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I. INTRODUCTION

The National Football League (NFL) has been called "the most successful sports league in history."[1] It controls America's "favorite" sport[2] with a business model that is "the envy of all other professional sports leagues."[3]

While the opinions of outsiders put the NFL at the apex of all sports leagues, the NFL's opinion of itself goes farther. In the NFL's view, it is no mere sports league. It is "the world's leading sports business, media and entertainment company."[4]

How the NFL thinks of itself is quite revealing. Traditionally, sports leagues produced sports. It was up to others—the sports media—to produce coverage on anything noteworthy that came out of the endeavor. The model of today's NFL, however, is to put sports league operations and sports media operation together under one roof. In other words, the NFL's mission today is largely to produce coverage of itself. Thus, television networks and other media enterprises have become the NFL's rivals. And in its bid to outdo them, the NFL has increasingly turned to assertions of intellectual property as a way keeping more and more of the market for itself. For the NFL, that market includes not only traditional broadcasting game coverage but all elements used by journalists to report on sports, including all audio and video recorded at or near a game, as well as up-to-date text information concerning games.

The NFL has long been a leader in aggressively pushing the law to provide ever more advantage to its business model, with the league's feats in antitrust and labor law being legendary.[5] Because of the NFL's leading role in American sports,[6] other leagues and organizers may look to what the

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1. MARK YOST, TAILGATING, SACKS, AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY 243 (2006).

2. *See, e.g.*, MICHAEL ORIARD, BRAND NFL: MAKING AND SELLING AMERICA'S FAVORITE SPORT 10 (2007).

3. YOST, *supra* note 1, at xvi.

4. *Internships & Entry Level Programs at the League*, NFL, http://www nfl.com/careers/internships (last visited Apr. 10, 2011).

5. Some of the landmark cases pursued by the NFL include: American Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2214 (2010) (dealing a 9-0 defeat to the NFL's attempt to gain antitrust immunity for its policy of collective negotiation of merchandizing rights for all teams); Brown v. Pro Football, Inc., 518 U.S. 231, 231 (1996) (holding that federal labor laws provide antitrust immunity to NFL owners' agreement to implement contract terms after rejection by players); U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1377-78 (2d Cir. 1988) (holding that large damages were unwarranted in a successful antitrust action brought by a rival league and affirming a jury award of one dollar).

6. *See, e.g.,* CRAIG R. COENEN, FROM SANDLOTS TO THE SUPER BOWL: THE NATIONAL FOOTBALL LEAGUE 1920-1967 2 (2005) (NFL ranks fourth among all companies worldwide in licensing revenue, behind Disney, Warner Brothers, and Bonjour); RONALD B. WOODS, SOCIAL

NFL is doing in planning their own IP strategies. That means that when it comes to gaining monopoly over ever broader swaths of the business of distributing information about its events, what the NFL is able to do in this arena will likely form the blueprint for all other big-time sports organizers. The NFL is, therefore, uniquely deserving of a special look, one which this article aims to provide.

Moreover, we live in an era of increasing assertions of intellectual-property entitlements by businesses of *all* stripes, all with the aim of gaining an advantage in the marketplace. Sports organizers[7] are among the vanguard of this trend. And among sports organizers, the NFL is at the very forefront. Thus, the story of the NFL's use of intellectual property to conquer the sports-media business is an important part of the broader narrative about intellectual property's ascending influence on our economy and our culture as a whole.

This article begins, in Part II, by exploring how the NFL has, over the years, gone from not caring about who owns the copyright to game footage to requiring game footage copyright to be assigned to it in the course of business deals, and then has gone on to making sweeping and spurious claims of ownership of copyright over all footage of NFL games. In Part III, I look at how the NFL has increasingly sought to exert control over all media relating to the NFL by neutralizing copyright's fair-use doctrine and by asserting non-copyright entitlements to information. My conclusion is that the increasing assertion of intellectual property entitlements by the NFL, and by extension, all sports organizers, poses a very real threat to the freedom of the press to report about sports.

II. FROM SELLING TICKETS TO OWNING COPYRIGHTS

The sports industry today is consumed with concern over intellectual property—but this is an obsession that is relatively recent. The sports industry has, however, had a long and storied relationship with intellectual property law's obverse: antitrust. The legal concepts of antitrust and IP are

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ISSUES IN SPORT 56 (2007) ("The NFL has been the leader in capitalizing on such merchandise by establishing NFL Properties to market the league and license merchandise."); YOST, *supra* note 1, at xvi ("[t]he NFL developed a business model that is the envy of all other professional sports leagues."); Michael J. Haupert, *The Economic History of Major League Baseball*, EH.NET (Feb. 1, 2010, 6:21 PM), http://eh net/encyclopedia/article/haupert mlb ("In 1966 MLB followed the lead of the NFL and sold its first national television package, netting $300,000 per team.").

7. When I use the term "organizers" in this article, I'm referring to those entities that stage sporting events. Those entities differ by sport, but they include teams, leagues, conferences, governing bodies, and others. Examples are the National Football League (NFL), the International Olympic Committee (IOC), the Fédération Internationale de Football Association (FIFA), and the National Collegiate Athletic Association (NCAA).

each other's yin and yang. Where antitrust law seeks to prevent monopolies, intellectual property law seeks to enshrine them. Because of the nature of organized sports, it has always been a foregone conclusion that, as a business, sports would run headlong into antitrust issues. Cooperation is the bane of antitrust, and cooperation among competitors is the habitual prerequisite to staging any kind of sporting event. Since intellectual property law has always been a sanctioned escape from the strictures of antitrust law, it's a wonder that it took the sports industry as long as it did to embrace IP.

A. IP INNOCENTS: SOME HISTORICAL CONTEXT

The sports industry initially paid no attention to intellectual property. When sports first became a business, sometime in the late 1800s, the dominant means to derive revenues was to sell tickets. Thus, the legal right that drove profits in sports was an interest in real property. The organizer of a sports event controlled the land, and, using that legal right, the organizer sold fans tickets to be able to come on the land to watch.

When radio came along, the real-property-driven system of profiting from organized sports events did not change. Originally, games that were broadcast by radio were generally "sustaining broadcasts"—neither the broadcaster nor the organizer paid the other.[8] Beginning in the 1930s, however, organizers—leagues or home teams—began demanding payments from radio networks for the privilege of broadcasting games.[9] The promotional benefit was no longer considered requisite compensation; fees had to be paid to the organizer.[10] Yet even when organizers started looking to telecasters for rights-payments, there was no conviction that the organizers should own the resulting sounds and images.

The NFL first got into the business of owning intellectual property rights in moving images in the 1960s. In 1962, Ed Sabol, a sports filmmaker who got his start filming his son's pee-wee football games, pitched NFL Commissioner Pete Rozelle on making a film of the NFL's championship game.[11] Sabol offered the NFL $3,000 in return, not for telecast rights, but for *film* rights—that is, the right to make a production for

8. Eric C. Covil, *Radio and its Impact on the Sports World*, AM. SPORTSCASTERS ONLINE, http://www.americansportscastersonline.com/radiohistory html (last visited Apr. 13, 2011).

