NOS. 14-16601, -17068

United States Court of Appeals for the Ninth Circuit

EDWARD C. O'BANNON, JR., On Behalf of Himself
and All Others Similarly Situated,

Plaintiff-Appellee,

– v. –

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellant,

– and –

ELECTRONIC ARTS, INC.; COLLEGIATE LICENSING COMPANY,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, DIST. CT. NO. 09-3329 CW
CLAUDIA WILKEN, CHIEF DISTRICT JUDGE

BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL BY A&E TELEVISION NETWORKS, LLC, ABC, INC., CBS CORPORATION, DISCOVERY COMMUNICATIONS, LLC, FOX BROADCASTING COMPANY, NATIONAL PUBLIC RADIO, INC., NBCUNIVERSAL MEDIA, LLC, THE REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS AND TURNER BROADCASTING SYSTEM, INC.

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Pursuant to Rules 29(c) and 26.1 of the Federal Rules of Appellate Procedure, *amici* provide the following disclosures of corporate identity:

A&E Television Networks ("AETN") is comprised of television networks including A&E®, HISTORY®, Lifetime®, Bio.®, Military HISTORY™, and Crime & Investigation Network®, among others. AETN is a Delaware LLC and is owned by Hearst Communications, Inc., Disney/ABC International Television, Inc., and NBC A&E Holding, Inc.

ABC, Inc. owns and operates, *inter alia*, ABC News, abcnews.com, the ABC Television Network and local broadcast television stations that regularly gather and report news to the public. ABC, Inc.'s corporate parent is The Walt Disney Company.

CBS Corporation is a mass media company with operations in virtually every field of media and entertainment, including but not limited to broadcast television, cable television, local television, radio, and publishing. CBS Corporation is a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of CBS Corporation. Otherwise, with respect to ownership of the Class A voting stock of CBS Corporation in the amount of 10% or more, CBS Corporation is only aware of the following information based upon filings made pursuant to Section 13(d) or

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Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors which works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970. The Reporters Committee For Freedom of the Press is an unincorporated association with no parent corporation and no stock.

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STATEMENT OF THE INTERESTS OF *AMICI*

Amici are organizations that create and disseminate speech to the public, including sports broadcasts, news, documentaries, and films. Some of the *amici* disseminate the sports programming at issue in this case, while all are directly affected by legal developments concerning the right of publicity.

In addition, within weeks after the district court issued its final judgment, a putative nationwide class sued major sports broadcasters, including *amici* ABC, NBC, Fox and CBS. *See Marshall v. ESPN, Inc.*, No. 3:14-1945 (M.D. Tenn.). That lawsuit asserts Tennessee state-law right of publicity claims, as well as federal antitrust and Lanham Act claims, premised upon the telecast of NCAA Division 1 football and basketball games.

Pursuant to Fed. R. App. P. 29, this brief is submitted by consent. No party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute any money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Underpinning the district court's decision below is the proposition that each participant in a team sporting event, or any other public entertainment event, has a right of publicity to control whether he or she may be depicted or even mentioned in any broadcast of the event. But that premise is simply wrong as a matter of law. No state in the more than eighty years since the broadcasting era began has ever recognized such a right.

And that is for very good reasons. If each of the hundreds of participants in a game or similar event had the exclusive right to control the broadcast of their "NIL", then no broadcaster could readily be certain it had the right to broadcast the event. Moreover, every single participant would then effectively have the right to control the broadcaster's message by dictating how (or if) their persona may be used or described. And because such putative rights of publicity would be fundamentally incompatible with basic freedoms to present events of interest to the public, the First Amendment would stand as a bar in the unlikely event any state were to ever decide to recognize them.

For these reasons, since the 1930s state laws recognize that only one entity can have a proprietary right to exclusively license the broadcast of entire sports and entertainment events: the *producer* of the event (e.g., the relevant team or sporting body). That sound conclusion is fully supported by *Zacchini v. Scripps-Howard*

Broadcasting Co., 433 U.S. 562 (1977) and *Wisconsin Interscholastic Athletic Association v. Gannett Co.*, 658 F.3d 614 (7th Cir. 2011) , which both address the proprietary rights of event producers to license an entire event for broadcast. The district court misconstrued those decisions to support corresponding publicity rights for every individual "performer" at the same event. That interpretation both ignores the fact that no state has recognized such a right for the reasons referenced above, and would also render meaningless the broadcasting rights that state law has recognized for more than eighty years.

Finally, the district court found that there is a market to buy and sell group licenses for NIL rights in game broadcasts, yet never pointed to a single example of a group license that any television network has supposedly ever actually bought or sold for the broadcast of any sporting event. Rather, the court inferred that such markets exist from language in programming agreements intended to protect broadcasters from any theoretical right or claim that might ever be asserted by anyone in future litigation. Such broad, *pro forma* contractual warranties and releases are commonplace in all manner of commercial agreements, but the district court erroneously treated them as implicit confirmation that the publicity rights at issue exist. That is not supportable.

