

4-1-1989

National Football League v. Beachland Ventures, Inc.

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Recommended Citation

Julie M. Levitt and Martin J. Bidwill, *National Football League v. Beachland Ventures, Inc.*, 6 U. Miami Ent. & Sports L. Rev. 139 (1989)
Available at: <http://repository.law.miami.edu/umeslr/vol6/iss1/7>

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RECENT DEVELOPMENT

NATIONAL FOOTBALL LEAGUE v. BEACHLAND VENTURES, INC., Civ. No. 89- 2311 (S.D. Fla. filed Oct. 17, 1989).

JULIE M. LEVITT & MARTIN J. BIDWILL

This Article presents our readers with information about a case that was filed just before this issue went to press. In National Football League v. Beachland Ventures, Inc., the NFL and its member club the Miami Dolphins brought suit to enjoin local bar owners from violating the NFL's "blackout" rule by showing "blacked out" games in their establishments. The editors of the Review are of the opinion that this case potentially is of considerable importance and felt it incumbent upon us to inform our readers about the case, even at this early stage of the proceedings. The United States District Court has ordered a temporary restraining order in the case; the defendants are considering an appeal to the Eleventh Circuit and expect to set a trial date in the near future.

FACTS

On any given Sunday afternoon or Monday night during the football season, bars and restaurants across the United States are filled with patrons watching National Football League games on the establishments' television sets. Sometimes the televisions are showing games that are being broadcast on local television stations. However, today it is quite possible to find the television showing a game that is not being shown on local channels, but instead has been received by the bar's satellite dish or cable television hook-up.¹ Many, but not all, of these games are "blacked out;"² that is,

1. All of the defendants in *Beachland* received the games by satellites; none were receiving the game via cable television hook-up.

2. See *infra* note 22 for a discussion of the contractual origin of the black out rule and

the NFL does not permit the game to be televised in the city or metropolitan area in which the game is being played.

A satellite dish system allows a bar to receive blacked out games by picking up the satellite feed from either the original transmission or a broadcast of the game from a city in which the game is being televised. Fearing that this activity ultimately will harm its gate receipts and diminish the value of its television rights,³ the National Football League (NFL) and its member clubs frequently have brought suit to enjoin the activity. The NFL's claims usually are based on allegations that the unauthorized display violates its copyright in the games⁴ as well as its right to be secure against unauthorized interception of the signal under the Federal Communications Act.⁵

Recently, the NFL and the Miami Dolphins (plaintiffs) brought suit in the United States District Court for the Southern District of Florida against several bar owners, an Elks' Club, and a Moose Lodge (defendants), all located in South Florida's tri-county area. *National Football League v. Beachland Ventures, Inc.*, Civ. No. 89-2311 (S.D. Fla. filed Oct. 17, 1989). The plaintiffs seek a permanent injunction that would prohibit the defendants' reception by satellite, and subsequent display in their establishments, of locally blacked out games. The plaintiffs were successful in obtaining a temporary restraining order⁶ on Friday, October 20, 1989, during a hearing before United States District Judge William

infra note 64 for a discussion of the antitrust exemption permitting the NFL to black out games.

3. "The [television] contract limitations . . . foster development of a local following for individual clubs." *National Football League v. Alley, Inc.*, 624 F. Supp. 6, 8 (S.D. Fla. 1983). *Cf.* *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 728 (8th Cir. 1986) ("black out" makes the right to broadcast games more valuable because the black out contributes to a full stadium, a more exciting crowd, and a more exciting television program).

4. See *infra* notes 11-18 and accompanying text.

5. 47 U.S.C. § 605 (Supp. IV 1986). 47 U.S.C. § 605 has been redesignated as § 705 by the Cable Communications Policy Act of 1984, § 6(a), Pub. L. No. 98-549, 98 Stat. 2779, 2804 (1984). However, for the sake of uniformity, this Article will refer to the statute as § 605. See *infra* notes 43-48 and accompanying text.

6. On October 26, 1989, the defendants moved the court for rehearing on the temporary restraining order, alleging that the plaintiffs have unclean hands. Specifically, they claim that Joseph Robbie, the owner of the Miami Dolphins, Ltd. and a member of the National Football League, is a member of a private club (LaGorce Country Club), located within 75 miles of Joe Robbie Stadium, which has shown blacked out Dolphins games via satellite dish. Defendants' Motion for Rehearing, *National Football League v. Beachland Ventures, Inc.*, Civ. No. 89-2311 (S.D. Fla. filed Oct. 26, 1989). The motion alleges that the club has shown the games with the knowledge and consent of Robbie. *Id.* at 3. The defendants have noticed Robbie for deposition to ascertain whether Robbie himself has watched the games at the club. *Id.*

Hoeveler.⁷ Judge Hoeveler found, *inter alia*, that there was a substantial likelihood that the plaintiffs would succeed in proving at trial copyright and Federal Communications Act violations.

