

Internet Streaming of High School Athletic Events for Commercial Purposes

I. Introduction

A level of interest in athletics, once reserved for college or professional sports, appears to be emerging at the high school level, as evidenced by increased coverage of high school sporting events by ESPN, Sports Illustrated and the FOX Sports Network. A similar trend is evident more locally as an increasing number of Wisconsin school districts receive inquiries about license agreements or other arrangements to facilitate the video streaming of athletic events over the Internet. What was once the province of local radio broadcasts, or television broadcasts during the WIAA tournament, may now be the subject of Internet streaming that can be broadcast around the world.

When contemplating school district involvement in (or licensing of) Internet streaming of high school athletic events, it is necessary to consider the application of existing laws to any contractual arrangement with a third-party vendor. A number of legal issues, including but not limited to the contents of a licensing agreement, WIAA rules, rights of privacy, and relevant federal and state statutes, should be taken into account when contemplating the commercial broadcast of high school athletic events over the Internet. The discussion of legal issues below is not an exhaustive list. Nevertheless, this presentation provides a general framework of the considerations a school board and its legal counsel should review.

II. General Contractual Arrangement Considerations

A. Licensing Agreement Considerations

1. Express, comprehensive rights and duties of the school district and the vendor.
2. Exclusive versus non-exclusive agreements, and enforceability of such agreements.
3. Assignment of responsibility for monitoring the appropriateness of content with respect to the video stream and any associated advertising.
4. The timing, amount and mechanism for school district compensation arising from the production and/or distribution of video images.
5. The term of the agreement and opportunity for termination of the relationship.

B. Establishing Safeguards within the Agreement

1. Include provisions to prevent objectionable advertising, for example:
 - a. Restrictions on the advertising of alcohol and tobacco products;
 - b. Lewd or obscene content should not be allowed; and
 - c. Disclaimer clauses may be desired.
2. Express contractual remedies may be included in the event of a breach of the contract allowing for, at a minimum, the following:
 - a. Automatic termination of the contract;
 - b. Compensation to the school district; and
 - c. Liquidated damages.

III. Wisconsin Interscholastic Athletic Association (WIAA) Rules and Guidelines

A. State Tournaments

1. The WIAA SENIOR HIGH SCHOOL HANDBOOK, page 51 (2007-08) establishes that:
 - a. The WIAA asserts exclusive jurisdiction over the production and distribution of broadcasts in connection with athletic competitions that take place during the State Tournament or State Tournament Series; and
 - b. The WIAA includes in its definition of “production and distribution,” among other media, “content streaming through any platform and physical media.”
2. The *WIAA Media Policies Reference Guide & Directory* provides:
 - a. Television stations, cable stations, and presumably other entities, are required to abide by the Internet policies established in this guide during Tournament broadcasts; and

- b. Any license agreement with third-party vendors should not include State Tournament or State Tournament Series events, unless such an agreement is reviewed and approved by the WIAA and/or its designated agent.

B. Regular Season Athletic Events

1. School districts retain greater latitude with respect to regular season athletic competitions.
2. The WIAA leaves matters concerning the video streaming of regular season high school athletic events over the Internet to the discretion of individual school districts (subject to other legal and practical considerations).

IV. Individual Right of Publicity

A. Right of Publicity

1. The “right of publicity” is generally understood to include the right of an individual to prevent the unauthorized commercial use of the individual’s name or likeness.
2. The principal purpose of the “right to privacy” is to protect the individual from the loss of commercial value resulting from the unauthorized appropriation of an individual's identity for commercial purposes.

B. The Right of Privacy under Wis. Stat. § 995.50.

1. The Wisconsin Legislature has established a “right of privacy” that encompasses a right of publicity under Wis. Stat. § 995.50.
2. Subsection (2)(b) states that an invasion of the right of privacy includes: “the use, for advertising purposes or *for purposes of trade*, of the name, portrait or *picture* of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.” (Emphasis added.)
3. Subsection (3) states that the right of privacy is to be interpreted in accordance with the developing common law of privacy and “with due regard for maintaining freedom of communication, privately and through the public media.”