Amici in this Brief take no position on the larger question of whether as a matter of antitrust law or public policy student-athletes should be paid for playing collegiate sports. Indeed, that question is not presented here, because Appellees chose not to assert that they should receive a share of the NCAA's television revenue as payment for playing sports. Instead, they claim entitlement to such revenue because their names and faces appear on television. This Brief is therefore not directed to the broader question of amateurism, but it does urge that the district court's judgment recognizing markets for "name, image and likeness rights" arising out of their participation in newsworthy team sporting events should not be allowed to stand.

ARGUMENT

I. STATE LAW DOES NOT RECOGNIZE A RIGHT OF PUBLICITY FOR PARTICIPANTS IN TEAM SPORTING EVENTS

Broadcasting team sporting events has been part of the fabric of American culture since the emergence of radio in the 1920s. Yet the district court never identified a single case that has permitted athletes or other event participants to assert a right of publicity in such broadcasts. To the contrary, every case on point has rejected the theory, and generally applicable state-law principles preclude its assertion.

A. A Right of Publicity Does Not Exist In The Context Of Non-Commercial Speech About Matters of Public Interest Like Sporting Events

Whether by statute and/or common law, all states recognizing a right of publicity significantly restrict its scope in deference to free expression interests.

Many states only recognize a right of publicity for what is essentially commercial speech, i.e. content that is used "for purposes of trade," *see, e.g.*, RESTATEMENT (THIRD) OF THE LAW OF UNFAIR COMPETITION § 46, or "for advertising purposes or for purposes of trade," N.Y. Civil Rights Law § 51. *See also* MASS. GEN. LAWS ch. 214 § 3A ("for advertising purposes or for the purposes of trade"); VA. CODE ANN. § 8.01-40 (same). As a practical matter, these states apply the tort to advertising or labeling goods or services, *see, e.g.*, *Carson v. Here's Johnny Portable Toilets*, 810 F.2d 104, 105 (6th Cir. 1987), and sometimes to items of merchandise like t-shirts or buttons. *See, e.g.*, *Winterland Concessions Co.*, *v. Sileo*, 528 F. Supp. 1201 (N.D. Ill. 1981), *aff'd* 735 F.2d 257 (7th Cir. 1984).

"[T]he use of a person's identity in news reporting, commentary, entertainment, [or] works of fiction or nonfiction" is expressly not considered to be "for purposes of trade." RESTATEMENT (THIRD) § 47. The district court recognized that game broadcasts are not commercial speech, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1006-07 (N.D. Cal. 2013), so they would not be deemed to be "for purposes of trade" in any state that has adopted that definition of the scope of rights of publicity. *See also Dryer v. NFL*, --- F. Supp. 3d ---, 2014 WL 5106738 at *4-8 (D. Minn. Oct. 10, 2014) (NFL documentaries using archival game footage are not commercial speech).

Other states do not limit the scope of the right as a threshold matter, but instead address speech interests by carving out exemptions by statute and/or case law. Either way, all states to address the question require that any content involving matters of public interest be exempt from publicity laws. *See, e.g.*, CAL. CIV. CODE § 3344(d) (exempting anything "in connection with any news, public affairs, or sports broadcast or account."). Public interest exemptions are not limited to traditional "news," but rather are construed broadly to reach almost any content that can be said to be of interest to the public. *See, e.g. Ruffin-Steinback v. dePasse*, 267 F.3d 457, 460-61 (6th Cir. 2001) (television mini-series); *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 797 (Cal. Ct. App. 1995) (posters created by newspaper for marketing purposes). Sports have long been recognized to be a matter of intense public interest, not merely for purposes of publicity claims but for any tort theory directed at sports-related content.[1]

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[1] *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion) (football coach a public figure in view of popular interest in the sport); *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1338 (N.D. Ind. 1997) ("it is this court's opinion that football, and specifically Notre Dame football is a matter of public interest"); *Washington v. Smith*, 893 F. Supp. 60, 63 (D.D.C. 1995) ("We conclude that the success of the Jayhawks, a major Division I team, is a matter of public concern."); *Holt v. Cox Enters.*, 590 F. Supp. 408, 410 (N.D. Ga. 1984) (noting in context of defamation action brought by ex-football player the public's longstanding interest in rivalry between Alabama and Georgia Tech teams); *Chuy v. Phila. Eagles Football Club*, 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc) ("[Interest] in professional football must be deemed an important incident among many incidents, of a society founded upon a high regard for free expression.").