The defendants presently are considering an appeal of this order to the Eleventh Circuit⁸ and have offered to prove at trial two defenses:

(1) in response to claims of copyright infringement, the defendants claim that their use falls into the "common use" exception of section 110(5) of the Copyright Act,⁹ which provides that no violation of the copyright in a broadcast occurs if the transmission is received on a receiving apparatus commonly used in the home;

(2) in response to claims of Federal Communications Act violations, the defendants claim that the plaintiffs' transmissions are of a kind intended to be received by the general public and, hence, are not protected by section 605 of the Federal Communications Act.¹⁰

This Article presents the arguments of both sides on each issue, discusses Judge Hoeveler's order, and alerts the reader to issues of first impression that are present in the case but which, as yet, have not been raised by counsel.

PLAINTIFFS' COPYRIGHT CLAIMS AND THE SECTION 110(5) DEFENSE

The gravamen of the plaintiffs' complaint is that the defendants infringed the plaintiffs' copyrights by showing the copyrighted NFL transmissions in their establishments, in violation of the black out rule and without the plaintiffs' authorization.¹¹ Before discussing this alleged infringement, it is first necessary to examine the genesis of the copyright which the plaintiffs claim in the transmission of their games.

The Copyright Act of 1976 protects only "original works of authorship fixed in any tangible medium of expression . . ."¹² Included as "original works of authorship" are motion pictures and

7. Temporary Restraining Order, *National Football League v. Beachland Ventures, Inc.*, Civ. No. 89-2311 (S.D. Fla. entered Oct. 20, 1989).

8. Telephone Interview with Hinda Klein, Rubin, Rubin & Fuqua, Miami, Florida, attorney for defendants (October 25, 1989).

9. 17 U.S.C. § 110(5) (1982).

10. 47 U.S.C. § 605 (Supp. IV 1986).

11. Plaintiffs' Brief In Support Of Plaintiffs' Application For Temporary Restraining Order And Preliminary Injunction And Plaintiffs' Proposed Findings Of Fact And Conclusions Of Law at 13, *National Football League v. Beachland Ventures, Inc.*, Civ. No. 89-2311 (S.D. Fla. served Oct. 20, 1989) [hereinafter Plaintiffs' Brief].

12. 17 U.S.C. § 102 (1982).

audiovisual works.¹³ Audiovisual works are defined by the Copyright Act as:

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.¹⁴

Further, the Copyright Act provides that “[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.”¹⁵

Applying the foregoing to the facts, it is clear whence the plaintiffs derive their copyright. The plaintiffs argue that each of the transmissions of televised NFL games is a wholly original work.¹⁶ Arguably, the transmissions fall within the Copyright Act’s definition of an audiovisual work in section 102. As the transmission is an original work, it need only be “fixed” in a tangible medium to gain copyright protection. The necessary “fixation,” the plaintiffs claim, derives from their fixation of each transmission in an audiovisual cassette tape, simultaneous with the telecasting.¹⁷

13. 17 U.S.C. § 102(a)(6) (1982).

14. 17 U.S.C. § 101 (1982).

15. *Id.* Ordinarily, one cannot bring suit for infringement of copyright until he has registered his claim for copyright in the work. Section 411 provides an exception to this rule for works that become fixed in the tangible medium simultaneously with their transmission, as is the case with plaintiffs’ games. Under § 411, plaintiffs can file an infringement action either before or after the transmission/fixation, so long as:

(1) they serve notice on the infringer not fewer than 10 nor more than 30 days prior to transmission/fixation, describing the work and the specific time and source of its first transmission, and declare their intent to secure copyright in the work; and

(2) they make registration for the work within the three month period following the first transmission.

National Football League v. McBee & Bruno’s, Inc., 621 F. Supp. 880, 885 (D. Mo. 1985) (construing 17 U.S.C. § 411 (1982)).

16. Plaintiffs’ Brief, *supra* note 11, at 7.

17. *Id.* The legislative history of the Copyright Act makes it clear that the transmission of a live sports event, if simultaneously recorded, is entitled to protection under the Copyright statute:

The bill seeks to resolve, through the definition of “fixation” in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes “authorship.” The further question to be considered is whether there has

Such a practice clearly would meet the definition of "fixed" as set out in section 101.¹⁸ Consequently, since the plaintiffs have an original work which is "fixed" in a tangible medium of expression, the NFL, and each of its teams, owns a copyright in the transmission of their games.