9. *Id.*

10. *Id.*

11. Rebecca Leung, *NFL Films, Inc.: Father-Son Team Establishes Gold Standard for Sports Photography,* 60 MINUTES (Aug. 25, 2004), http://www.cbsnews.com/stories/2004/01/26/60II/main595946.shtml.

people to see long after they already knew who would win.[12] Rozelle accepted the $3,000 from Sabol,[13] and Sabol produced a Hollywood-ized half-hour retelling of the title game between the New York Giants and the Green Bay Packers.[14] The production was a "film" in every sense of the word: It was not only shot on photochemical film stock, it was edited together as cinema and voiced not with a call, but with storytelling narration.[15] The movie opens with shots of a snowy, sleepy Green Bay, Wisconsin, population 62,888, "whose heart is warm for the Packers," and then switches to a sweeping aerial shot of Manhattan, drawing a comparison with "the great city of the western world," population 8.7 million.[16] When the epic battle begins, it is set to patriotic marching-band music, cut with reaction shots on sideline coaches and pushed by the narrator's fateful baritone.[17] The film so impressed Rozelle that the NFL purchased Sabol's fledgling production company and gave him the job of producing an annual half-hour highlights film for every team in the league.[18] Sabol's film company was transformed into NFL Films, the league's own motion-picture production company.[19] With the new company, the NFL entered the business of producing and owning copyrighted works that captured the league's on-the-field product. It is far from clear, however, that the NFL bought Sabol's company to obtain copyrights. In fact, it is more likely that the NFL's chief motivation was just to ensure the continued production of Sabol's particular product of lionizing cinema that lent a sense of gravitas and high art to the sport of football. The idea of controlling all footage of NFL games did not take root until two decades later.

B. OBTAINING COPYRIGHTS BY ASSIGNMENT

In the 1970s, assignments of copyright by telecasters to sports organizers were unheard of. Yet today, such assignments are routine—virtually all organizers obtain a copyright assignment as part of their deal to have a game televised. Some smaller-scale organizers, such as some high-

12. *Id.*
13. *Id.*
14. N.F.L. WORLD CHAMPIONSHIP GAME 1962 (Blair Motion Pictures Inc. 1962), *available at* http://www.nfl.com/videos/nfl-videos/09000d5d8060eda2/The-1962-NFL-Championship-Game.
15. *Id.*
16. *Id.*
17. *Id.*
18. Leung, *supra* note 11.
19. *Id.*

school athletic associations, continue to be grateful for any television coverage, and thus do not press the point in securing deals. But in the world of big-time professional sports, such assignments are orthodoxy. For any given Major League Baseball game, the home club will grant the rights to televise the event and take assignment of the copyright in the televised footage. In the NFL, the league as a whole grants telecast rights on behalf of the league and takes the assignment of copyright to all footage under its own name. The NFL's ability to negotiate as a league, rather than on a team-by-team basis, stems from an antitrust exemption granted by statute.[20]

Evidence of the ownership of the copyrights to 1970s game footage comes from some of the earliest at-home VCR recordings of broadcast television ephemera, much of which is now available on YouTube. For example, in 1975, the CBS network held the broadcast rights to the NFC games, and the NBC network held the rights to AFC games.[21] At that time, the networks produced non-event scores-and-highlights programs for airing before and between games. The CBS network's show along these lines was *NFL TODAY*.[22] A recording from 1975 indicates that when *NFL TODAY* showed a clip of an AFC football game, a lower-third graphic would appear over the clip with the text "Courtesy NBC SPORTS."[23]

It is difficult to pin down precisely when the NFL decided it would require a copyright assignment as part of a telecast deal, but, based on a search of records of the Copyright Office of the Library of Congress, a major turning point appears to have occurred around 1983.[24] Prior to 1983, the only copyright registrations in the name of the NFL are for odds and ends.[25] A typical copyright registration for the league in the pre-1983 era is the film *Football Injury Prevention,* commissioned by the NFL in association with the NCAA, a production which presumably was aimed at insiders rather than fans.[26] By contrast, starting in 1983, Copyright Office records reflect increasing registrations for television game coverage. In 1983, there were 12 registrations for which the NFL is the claimant or

20. *See* 15 U.S.C. § 1291, et seq. (2006).

21. *See* Tim Brulia, *A Chronlogy of Pro Football on Television: Part 2,* THE COFFIN CORNER, no. 4, at 20 (2004), available at http://www.profootballresearchers.org/Coffin_Corner/26-04-1038.pdf.

22. *See id.*

23. *See, e.g., NFL TODAY* (CBS television broadcast 1975), *available at* http://www.youtube.com/watch?v=XHV6gb82WRI&feature=related.

24. *See generally* U.S. COPYRIGHT OFFICE: (Dec. 1, 2011) http://www.copyright.gov/records/.

25. *Id.* Note that copyright records before 1978 are not available in the electronic database and were not searched.

26. *Id.* at PA0000103705 (June 1, 1981 Copyright Office record for "football injury prevention").

copyright owner of television game coverage, including for games telecast by NBC and CBS. The 1983 registrations include playoffs held in early 1983[27] and regular season games from late 1983.[28] The NFL's acquisition of copyrights to game coverage was not, at this stage, universal. A Monday Night Football game of November 7, 1983 was registered by the ABC network, with ABC listed as the copyright claimant/owner.[29]

The NFL's project to possess copyrights to game coverage in this era appears to have been half-hearted. In 1983, registrations were filed for the television coverage of only 12 games—far fewer than the number actually telecast.[30] The paucity of registrations does not mean that the NFL surrendered copyright ownership to all other games, since copyright ownership can be maintained without registration.[31] Nonetheless, registrations are generally filed for all copyrights that a business considers to be important assets, since registration is required to make available the full panoply of remedies permitted under the law for any given work.[32]

Today, by contrast, it is clear that the NFL takes its copyrights very seriously. Copyright Office records indicate that the NFL now has a consistent practice of registering each and every game telecast.[33]

C. CLAIMING COPYRIGHTS BY FIAT

There is no question that the NFL owns the copyright to what it has received from its broadcasting partners by way of valid copyright assignments. That is, there is no real question that the sort of legal arrangements the league began making in the early 1980s are effective, thus creating enforceable rights. Through its business arrangements, the NFL has secured copyright ownership over the main coverage of every game. But the NFL's ownership of telecast game coverage does not mean that it

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27. *See, e.g., id.* at PAu000480261 (NBC, AFC playoff game, Miami Dolphins versus New England Patriots on Mar. 11, 1983); PAu000480263 (NBC, AFC playoff game, San Diego Chargers versus Miami Dolphins on Mar. 11, 1983); PAu000480758 (NBC, AFC championship game, New York Jets versus Miami Dolphins on Mar. 17, 1983).

28. *See, e.g., id.* at PAu000563202 (CBS, regular season game, Detroit Lions versus Tampa Bay Buccaneers on Dec. 18, 1983).

29. *See id.* at PA0000195032 (ABC, NFL Monday night football, regular season game, New York Giants versus Detroit Lions, Nov. 7, 1983).

30. Based on a search of Copyright Office records. See U.S. COPYRIGHT OFFICE, *supra* note 24.

31. *See* 17 U.S.C. § 408(a) (2006).

32. *See id.* § 412.

33. For example, Copyright Office records indicate 226 registrations by the National Football League for motion picture works, all or nearly all game coverage. See U.S. COPYRIGHT OFFICE, *supra* note 24.

owns the copyright over all footage of every game. That is because the telecasters are not the only persons with cameras inside a stadium. Members of the local news media have long been allowed into stadiums to shoot video for their own news programs. And fans have long been able to shoot video with their camcorders. Yet sometime within the past 10 years or so, the NFL has begun attempting to gain the copyright to this non-telecaster footage as well.