B. Every Case on Point Rejects Appellants' Asserted Right of Publicity

Because sports broadcasts concern matters of public interest and are not disseminated "for purposes of trade," every case to consider the question has held that the broadcast of sporting events, or the use of archival footage from them for informational purposes, does not violate the publicity rights of game participants. Indeed, this Court in *dicta* has recently suggested as much. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1283 (9th Cir. 2013) (material such as "video depictions of [athletes'] play" are "a means for obtaining information about real-world football games" that are protected by California's "public interest" and "public affairs" exemptions).

The question was first addressed by New York's highest court in *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485 (N.Y. 1952). *Gautier* concerned a claim by an animal trainer who performed at a halftime show at a televised Washington Redskins football game. The trainer brought a claim under New York's misappropriation statute, its statutory equivalent of a publicity right. The Court held that because the trainer's performance was merely one element of a broadcast of a newsworthy event (the football game), it was not actionable under the statute. *Id*. at 488.

Thirty years later, the district court in *NFL v. Alley, Inc.*, 624 F. Supp. 6 (S.D. Fla. 1983) reached the same conclusion with respect to the athletes who compete in football games. It held that Miami Dolphins players have no right of publicity in the broadcasts of Dolphins games, because game broadcasts do not use their images to promote any commercial product and are "'presentation[s] having a current or legitimate public interest.'" *Id*. at 10 (citation omitted). A few years later, in *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, 805 F.2d 663 (7th Cir. 1986), the Seventh Circuit considered but never directly reached the issue, because it held that any publicity claims of Major League Baseball players in game telecasts were preempted by the Copyright Act – a conclusion seconded by several recent cases. *See, e.g.*, *Dryer*, 2014 WL 5106738, at *16-17 (use of archival footage in NFL documentaries is pre-empted); *Ray v. ESPN, Inc.*, 2014 WL 2766187, at *5 (W.D. Mo. Apr. 8, 2014) (re-broadcast of a wrestling match is pre-empted); *Somerson v. McMahon*, 956 F. Supp. 2d 1345, 1355 (N.D. Ga. 2012) (same).

Finally, another case addressed *in dicta* the potential assertion of a right of publicity by football players in the context of a different claim. In *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956), the Third Circuit considered a claim by a boxer whose 1936 match was rebroadcast on television fifteen years later. The boxer's specific complaint was that the contract he signed in 1936 for royalties from movie rights with a non-party did not technically extend to television, because it did not exist then. *Id.* at 483.

In a decision the Third Circuit virtually declared to be *sui generis*, it held the boxer could pursue a claim for unfair competition. More importantly, however, the Court appeared to recognize that its decision might one day be misconstrued to support the very theory asserted by Appellees in this case. It thus declared that "if there be telecasts of an intercollegiate football game, the players, knowing or having reasonable grounds to know that the contest was being telecast, would be presumed to have waived any right to compensation for their performances by participating in the contest." *Id.* at 487. Other, more recent cases have rejected publicity claims concerning various uses of archival footage in noncommercial speech. *Dryer*, 2014 WL 5106738; *Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 316 (Cal. Ct. App. 2001) (use of video clips from games on Major League Baseball's website concerned matters of public interest).

While the grounds for these decisions vary, their unanimous, consistent results demonstrate the absence of any support for the proposition that any state has, or would recognize, a right of publicity for participants in the broadcast of a team sporting event. The district court pointed to only one state, Minnesota, whose law it speculated might recognize a cause of action because it construed one decision to potentially permit recovery for "at least certain kinds of broadcast footage." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, --- F. Supp. 2d ---, 2014 WL 1410451, at *11 (N.D. Cal. Apr. 11, 2014) (citing *Dryer*, 689 F. Supp. 2d at 1123). The district court misconstrued that preliminary ruling, but in any event the same court recently issued its summary judgment opinion and squarely held that neither Minnesota, nor any of the other half-dozen state laws it considered would recognize that athletes have a right of publicity in game footage. *Dryer*, 2014 WL 5106738, at *11-15.

The district court's construction of the right of publicity, therefore, contradicts more than fifty years of unbroken case law.

C. Every Case on Point Recognizes that the Producer of a Game Has the Exclusive Right to License the Entire Game for Broadcast

State law not only rejects any right of publicity for game participants in sports broadcasts, it recognizes the opposite principle that the producer of a live entertainment event has the proprietary and exclusive right to determine who may broadcast the entire event. The two theories are fundamentally at odds with one another because if, hypothetically, a broadcaster needed to secure a license not only from the event's producer, but also from the hundreds of a participants whose images may appear on television (such as athletes, coaches, referees, cheerleaders, trainers, and marching band members), then no one could really promise exclusivity. And certainly the producer would lose control over its ability to issue broadcast licenses to its sporting events.

