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Technology and Copyright Law - Illuminating the NFL's Blackout Rule in Game Broadcasting

Sonali Chitre

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Technology and Copyright Law— Illuminating the NFL’s ‘Blackout’ Rule in Game Broadcasting

by
SONALI CHITRE*

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I. Introduction

Copyright is critical to protecting sports broadcasts. New technology has evolved to disseminate these broadcasts to the many people who enjoy professional sports. The purposes of copyright are two-fold: first, it gives authors, such as the National Football League (“NFL”) a financial incentive to create works;¹ and second, it gives

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1. Authors should be able to have an economic and moral claim to the fruits of their unique intellectual efforts. PATRYCOPY § 3:19 “Authors”—Who may be an ‘author’?” (Mar. 2010); *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (holding that a news organization may hold a quasi-property interest in news it has gathered, even though the information found in the news was not copyrightable).

the public access to works of authorship for their enjoyment and use.² Copyright laws protect sports broadcasts when they are fixed³ 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 television 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 seventy-two hours of game time for a seventy-five mile radius outside of certain stadiums in order to increase ticket sales at the games.⁵ In *National Football League v. McBee & Bruno's, Inc.*, owners of a sports bar violated the “blackout” rule by showing the St. Louis Cardinals (currently known as the Arizona Cardinals) game where the game was not supposed to be shown. The court found that this was an infringement of the NFL's exclusive public performance right.⁶ This paper will analyze *McBee & Bruno's* implications in the 2010 context. The NFL has stronger exclusive rights in their broadcasts today than in 1986 because of additional protections granted by digital rights.⁷ 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.⁸ The NFL blacks out games that are not sold out

2. The public benefits from granting authors limited monopolies in their works create an incentive for authors to supply these works in the marketplace. PATRYCOPY § 3:19 “Authors”—Who may be an ‘author?’” (Mar. 2010). However, Congress balances this incentive with society's interest in the free flow of ideas, information, and commerce. *Satellite Broad. & Commc'n Ass'n v. FCC*, 275 F.3d 337, 367 (4th Cir. 2001) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

3. See *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1014 (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).

4. 17 U.S.C. § 101 (2009).

5. This “blackout” rule dates back to 1973. Sean Gregory, *With Fewer Sellouts, NFL's Blackout Rule Under Fire*, TIME (2009), available at <http://www.time.com/time/business/article/0,8599,1921401,00.html>.

6. *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986).

7. 17 U.S.C. § 106 (2009).

8. In addition to the NFL, the MLB and NHL also have “blackout” policies, but they are not based on attendance. See *Why are some Saturday and Sunday games blacked out of MLB Extra Innings?*, DIRECTV.COM, http://support.directv.com/app/answers/detail/a_id/36/kw/blackouts/r_id/104513 (last visited Sept. 26, 2010); *NHL Blackouts*, SHAW,

within seventy-two hours of game time. The blackout extends within a seventy-five mile radius of the stadium, incentivizing local fans to attend the game rather than watch it on television. The NFL seeks to increase ticket sales at games because having more fans at games increases excitement and makes broadcast rights more valuable.⁹ The blackout rule has been widely criticized by professional sports fans and others.¹⁰ Some people blame the teams' poor performance,¹¹ and others blame the fans.¹² Some teams, such as the Oakland Raiders and the Detroit Lions, had many games blacked-out in the 2009-2010 season.¹³ The NFL responded in September 2009 by showing blacked-out games on NFL.com on a delayed basis at no cost in affected markets.¹⁴ However, many fans do not use the NFL's authorized tools to watch games. Instead, they use Internet streaming and other technologies to watch live games within the blacked-out area. Therefore, the NFL's blackout rule may actually decrease rather than increase the value of the game broadcasts.

<http://www.shaw.ca/enca/ProductsServices/Television/OnDemand/NHLBlackouts.htm>. (last visited Sept. 26, 2010).

9. *McBee & Bruno's, Inc.*, 792 F.2d at 728. 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.

10. Rep. Brendan Boyle recently introduced legislation in the U.S. Congress that would end regional "blackouts" of NFL games where the games are played in stadiums constructed or subsidized with tax dollars. *NFL Blackout Rule is Unfair*, THE CITIZENS' VOICE (Sept. 14, 2010), available at <http://citizensvoice.com/news/nfl-blackout-rule-is-unfair-1.1010231>.