Today, the NFL currently makes the breathtaking claim that it owns the copyright to all footage shot inside the stadium—regardless of who shoots it. The league's claims of ownership extend to video shot by fans and by members of the media who entered the stadium with press credentials or with regular tickets. An articulation of the NFL's self-declared ownership rights can be found in a 2008 memorandum from the NFL directed to presidents and general managers of television stations and programming services.[34] That document states:

> NFL game film or tape includes all footage of NFL game action, including footage of ancillary activities inside the stadium (e.g., cheerleaders, pre-game activities) regardless of the source of such footage. This includes, but is not limited to, network coverage of games, footage shot on NFL sidelines with or without proper credentials, and NFL Films' coverage.[35]

Another declaration of ownership can be found in information provided in 2011 by NFL Films, a league subsidiary, for potential licensees of NFL game footage. It says:

> NOTE: NFL copyrighted footage includes all footage of NFL game action, including footage of ancillary activities inside the stadium (e.g., cheerleaders, pre-game activities, crowd, sidelines, etc.) from the period three hours prior to kickoff of an NFL game to one hour after the NFL game has ended, regardless of the source of such footage, as well as NFL controlled events (i.e., Combine, NFL Draft, etc.) This includes, but is not limited to television coverage of games/events, footage shot on NFL sidelines with proper credentials, and NFL Films' coverage.[36]

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34. Film/Tape Usage Guidelines Memorandum from Nancy Behar & Rachel Margolies, Nat'l Football League, to Television Station and Programming Service Presidents/General Managers (2008) (on file with author) [hereinafter Guidelines Memorandum].

35. *Id.*

36. *Football Licensing,* NFL FILMS, http://www nflfilms.com/ (click on "football," then "licensing").

These claims are made with considerable bravado; nonetheless, they are without legal basis. Let's analyze the possible arguments the NFL could advance in an attempt to support these claims.

At the outset, we need to note that the general rule in U.S. copyright law is that the person who operates the camera is the author of the footage,[37] and that the author of the footage is the owner of the copyright in it.[38] There are, however, various exceptions in the law that can place the ownership of the copyright in someone other than the immediate author.

One exception to the regular author-owner rule is the employee work-for-hire doctrine. If the author is an employee, working in the regular course of his or her job, then the employer ends up being the owner and, for copyright purposes, the author under the "work for hire" doctrine.[39] For example, if an NFL employee were to shoot footage, that footage would belong to the NFL. While the employee work-for-hire doctrine can cause the person shooting footage to not hold the copyright, it is important to observe that the work-for-hire doctrine does not work beyond employees. Neither ticket holders nor credential holders are "employees" for the purposes of the work-for-hire doctrine. Although some terms in federal statutory law are stretched beyond their plain meaning, the meaning of "employee" in the copyright statute is not such a term. Under the copyright law, employee means employee.[40] Thus, the employee work-for-hire doctrine cannot substantiate the NFL's claim of copyright ownership to all game footage.

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37. *See* Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 131-43 (S.D.N.Y. 1968) (Abraham Zapruder was the author of a film of the John F. Kennedy assassination because, despite being a dressmaker without film credentials using a home movie camera, he selected the camera and the time and location of his filming); Pagano v. Chas. Beseler Co., 234 F. 963, 963-64 (S.D.N.Y. 1916) (holding that a photograph of a scene on Fifth Avenue in Manhattan, including the Public Library, was properly pled as authored by the photographer because the photographer alleged that he selected the "position and place from which to take said picture, and the moment when the light, shade, cloud, and sky effects upon said New York Public Library and its surroundings combined to make a new harmonious and artistic picture."). *But see* Lindsay v. R.M.S. Titanic, 1999 U.S. Dist. LEXIS 15837, at *20-21 (S.D.N.Y. Oct. 13, 1999) (holding that undersea footage of the Titanic wreckage was authored not by the camera operator, who exercised no creative control, but by the film's director, who created storyboards, briefed the camera operator, and screened dailies). *See also* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography,* 65 U. PITT. L. REV. 385, 448 n.245 (2004) (noting that because of other facts in the *Lindsay* case the court may have been predisposed to find against the camera operator).

38. 17 U.S.C. § 201(a) (2006).

39. *See* 17 U.S.C. § 101. Note that while popularly known as the "work for hire" doctrine, the statute's actual words are "work made for hire."

40. *See, e.g.,* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) ("Nothing in the text of the work for hire provisions indicates that Congress used the words 'employee' and 'employment' to describe anything other than the conventional relation of employer and employee," internal quotations omitted).

There is another version of the work-for-hire doctrine that is applicable outside the employer-employee context—that applicable to specially commissioned works. Under this provision, the law recognizes an artist's ability to make a person commissioning the work the "author" under the copyright statute, and thus the initial owner.[41] The specially-commissioned-works provision only works for certain categories of work, but one of those categories is "motion picture," which includes videotaping and film footage.[42] The problem for the NFL, however, is that a specially commissioned motion picture will only qualify as a work made for hire "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[43] Neither the NFL memo nor the NFL Films memo count. Even if construed as an agreement, neither is signed. As is the case with "employee," the copyright statute allows no wiggle room in its language. The phrase "signed by them" means what it says: having signatures from both parties.[44] Thus the specially-commissioned-works version of work-for-hire doctrine does not provide a means for the NFL to support its broad claims of ownership to all game footage.

A separate way the NFL could conceivably get ownership of the footage shot by third parties would be by assignment. But an assignment of copyright, in order to be valid, must be done by way of a "writing," which must be "signed by the owner of the rights."[45] For uncredentialed reporters and regular-ticket-holding fans, there's no written, signed instrument of assignment. So transfer of copyright by assignment also does not provide a means for the NFL's claims of ownership of all footage.

Another argument that the NFL could make to try to block the shooter's copyright in the footage is to say that unauthorized video recordings of a football game infringe the league's copyright *in the game*. That is, the NFL might argue that making a video recording of the live sporting event taking place on the field constitutes an unauthorized derivative work. The problem with this argument is that live sporting events—as opposed to the broadcasts of them—do not constitute

41. 17 U.S.C. § 201.

42. *Id*. § 101.

43. *Id.*

44. *See, e.g.,* Homeowner Options for Mass. Elders, Inc. v. Brookline Bancorp, Inc. 754 F. Supp. 2d 201, 208 (D. Mass. 2010) ("A writing . . . must mention a 'work made for hire' relationship and must be signed by both parties . . . By contrast, an assignment of a copyright requires a writing signed only by the grantor.").

45. 17 U.S.C. § 204(a).

copyrightable subject matter.[46] Since the game itself is not susceptible to copyright, such a copyright cannot be used in an offensive manner against unauthorized videographers.

In sum, there is nothing in the Copyright Act that allows for the NFL to claim ownership over footage of games or game-day activities shot by third parties.

What about something beyond the Copyright Act? What about the operation of the common law or the court's inherent equity powers? Common sense would seem to indicate that rearranging rights might be possible in this manner: When a third-party obtains footage of an NFL game, it could be said that the camera operator, or the camera operator's employer, obtained that footage in contravention to the NFL's express policies and conditions for granting credentials or tickets. That being the case, we can imagine a non-spurious argument for a conveyance by operation of law—such as through a theory of unjust enrichment or constructive trust. But the copyright statute has foreseen such a tack and prohibits it. The statute's text provides:

> When an individual author's ownership of a copyright . . . has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title . . . .[47]

Thus, it does not matter that a person inside the stadium was expressly prohibited from taking pictures or shooting footage. Such prohibitions do not change the application of federal copyright law to decide who is the author and owner. In fact, even if a person was trespassing when she or he took footage of the game or anything inside the stadium, that person would be the author and owner of the footage.[48]

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46. *See* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846-47 (2d Cir. 1997) (basketball games themselves, as opposed to telecast of the same, do not fall within the subject matter of copyright because they do not qualify as "original works of authorship").

47. 17 U.S.C. § 201(e).