This principle was first articulated in the 1930s, most prominently in a case testing the Pittsburgh Pirates' right to enter into contracts with a group of radio broadcasters for the exclusive right to broadcast Pirates games. In 1938, a competing broadcaster stationed multiple observers outside of Forbes Field (where the Pirates played at the time) who could see over the outfield fence. Those observers then relayed play-by-play descriptions of the action to the broadcaster, enabling it to offer its own competing, near real-time broadcast of the entire game. The Pirates successfully obtained an injunction barring the practice. *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

The court reasoned that the Pirates, having made the investment to "acquire[] and maintain[] a baseball park, [and] pay[] the players who participate in the game," had a "property right" to "sell[] exclusive broadcasting rights to companies which value them." *Id.* at 492. It further held the club's proprietary right could be legally enforced through a claim for unfair competition against the renegade broadcaster. *Id* at 492-93. It pointed to prior decisions from New York courts enjoining essentially the same scheme to offer competing broadcasts of sporting events from outside Ebbets Field and Yankee Stadium. *See Twentieth Century Sporting Club v. Transradio Press Serv.*, 300 N.Y.S. 159 (N.Y. Sup. Ct. N.Y. Cnty. 1937); *Rudolph Mayer Pictures v. Pathe News, Inc.*, 255 N.Y.S. 1016 (N.Y. App. Div. 1932).

Twenty years later, another entrepreneur tested a different tactic to try to offer unlicensed radio broadcasts of New York Giants baseball games (now, of course, the San Francisco Giants). The radio station simply listened to the authorized play-by-play radio broadcast of a game, and then repeated what happened in a slightly delayed broadcast of its own. A New York trial court held that practice also constituted unfair competition. *Nat'l Exhibition Co. v. Fass*, 143 N.Y.S.2d 767, 777 (N.Y. Sup. Ct. N.Y. Cnty. 1955). As in the Pirates' case, the court reasoned that the Giants "at great expense . . . is employing a large number of the most highly skilled players or performers who have been and are available, and, at great expense, has provided and is providing a park with facilities," and therefore enjoyed a "property right" to exclusively license the team's games for radio and television broadcast. *Id*. at 770. A Texas appellate court in the same era reached the same conclusion with respect to television broadcasts of high school football games. *Sw. Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230, 232-33 (Tex. App. 1947) (citing both *Pittsburg Athletic Co.* and *Twentieth Century Sporting Club*).

These cases also illustrate why Appellees' real grievance is with the NCAA's no-pay-for-play amateurism rules, which television networks have nothing to do with formulating or enforcing. The case law granting producers the proprietary right to issue broadcasting licenses in no way precludes athletes from seeking a share of the broadcast licensing revenues through negotiations with the producers. *Pittsburgh Athletic Co.*, 24 F. Supp. at 492. And indeed, within the realm of professional sports, over the years athletes have brought litigation premised on antitrust and labor laws seeking a freer labor market to obtain a greater share of their team's revenue, such as the battle over baseball's reserve clause several decades ago. The resolution of those disputes did not turn on recognition of alleged publicity rights in game broadcasts, and indeed there are several cases pending in district courts that assert the identical complaints about NCAA amateurism rules and demand that student-athletes be paid for being athletes. *See, e.g.*, *Jenkins v. NCAA*, No. 4:14-cv-02758-CW (N.D. Cal.), Dkt. No. 90 at 5. Whatever the merits of those cases, they are not premised on the recognition of supposed "NIL" rights – indeed, as noted above, such rights have been expressly rejected when tested in the courts.

D. The District Court Misinterpreted *Zacchini* and its Progeny, All Of Which Support A Game Producer's Exclusive Right To Grant A Broadcast License

The district court's tentative conclusion that some states would recognize a right of publicity for athletes who participate in a team sport was based largely on its construction of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The court understood *Zacchini* to be a case about any "performer's right of publicity," the same right asserted by all of these student-athletes. *In re NCAA*, 2014 WL 1410451 at *7. Respectfully, the district court misconstrued *Zacchini*. Like the sports team cases discussed above, at bottom *Zacchini* was about the right of a producer of an entertainment event to exercise control over the broadcast of the *entire* event. It was not about the right of each participant in a large group event –such as a collegiate football or basketball game – to separately control how a broadcaster may depict a picture or mention a name.

Rather, Hugo Zacchini's complaint was essentially the same one made by the Pittsburgh Pirates a half-century earlier: that the news station had usurped his right to control the broadcast of an "entire act" that he produced. *Zacchini*, 433 U.S.at 569. But because *Zacchini* involved a one-man show, the "entire act" and his own performance were one and the same, so there was no need to distinguish the two. Essentially, the state-law proprietary right recognized by Ohio applied long-standing principles of sports broadcasting law to the unusual scenario of a self-produced, one-man show that only lasted fifteen seconds.