The Copyright Act provides that the owner of a copyright in an audiovisual work has the exclusive right to perform and display that copyrighted work publicly.¹⁹ The statute considers a work performed or displayed publicly when it is "perform[ed] or display[ed] . . . 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 . . ." ²⁰ The plaintiffs claim that the defendants' actions constituted public performance or display of their copyrighted work.²¹ Since the plaintiffs did not license the defendants to "publicly perform or display" the transmissions, the plaintiffs claim that the public display or performance infringed their copyrights in the transmissions.²² On this basis, they seek injunctive relief.

been a fixation. If the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same: the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5665 [hereinafter H.R. REP. NO. 1476].

18. 17 U.S.C. § 101 (1982), set forth *supra* in text accompanying note 15.

19. 17 U.S.C. § 106(4)-(5) (1982).

20. 17 U.S.C. § 101 (1982).

21. Plaintiffs' Brief, *supra* note 11, at 13. In showing the transmissions to the public in their establishments, the defendants used allegedly all or substantial portions of the copyrighted programs. *Id.*

22. *Id.* The NFL has contracted with the major networks—ABC, CBS, NBC, and ESPN—to provide for the telecasting of their games. *Id.* at 5.

By these contracts, each network obtained exclusive rights to televise certain NFL games, subject to contractual limitations, among them the requirement that . . . games [not sold out by 72 hours before game time] are not to be broadcast live; that is, that they be blacked-out in the home club's home territory which is the area within a 75-mile radius of the club's home playing site.

National Football League v. McBee & Bruno's, Inc., 621 F. Supp. 880, 883 (E.D. Mo. 1985), *aff'd*, 792 F.2d 726 (8th Cir. 1986). "Among the purposes of these contract provisions are protection of live gate attendance, protection of ticket sales and associated revenues, prevention of oversaturation of the television viewing market, and approximate equalization of the club's television exposure." Plaintiff's Brief, *supra* note 11, at 6. The NFL relies on an exemption from the antitrust laws in refusing to allow a local station to carry a given game. *See infra* note 64.

The defendants do not challenge the plaintiffs' assertion that plaintiffs' transmissions are a copyrighted work. Instead, the defendants claim that their display of the blacked out games, because they receive the games via satellite dish, is permitted as it falls into the category of non-infringing acts under section 110(5) of the Copyright Act.²³ Section 110(5) provides that, despite the provisions of section 106, the "communication 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" is not an infringement of a copyright.²⁴ Section 110(5) commonly is referred to as the public or common use exemption because it allows technology which is commonly used in private homes to be used in a commercial establishment without penalty under the copyright law.²⁵ The legislative history of the Copyright Act indicates that the purpose of Section 110(5) "is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use."²⁶ The defendants argue that a satellite dish is a receiving apparatus which is commonly found in the home.

The plaintiffs directly refute this contention. They urge that, unlike receiving devices such as the television and radio, satellite dishes are not *commonly* used in private homes.²⁷ The plaintiffs basically argue that the receiving apparatus that picks up the transmission is the satellite dish rather than the television and since satellite dishes are not commonly used in private homes, section 110(5), by its plain language, does not apply.

In the past, courts have agreed with plaintiffs who argued that satellite dishes are not commonly found in private homes. For example, in *National Football League v. McBee & Bruno's, Inc.*,²⁸ the United States District Court for the Eastern District of Missouri rejected this argument, finding that satellite dishes were outside the section 110(5) exemption because they were outnumbered by television sets in this country by more than 100 to one.²⁹

23. Memorandum In Opposition To Plaintiffs' Request For Temporary Restraining Order and Preliminary Injunction at 6, *National Football League v. Beachland Ventures, Inc.*, Civ. No. 89-2311 (S.D. Fla. served Oct. 20, 1989) [hereinafter Defendants' Memorandum].

24. 17 U.S.C. § 110(5) (1982).

25. Defendants' Memorandum, *supra* note 23, at 4.

26. H.R. REP. No. 1476, *supra* note 17, at 5700.

27. Plaintiffs' Brief, *supra* note 11, at 13.

28. 621 F. Supp. 880 (E.D. Mo. 1985), *aff'd*, 792 F.2d 726 (8th Cir. 1986).