48. *See, e.g.,* Bd. of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 251 (1905) ("If, then, the plaintiffs' collection of information is otherwise entitled to protection, it does not cease to be so, even if it is information concerning illegal acts. The statistics of crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data."); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854 (5th Cir. 1979) (refusing to hold as uncopyrightable obscene films, explaining that "the statutory language 'all the writings of an author' is facially all-inclusive, within itself admitting of no exceptions."). *Compare* Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0,* 10 VAND. J. ENT. &

The copyright statute has one exception where involuntary transfers by operation of law are allowed—the Bankruptcy Code.[49] However, even if the shooter of the footage went into bankruptcy, the NFL would not have a legal entitlement to the copyright. Rather, the copyright to the footage would pass into the bankruptcy estate and be sold for the benefit of creditors.[50]

While the NFL's claims to ownership of all footage obtained inside the stadium are illegitimate, such claims are not without force. In truth, the NFL can make up for a lack of soundness in legal claims with raw intimidation. The NFL has vast financial resources for lawsuits, and it has built up a reputation for aggressive litigation.[51] That means vindicating rights in court against the NFL is guaranteed to be expensive and slow. Moreover, any time a dispute goes to court, the parties know there is always the chance that the court might change the law or simply ignore it.

Thus, the NFL may be ultimately successful in maintaining a bogus legal entitlement to game footage through sheer force of will. Undoubtedly, that is a prospect not lost on the NFL. Apparently, the acquisition of legal rights through bluster and shovery is what the NFL is banking on in making its sweeping claims. It is difficult to believe the NFL has made its claims out of a mistaken understanding of the law. Even so, the de facto capture of copyrights owned by others through swagger is a noteworthy legal evolution.[52]

III. FROM OWNING COPYRIGHTS TO CONTROLLING THE MEDIA

Paired with the NFL's drive to gain the copyrights to all game footage shot by others, there is another, more wide-ranging campaign: an attempt to own and control an ever-growing portion of media coverage over its own activities and events. The NFL has now entered into the business of

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TECH. L. 101 (2008) (arguing, inter alia, that copyright law should be changed so that copyright protection is made contingent upon a demonstration that the content was produced legally).

49. 17 U.S.C. § 201(e).

50. 11 U.S.C. §§ 704(a), 726 (2006).

51. *See, e.g.,* Kathy Kirby & Scott Woodworth, *NFL Media Guidelines—A Legal Look Webinar—Archive*, RTDNA (Aug. 26, 2010), http://www rtdna.org/pages/education/nfl-media-guidelines-a-legal-look-webinar-archive.php (describing the NFL as being generally "very aggressive" and even "draconian" in attempted enforcement of claimed rights).

52. That being said, the NFL's use of intimidation to create rights not based in law is not new. The NFL is notorious for bullying with regard to its trademark for "Super Bowl." *See, e.g.,* Ron Coleman, *Counterfeit Arguments,* LIKELIHOOD OF CONFUSION (Jan. 18, 2009), http://www.likelihoodofconfusion.com/counterfeit-arguments/ (stating with regard to the NFL's trademark rights to Super Bowl, "the league has set up a campaign not only to protect its legitimate rights but a buffer of illegitimate intimidation-based quasi-rights around the real thing.").

telecasting its own games and even providing news coverage on itself. As it has done so, the NFL has grown increasingly intolerant of old-guard outlets for sports journalism, who are the league's newfound competitors.

A. THE MEDIA/ORGANIZER DICHOTOMY

Historically, the sports news media developed as an institution independent of sports organizers. Sports newspaper journalism arose in an era when sports organizers derived profits from selling seats. Newspaper journalists were allowed to come to games and take notes, and, when the technology eventually permitted it, photographs. The journalists then published their photos and accounts of the games along with tables of scores and standings. It was a symbiotic relationship: Newspapers sold copies and advertising based on the reporting of sports events while sports organizers gained a burgeoning fanbase fed by the media exposure.

The relationship began to change when broadcast media developed. At first, as mentioned previously, radio broadcasts of games were financed as newspaper journalism had been—with neither the organizer nor the media outlet paying the other.[53] That changed in the 1930s when organizers began demanding payments from radio networks for the privilege of broadcasting live games.[54] Nonetheless, organizers' posture toward writers and photojournalists remained unchanged, with reporters being permitted to continue to cover games as they had before. Thus, there developed a lasting dichotomy in sports media—a distinction between sports journalists and sports broadcasters. For broadcasters, first radio and later television, there was an understanding that organizers would charge for the "rights" to the game. For journalists of any medium, it was understood, if not explicitly stated, that their "right" to report on sports was a societal one. In keeping with this distinction, all journalists, as members of the free press, were allowed to take notes, shoot photos and video, and write stories. For sports broadcasters, getting the rights to a game meant getting rights that were exclusive to the medium (radio or television) and to the language (English or Spanish). On the other hand, where sports journalism was concerned, no one newspaper or network could capture a monopoly on sports reporting over a particular team or league by way of paying for an exclusive deal.

These long-standing media/organizer and broadcaster/journalist dichotomies are now being eroded. The change is driven is large part by the fact that traditional broadcast outlets, traditional journalism outlets, and

53. Covil, *supra* note 8.
54. *Id.*

the NFL, have all been working to set up camp on the new media frontier—the web and internet-connected mobile platforms. And the NFL has taken the opportunity to start drawing lines in the sand, steadily narrowing journalists' access. A key turning point was around the middle of the first decade of the 2000s, when the NFL undertook a concerted effort to restrict broadcasters so as to exercise a more monopolistic control over new media exploitation.

B. THE NFL'S BROADCASTING BLITZ

The NFL entered the television broadcasting business on November 4, 2003 with the launch of NFL Network.[55] At its debut, it was distributed to 11.5 million homes via cable and satellite, and as of the fall of 2006, NFL Network counted 41 million subscribers.[56] The channel's staple programming includes extended game highlights and programs from the NFL Films library.[57] When it launched, NFL Network offered pretty much everything NFL-related except live game coverage. But, beginning in 2006, the NFL began airing live coverage of a slate of games that it had removed from the package of games offered to old-guard television networks.[58]

At the time of NFL Network's birth, the league had already secured copyright over all footage of games created by broadcast-rights holders by way of assignment provisions in the underlying deals.[59] But the NFL did not, at that point, legally control all the professionally produced game video. Consistent with long-standing tradition, NFL teams allowed local television stations to put videographers on sidelines to capture low-angle footage that could be used in the sports reporting on local news programs. However, in March 2006, that changed when NFL owners voted to completely ban local television cameras from the sidelines.[60] It's worth noting that this move came just months before the NFL was set to debut live games on NFL Network.[61] It also came at time when negotiations were up in the air with major networks over broadcasting rights, and when the

55. *About NFL Network*, NFL.COM, http://www.nfl.com/nflnetwork/fastfact (last visited Apr. 3, 2011).
56. *Id.*
57. *Id.*
58. Kirby, *supra* note 51.
59. *See* Part II.B., *supra*.
60. Kirby, *supra* note 51.
61. *Id.*

NFL began focusing on distribution of content via its own online platforms.[62]

When the NFL banned sideline cameras, local broadcasters pushed back.[63] They offered a compelling argument for why the league ought to continue to allow them access to the sidelines—local stations, by covering hometown teams, "put fans in the seats."[64] Indeed, the importance of local television media for NFL clubs was and is inarguable. But despite this, the NFL stuck to its guns, leaving the sideline ban in place. In an attempt to placate local stations, the league offered that NFL Films would license low-angle footage of games for a nominal fee.[65] It was a way of giving local television stations something for the late-night news while still consolidating ownership over all game footage. In addition, some of the teams—acting on their own and in contravention of league policy—decided to allow pool coverage for local television stations on their sidelines.[66] These moves notwithstanding, however, the local television media remained upset, and station management worked to put pressure on local teams as a way to resist NFL policy.[67] Local media in some places even turned to state lawmakers—including those in Michigan, Missouri, and Arizona—to try to get helpful legislation passed, arguing that with the NFL playing in publicly financed, publicly owned stadiums, the public interest was served by having local media get access inside the facility for the games.[68] The dispute endured, and by the end of the 2006 season, the situation was unstable, and it was clear that the NFL had found the limits of its own power.