C. Student Athletes and Spectators

1. A potential right to privacy/publicity for student athletes.
 - a. Kristine Mueller has concluded in *No Control Over Their Rights of Publicity: College Athletics Left Sitting the Bench*, 2 DePaul J. Sports L. Contemp. Probs. 70 (2004), that University of Wisconsin athletes have a right of privacy under Wisconsin law that should be recognized in connection with their participation in collegiate athletics.
 - b. A similar analysis may apply at the high school level. Accordingly, conservative practice may include obtaining written consent from students ages 18 years or older, or from a parent or guardian of a student who is a minor, when students and parents are signing forms and waiver documents prior to participation in athletic events, cheerleading, band, pom-pom squad and other relevant activities.
2. A potential right to privacy/publicity for spectators.
 - a. Out of apparent concern that Wis. Stat. § 995.50 (or similar statutes in other states) also provides a right of publicity to spectators, some institutions hosting collegiate or professional athletic events have attempted to obtain the requisite consent.
 - b. For example, the back of a University of Wisconsin football ticket states: “Holder grants permission to the University of Wisconsin (and its designees and agents) to utilize the Holder’s image, likeness, actions and statements in any live or recorded audio, video, or photographic display or other transmission, exhibition, publication or reproduction made of, or at, the event without further authorization or compensation.”
 - i. Whether such a statement meets the requirement of “written consent” under Wis. Stat. § 995.50(2) is uncertain.
 - ii. An organization may also argue that a ticket-holder’s appearance in a video production is not an invasion of privacy under Wis. Stat. § 995.50(3), because freedom to use the image is necessary to maintain “freedom of communication, privately and through the public media.”

V. Federal Laws

A. Copyright Laws; Title 17 U.S.C. *et. seq.*

1. Federal copyright law provides legal rights to those who create a copyrightable work, including still pictures and video productions.
 - a. Copyright law may in some cases overlap with the right of publicity discussed above.
 - b. The primary focus of copyright law in this context is to provide rights to individuals or entities who create a video, including individuals who perform videotaping or commentary in connection with a recorded event.
2. Copyright ownership, as defined in 17 U.S.C. § 201, is a significant consideration because a copyright owner generally has control over the copyrighted work and derivative works.
 - a. A copyright owner may control the price at which a video is sold, the manner by which it is distributed, and the nature of any editing, modifications, or additions to the work.
 - b. A copyright owner may delegate rights of control to a licensee through a license agreement.
3. The Work-Made-for-Hire Doctrine; 17 U.S.C. §§ 101, 201(b).
 - a. In cases where a third-party vendor records an athletic event utilizing its own employees, most often the vendor will be the initial copyright owner.
 - b. Copyright interests that would otherwise vest in individual employees who create a video generally vest with an employer, when the employee creates the video within the scope of his or her employment.
 - c. The work-made-for-hire doctrine does not necessarily apply to all employer-employee relationships. Therefore, many employers require employees to execute work-made-for-hire agreements in order to firmly establish that the owner of a copyright in a video production is the employer, not the employee.

4. Negotiating rights between the school district and the third party vendor.
 - a. If the school district is the owner of a copyright due to school district staff or volunteers, involvement in the filming of a video, it may provide a license back to the vendor for specific purposes.
 - b. If the vendor owns the copyright, the parties may enter into an agreement that grants the vendor access to athletic events for the purpose of recording videos to be distributed on a commercial basis, while agreeing to specified obligations in exchange for such privilege.
 - c. School districts should consult with legal counsel regarding the terms of such an agreement, and the relative advantages and disadvantages of entering into a license agreement versus another form of agreement.
 - d. The rights associated with the broadcast of an entire athletic event often differ from the rights of the press to broadcast clips on the evening news, First Amendment rights also come into play.

5. Documenting Copyright Ownership

- a. School district officials need to ensure that an employee involved in creating a video falls under the work-made-for-hire doctrine, so that the school district will be recognized as the copyright owner.
- b. Volunteers who participate in creating the video need to execute a work-made-for-hire agreement prior to the creation of the video, in order to ensure that the school district is recognized as the copyright owner.
- c. Assuming the school district is the copyright owner, the school district and vendor are then free to assign copyright ownership and/or license rights, as agreed between the parties.