Zacchini's rationale makes clear that the state-law right at issue was never intended to protect the micro-"performances" of each participant in a large group event like a football game. The Court emphasized that depriving Zacchini of compensation for a television broadcast of his "entire act" was "similar to preventing [him] from charging an admission fee," because that is another way producers of live entertainment events typically exploit the value of the events they organize. *Id*. at 575-76. And the Court's primary reason for rejecting the Ohio news station's First Amendment defense was the same one first articulated in the

Pirates case (which *Zacchini* cited): to provide an "economic incentive" for event producers "to make the investment required to produce a performance of interest to the public." *Id*. at 576.

As applied to team sports, *Zacchini*'s reasoning protects the entity responsible for producing the game, not every player who participates. Producers of games (like teams or leagues) make the investments necessary to put on a large crowd event and charge admission fees. The analogue in this case to the "entire act" discussed in *Zacchini* would be a NCAA football or basketball game as a whole. Indeed, the proposition that every player, coach, referee, trainer, cheerleader, and marching band member even has a distinct "entire act" within a football or basketball broadcast is virtually nonsensical. *Id*. at 575.[2]

The litigation history of *Zacchini* further confirms this reading. The case was not originally filed as a right of publicity claim, and indeed the Ohio Court of Appeals construed the complaint to state claims for common-law conversion and

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[2] If *Zacchini* really applied to individual athletes, the most direct analogy would be a television news report about a football game that showed a 15-second clip of a winning field goal kick, where that kick was the placekicker's only appearance in the game. Under the district court's construction of *Zacchini*, the kicker could successfully sue the television station for broadcasting his "entire act" in violation of his right of publicity. Surely no court would sustain that theory, and indeed no one in this case argued that news coverage of games would be actionable. But that can only be so because the broadcast of the performances of individual players are not subject to a right of publicity in the first place, regardless of whether any individual's "entire act" were depicted.

copyright infringement – causes of action resembling the unfair competition and/or commercial misappropriation concepts recognized in the Pirates line of cases. *Zacchini v. Scripps-Howard Broad. Co.*, 1975 WL 182619 (Ohio Ct. App. Jul 10, 1975). But the Ohio Supreme Court chose instead to characterize the claim as a "right to the publicity value of his performance," 433 U.S. at 565 (internal quotation marks omitted), an essentially *sui generis* cause of action that in hindsight might better have been called something else to avoid all the confusion that label has since created in many lower courts. Most importantly, the United States Supreme Court emphasized that whatever its label might be, this state-law theory was different from a claim for "unauthorized use of another's name for purposes of trade," which is what the right of publicity to control the use of one's image or likeness for commercial purposes asserts. *Id*. at 573 n.10, 576.

Subsequent cases directly applying *Zacchini* have likewise understood the case to uphold the broadcast licensing rights of sports event producers, not publicity rights for individual athletes. Most notably, in *Wisconsin Interscholastic Athletic Association v. Gannett Co.*, 658 F.3d 614 (7th Cir. 2011) ("*WIAA*"), the Seventh Circuit rejected a claim by the news media that First Amendment access principles preclude public high school athletic associations from licensing exclusive rights to stream high school football games on the internet. Applying *Zacchini*, *WIAA* held that "the *producer* of entertainment is entitled to charge a fee in exchange for consent to broadcast . . . the *producer* of the entertainment—the NFL, FIFA, or the *NCAA*—normally signs a lucrative contract for exclusive, or semi-exclusive, broadcast rights for the performance." *Id.* at 624, 628 (emphasis added). And in so holding, the Court made it clear that "tournament games are *a performance product of WIAA* that it has the right to control." *Id.* at 616 (emphasis added).

Other lower courts considering similar First Amendment challenges to broadcasting agreements by public entities have construed *Zacchini* the same way. *See, e.g.*, *Okla. Sports Props., Inc. v. Indep. Sch. Dist. No. 11 of Tulsa Cnty., Okla.*, 957 P.2d 137, 139 (Okla. Civ. App. 1998) (the First Amendment does not preclude a public high school district from licensing the rights to broadcast high school football games); *Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 85 (D. Conn. 1981) ("It is clear that the ISU [International Skating Union] has a legitimate commercial stake in this event [Word Figure Skating Championships], and they, like Zacchini, are entitled to contract regarding the distribution of this entertainment product."); *KTSP-TAFT Television & Radio Co. v. Ariz. State Lottery Comm'n*, 646 F. Supp. 300, 310 (D. Ariz. 1986) (state entity may grant exclusive broadcasting rights for state lottery drawings).

The district court, however, construed this line of cases to suggest that every individual NCAA athlete is indistinguishable from the plaintiff in *Zacchini*. *In re*

NCAA, 2014 WL 1410451 at *7. The court even drew the same conclusion with respect to *WIAA*, even though the only party in that case was the high school equivalent of the NCAA. That is not a persuasive construction of those cases, and is the principal source of the district court's error with respect to the right of publicity.