C. THE SIDELINE VIDEO ACCESS AGREEMENT

Before the next season, in August 2007, a group of television station executives, led by the president of the Radio-Television News Directors Association (RTNDA),[69] traveled to New York to meet with representatives of the NFL about issues of access for local TV cameras.[70] When they got there, the NFL surprised them with a new document, the Sideline Video

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. Note that this organization later changed its name. *See infra* note 143.
70. Kirby, *supra* note 51.

Access Agreement.[71] There was good news and bad news for local stations. The good news was that local television cameras would be welcomed back on the sidelines.[72] The bad news was that the copyright to the footage would be transferred to the NFL.[73] Then, once the copyright was transferred, television stations would only be able to use the footage under the terms of the NFL's highly restrictive policy on the use of highlights.[74] Thus, the NFL introduced a way to let local media back on to the field, but in a way that co-opted their labor to grow the NFL's copyright holdings and maintain the NFL's monopoly on all professionally produced game footage.

The Sideline Video Access Agreement also contained a means for suppressing competition among local news outlets—a clause requiring stations to make their sideline footage available to other stations on a pool-coverage basis.[75] With this arrangement, local stations would no longer be competing on the basis of who could capture the best camera coverage from the sidelines for use in news reporting.

On its face, the Sideline Video Access Agreement may seem unremarkable. It may look like a simple compromise, a business expedient. But its humble outward aspect belies its importance. The introduction of the Sideline Video Access Agreement is a major turning point in the legal history of sports, media, and intellectual property.[76] Up to this point, there had always been a strong distinction between sports broadcasting and sports journalism. Sports broadcasting was an enterprise that was ultimately controlled by the league through telecast rights agreements, with generation of league profits as its aim. Sports journalism, on the other hand, was an enterprise over which the league had no control, conducted by a jostling multitude of unconnected actors. Sports reporting, though it had usually benefited the league's bottom line indirectly, was not operated by the league for its own profit. Instead, it was something that the league was obliged to tolerate as a consequence of doing something newsworthy. The Sideline Video Access Agreement marked the end of that distinction. Instead of the press being endured as a gaggle of arms-length acquaintances, the press has been fused together and co-opted as a media business partner.

The extraordinary nature of the Sideline Video Access Agreement was noticed by at least some of those on the receiving side. A number of

71. *Id.*
72. *See id.*
73. *See id.*
74. These restrictions are discussed in Part III.D, *infra*.
75. Kirby, *supra* note 51.
76. To this point, the Sideline Video Access Agreement has not been discussed at all in legal scholarship, and has received very little attention in the media.

television stations refused to sign it.[77] Some signed but crossed out certain provisions.[78] Others signed with the caveat that it was subject to further negotiations.[79] Apparently, some local franchises were not interested in what NFL corporate was trying to do, and they were happy to look the other way when confronted with these small acts of rebellion. But not all.[80]

It is worth taking a close look at the details of the Sideline Video Access Agreement. Doing so reveals the great lengths the NFL has gone in order to secure the maximum control over game footage without invalidating the arrangement as legally abusive.

Note first that, at least in its 2010 iteration, the Sideline Video Access Agreement transfers copyright not with an assignment per se, but something having virtually the same effect:

> Station hereby grants to NFL Productions LLC ("NFL Films") an exclusive worldwide, royalty-free license in and to any and all video footage (including accompanying audio) of NFL game action created by Station in the course of any access granted by the Club (such footage and related audio, the "Footage") for use in any and all media now known or hereafter developed ("Licensed Uses"). This grant authorizes NFL Films or its designees, at its or their expense, to sue for infringement based on any violation of the rights granted pursuant to this license. The license shall last for the duration of the copyright in the Footage.[81]

Note that this provision includes a grant to the NFL of a right to sue for infringement of the footage, and that the license lasts as long as the copyright does. Thus, combined with the exclusivity of the license, the arrangement aims to achieve a result equivalent to an assignment.

Despite its obvious lawyer-crafted carefulness, the Sideline Video Access Agreement appears to contain a chink in the armor. Note the phrase "shall last for the duration of the copyright." This wording shows the drafter's awareness of a potential problem arising with the doctrine of copyright misuse. More commonly, instead of purporting to last the duration of the copyright, such an agreement would specify that the license would be "perpetual." But "perpetual" licensing agreements may be open to attack as "copyright misuse," an antitrust-type defense that can be used to

77. Kirby, *supra* note 51.
78. *Id.*
79. *Id.*
80. *Id.*
81. Nat'l Football League Form Sideline Video Access Agreement (2010) (on file with author) [hereinafter Sideline Video Access Agreement].

avoid infringement liability or perhaps even invalidate the copyright. For example, in *Lasercomb America, Inc. v. Reynolds,*[82] the Fourth Circuit upheld the doctrine of copyright misuse as a defense to infringement.[83] The court held that the licensor in that case committed misuse of its copyright when it attached conditions to its software license that prohibited reverse engineering and the development of competing software for a term of 99 years, longer than the then-applicable 75-year term of copyright.[84] Thus, the NFL's language attempts to sidestep a *Lasercomb* problem with language that limits the license to the duration of the copyright.

There is a problem, however. The law's concern is not with the *license* being perpetual, but with the *restrictions* being perpetual. The Sideline Video Access Agreement as a whole does not purport to be limited in time to the duration of the term of copyright. Thus, under the plain language of the agreement, the restrictions binding the station outlast the grant of any license by the NFL. This means that even after the copyright in the footage expires, the station remains bound not to use the footage unless it gets permission from NFL Films.[85] Thus, even when the world at large will be free to use the footage, since it will be in the public domain, the station will be contractually obligated to refrain from its use. This type of restriction is exactly the kind of overreaching that courts have upheld as copyright misuse.

It is possible that the NFL's imposition of restrictions that outlast the license was sloppy drafting. The more plausible story, however, is that the agreement's effect was intentional. That view tends to be confirmed by the fact that the text of the agreement correctly comprehends the difference between the terms "license" and "Agreement," as those terms are used consistently throughout the document respectively to refer to permission to use the footage (the "license") and to the overall bargain (the "Agreement"). If it seems unlikely that the NFL's drafters intentionally sought reach beyond what copyright-misuse case law indicates is allowable, remember that the NFL has a lengthy tradition of overreaching.[86]

82. 911 F.2d 970 (4th Cir. 1990).

83. *Lasercomb America, Inc.*, 911 F. 2d at 973.

84. *Id*. In 1998, the Sonny Bono Copyright Term Extension Act amended § 302 by substituting "95" for "seventy-five." Pub. L. No. 105-298, 112 Stat. 2827 (current version at 17 U.S.C. § 302 (1998).

85. Agreement, *supra* note 811.

86. *See supra* Part II.C.

D. REPLACING FAIR-USE LAW WITH COMPANY POLICY

The heavy-handedness of the Sideline Video Access Agreement must be considered in context with another means employed by the NFL for controlling the news media—its attempt to displace copyright law's fair-use doctrine with a public pronouncement of the NFL's policy on what it will and will not tolerate in terms of media re-use of footage.