11. Jamie Samuelsen, *Ford Field Attendance is About Performance*, FREEP.COM (Sept. 23, 2009, 2:09 PM), <http://www.freep.com/article/20090923/SPORTS01/90923043/Ford-Field-attendance-is-about-performance>. It seems to be a downward spiral. The worse the team is, the less people want to buy tickets to games, which increases the chance that home games will be 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 to attend games. This may cause the team to lose morale and perform even worse.

12. Debbie Schlusel, *With 'Fan' Like This, No Wonder Detroit Lions Games are Blacked Out*, DEBBIE SCHLUSSEL (Oct. 30, 2009, 1:40 PM), <http://www.debbieschlusel.com/11311/with-fans-like-this-no-wonder-lions-games-are-blacked-out/>.

13. Kelly McWilliams, *2009 NFL Ticket Sales Hold Strong for Top Teams, but Economy Hurts Weaker Clubs*, TICKET NEWS (Jan. 29, 2010, 11:36 AM), <http://www.ticketnews.com/NFL-ticket-sales-hold-strong-for-top-teams-but-economy-hurts-weaker-clubs1102912>.

14. *NFL.com to show blacked-out games free in local markets on delayed basis*, NFL.COM (Sept. 2009), <http://www.nfl.com/news/story?id=09000d5d8127eb87&template=without-video-with-comments&confirm=true>. This service was part of the NFL Game Rewind package, which made games available on-demand through subscriptions to NFL.com.

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 because satellite dishes were not commonly found in private homes. Despite their use of "clean feeds" to satellites, the court held the defendant's display via satellite dish to be an infringement.¹⁵ Today, satellite televisions are commonly found in U.S. homes. There are roughly 30 million satellite dishes in use in homes across the United States,¹⁶ which is thirty times more than the 8th Circuit said existed in 1986.¹⁷ However, DishNetwork and DirecTV are the primary providers of satellite TV, both of which offer NFL game packages.¹⁸ Therefore, the games within the blacked-out zone are also blacked-out on satellite TV.¹⁹

Because the Copyright Act now extends to digital rights, 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.²⁰ Internet streaming technology also allows people to watch games within the seventy-five mile blackout radius. People who use pirating technologies are likely infringing upon the NFL's exclusive rights to control public performances of their games. However, they may not be easily caught. Thus, the blackout rule 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.

15. *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986).

16. *Churn Pressures Drive to Advanced DTH Receiver Adoption in North America*, TALK SATELLITE- AMERICAS, <http://www.talksatellite.com/Americas-A703.htm>.

17. *McBee & Bruno's, Inc.*, 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 have residential use when the home is so situated that access to television stations by antenna is poor. The televisions cost around \$100 whereas the satellite dish systems cost from \$1,500 to \$3000, and could go up to \$6000).

18. *Sports Programming and Sports Channels*, DISHNETWORK.COM, <http://www.dishnetwork.com/sports/default.aspx> (last visited Sept. 26, 2010); *DIRECTV: Leader in Sports TV*, DIRECTV.COM, <http://www.directv.com/DTVAPP/content/sports/overview> (last visited Sept. 26, 2010).

19. Norman M. Sinel et al., *Recent Developments in Cable Law*, 994 PLI/Pat 17 (2010).

20. See HOWTOWATCHFOOTBALL.COM, <http://www.howtowatchfootball.com/> (last visited Sept. 26, 2010).

III. The Case: *McBee & Bruno's*

A. Facts of the Case

In *McBee & Bruno's*, defendants showed blacked-out Cardinals home games in the St. Louis area within the seventy-five mile blackout radius. The NFL, an unincorporated non-profit association of member clubs that schedules games and manages club affairs, sued owners of bar-restaurants within seventy-five miles of Busch Stadium.²¹ Defendants used C-band satellite dish antennas²² to receive transmissions of a “clean feed” of the Cardinals game and showed it in their establishment.²³