29. *McBee*, 621 F. Supp. at 887. The Eighth Circuit held that this determination was

The *Beachland* defendants have noted the *McBee* findings. However, they point out that the Eighth Circuit in *McBee* left open the possibility that these satellite dishes might *someday* be commonplace.³⁰ Given that possibility, the *Beachland* defendants argue that, while there were only one million satellite dishes in use at the time of the *McBee* decision in 1985, today there are more than 2.5 million dishes in the United States.³¹ The defendants go on to point out that dish systems are more readily available to the general public: satellite dish systems now cost between \$1,499 and \$2,500 and, in fact, many systems can be financed for as little as \$41.00 per month,³² a cost similar to that of cable television services.³³ Armed with these updated statistics, the defendants have attempted to frame an argument to show "it is clear that satellite dishes are commonly found in homes and thus the reception of 'blacked out' games by the Defendants falls within the [section 110(5)] home use exemption."³⁴

Essentially, in order to be entitled to an injunction, the plaintiffs must demonstrate that they will be irreparably harmed if the court does not enter the injunction.³⁵ In the copyright context,

not clearly erroneous. 792 F.2d at 731. Yet, this comparison is illogical. At the simplest level, both television sets and satellite dishes are receiving devices, but the similarity for purposes of this analysis ends with this fact. Many homes in the United States are multiple-television set homes, as defendants are expected to show at trial. On the other hand, one satellite dish can feed any number of television sets within a home (or an apartment complex), so only one is needed per home. See Testimony of Charles Blankenship, owner of GIC, Inc. (a satellite retailer) at Hearing on Plaintiffs' Application for Temporary Restraining Order and Preliminary and Permanent Injunction, *National Football League v. Beachland Ventures, Inc.*, Civ. No. 89-2311 (S.D. Fla. held Oct. 20, 1989). Therefore, a comparison based on sheer number of devices in use in American homes is drawn too broadly. A far more appropriate comparison would examine the number of homes with satellite dishes and the number of homes with cable converters, for, like a satellite dish, one cable hook-up can serve any number of television sets within a given home.

30. *McBee*, 792 F.2d at 731.

31. Defendants' Memorandum, *supra* note 23, at 6.

32. *Id.*

33. Testimony of Charles Blankenship, *supra* note 29.

34. Defendants' Memorandum, *supra* note 23, at 6. As Judge Hoeveler granted the temporary restraining order, it appears that he believes that the circumstances have not changed substantially. Moreover, as the standard of review applicable to his determination will be whether his findings were clearly erroneous, it is unlikely that this determination will be overturned at this stage of the proceedings.

35. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In order to obtain a preliminary injunction, a party first must satisfy four prerequisites:

- 1) a substantial likelihood that he will ultimately prevail on the merits; 2) that he will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and 4) that the injunction, if issued, would not be adverse to the public interest.

where the intended use of copyrighted material is for a commercial purpose, the likelihood of future harm is presumed.³⁶ The defendants concede as much.³⁷ However, the defendants claim that the presumption of irreparable harm is rebuttable and ultimately can be overcome.³⁸ To illustrate their purported ability to rebut the presumption, the defendants in *Beachland* produced affidavits of bar patrons attesting that even if the bar did not show the game, the patrons still would not attend the game in the stadium.³⁹ In essence, the defendants argue that the patrons would not have attended the game irrespective of whether it was broadcast in the defendants' establishments. Further, they argue that there is simply no link between the defendant establishments' increased revenues when showing blacked out games, and an increase in the plaintiffs' profits when blacked out games are not shown.⁴⁰ The plaintiffs' response, akin to that of the plaintiffs' in *McBee*, would be simple: more persons attend the games if there is no television showing available; further, a full stadium translates into greater

United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983) (citation omitted). This Article addresses the copyright issue only in terms of the first two requirements. In addition to their denying that the plaintiffs incurred irreparable injury, the defendants sought to attack the plaintiffs' prediction of success on the merits. The defendants argued that the plaintiffs cannot succeed on the merits because changed circumstances have validated the argument that the display of the NFL games picked up on the satellite dishes fits into the common use exemption embodied in section 110(5) of the Copyright Act. Defendants' Memorandum, *supra* note 23, at 3-6. The defendants, however, also claim that the plaintiffs are unable to meet their burdens on the third and fourth requirements. Defendants' Memorandum, *supra* note 23, at 8-9.

36. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984).

37. Defendants' Memorandum, *supra* note 23, at 7.

38. *Id.*

39. *Id.* See also *id.* at Appendix. Cf. National Football League v. McBee's & Bruno's, Inc., 792 F.2d 726, 729 n.5 (8th Cir. 1986) (An owner of one of the establishments testified that when a blacked out game was shown he served 190 patrons, as opposed to a mere 30 customers on a regular Sunday.) However, the mere fact that an individual comes to a bar to watch a game does not mean he would go to the stadium were the TV feed not available. With no empirical proof, it is still an open question as to whether the inability to publicly watch blacked out games via satellite dishes will stimulate stadium attendance.

40. Defendants' Memorandum, *supra* note 23, at 8-9. Because the result of Judge Hoevler's order is that the blacked out games are not going to be shown in the bars, it now will be possible to determine whether the blackout enforcement actually will affect attendance at the remaining Dolphin home games. Evidence that there is little or no resultant effect will go a long way toward proving defendants' contention that there is no irreparable harm to the Dolphins and the NFL.