Copyright's fair-use doctrine gives all media outlets—not just those with cameras in the stadium—the ability to use game footage in their reporting. While news outlets often prefer to shoot their own video, they are clearly privileged by copyright law to make at least some use of footage owned by others, including the NFL.

Section 107 of the Copyright Act provides that "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright."[87] The statute provides a non-exclusive list of four factors to use in determining whether a defendant's use is a fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.88

So, depending on how much footage is used, and in what context, a television broadcaster's use of NFL footage may be fair and, therefore, non-infringing. It may be debatable whether any given use is a fair use, but one thing is certain—every copyrighted work is susceptible to some usage that will be considered fair use. It is well understood that the copyright monopoly is an incomplete one. Copyright law's underlying purpose is to benefit the public interest.[89] Thus, "[t]he copyright owner has never been accorded complete control over all possible uses of a work."[90]

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87. 17 U.S.C. § 107 (2006).
88. *Id.*
89. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
90. Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381, 1395 (6th Cir. 1996).

The settled law notwithstanding, the NFL takes an absolutist stance when it comes to copyright. Contrary to the law, the NFL purports to have complete control over all possible uses of NFL game footage.

The NFL's domineering posture is apparent in the message that the NFL requires broadcasters to insert into game coverage. It is familiar to everyone who has watched more than a trivial amount of NFL football. Over soaring music and glassy images of NFL heroes reflected in furrowed chrome, an orotund voice mirthlessly declares:

> This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited.[91]

And when the NFL says "any other use," they mean it. Few things, in fact, better illustrate the NFL's overreaching than the copyright warning itself, which not long ago took a stumble into a patch of ironic quicksand. In February 2007, legal scholar Wendy Seltzer uploaded to YouTube a 34-second clip from the just-played Super Bowl XLI featuring the league's overbroad baritone copyright notice.[92] Five days later, YouTube received a takedown notice, served pursuant to the Digital Millennium Copyright Act,[93] demanding that YouTube remove the video, which YouTube did.[94] Seltzer then sent a counter-notification, asserting fair use, and reuploaded the clip.[95] The NFL then delivered another takedown notice, with which YouTube complied, to which Seltzer responded with yet another counter-notification and yet another upload.[96] Stalemated, the NFL was at that point faced with the prospect of taking the case to court or walking away. The NFL chose the latter. Today, the clip remains on YouTube, enduring evidence of a rare loss for the NFL in the legal sphere.[97] Nonetheless, the episode well illustrates how aggressive the NFL is in the arena of IP enforcement.

The NFL's absolutist view over its domain with respect to copyright is brought to bear not just against legal scholars and YouTubers, but also

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91. *See, e.g.,* Eric Bangeman, *FTC Complaint Flags NFL, MLB, Studios for Overstating Copyright Claims*, ARS TECHNICA (Aug. 1, 2007), http://arstechnica.com/tech-policy/news/2007/08/ftc-complaint-flags-nfl-mlb-studios-for-overstating-copyright-claims.ars.

92. Wendy Seltzer, *Legal Tags: The Blog*, SELTZER.ORG (Feb. 8, 2007), http://wendy.seltzer.org/blog/dmca-nfl.

93. Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998). The portion dealing with takedown notices and liability for online infringement is found at 17 U.S.C. § 512.

94. *See* Seltzer, *supra* note 92.

95. *Id.*

96. *Id.*

97. *See* YOUTUBE (Feb. 8, 2007), http://www.youtube.com/watch?v=a4uC2H10uIo.

against traditional media operations. When it comes to dealing with the news media, the NFL simply does not acknowledge fair use. Instead, the NFL has issued policies announcing what uses it will and will not tolerate. In contrast to the flexible and fuzzy boundaries of the fair-use doctrine, the NFL spells out what it deems allowable with precision.

The NFL's policy, in its general contours, is as follows: Broadcasters—whether networks or individual stations—are permitted, on game day, to use up to six minutes of same-day highlights footage in any given news program or sports wrap-up show.[98] On non-game days, stations may use in each program up to two minutes of NFL highlights from games played during the preceding seven days.[99] In both cases, use is allowed only if the show "do[es] not focus unduly on the NFL and/or individual NFL clubs, players or other personnel."[100]

The NFL has prescribed slightly different limitations for "continuous loop news services," that is, channels that use a "wheel" format, showing the same program over and over throughout the day.[101] For these outlets, instead of restricting the amount of highlights by time, the NFL dictates limits by numbers of plays that can be shown.[102] Loop services with a half-hour wheel format can air up to 14 plays per half-hour segment.[103] If using a 15-minute-wheel format, the channel can air up to 7 plays per 15-minute segment.[104]

Regardless of the format the broadcaster is using, the policy does not permit highlights to be shown from a game that is still in progress.[105]

At first blush, it might seem that the NFL's video highlights policy tracks fair-use law, in terms of its broad contours. But that's not borne out by a careful look at the details.

For example, a first-order principal of fair use analysis is to take into account how much of a copyrighted work is used in relation to the copyrighted work as a whole.[106] That is, the court is to look at the ratio of the portion used by the defendant to the size of the plaintiff's entire work. But the NFL policy looks at the quantity of highlights used in relation to the

98. Video Highlight License Memorandum from the Nat'l Football League to the Television Station and Programming Service Presidents/General Managers § 2 (June 2010) (on file with author) [hereinafter Video Highlights License Memorandum].

99. *Id.* at § 2.

100. *Id.* § 1(c), 2.

101. *Id.* § 3.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* § 4.

106. 17 U.S.C. § 107(3) (2006).

size of the program in which they are used–that is, the ratio of portion used by the defendant to the size of the *defendant's* entire work. As already stated, the focus of the NFL has been on whether the *defendant's* program is focused "unduly" on the NFL[107] or how many plays are shown per minute of the *defendant's* programming.[108]

Another feature of the NFL's video highlights policy that departs from the principles of fair-use doctrine is the clause prohibiting highlights from being used in a "negative" way:

> In addition, Highlights may not be used in a manner that negatively reflects on, or portrays in a negative light, the NFL, its professional member clubs, their players, coaches, fans, officials or the sport of football.[109]

While criticism traditionally inures to the defendant's benefit in fair-use analysis, the NFL's policy is that the usage of its copyrighted material for purposes of criticism will not be tolerated. It's worth noting that one lawyer who has represented the television media in discussions with the NFL has noted that he is aware of no attempt to enforce this provision.[110]

The NFL's video highlights policy also purports to prohibit alteration or modification of footage:

> All Highlights used pursuant to this License must be used as provided and without modification. For example, Highlights may not be enlarged, shrunken or otherwise edited to remove or cover any graphics in such Highlights.[111]

This too goes in the opposite direction of fair-use law. Adding and changing elements makes the use more "transformative," and transformativeness strongly favors a finding of fair use.[112]

To qualify under the NFL's highlights policy, the footage must be used for "news purposes" in one of three types of programs: "regularly scheduled news programs, continuous loop news services, and sports wrap-

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107. Video Highlights License Memorandum, *supra* note 98, §§ 1(c), 2.

108. *Id.* § 3.

109. *Id.* § 7.