E. Practical and Policy Considerations Preclude the Recognition of a State Law Right of Publicity For Game Participants

If states were to recognize a right of publicity in the broadcast of team sporting events, it would invite legal and practical chaos. There are numerous "performers" who contribute to the appeal of a game broadcast to the viewing public. Some examples include coaches, cheerleaders, referees, medical personnel, marching band members, halftime performers, and others who appear on television and might try to assert, frivolously or not, that they were identifiable for a sufficient period of time to qualify as a participant for this purpose. If each "performer" has a right of publicity, a prospective broadcaster would have to identify them all in advance and secure hundreds of individual licenses.

The district court dismissed these concerns in a footnote, observing that "any individual student-athlete would [not] be able to prevent a broadcaster from televising his team's games merely by withholding his consent" because these Appellees only sought to obtain group licenses, so their individual rights could be transferred as part of the collegiate recruiting and admissions process. *In re NCAA*, 2014 WL 1410451, at *11 n.10. Plaintiffs' expert Dr. Noll agreed that group licenses would be essential because otherwise "if any single student, if the middle linebacker says you can't have access to my names, image and licenses (sic), you can't produce the" broadcast. ER 292 at 312:14-16.

The problem with the court's reasoning is that it confused its effort to fashion what it viewed to be a practical solution to the very specific issue before it – how future student-athletes who are recruited to play college football and basketball starting in 2015 might be compensated for their "NILs" – with the consequences of recognizing legal rights of publicity that sweep far beyond this case. To begin with, the court's rationale provides no answer to how a broadcaster is supposed to obtain publicity rights for re-broadcasts of games and events that have already taken place. No recruiting or "group licensing" mechanism could readily solve that problem, or explain how a broadcaster is even supposed to identify and find all the participants and their heirs (since publicity rights are often descendible) from a game played fifty years ago. And even if that were possible, nothing could prevent that single "middle linebacker" who has soured on the game of football from declining to participate and thus hold up everyone's ability to ever accurately re-broadcast the event.

Moreover, going forward the publicity rights asserted here would very likely apply to all manner of less organized sports and group performances, ranging from Little League baseball games to small-town parades and perhaps activities like school spelling bees that increasingly are streamed on the internet. *See, e.g.*, *WIAA*, 658 F.3d at 623 (noting that streaming agreements for high school football playoffs also covered school plays and sixth-grade spelling bees). None of the participants in those events would likely be members of organized groups like players' unions that could bargain for group licensing programs, nor would local internet streamers or cable access channels be in a position to hire legions of clearance specialists to ensure that all necessary rights had been obtained. No sound construction of any state's law would recognize a right of publicity that would require that.

II. THE FIRST AMENDMENT WOULD BAR THE RECOGNITION OF A RIGHT OF PUBLICITY FOR PARTICIPANTS IN A GAME BROADCAST

The district court's reading of *Zacchini* and its progeny was also the basis of its conclusion that the First Amendment would pose no barrier to any state's recognition of participant publicity rights. *In re NCAA*, 2014 WL 1410451 at *7-11. That too was erroneous, because as previously discussed those cases do not stand for the proposition that game participants have publicity rights, but rather that the First Amendment does not bar event producers from entering into exclusive broadcasting deals. However, the First Amendment would bar the assertion of publicity rights by event participants, because the balancing analysis applicable to that scenario is entirely different.

A. Publicity Rights in Broadcasts for Game Participants Would Provide None of the Incentives Critical to the First Amendment Balancing Analysis

Courts have long protected the exclusivity of a producer's exclusive right to grant broadcast licenses because those proprietary rights incentivize producers to undertake the investment to organize teams and sponsor sporting events in the first place. That in turn increases the availability of events of interest to the public. *See, e.g.*, *Nat'l Exhibition Co.*, 143 N.Y.S.2d at 770; *Pittsburgh Athletic Co.*, 24 F. Supp. at 492 (recognizing the Pirates' broadcasting rights because they made the investment to "acquire[] and maintain[] a baseball park, [and] pay[] the players who participate in the game").

This same incentive rationale was the basis of the Court's First Amendment decision in *Zacchini*. The Court emphasized that the proprietary right Zacchini asserted functioned much like copyright law, which incentivizes the creation of expressive works by authorizing their creators to exclusively license them to a single publisher. *Zacchini*, 433 U.S. at 576. *Zacchini* also considered the defendant television station's competing free speech interests, but concluded that because the only question presented by the asserted publicity right was "who gets to do the publishing," the balance favored Zacchini. *Id.* at 573.