On the other hand, it is questionable whether the defendants will be allowed to challenge this presumption at all, for the antitrust exemption from which the right to black out games flows, see *infra* note 64, is based on the underlying presumption that gate attendance is affected by a blackout. The district court is going to have to make a determination as to what extent this antitrust presumption is properly imported into the copyright infringement calculus.

ticket sales and a more exciting—and therefore more marketable—television entertainment program.⁴¹

PLAINTIFFS' TELECOMMUNICATION CLAIMS AND THE PUBLIC USE DEFENSE

None of the defendants in *Beachland* are licensed by the NFL or the Miami Dolphins to receive the broadcast of any blacked out NFL game.⁴² In addition to their copyright allegations, the plaintiffs claim that the defendants, by use of satellite dish antennae or "earth stations," are intercepting their satellite transmission in violation of section 605 of the Federal Communications Act⁴³ and that the plaintiffs, therefore, are entitled to injunctive relief and damages.⁴⁴ Section 605(a) provides in part:

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the . . . contents [or] substance . . . of such intercepted communication to any person. No person not being entitled thereto shall receive . . . any communication . . . and use such communication . . . for his own benefit or for the benefit of another . . .⁴⁵

The Federal Communications Commission considers the plaintiffs' satellite transmissions to fall within the ambit of "radio communications" for the purpose of this section.⁴⁶

The plaintiffs argue that the defendants' interception of the broadcast and their display of the games to their patrons constitutes unauthorized interception and receipt of private communications in violation of section 605(a).⁴⁷ They allege that the communications are private transmissions to broadcast affiliates and are

41. *National Football League v. McBee & Bruno's, Inc.*, 621 F. Supp. 880, 888 (E.D. Mo. 1985), *aff'd*, 792 F.2d 726 (8th Cir. 1986). The Eighth Circuit held this finding was not clearly erroneous. 792 F.2d at 730.

42. Plaintiffs' Brief, *supra* note 11, at 10-13.

43. 47 U.S.C. § 605 (Supp. IV 1986).

44. Plaintiffs' Brief, *supra* note 11, at 16; Temporary Restraining Order, *supra* note 7, at 2-3. 47 U.S.C. § 605 (Supp IV 1986) allows aggrieved parties to recover damages. *See infra* note 66 and accompanying text.

45. 47 U.S.C. § 605(a) (Supp. IV 1986).

46. *National Football League v. Alley, Inc.*, 624 F. Supp. 6, 9 (S.D. Fla. 1983) (citing *In the Matter of Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 F.C.C.2d 205, 216 (1979)).

47. Plaintiffs' Brief, *supra* note 11, at 10-13. Plaintiffs anchor their claim of standing to sue in § 605(e)(3)(A), which provides, "any person aggrieved by any violation of subsection (a) of this section . . . may bring a civil action." 47 U.S.C. § 605(e)(3)(A) (Supp. IV 1986). *See also Alley*, 624 F. Supp. at 9-10.

not intended for the general public.⁴⁸ The defendants disagree vehemently, citing as evidence of the intent of a public transmission the fact that if the plaintiffs intended for their transmissions to be private, they would have encrypted them so that they could not be received by the public.⁴⁹ If the transmissions are found to be pub-

48. Plaintiffs' Brief, *supra* note 11, at 8.

49. Defendants' Memorandum, *supra* note 23, at 5. Indeed, at first blush 47 U.S.C. § 605(b) seems to lend support to this contention because it specifically exempts from liability under § 605(a) any individual who receives any satellite cable programming for private viewing if the program involved is not encrypted. However, broadcasters intending private communications are under no statutory duty to encrypt their transmissions; rather, the statute *allows* them to encrypt their transmissions for their own protection. *See* 47 U.S.C. § 605(b)(1) (Supp. IV 1986).

Still, it is important to note that the defendants' fallback argument, in the event that they cannot prove the transmissions were public communications, lies within § 605(b). Section 605(b) is applicable only where the intercepted private transmission is not encrypted and where there is no marketing system established under which the individual may obtain authorization from the transmitter or its agent. Defendants may have an uphill battle to prove that there is no licensing system available by which they can obtain a license to receive the NFL games. *But see* Letter to the Editor, Miami Herald, Oct. 30, 1989, at 14A, col. 3. Rebecca Gautier, General Manager of defendant Sports Page Lounge states that "the NFL will not permit the bars and restaurants involved to negotiate fairly with it." *Id.* at col. 4. (This leaves aside any question of whether this license would allow the defendants to *display* the games, which seems much more a matter of copyright law. *See supra* notes 11-41 and accompanying text.)