110. Woodworth, *supra* note 51.

111. Video Highlights License Memorandum, *supra* note 988, § 7.

112. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) ("Although such transformative use is not absolutely necessary for a finding of fair use, . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . , and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

up shows."[113] All of these categories are carefully defined. Under the 2010 policy, "regularly scheduled news programs" means "traditional news programs that regularly include news, sports and weather segments."[114] Again, there is the additional limitation that the segment on sports "does not unduly focus on the NFL and/or individual NFL clubs, players or other personnel."[115]

With its definitions of allowed users to highlights, the NFL clearly means to exclude news-magazine shows. In particular, the NFL policy also singles out two shows as examples of programs that do not, per the NFL, meet this definition: "60 Minutes" and "The Rachel Maddow Show."[116] Notably, both shows have done some unflattering reporting about the NFL in the past.[117] One might think that the producers of such news-magazine shows would insouciantly disregard the NFL's policy on highlights and use highlights footage anyway, since it would seem to be paradigmatic fair use. After all, such a use would clearly be in the vein of "criticism, comment, [and] news reporting"; the use would be only very slight in terms of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and the use would seem to have no "effect . . . upon the potential market for or value of the copyrighted work."[118] Yet, despite the NFL's dubious legal position, news-magazine shows seem to be caving, or at least Rachel Maddow's show has.

The Rachel Maddow Show's surrender to NFL policy was clear when Maddow discussed an incident on her show that occurred in the December 12, 2010 NFL game in which the New York Jets were hosting the Miami Dolphins.[119] In the third quarter, on a Dolphins punt, Miami cornerback Nolan Carroll was running downfield on punt coverage. As he strayed out of bounds, Sal Alosi, the strength-and-conditioning coach for the Jets, stuck out his left knee and tripped Carroll.[120] Alosi later admitted the trip was

113. Video Highlights License Memorandum, *supra* note 98, § 1.

114. *Id.*

115. *Id.*

116. *Id.*

117. Ryan Witt, *Video: Rachel Maddow Reveals How Most NFL Teams Give Money to Republicans*, EXAMINER.COM (Sept. 20, 2009), http://www.examiner.com/political-buzz-in-national/video-rachel-maddow-reveals-how-most-nfl-teams-give-money-to-republicans.

118. 17 U.S.C. § 107 (2006).

119. *Jets Coach Who Tripped Dolphins Player Suspended, Fined*, NFL.COM, http://www nfl.com/news/story/09000d5d81cdf34e/article/jets-coach-who-tripped-dolphins-player-suspended-fined (last visited Sept. 13, 2011).

120. Jane McManus, *Jets Coach Sal Alosi Trips Nolan Carroll*, ESPNNEWYORK.COM (Dec. 13, 2010, 2:21 PM), http://sports.espn.go.com/new-york/nfl/news/story?id=5913168.

intentional.[121] Maddow then discussed the incident on her show, but didn't show the clip, stating:

> I would like to show you the cheating in question. It is on tape. But because the cheating happened in a professional football game and the professional football league which I shall not name but whose initials are NFL, because they get very proprietary about anybody using their footage, I cannot roll tape to show you the cheating happening.[122]

Chilled out of showing the highlight footage, Maddow's show staged an in-studio re-enactment which she called "the next best thing [and] significantly cheaper, it turns out."[123] As one blogger put it, Maddow's work-around was "pretty funny."[124] He doled out a special kudo for the "manual telestrator," a large white cardboard circle held up by hand to pinpoint the wrongdoing.[125]

But laughs aside, the episode is remarkable for what it says about the power dynamic between the NFL and the news media. There is no doubt that it would have been fair use for the producers of "The Rachel Maddow Show" to roll the clip. Yet, they didn't. And the NBC news organization, of which MSNBC is a part,[126] is about as big as they come. When such a large and well-respected news organization bows to a private entity's self-declared zone of exclusion around a newsworthy event, it is clear that the letter of the law is becoming increasingly irrelevant to the real world of television news reporting on sports.

E. MOVING FROM "GUIDELINES" TO A "LICENSE GRANT"

Originally, the NFL's dictates about what it would and would not tolerate came in the form of "guidelines." For example, in 2008, the document declaring NFL policy on the use of footage in the context of television news and sports reporting was contained in a memorandum with the subject line "Film/Tape Usage Guidelines, 2008."[127] The document

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121. *Id.*

122. *The Rachel Maddow Show*, (MSNBC television broadcast Dec. 16, 2010), *available at* http://www msnbc msn.com/id/26315908//vp/40691396#40691396.

123. *Id.*

124. Doug Farrar, *Video: The Rachel Maddow Show re-enacts 'Tripgate,'* SHUTDOWN CORNER, A YAHOO SPORTS BLOG (Dec. 16, 2010 1:10 PM), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/Video-The-Maddow-Show-re-enacts-Tripgate-;_ylt=A2KJ3CewRpdNHSsADyJNbK5_?urn=nfl-296940.

125. *Id.*

126. *NBC News*, NBC, http://www nbcuni.com/broadcast/nbc-news (last visited Sept. 24, 2011).

127. Guidelines Memorandum, *supra* note 34.

contained no mention of "fair use," but instead claimed to be a statement on what constituted "allowable use."[128] In not mentioning "fair use," but talking in terms of "allowable use," the document seems to invoke a kind of diplomatically crafted ambiguity. It is as if the document says, "We know you stations are going to claim fair-use rights for footage on newscasts. We, on the other hand, don't want to acknowledge that 'fair use' exists. We'll just tell you what we consider to be 'allowable use,' and that way we can avoid a confrontation."

But the NFL has now shifted away from this impliedly deferential stance. That shift is signaled by a subtle but important change in rhetoric. As of 2010, the NFL no longer speaks of "guidelines" or "allowable use." Instead, the 2010 document is styled as a "Video Highlights License."[129] This document spells out what is and is not included in the "License grant."[130] The use of the term "license" carries the clear implication that what television stations do, they do not because it is "allowable," but because the NFL has given them specific permission. While it may or may not have been within the unilateral power of the NFL to change what was "allowable," by using the term "license," the NFL sends the message that permission can be revoked. Indeed, that distinction is borne out by comparing what the two documents have to say with regard to consequences for errant stations. The 2008 Guidelines state:

> Penalties
>
> The NFL will take all appropriate action to protect its valuable intellectual property rights. Such actions may include, among other things, denying a television station's employees credential access to NFL games and denying a television station the use of the NFL's "news access" satellite service.[131]

By contrast, the 2010 License is accompanied with this warning:

> Please note that any violation of the attached NFL Highlight License by your organization may result in the revocation of this license and/or subject your organization to any other remedies available to the NFL, including, but not limited to, a copyright infringement action, denying your Station's employees credential

128. *Id.*
129. Video Highlights License Memorandum, *supra* note 98.
130. *Id.* § 8.
131. Guidelines Memorandum, *supra* note 34.

> access to NFL games, denying use of the NFL's "News Access" satellite service and/or monetary penalty.[132]

Note that the 2008 document merely threatens to take away special favors that the NFL bestows on cooperative media organizations: press credentials and access to a satellite feed. The 2010 document additionally threatens to revoke the license, which it claims is the station's only legal way to use footage. Thus, the 2010 document threatens disobedient stations with a denial of the station's legal right to make any use of the footage—something that, under the law, is not within the NFL's power to do. The 2010 document also threatens a copyright infringement action—despite the fact that such a lawsuit would be technically frivolous for all cases outside the scope of the license that constitute fair use.

F. THE FIGHT FOR THE NEW FRONTIER

While the NFL's asserted prohibitions on the broadcast media are quite heavy handed, they are outstripped by the league's stated restrictions on online uses of video of NFL events. In fact, when it comes to the online realm, the NFL's list of verbotens extends even to still photography and the bare reporting of facts.