Witnesses at trial described the process by which live football games were telecast by networks.²⁴ 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.²⁵ The simultaneous audio and video signals coalesced at an Earth station, or communication terminal, outside the stadium. This combined signal, called an “uplink,” was transmitted to a satellite, which then sent the signal through a “downlink,” to a network control point in Long Island, New York.²⁶ This signal was a “clean feed,” which meant that it was pure game footage without any added commercials or interruptions.²⁷ CBS Studios in New York added commercials and station breaks, creating a “dirty feed.”²⁸ The process of creating a dirty feed and sending it out to local affiliates who sent it into peoples’ homes took less than two seconds.²⁹ Defendants in this case were able to pick up the clean feed from the Cardinal’s stadium and show it.³⁰

21. *McBee & Bruno's, Inc.*, 792 F.2d at 728.

22. Although these antennas are still in used, many consider them to be bulky and outmoded. They are also called “TRVO,” which is short for “television receive-only.” *Top Stories for 2009*, BROADCAST ENGINEERING (2009), available at <http://broadcastengineering.com/news/top-stories-2009/index.html>.

23. *McBee & Bruno's, Inc.*, 792 F.2d at 728-29.

24. *Id.* at 728.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 728-29.

29. *Id.* at 728 (discussing NFL counsel’s description of “instantaneous” nature of live telecast in terms of local affiliates’ broadcasts).

30. *Id.* at 728-29.

B. Issues in the Case

The district court had to determine whether the clean feed of the NFL broadcast was copyrightable since only the dirty feed was registered with the Copyright Office.³¹ The court then had to determine whether showing the NFL's clean feed at the establishment fell within a statutory exemption to the NFL's exclusive public performance rights.³² The court found that the plaintiff NFL's clean feed was copyrightable and that the defendant's performance of the feed was not exempted under the Copyright Act.³³

C. The Eighth Circuit's Decision

The Eighth Circuit Court of Appeals affirmed the lower court's finding that the game itself was the protected work; therefore, the live broadcast of the clean feed was also protected.³⁴ The Eighth Circuit agreed that the NFL obtained a copyright in the noncommercial elements of the game.³⁵ The court examined the legislative history on fixation and decided that the plain purpose of fixation was consistent with protecting this game.³⁶

The Eighth Circuit then analyzed the home-use exemption by looking at how likely it was for the 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.³⁷ Unlike music cases where no royalties were paid when music was intercepted,³⁸ it was not possible

31. *Id.* at 729.

32. *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).

33. *McBee & Bruno's, Inc.*, 792 F.2d at 731–732.

34. *Id.* at 732.

35. *Id.*

36. *Id.* Today, section 1101 of the Copyright Act protects live musical broadcasts from bootlegging, even if they are not fixed. 17 U.S.C. § 1101 (2006).

37. *McBee & Bruno's, Inc.*, 792 F.2d at 731.

38. *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

to obtain a license to watch these games within the blacked-out zone in this case.³⁹ The district court found that televisions outnumbered satellite dish antennas one hundred to one. Further, the district court found it unlikely that the average customer could watch the blacked-out games at home because there were fewer than one million dish systems in use, most of which were in commercial establishments.⁴⁰ Home satellite systems were used mainly in homes that lacked adequate access to television broadcasting stations due to poor antenna reception.⁴¹ The district court also found that televisions cost one hundred dollars or more, but satellite systems cost between \$1,500 and \$6,000.⁴² Thus, the Eighth Circuit affirmed the district court's finding that satellite systems were not commonly found in peoples' homes.⁴³

IV. Copyright Act

A. Definitions from the Copyright Act

The applicable statute in question 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 fixed simultaneously with its transmission.⁴⁴ A copyrightable work is an original work, which can be defined as an independently created work that has a modicum of creativity and is fixed in a tangible medium of expression.⁴⁵ This includes, among other media, audiovisual works and motion pictures. Thus, under the Copyright Act, taping a football game constitutes fixing the players' performance.

(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).

39. *McBee & Bruno's, Inc.*, 792 F.2d at 731.

40. *Id.* at 731-32.

41. *Id.*

42. *Id.*

43. *Id.*

44.

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).