If the defendants are successful in showing the § 605(b) exemption, they also will be helped by the fact that some of the defendants did not *intercept* satellite cable transmissions within the meaning of 605(b). Rather, the broadcasts were shown on stations that were *provided* to defendants such as the Sports Page Lounge through the satellite subscription service to which they subscribed. *See infra* text accompanying notes 61-65. This places defendants squarely within the ambit of the policy goals of the Cable Communications Policy Act (CCPA), Pub. L. No. 98-549, 98 Stat. 2779 (1984), the legislation that created § 605(b). Section 605(b) functions as much to define ways in which the cable industry can protect itself from piracy as it functions as a private use exception. *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 684 F. Supp. 1138, 1140-41 (D. Mass. 1988) (quoting Statement of Senator Packwood, Chairman of the Committee on Commerce, Science, and Transportation, on the House Amendment to S. 66, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4742, 4745-46). The *Quincy* court set forth a painstaking analysis of the legislative history of the CCPA:

[W]hen Congress passed the . . . Act, it was concerned about theft of cable service. . . . The [Committee] report goes on to state that this loss [of revenues due to theft] poses a major threat to the economic viability of cable operators and programmers, and creates unfair burdens on cable subscribers who are forced to subsidize those who are getting the service for free. In passing the CCPA, then, Congress established the policy that only those who are authorized [should] receive cable service. . . . Moreover, the Committee Report also recognizes that unauthorized interception of cable programming significantly injures the cable programmers and operators, and the paying subscribers.

Quincy Cablesystems, 684 F. Supp. at 1143. Clearly, the intent of § 605(b) is to avoid a free rider problem. If the court does not find that the transmissions were public, defendants such as Sports Page Lounge have a ready argument that will help to justify their receipt of the private signal under § 605(b): they have *paid* for their satellite service, so the policy of the

lic, defendants would be able to rely on the public broadcast exemption of section 605(a), which provides: "This section shall not apply to the receiving . . . [of] the contents of any radio communication which is transmitted by any station for the use of the general public"50

The case law discussing section 605 in this context would seem clearly to support the plaintiffs' contention that the transmissions are private. In *Quincy Cable Systems, Inc. v. Sully's Bar, Inc.*,⁵¹ plaintiffs Quincy Cablesystems (QCS) and New England Sports Network (NESN) won a summary judgment under section 605⁵² against three Quincy, Massachusetts bars that intercepted, by dish antennae, signals sent by NESN to QCS for transmission to QCS's cable subscribers.⁵³ The court explained that the test under section 605 is appropriately "not whether the content of the program has mass appeal or mass availability but rather, whether it was *intended* for the use of the general public."⁵⁴ NESN intended its transmission to be received only by QCS.⁵⁵

In a case in the Southern District of Florida, *National Football League v. Alley, Inc.*,⁵⁶ United States District Judge Kehoe enjoined several Miami and Palm Beach County bars and restaurants from receiving and displaying Miami Dolphins' and other NFL games.⁵⁷ Judge Kehoe presumed the intent issue; he did not specify precisely which transmissions the defendants had intercepted, but it appears to have been either the televising networks' transmission of the line feed from the stadium to its New York studios (called the clean feed) or the feed from New York containing spliced-in commercials (called the dirty feed) to network affli-

statute has not been offended. However, the policy might be offended if the satellite subscription service itself was not paying for what was a private transmission. Again, this begs the question: was the subscription service receiving a signal which was intended for public or private use?

50. 47 U.S.C. § 605(a) (Supp. IV 1986).

51. 684 F. Supp. 1138 (D. Mass. 1988).

52. *Id.* at 1141.

53. *Id.* at 1139.

54. *Id.* at 1140 (quoting *Movie Systems, Inc. v. Heller*, 710 F.2d 492, 494 (8th Cir. 1983)) (emphasis in original).

55. *Id.* Under § 605, the focus is upon the transmitter's intent for the actual transmission intercepted, not its ultimate destination (which normally would be the general public). Even if the analysis focused on ultimate destination, the result in *Quincy* would have been the same, for "[t]he plaintiffs [in *Quincy*] are in the business of providing programming to paying customers, not to the general public." *Id.*

56. 624 F. Supp. 6 (S.D. Fla. 1983).