At the outset, it's important to observe how the NFL has taken pains to separate the internet entirely from over-the-air and cable broadcasting. The NFL's 2010 Video Highlights License, though it grants permission to broadcasters for the re-use of footage, expressly states that it does not extend to those broadcasters' online platforms. What's more, it purports to secure the broadcaster's agreement to not to use highlights footage online, except for a narrow exception. Via this provision, the NFL purports to have secured broadcasters' surrender of their fair-use rights under copyright law. The document states:

> This License grant applies only to distribution of Highlights as part of a linear television channel delivered over-the-air or via cable and satellite services (e.g., DirecTV, Cox, Verizon FiOS TV).
>
> This License does not grant you the right, and you expressly agree not, to use Highlights for any other media platform including, but not limited to, on a mobile or wireless platform or on an internet or online site, except that such Highlights may appear on an internet or online site if they are part of a single, non-archived, online

132. Video Highlights License Memorandum, *supra* note 98, at 1.

> "simulcast" of a television station's entire regularly scheduled news programming.[133]

It's not hard to imagine why the NFL treats online media different from broadcast media. The NFL is an online media content provider itself. With its website, NFL.com, the league has whole-heartedly entered into the business of providing news, photos, and up-to-date information about ongoing games. For potential advertisers on NFL.com, the league promises updated blog feeds with the latest NFL news[134] and "[e]xpert analysis and continuous updates/alerts unique to NFL.com"[135] along with updated blog feeds with the latest NFL news.[136] In addition, the NFL offers mobile device apps that provide in-game audio highlights updated on a quarterly basis, up-to-the-minute news and scores, alerts for every touchdown, and notifications whenever a team moves past the 20-yard line toward the goal.[137]

Contrasting with the NFL's own instant reportage of facts from games, members of the credentialed press, as a condition of receiving their credentials, are hamstrung in their ability to deliver information over the internet. For example:

> [W]hile a Game is in progress, any forms of accounts of the Game must be time-delayed and/or limited in amount (e.g., score updates with detail given only in quarterly game updates, fewer than 10 photographs during the game) so that the Accredited Organization's game coverage cannot be used as a substitute for, or otherwise approximate, authorized play-by-play accounts.[138]

Note that the stated rationale appears to be disingenuous. The restrictions go well beyond preventing play-by-play coverage. The restrictions go so far as to prevent competition with the NFL's mobile device apps and website content, neither of which could be said to be a substitute for play-by-play coverage.

In addition, the credential conditions prescribe heavy limitations on the use of video online. According to the NFL's credentialing conditions, no video of game action can be used online at all, unless it is part of a

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133. *Id.* § 8.

134. *2010 Media Kit*, NFL.COM, 10 (2010), http://www nfl.com/static/content/catch_all/nfl_generic_content/media-kit-2010.pdf.

135. *Id.*

136. *Id.* at 11.

137. *Verizon and NFL Mobile: The Evolution of Fandom*, VERIZON WIRELESS, http://solutions.vzwshop.com/nfl/Site.aspx#/home (last visited Apr. 18, 2011); *NFL Mobile Game Center*, NFL.COM, http://www.nfl.com/mobile/gamecenter (last visited Apr. 18, 2011).

138. NFL 2010 Credential Memo Form 5 (on file with author).

simulcast of a regularly scheduled news program distributed by traditional broadcasting.[139] To prevent simulcasting from providing a reservoir of online content for non-NFL entities, the conditions require that news programs, if they contain game highlights, cannot be "archived," that is, made available later to online viewers.[140] Non-game video—such as press conferences—may be posted online, but the amount of such non-game video is limited to 90 seconds per day.[141] NFL.com's copious use of video, making it available from every page on the website, is offered to potential advertisers as a key selling point.[142]

The NFL's forceful claims appear to backed up with the intent to aggressively attempt enforcement. Lawyers representing the RTDNA[143] have opined that the NFL intends to be quite forceful in enforcing limitations on online coverage, saying that the NFL is likely, for instance, to crackdown on updating Facebook more than once per quarter.[144] Kathy Kirby, a lawyer for the RTDNA, noted that a reporter for *Newsday* was ejected from Giants Stadium during an NFL game because of live blogging.[145] She characterized the NFL as "pretty aggressive" with regard to activities such as live blogging, and, for bloggers attempting to do play-by-play coverage, she warned that the NFL may be "draconian."[146]

For the most part, the policies of the NFL, as reflected in its credentialing agreements, are of dubious enforceability. It seems unlikely that a court would issue an injunction to stop a news outlet from reporting newsworthy information or making fair uses of copyrighted content. But, in the end, it doesn't really matter whether the provisions of the credential agreements are legally enforceable. They are clearly real-world enforceable. If media outlets disobey the NFL's restrictions, the NFL and its teams can simply deny those media outlets credentials, a price that is too high for most television stations to pay. The NFL has the legal right to deny credentials as it sees fit because the NFL or its teams have a possessory right to the real property on which the game is being held.

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139. *Id.*

140. *Id.*

141. *Id.*

142. *2010 Media Kit*, *supra* note 135 at 14 ("Video is accessible from nearly every page of NFL.com.").

143. The RTDNA, previously known as the Radio-Television News Directors Association (RTNDA), since changed its name to the Radio Television Digital News Association. *See* Edward R. Murrow, *RTNDA Set to Make Historic Name Change on October 13,* RTDNA (Sept. 21, 2009), http://www rtdna.org/pages/posts/rtnda-set-to-make-historic-name-change-on-october-13675.php.

144. Kirby, *supra* note 51.

145. *Id.*

146. *Id.*

Thus, the organizer's ultimate legal right, upon which its business model rests, comes back to the real property interest that sustained sports long before it ever worried about intellectual property rights.

It needs to be noted that while some assertions of IP entitlements are currently of dubious enforceability, their enforceability may change over time. The law often follows its own expectations. Right now, the battle is being fought to shape those expectations. One viewpoint sees the assertion of monopoly rights over sports reporting as absurd. Dominic Young, editorial director of News International, has said, "It's nonsensical—the right to report . . . on sporting events on new media platforms . . . is not a licensable right."[147] But others see things differently. Andrew Croker, the head of Perform, a company that holds and exploits digital media rights, sees norms of a free and open print-based press as an aberration: "The broadcasters pay but the [newspaper] journalists get a free sandwich and a parking space . . . They sell this content to their readers. You have to have a commercial agreement."[148]

IV. CONCLUSION

Much of the law—in terms of how it affects society—is never written down in judicial opinions or statutes. The assertion of intellectual property by the NFL is an example of one such invisible, but potent, legal force. If trends continue, the NFL and other sports organizers will, year-by-year, make ever bolder and more expansive assertions of intellectual property, while at the same time looking to capture revenues from ancillary forms of media relating to their sports, including news reporting and commentary. It does not overstate the case to say that this represents a threat to culture. Sports is an integral and basic part of human and American culture.[149] Centralized control threatens its value to society and impedes the ability of the community to meaningfully engage with it. While some level of centralized control of sports is undoubtedly necessary to coordinate the activity so as to provide first-class competition on the field, there is no such need to have information, imagery, news, and commentary concerning that sport controlled by a single entity. The freedom of the sports media has long been taken for granted. We may not know how important it was until it is lost.

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147. Paul McNally, Sports Authorities Must Fight for Press Freedom, PRESS GAZETTE (Oct. 23, 2008), http://www.pressgazette.co.uk/story.asp?storyCode=42297&sectioncode=1.

148. *Id.*

149. *See, e.g.,* JAMES A. MICHENER, SPORTS IN AMERICA 86 (1987) ("Every world culture that we know has provided some kind of spectator sports, and the tradition must have been productive or we would not have so many remnants of Greek and Roman coliseums.").