B. Family Educational Rights and Privacy Act (FERPA); 20 U.S.C. § 1232g, et seq.

1. FERPA applies to all school districts that receive federal funding.
2. FERPA generally prohibits the release of education records or personally identifiable information contained in education records

without the written consent of a parent/guardian or student who is 18 years old or older.

3. FERPA establishes specific notice requirements designed to inform parents and eligible students of their legal rights under the law.
4. FERPA potentially applies to videos that contain images of students because such video images are likely to fall within the definition of an education record under 20 U.S.C. § 1232g(a)(4)(A).
 - a. Under 20 U.S.C. § 1232g(a)(4)(A)(ii), a video recording of a high school athletic event may constitute an education record whether maintained by a school district or by a person acting on behalf of a school district.
 - b. However, under 34 C.F.R. § 99.3, only videos that are “directly related to a student” fall within the scope of the statute.
 - c. As a result, a video that contains a single image of a gymnast on a balance beam is more likely to be considered an education record under the FERPA, than is a video of a marching band that is not used by school officials to evaluate a student’s performance or behavior.
5. It is unclear whether FERPA defines a video recording of an event that is already open to the public to be a confidential education record.
 - a. Regardless, school districts may wish to undertake steps to satisfy the requirements of the statute in case a video recording of a high school athletic event falls within the scope of FERPA.
 - b. Under 34 C.F.R. § 99.37, such steps include giving notice to parents and eligible students of their right to object to the disclosure of personally identifiable information.
6. Under FERPA’s definition of “directory information,” it is possible that a video may constitute a “photograph.” If so, school districts may be able to utilize already existing notice procedures applicable to directory information to satisfy the requirements of FERPA when disclosing video recordings.
7. Given the uncertainty of FERPA’s application in this emerging area, school districts are advised to obtain written consent for disclosure from

parents or eligible students in advance of extra-curricular activities that will be the subject of video streaming over the Internet.

- a. School districts may seek written consent for disclosure at the same time that parents and students are asked to sign waivers in connection with the right of privacy, as discussed above.
- b. Additionally, school districts may wish to condition participation in relevant extra-curricular activities upon a parent's or eligible student's willingness to allow such a disclosure, in order to prevent an individual student or parent from having a veto power over the distribution of a video that falls within the scope of FERPA.

C. Protection of Pupil Rights Act (PPRA); 20 U.S.C. § 1232h

1. The PPRA was passed to protect against overly intrusive student surveys and evaluations.
2. Nevertheless, the PPRA should be reviewed in connection with any contractual arrangement a school district considers for the video steaming of high school athletic events over the Internet.
3. The Family Policy Compliance Office is the federal agency that administers both the FERPA and the PPRA.
 - a. The agency has in the past taken the unofficial position that if the FERPA applies in a given set of circumstances, the PPRA applies as well.
 - b. It is questionable, however, whether such an interpretation of the PPRA would hold up in a court of law.
4. School districts should still be aware that 20 U.S.C. § 1232h(c)(1)(E) of the PPRA requires schools to adopt a policy that describes when a school district will engage in the collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling, or otherwise provides such information to others for that purpose.
5. To the extent that the production and distribution of a video constitutes the collection of personal information from students under the PPRA, school districts should give notice of such activity in compliance with the statutory requirements.

D. E-Rate Eligibility

1. If the parties are contemplating the use of technology owned by the school district in connection with the commercial distribution of athletic events over the Internet, and a school district receives E-rate funding, any relevant limitations imposed by federal statute or the Federal Communications Commission should be accounted for within a vendor agreement.
2. For example, 47 U.S.C. § 254(h)(3) prevents a school district from selling, reselling or otherwise transferring its discounted service “for money or any other thing of value.”
3. It may be argued that a school district would be receiving value for use of its discounted service if a third party uses a school district’s internet services to transmit an event.
4. In order to avoid any potential violation of the statute, the parties may wish to clarify in their agreement that the third-party vendor is not allowed to use any E-rate funded services to record, transmit, or broadcast an event.