57. *Id.* at 11.

ates.⁵⁸ The court concluded, "Defendants' interception, divulgence [sic] and use of *private* satellite communications for their own benefit by public showings in their places of business violated plaintiffs' rights under Section 605"⁵⁹

Although the defendants in *Beachland*⁶⁰ presently have not asserted as much, it is clear that *Quincy* and *Alley* are distinguishable on their facts and *Beachland*, in fact, raises what appears to be a novel question of law. At least one defendant here, the Sports Page Lounge, did not intercept a network-to-affiliate or affiliate-to-cable system transmission. Rather, the Sports Page Lounge received the October 8, 1989, Miami Dolphins-Cleveland Browns game from *WXIA*, an Atlanta-based *television station*, by way of PRIMETIME 24, a satellite subscription service.⁶¹ This is significant for the following reason: *WXIA* was broadcasting the game to metro-Atlanta area residents by normal television means.⁶² The public use exception of section 605(a) states that one is not liable under this section when one receives "the contents of any radio communication which is transmitted by *any station* for the use of the *general public*."⁶³ *WXIA* was a station transmitting its signal⁶⁴

58. For an excellent discussion of the technology involved in broadcasting a live sports competition, see *National Football League v. McBee & Bruno's, Inc.*, 621 F. Supp. 880, 883-84 (E.D. Mo. 1985), *aff'd*, 792 F.2d 726 (8th Cir. 1986).

59. *Alley*, 624 F. Supp at 10-11 (emphasis added). The court made much of the fact that the transmissions occurred over the C band frequency, 3700-4200 MHz, which cannot be received without the use of a dish antenna. *Id.* at 9, 10. According to the court, the C band is to be used only for point-to-point transmissions, not *broadcasts*. *Id.* at 10 (citing *In the Matter of Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 F.C.C.2d 205, 216 (1979)); 47 C.F.R. § 2.106 (1987)). The court apparently would find that any interception of a C-band transmission is *per se* a violation of § 605. Even so, *Beachland* presents a wholly different situation, at least with respect to defendant Sports Page Lounge. The telecast that Sports Page received was the *public telecast* of the game to metro-Atlanta area residents by television station *WXIA*, so Sports Page *did* receive a *broadcast*. See *infra* notes 61-65 and accompanying text.

60. *National Football League v. Beachland Ventures, Inc.*, Civ. No. 89-2311 (S.D. Fla. filed Oct. 17, 1989).

61. Defendants' Memorandum, *supra* note 23, at Appendix (affidavit of defendant Frank Ambrose, owner of the Sports Page Lounge).

62. Telephone Interview with Jack Lease, employee of *WXIA* (October 30, 1989).

63. 47 U.S.C. § 605(a) (Supp. IV 1986) (emphasis added).

64. An issue likely to arise at trial is what properly is the focus of the court's broadcast signal analysis in this context. One Eleventh Circuit case seems to hold clearly that the question is not whether a station may *originate* the television signal of a blacked out game *within* the blackout territory, but whether the station may *send* the signal of the game *into* the blackout area when it has the right to show the game in the non-blackout territory. *WTWV, Inc. v. National Football League*, 678 F.2d 142 (11th Cir. 1982). The *WTWV* court also held that, in fact, the NFL can prevent a station from sending a signal into the blackout territory. *Id.* at 146.

On the other hand, defendants in *Beachland* are likely to point to the Eighth Circuit's

for the use of the general public. Further, the traditional intent

opinion in *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986), which affirms the dismissal of the NFL's complaint against Sandrina's, a St. Louis area bar that received blacked out St. Louis Cardinals games by regular television broadcast from a station located outside the blackout territory. The *McBee* court held that the defendant bar had not "done anything that even arguably violates the Communications Act . . ." *Id.* at 733. *WTWV*, then, certainly would support an action against PRIMETIME 24, for PRIMETIME 24 was the agent sending a signal into the blackout territory. But it is of questionable application to *Beachland*, at least with respect to defendant Sports Page Lounge, for Sports Page Lounge is much more like Sandrina's even though Sandrina's did not use a dish to receive the game. *See McBee*, 792 F.2d at 728 n.3. In *Beachland*, the NFL seeks to enjoin not the broadcast of its game but rather the receipt of its game by a bar owner receiving it from an out-of-town television station (WXIA).

In working through these cases that seem to point it in different directions, the District Court in *Beachland* may well be drawn to examine the underlying rationale for allowing the NFL to black out its games; its origin lies in an exemption to the antitrust laws that the Congress carved out specifically for telecasts of professional sporting events. *See* 15 U.S.C. § 1292 (1988). A thorough analysis of the subject could lead to startling conclusions, particularly in light of the fact that Judge Hoeveler's temporary restraining order prohibits defendants from receiving *all* games that are blacked out in the cities in which they are being played, no matter how far away from defendants those cities may be, not simply Dolphins' games blacked out at home. *See Temporary Restraining Order, supra* note 7.

