout rule prevented television watching by both hearing and hearing-impaired people and thus was not discriminatory. In NFL v. TVRADIONOW Corp., the court held that defendants infringed plaintiffs’ public performance rights and defendants were permanently enjoined from infringing the National Basketball Association (NBA) and NFL’s works through

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68 Also, unauthorized viewing at home is not a public performance, although it may be a violation of reproduction and distribution rights.
70 Id. (holding radio broadcasts were not covered by the blackout rule).
streaming over the Internet using the iCraveTV.com site or any other Internet site. In *NFL v. PrimeTime 24 Joint Venture*, the NFL was also granted a permanent injunction that stopped defendant from transmitting NFL games to Canada. In *Live Nation Motor Sports, Inc., v. Davis*, the court found that providing unauthorized access to motorcycle racing producer’s live webcasts through defendant’s website was copyright infringement.

In terms of how far the NFL’s protection extends, the games themselves are likely not copyrightable under *NBA v. Motorola, Inc.* In that case, defendants did not engage in unlawful misappropriation under the “hot news exception” to the Copyright Act and therefore transmission of the factual information was not a violation of the NBA’s exclusive rights in its broadcasts.

In *McBee & Bruno’s*, the court reasoned that the fixation of the game made the broadcast copyrightable. It is possible that games themselves could be copyrightable because of the actions of the players and coaches. However, in *Morris Communications Corp. v. PGA Tour, Inc.*, the communications corporation was liable for copyright infringement of the PGA’s

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74 NBA v. Motorola Inc., 105 F.3d 841 (2d Cir. 1997) (holding that basketball games do not constitute original works of authorship within the meaning of § 102(a) of the Copyright Act, but the broadcasts of the games were entitled to copyright protection). *But see* Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663 (7th Cir. 1986) (finding that a particular baseball game itself played on the date of broadcast was copyrightable, in addition to the broadcast, which was deemed an audiovisual work with creativity because of the lighting and camera angles used).
75 Motorola, 105 F.3d 841.
76 McBee & Bruno’s, 792 F.2d at 731-32 (finding that the broadcast meets the definition of “work of authorship” under 17 U.S.C. § 102(a)).
promoter’s scores because the PGA invested millions of dollars in its property right, the scores, and that value vanished when the scores were in the public domain.\textsuperscript{78}

It seems that the reason that live broadcasts are valuable is that they create excitement and encourage viewers to feel like they are part of the game. When people try to circumvent licensing of broadcasts in order to transmit the information within the game, that may be legal if the information transmitted does not fit into the “hot news” exception. However, if transmitting information in real-time is economically harmful, as in the case of \textit{Morris}, then would-be infringers may be prohibited from transmitting even factual game statistics.\textsuperscript{79} If people transmit the broadcasts themselves via unauthorized Internet streams or via satellite, it would likely constitute prima facie copyright infringement.\textsuperscript{80} If people use satellite technology to show “blacked-out” games in public places, they would be infringing the NFL’s exclusive right of public performance.\textsuperscript{81}

\textbf{VI. Conclusion}

The NFL has very strong exclusive rights to control licensing of its game broadcasts, and that includes the right to control access to live performance of games through the “blackout” rule. Although today satellite technology is much more common than in 1986, satellite providers block games that are “blacked-out” because the providers are licensees of the NFL. The unintended result of the combination of modern technology with the “blackout” rule for the NFL is that fans may try to use decryption technology or they may decouple their satellite dishes from

\textsuperscript{78} Morris Communications Corp. v. PGA Tour, Inc, 235 F.Supp.2d 1269 (M.D.Fla. 2002), \textit{aff’d} 364 F.3d 1288 (11th Cir.) (reasoning that the PGA had the right to license or sell broadcasting rights in its products).

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} However, an individual watching a game at home would not be a “public performance” violation under the definition from the Copyright Act. If the individual does not own a copy because they only watched the game live on the Internet and it did not save anywhere, it may not be “fixed” and in their possession. This would make it very difficult to hold such a user liable.

\textsuperscript{81} It may be difficult to descramble or decrypt satellite feeds from the equipment they are hooked up to by DBS providers, but it is certainly possible.
the Dish Network or DirecTV box to receive the games. Also, fans may simply download
Internet streams to watch “blacked-out” games live. Unauthorized use of satellite decryption
technology or the Internet harms the NFL, but it is difficult to measure how much money the
NFL loses. The status of the law is that the NFL has very strong copyrights in its game
broadcasts. However, the “blackout” rule should be reevaluated, as it is likely not the best way
to keep fans engaged and thus allow the NFL to generate maximum revenue from licensing its
copyrighted broadcasts.