VI. Wisconsin Laws

A. Pupil Records Law; Wis. Stat. § 118.125(2)

1. Wisconsin’s Pupil Records Law is designed to protect the confidentiality of pupil records.
2. While a live video stream may not constitute a pupil record, the recording of such video images on physical media probably falls within the definition of a pupil record under the Pupil Records Law.
 - a. If a school district contemplates creating and maintaining DVDs or other digital media associated with a video recording of students, it is likely that such recording will fall within the scope of the Pupil Records Law.
 - b. Additionally, if a school district creates or maintains a video as a part of an arrangement with a third-party vendor, for the purpose of Internet streaming, a school district should be prepared to comply with the requirements of the Pupil Records Law.

3. A video recording may constitute a “photograph” under the Pupil Records Law and, thus, be properly characterized as “directory data.”
 - a. If a video recording is directing data, it would not be necessary to obtain written consent from parents, guardians or adult students, if the notice requirements of the law are otherwise satisfied with respect to directory data.
 - b. However, it is likely that school districts will need to seek written waivers and consents addressing a number of other legal issues in advance of a student’s participation in an activity that is the subject of video streaming. Thus, as a matter of conservative practice, school districts are advised to obtain written consent under the Pupil Records Law to the disclosure of video recordings, along with the other required waivers and consents.

B. Public Records Law; Wis. Stat. §§ 19.31-19.39

1. School districts also need to be aware of the requirements of Wisconsin’s Public Records Law in cases where a video recording is created or maintained by a school district.
 - a. The definition of a “record” under Wisconsin’s Public Records Law clearly includes video recordings.
 - b. Thus, a DVD or other digital media may be subject to disclosure upon request of a citizen.
2. However, under Wis. Stat. § 19.32(2), the definition of a “record” does not include materials to which access is limited by copyright.
3. Accordingly, the ownership and nature of copyright interests are likely to have a direct impact on whether school districts are required to disclose video recordings of high school athletic events in connection with requests by individuals or organizations for such records.

VII. Labor and Employment Issues

- A. School districts will not have primary responsibility for compliance with labor and employment laws in cases where a third-party vendor performs all of the production and distribution functions associated with the Internet streaming of a high school athletic event.

- B. On the other hand, school districts must be mindful of legal requirements that may apply if school district employees, students or volunteers participate in the production or distribution of videos of high school athletic events over the Internet.
1. For example, work by a school district employee who is paid by the district to record athletic events is subject to standard requirements concerning withholding, worker's compensation, overtime pay, and similar employment laws.
 2. In addition, school district officials should be certain to consider whether assignment of school district employees or others to such duties is governed by the provisions of an existing collective bargaining agreement.
- C. A school district must also comply with state and federal child labor laws, such as Wis. Stat. §§ 103.64-83 and 29 C.F.R. Part 570, if students are employed to participate in the production or distribution of videos of high school athletic events over the Internet.
1. Child labor laws often include work permit requirements and hour and time of day restrictions.
 2. Under Wis. Admin. Code § DWD 270.18, Wisconsin's child labor laws may also apply to student volunteers under certain circumstances.
 3. Wis. Admin. Code § DWD 270.19 sets forth specific guidelines that address the role of students as volunteers, along with applicable restrictions.
 4. When a school district agrees to provide employees or volunteers to participate in the production or distribution of videos of high school athletic events over the Internet by third-party vendors, it is important to remember that the school district may retain ultimate responsibility for the actions of such individuals.
 5. In *Arsand v. City of Franklin*, 83 Wis. 2d 40 (1978), the Wisconsin Supreme Court stated that, in some cases, municipalities are not only responsible for the actions of employees, but for the actions of volunteers as well.

VIII. Conclusion

The Internet streaming of high school athletic raises a number of relatively novel legal issues to be carefully considered by school boards and legal counsel, as suggested by the discussion above. Given the number and complexity of such issues, it is necessary to conduct a legal review based upon the specific circumstances of a given case, preferably with the early involvement of legal counsel.