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Ruling favors the IHSA's right to charge online fees

Illinois Press Association fights against paying for streaming the playoff games

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One Illinois High School Association (IHSA) grudge match ended well before the championship football games it hosts will kick off on Friday in Champaign.

A judge ruled on Nov. 13 in the IHSA's favor in a dispute with the Illinois Press Association (IPA) over the legal right to charge fees for broadcasting playoff games on the Internet.

Sangamon County Circuit Judge Patrick W. Kelley ruled that a 2008 settlement allowing IPA newspapers to photograph IHSA events did not also allow them to broadcast the events live over the Internet.

The ruling fits into a growing body of case law — including a 7th U.S. Circuit Court of Appeals ruling last year — where newspapers challenge high school sports associations' legal rights to charge broadcasting fees for what they see as a public event.

"It gets to the question: Can associations like ours have broadcast policies like this? And clearly, at least in this appellate area, I

think we can," said Marty Hickman, IHSA executive director.

The dispute began in 2007 when IPA newspapers sold pictures from playoff football games. The IHSA asked them to stop because it signed an exclusive contract with a company to sell such pictures, said Matthew S. Hefflefinger, a partner at Heyl, Royster, Voelker & Allen P.C., who represents the IHSA.

When some newspapers balked at the agreement, the IHSA locked their photographers out of the 2007 state finals games, says a lawsuit filed by the IPA that year. The lawsuit accused the IHSA of two counts of prior restraint.

In a settlement that dropped those and two other charges, the sides agreed that the IHSA will not try "to control or regulate the production, distribution or sale of any newspaper product."

When the IHSA charged Northwest Herald newspaper a \$75 fee to broadcast a playoff game online earlier this month, the IPA filed a petition to enforce the 2008 agreement, Hefflefinger said.

"This has been a brewing issue and there have been letters ex-



Matthew S. Hefflefinger



Eldon L. Ham

changed over the years," Hefflefinger said.

Donald M. Craven, owner of Donald M. Craven P.C. and general counsel for the IPA, said his argument that live streams counted as "newspaper product" under the agreement failed to persuade Kelley, the circuit judge.

The judge's decision, however, protects newspapers' rights to post video clips and photographs from playoff games, he said. It does not apply to regular season games, which the IHSA does not produce.

"So the question becomes, is (live streaming) popular enough among Illinois newspapers now that we want to do something about that?" Craven said. "We're polling the membership."

He said if he pursued further litigation he would ask the question: "Does the IHSA really own the championship series in high school sports?"

Gannett Co., a newspaper publisher, asked a similar question about the Wisconsin Interscholastic Athletic Association (WIAA) in a 2011 case where the 7th Circuit ultimately sided with the WIAA.

Gannett argued that the WIAA could not collect a fee because high school sports represent taxpayer-funded events that deserve full-

access news coverage the same way other government events do.

In her opinion in favor of WIAA, Judge Diane P. Wood wrote: "Gannett's argument boils down to an assertion that a government actor cannot, under any circumstances, act like the NFL, FIFA or NCAA. But the First Amendment does not require such a draconian rule."

While the IPA's case turned with the settlement agreement, Eldon L. Ham, an IIT Chicago-Kent College of Law adjunct professor of sports law and society, said IPA would likely lose a more direct challenge to the IHSA's ownership of the games if the group fought this in court.

"If the IHSA is deemed to be putting on these playoff games, I'm sure that the more fair approach is that they own them as their work product," Ham said.

"They own the product of those games. And if they own it, then they're free to sell or license it."

Craven said he sees larger questions about the role of the IHSA.

"They are conducting what are essentially functions of public bodies," he said. "And the claim of ownership of what is essentially a public function by a private entity is troublesome."

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