There is no evidence or logic, however, supporting the notion that the recognition of publicity rights for every individual performer is necessary to induce athletes to play sports, or cheerleaders to lead pep rallies, or the marching band to perform at halftime. Indeed that is counterintuitive, and such publicity rights have never been necessary to incentivize the creation of sporting events.

Indeed, Dr. Noll testified that because his goal was simply for the NCAA to share television revenue with athletes, it would not matter for purposes of his antitrust analysis whether publicity rights in game broadcasts are ever legally recognized. ER 314:9-17.[3] He specifically disclaimed any opinion about the answer to that legal question. Transcript of Proceedings at 361:15-17, *O'Bannon v. NCAA*, No. C-09-3329 CW (N.D. Cal), Dkt. No. 213 ("I have no horse in the race about what is the legal definition of a -- of the rights of students in licensing and their names and likenesses and images."); *Id.* at 381:12-13 ("It's not a concern of mine what the legal rights are.").

[3] Q: And your conclusion of this case and what you all are seeking is if the colleges are allowed to share broadcast revenues of the athletes, that they will do so simply in order to recruit them, correct?
Dr. Noll: That's correct.
Q: Regardless of whether there really are any such things as NIL rights?
Dr. Noll: The precise legal definition of what an NIL right is not at issue to me.

Dr. Noll's observations are confirmed by the experience of professional sports. That courts rejected assertions of publicity rights by professional baseball and football players in the context of television broadcasts in the 1980s has not inhibited anyone from playing those sports or receiving skyrocketing compensation. That is because whether, or how much, athletes are compensated by teams or leagues has nothing to do with the recognition of such rights. *Baltimore Orioles*, 805 F.2d at 673 ("there is no relationship between the division of *revenues* [obtained by MLB] from nationally televised broadcasts and the ownership of *rights* in those telecasts.").

B. Recognizing Publicity Rights for Game Participants Would Inhibit Far More Speech Than the Producer Rights Upheld in *Zacchini*

Moreover, not only are the incentive concerns the Court pointed to in *Zacchini* wholly absent here, the other side of the balance is also entirely different. For example, vesting publicity rights in every participant in a football game would pose substantial practical and legal obstacles to obtaining the necessary rights to broadcast a game at all. The chilling effect on the availability of speech about such matters of public interest would be far greater than when only a producer's rights are at issue, as was the case in *Zacchini* and its progeny.

Finally, even if these practical barriers to producing a game broadcast could theoretically be overcome, the recognition of personal rights of publicity for each team participant would be wholly inconsistent with core First Amendment values. As a legal matter, the right of publicity is a personal right that affords each person the right to control whether, and under what terms, their image may be displayed. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000). As a result, any of the hundreds of participants in a football game could demand that their image be wiped out, or that the broadcaster only speak about them positively, or even that the broadcaster disparage some disfavored rival as a condition of granting a license. There is no conceivable state interest served by granting numerous participants the right to attempt to exercise such censorial control over the broadcast of an event of public interest.

Once the district court's erroneous construction of *Zacchini* is recognized, the factors that should be considered in conducting the First Amendment inquiry are readily apparent. Many courts have considered whether the First Amendment outweighs right of publicity claims in the context of non-fiction media content that depicts and/or describes actual events. The factors courts most often consider are whether the content at issue is commercial speech, and/or whether its subject-matter relates to matters of public interest. *See, e.g. C.B.C. Distrib. & Mktg. v. MLB Advanced Media, L.P.*, 505 F.3d 818, 823-24 (8th Cir. 2007) (factual data in fantasy baseball games); *Ruffin-Steinback***,** 267 F.3d at 461-62 (television mini-series about singing group "The Temptations"); *Gionfriddo*, 114 Cal. Rptr. 2d at

313-18 (archival footage of baseball games); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 791-94 (Cal. Ct. App. 1993) (documentary about surfing); *Dryer*, 2014 WL 5106738, at *3-15. Game broadcasts satisfy both factors, and so the First Amendment would bar the state-law publicity theories Appellees assert.

III. THE PRESENCE OF PUBLICITY RIGHTS CANNOT BE DETERMINED BY *PRO FORMA* CONTRACT LANGUAGE MERELY INTENDED TO ALLOCATE THE RISK OF POTENTIAL FUTURE LITIGATION

The district court also erred by inferring the existence of athletes' publicity rights from prophylactic provisions of broadcasting contracts. Specifically, the district court found that "a submarket exists in which television networks seek to acquire group licenses to use FBS football and Division I basketball players' names, images, and likenesses in live game telecasts", as well as another sub-market for unspecified "archival footage." *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 968, 971-72 (N.D. Cal. 2014). Although the district court ultimately found no harm to competition in these submarkets, it held that student-athletes' ability to market the same underlying NIL rights were unreasonably restrained in the "college education market" or, alternatively, the "market for recruits' athletic services and [NIL] licensing rights." *Id.* at 973. The "licensing rights" of potential recruits must have value, the court inferred, because universities appear to bundle and sell them to networks.