45. *Id.*

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.⁴⁶ These rights may be divided or assigned in the negative through prohibition of uses of the work.⁴⁷ Public performance rights only apply to literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works.⁴⁸ 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 motion picture or other audiovisual work.⁴⁹ Since the NFL's work is an audiovisual work and a motion picture, the NFL has the exclusive rights of reproduction, preparation of derivative works, distribution, public performance, and public display (for individual images). Arguably, the NFL may also have had a sound recording in the audio portion of the broadcast, as implied from the language in *McBee & Bruno's*.⁵⁰ Today, the NFL would have all five exclusive

46. 17 U.S.C. § 106 (2010). 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.

Id.

47. *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987). By blacking out games, the NFL prohibits public performance of the games in a certain market.

48. 17 U.S.C. § 106(4).

49. *Id.* § 106(5).

50. *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 727 (8th Cir. 1986).

'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.

rights, as well as the section 106(6) digital right in its sound recording.⁵¹

A “digital transmission” is a transmission in whole or in part in a digital or other non-analog format.⁵² The digital right in section 106(6) was not in place when the Eight Circuit decided *McBee & Bruno’s* in 1986. Rather, Congress added this right in 1995 under Public Law 104-39 section 2.⁵³ The Digital Millennium Copyright Act allows copyright holders to release works in an encrypted digital format, which provides assurances that they can obtain relief against those who would decrypt or unlock these works without permission.⁵⁴

Unauthorized streaming of games on the Internet harms sports organizations like the NFL.⁵⁵ Now, digital rights management may be employed to stop or control end-users’ use of digital media. Unauthorized distribution of games on the Internet constitutes digital piracy and is a violation of the NFL’s digital right.⁵⁶ Only some courts have acknowledged that public distribution is the same as “making a work available.”⁵⁷ 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. Although the NFL has tried to

17 U.S.C. § 101. One could argue that the audio portion of games can be coupled with the visual portion. This would make the audio portion an “accompanying” part of the audiovisual work, which does not qualify a sound recording for copyright. However, parts of the NFL’s audio, such as commentators describing the game, are created separately from the visual portion of the game. Further, radio stations air the audio portion on the radio. Thus, because the audio portion can stand separate from the visual portion, it is eligible for a sound recording copyright.

51. 17 U.S.C. § 106 (1)–(6).

52. 17 U.S.C. § 101.

53. 17 U.S.C.A. § 106 (1995 Amendments Pub. L. 10-39 § 2). Congress passed the new section after the WTO Uruguay Round to harmonize U.S. standards with global standards. The Digital Performance Right in Sound Recordings Act of 1995, H.R. 1506 was intended to protect against piracy of phonograms. Statement of Marybeth Peters, the Register of Copyrights, before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary, 104th Cong. (1995), available at <http://www.copyright.gov/docs/regstat062895.html>.

54. MELVILLE NIMMER, PAUL MARCUS, DAVID A. MYERS, AND DAVID NIMMER, *CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY* 278 (7th ed. 2006).

55. Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 259–83 (describing the increasing problem of Internet piracy for professional sports organizations).

56. *Id.* at 268.

57. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (finding a library distributed a work by placing an unauthorized copy in a library, although copies may not have changed hands).

use DMCA take-downs to remove clips from sites like YouTube.com, these clips may be considered educational and fair use under Section 107 of the Copyright Act.⁵⁸

C. Exemption: § 110 Limitations on Exclusive Rights: Exemption of Certain Performances and Displays

Federal copyright law prohibits the unauthorized broadcast of sports events by granting copyright owners the exclusive right to control transmissions of their works.⁵⁹ The section 110(5) exemption limits the copyright holder's ability to control rebroadcasts of their work.⁶⁰ Congress enacted this section to allow proprietors of small

58. David J. Warner, *Is the NFL Abusing Copyright Law*, FANHOUSE (Mar. 19, 2007, 7:07 PM), <http://nfl.fanhouse.com/2007/03/19/is-the-nfl-abusing-copyright-law/>; 17 U.S.C. § 107 (2009) (discussing fair use as a possible counterclaim to notice and takedown procedures).

59. See MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & ROBERT C. BERRY, *SPORTS LAW AND REGULATION, CASES, MATERIALS, AND PROBLEMS* 1052 (2d ed. 2009). Also, retransmissions of a signal embodying a copyrighted work are public performances. See 17 U.S.C. § 111 (2009).

60. 17 U.S.C. § 110 (2009).

Limitations on exclusive rights: Exemption of certain performances and displays: (5) (A) [C]ommunication 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, 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—

(I) 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

noncommercial media systems to perform copyrighted works in limited instances.⁶¹ In *McGee & Bruno's*, defendants argued that their performance of blacked-out games fell within the category of non-infringing acts under Section 110(5), which limits copyright liability for communication of a transmission embodying a performance by public reception of the transmission on a single

(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—

(I) 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 one 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).

61. *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731 (8th Cir. 1986); *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).

receiving apparatus of a kind commonly found in private homes.⁶² However, the court held that because satellite dishes are not commonly found in private homes, the exemption did not apply.⁶³

In 2008, the number of satellite television subscribers in the U.S. reached over 30 million.⁶⁴ Because satellite televisions are now commonly found in private homes, other parts of Section 110(5) such as part B(i), might apply to the facts of *McBee & Bruno's* if it were decided today.⁶⁵ 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.⁶⁶ Satellite TV in the 1980s was expensive and the equipment was large and cumbersome.⁶⁷ However, dish sizes today have decreased to eighteen inches or less and the cost of the service for DBS providers has been greatly reduced.⁶⁸

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.⁶⁹ The signals the box receives are encrypted and need to be decrypted by the receiver.⁷⁰ The NFL's digital rights make

62. *McBee & Bruno's, Inc.*, 792 F.2d at 730–31.

63. *Id.*

64. *Churn Pressures Drive to Advanced DTH Receiver Adoption in North America*, *supra* note 16. A basic package for satellite TV can now be as low as \$30.00 per month. See DIRECTV, <http://www.directv.com> (last visited Sept. 26, 2010).

65. 17 U.S.C. § 110(5) (2009); *McBee & Bruno's, Inc.*, 792 F.2d at 727–29.

66. Karim Nice & Tom Harris, *How Satellite TV Works*, HOW STUFF WORKS (May 30, 2002), <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 (twelve to fifteen GHz) began to be used for satellite broadcast transmission and second, the broadcast was digital and not analog.

67. These dishes were between twelve and sixteen feet in diameter. *How Did Satellite Begin?*, STASON.ORG <http://stason.org/TULARC/entertainment/satellite-tv-television-receive-only-tvvp/02-How-did-satellite-TV-begin.html> (last visited Sept. 26, 2010).

68. J.V. Evans, *Satellite Systems for Personal Communications*, 86 PROC. OF THE IEEE 1325, 1325 (1998). Because the signals were digitized, the satellite bandwidth can be utilized very efficiently, reducing the cost of the technology. *Id.*

69. *Id.*

70. 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. Scott Savage and Michael Wirth,

it illegal to decrypt the boxes to enable game viewing. Because of the NFL's ability to control its 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. Many fans miss games and casual or newer fans may lose interest in football altogether because of the blackout rule. However, the NFL clearly has the ability to control broadcast rights in games. The NFL controls licensing of television, radio, Internet, and satellite broadcasts. Even so, there are difficulties in enforcing copyright laws on individuals who stream the games from the Internet or use complex decryption technologies to bypass the blackout rule in their homes.⁷¹ Since Internet and satellite technologies today have global coverage, a geographical restriction on where games are shown may not make much sense.

Case law shows the strength of professional sports organizations' copyrights in their game broadcasts. In *Stoutenborough v. National Football League, Inc.*, the plaintiffs alleged that the NFL's blackout rule discriminated against the hearing-impaired by preventing them from enjoying a game on television that others could enjoy via radio-broadcast.⁷² The court held that the blackout rule prevented television watching by both hearing and hearing-impaired people and thus was not discriminatory.⁷³ In *National Football League v. TVRadioNow Corp.*, the court held that defendants infringed plaintiffs' public performance rights and permanently enjoined the defendants from infringing the National Basketball Association ("NBA") and NFL's works by streaming the games over iCraveTV.com or any other Internet site.⁷⁴ In *National Football League v. PrimeTime 24 Joint Venture*, the court also granted the NFL a permanent injunction that stopped the defendant from

Price, Programming, and Potential Competition in U.S. Cable Television Markets, 27 J. OF REG. ECON. 25 (2005).