The district court did not support those findings by pointing to any actual group broadcast license for the broadcast of *any* sport. Rather, it inferred the existence of markets for NIL player licenses in collegiate game broadcasts from a handful of sentences in various programming contracts that contain terms such as "name" and "likeness" within long-form agreements.[4]

Amici respectfully submit that the contractual language the district court relied on does not remotely form a basis upon which to infer the existence of such novel, expansive publicity or NIL rights, let alone markets for trading them. Not only do many of the contractual clauses cited fail to even purport to speak to actual game telecasts,[5] all of them recite a laundry list of proprietary or related "rights" that any person or entity might ever attempt to assert, ranging from "universities" to "colleges" to "sites" to "conferences" to "non-conference opponents" to "any

[4] *See, e.g, O'Bannon*, 7 F. Supp. 3d at 969 ("These contracts demonstrate that there is a demand for these rights among television networks."); *id*. (rejecting defendant's expert's testimony "that sports broadcasters need not acquire the rights to use student-athletes' names, images and likenesses."); *id.* at 988 (athletes "provide their schools with something of significant value: their athletic services and the rights to use their names, images, and likenesses."); *id.* at 989 ("this price-fixing agreement operates by undervaluing the name, image, and likeness rights that the recruits provide to the schools."); *id.* at 993 ("Because student-athletes are not permitted by NCAA rules to license the rights to use their names, images, and likenesses, the networks deal exclusively with schools and conferences when acquiring the student-athletes' rights."); *id.* at 994 (referring to purported NIL rights as "intellectual property and performance rights").

[5] *See, e.g., O'Bannon,* F. Supp. 3d at 968-69 (citing Trial Exs. 2104-16, 2116-17, 2230-10, 11).

other persons connected with the Bowl Games." In turn, the agreements typically provide that the licensor (i.e., the conference or the NCAA) is responsible for securing any "reasonable or necessary" rights to effectuate the purposes of the agreement.

Their purpose is plainly to ensure that the purchaser (i.e., the network) is protected by the seller (i.e. the NCAA or a conference) from any legal claim that anyone *might conceivably* assert to try to undermine the broadcasting rights being purchased, regardless of its likely merit. The same contracts also contain representation, warranty and indemnification clauses that serve a similar function, as the very expert testimony the district court cited confirmed . *O'Bannon*, 7 F. Supp. 3d at 969 (broadcasters "would prefer to have consents, and you would like to have somebody stand behind those consents so that you don't have to worry about somebody coming after you later with a claim."). Indeed, every day parties enter into contracts that recite, release, and/or provide indemnities for all manner of potential claims that neither party actually expects to exist, solely to minimize the risk of possible future disputes. Thus, paradoxically, the networks' efforts to obtain contractual protection from the consequences of even erroneous legal rulings regarding intellectual and other proprietary rights were viewed by the district court as evidence establishing the existence of one of those very rights.

Notably, other courts have rejected such reasoning in the specific context of alleged publicity rights, and recognized that protective language in licensing agreements does not define the scope of underlying rights. For example, the Eighth Circuit's decision in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media, L.P.*, arose because a distributor of fantasy baseball games had an agreement with the Major League Baseball Players' Association to license the right to use players' names and statistics. After the Association switched to a competitor, a lawsuit ensued. The Court held that the First Amendment precluded any publicity rights with respect to the fantasy games, regardless of the prior license. *C.B.C. Distrib. & Mktg.*, 505 F.3d at 823-24. *See also CBS Interactive Inc. v. NFL Players Ass'n, Inc.*, 259 F.R.D. 398, 417-19 (D. Minn. 2009) (holding the same with respect to fantasy football games). Similarly, in the context of copyright law courts have long held that a party's decision to seek licensing agreements to avoid litigation does not determine whether a license was actually necessary to use the material at issue. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n. 18 (1994); *Hofheinz v. AMC Prods., Inc.*, 2003 WL 25293919, at *4 (E.D.N.Y. Apr. 23, 2003) ("a litigant may have any number of reasons for seeking licenses, including to avoid litigation such as this.") . Yet the prophylactic contractual language the district court relied on is far more attenuated than the explicit licenses that were deemed to be irrelevant in those cases.

Amici recognize that there are many issues this Court must consider in this antitrust case, including potentially dispositive ones that may not implicate the issues addressed in this Brief. Nonetheless, given their potential ramifications, *amici* hope the Court will take the opportunity to address and correct these unprecedented aspects of the ruling below.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the judgment below.

Respectfully submitted,

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Dated: November 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 21, 2014. Participants in the case who are registered CM/ECG users will be served by the appellate ECF system.

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