71. Also, unauthorized viewing at home is not a public performance, although it may be a violation of reproduction and distribution rights. See 17 U.S.C. § 101.

72. *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 582 (6th Cir. 1995).

73. *Id.*

74. *Nat'l Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d 1831, 1838 (W.D. Pa. 2000) (reasoning that defendants' purpose of streaming games for Canadian audience did not stop American users from accessing site, thereby harming plaintiffs' market).

transmitting NFL games to Canada.⁷⁵ In *Live Nation Motor Sports, Inc., v. Davis*, the court found that providing unauthorized access to the motorcycle racing producer's live webcasts through defendant's website was sufficient to impose a preliminary injunction.⁷⁶

Under *NBA v. Motorola, Inc.*, the NFL's copyright protection is unlikely to extend to the games themselves.⁷⁷ In that case, defendants gathered factual information themselves and were not competing with an NBA service.⁷⁸ Therefore, defendants did not engage in unlawful misappropriation under the "hot news" exception to the Copyright Act; and transmission of the in-progress game statistics was not a violation of the NBA's exclusive rights in its broadcasts.⁷⁹ In *McBee & Bruno's*, the court reasoned that the fixation of the game made the broadcast copyrightable.⁸⁰ It is possible that games themselves could be copyrightable because of the actions of the players and coaches.⁸¹ However, in *Morris Communications Corp. v. PGA Tour, Inc.*, the communications corporation was liable for copyright infringement of the Professional Golf Association's ("PGA") 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.⁸²

75. *Nat'l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000) (finding the Satellite Home Viewer Act allowing delivery of network program to unserved households in the U.S. did not apply to retransmissions to Canada). *But see Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995) (finding that federal copyright law does not apply to extraterritorial acts of infringement).

76. *Live Nation Motor Sports, Inc. v. Davis*, No. 3:06-CV-276-L, 2006 WL 3616983, *4 (N.D. Tex. 2006) (finding that uplink transmission of signals was a step in the process by which the NFL's protected work "wends its way" to a public audience; and each step of the process by which a protected work gets to an audience is protected).

77. *Nat'l Basketball Ass'n v. Motorola Inc.*, 105 F.3d 841, 846 (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 that 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).

78. *Motorola*, 105 F.3d at 843.

79. *Id.*

80. *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731-32 (8th Cir. 1986) (finding that the broadcast meets the definition of "work of authorship" under 17 U.S.C. § 102(a)).

81. Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 632 (2003).

82. *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004) (reasoning that the PGA had the right to license or sell broadcasting rights in its products).

It seems that the reason why live broadcasts are valuable is that they create excitement and encourage viewers to feel as if they are part of the game. Attempting to circumvent licensing of broadcasts in order to transmit the information within the game may be legal if the information transmitted does not fit into the “hot news” exception.⁸³ However, if transmitting information in real-time is economically harmful, as in the case of *Morris*, then would-be infringers may be prohibited from transmitting even factual game statistics.⁸⁴ If people transmit the broadcasts via unauthorized Internet streams or via satellite, it would likely constitute prima facie copyright infringement.⁸⁵ 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.⁸⁶

VI. Conclusion

The NFL has very strong exclusive rights to control licensing of its game broadcasts. These rights include the right to control access to live performance of games through the blackout rule. Although satellite technology today is much more common than it was in 1986, satellite providers block games that are blacked-out because the providers are licensees of the NFL. The unintended result for the NFL of the combination of modern technology with the blackout rule is that fans may try to use decryption technology or decouple their satellite dishes from the Dish Network or DirecTV box to receive the games. Fans may also 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 is losing. The status of the law affords the NFL very strong copyrights in its game broadcasts. However, the blackout rule should be reevaluated because it is not the best way to keep fans engaged and thus allow the NFL to generate maximum revenue from licensing its copyrighted broadcasts.

83. See *Motorola*, 105 F.3d at 843. Cf. *Pollstar v. Gigmania Ltd.*, 2000 WL 34016436, at *13 (E.D. Cal. 2000) (holding “hot news” doctrine should apply to website that published time sensitive concert information).

84. *Morris*, 364 F.3d at 1288.

85. 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. 17 U.S.C. § 110(5) (2009).

86. 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.