The NFL draws its antitrust exemption from Title 15, United States Code sections 1291 and 1292. Careful examination of § 1292 reveals that it is poorly drafted and offers little guidance in dealing with the admittedly complex question of whether a satellite dish user can pull into the black out territory a broadcast from an area in which the game is not blacked out without liability to its operator. This question differs from the typical questions raised under section 1292 because, normally, under section 1292, the party looking to the antitrust laws for remedy is a broadcaster challenging the NFL's right to refuse to allow the broadcaster to carry the blacked out game. Section 1292 insulates the NFL from this type of claim, but seems to have no ready answer as to suits in contexts other than this narrow one, specifically suits involving persons receiving the blacked out telecasts. The exemption was designed to encourage gate attendance at professional sporting events, in recognition that this would benefit the sports leagues, and therefore the public. The black out rule provides that a given game may be blacked out in the area consisting of a seventy-five mile radius from the event site if the game tickets have not been sold out seventy-two hours before kickoff. The defendants are likely to muster a strong challenge to the validity of this premise at trial. Assuming *arguendo* that this actually does have an effect on the gate receipts, there is *no logical reason* for section 1292 to prevent the viewing in Miami of a game that, for example, arises in Seattle and is blacked out *in Seattle* in an attempt to draw Seattle-area fans. Yet, Judge Hoeveler's decision enjoins the defendants' reception of *all* NFL games, regardless of city of origin. *Cf. National Football League v. McBee & Bruno's, Inc.*, 621 F. Supp. 880, 891-92 (E.D. Mo. 1985), *aff'd*, 792 F.2d 726 (8th Cir. 1986); *National Football League v. Alley, Inc.*, 624 F. Supp. 6, 10-11 (S.D. Fla. 1983) (district courts' orders enjoin the defendant bar owners from receiving *all* NFL games via satellite dish although the bodies of the opinions discuss only the receipt of locally blacked out games); Letter to the Editor, *supra* note 49, at col. 3 ("What harm [can] possibly come to the NFL if local bar owners decide to show another game than the games on our local TV sets?"). In essence, the statute's utter lack of limits to define the appropriate scope of the exemption has caused the courts to allow plaintiffs to use as a sword that which was intended as a shield.

As a final comment on the subject, it is worthy of note that an order so broad can lead to other absurd results. By its terms, the order prevents defendants from receiving by satellite from another city any game which is blacked out in the defendant's home city. This

test of section 605 has been satisfied because *WXIA did intend* the general public to receive its transmission. Its broadcast of the Dolphins-Browns game should be considered not a private transmission but rather a public use exception transmission. Therefore, defendant Sports Page Lounge's receipt of the game was not violative of section 605.⁶⁵

This factual distinction also will be relevant to defendants' arguments to avoid liability for damages under section 605⁶⁶ by showing that plaintiffs suffer no actual harm from defendants' interception of the broadcast signal: if the broadcast already was public, no damage resulted.

CONCLUSION

National Football League v. Beachland Ventures, Inc. has the potential to be one of the most important decisions to date involving the NFL's black out rule. The defendants, seizing on language in the Eighth Circuit's opinion in *National Football League v. McBee & Bruno's, Inc.*, argue that satellite dishes have become receiving apparatuses of a kind commonly found in the home, and that, as such, their reception and display of the blacked out games does not infringe the plaintiffs' copyright. In essence, the defendants argue that the receipt by satellite dish puts the use within the "common use" exception embodied in section 110(5) of the Copyright Act of 1976. The plaintiffs argue that, as the circumstances have not changed substantially since *McBee*, satellite dishes are still not sufficiently common-place to meet section 110(5)'s exception. The resolution of this issue cannot be predicted but it appears that the

leads to a logical result and faithfully executes the intent of § 1292 when the recipient himself is located within the blackout territory. But what of the circumstance where the recipient is located thousands of miles away from the blackout territory and a *local television station* in his area is carrying the game. The broad brush of the order would force a defendant who wishes to see the game to watch it on his local station or not at all—even if for some reason he prefers to watch it on a non-local station (for example, he wishes to hear the station's news briefs in another city). It will be up to the court to decide whether such a result is tolerable.

65. This does not, however, answer whether it was violative of plaintiffs' copyrights. See *supra* notes 11-41 and accompanying text.

66. Section 605(e) sets forth the relief that the court may grant, which includes: injunctions [(e)(3)(B)(i)], costs and attorneys' fees [(e)(3)(B)(iii)], and damages [(e)(3)(B)(ii)]. Damages are determined under § 605 (e)(3)(C) and may involve the aggrieved party's actual damages [(e)(3)(C)(i)(I)], or a statutory damage remedy between \$1000 and \$10,000, with the actual amount awarded at the judge's discretion [(e)(3)(C)(i)(II)]. In addition, if the violation was willful and committed for the purpose of direct or indirect commercial advantage, the court may add to the damages an award not to exceed \$100,000 per infringement. 47 U.S.C. § 605 (e)(3)(C)(ii) (Supp. IV 1986).

plaintiffs may have the upper hand in this argument.

Should they decide to argue it, the defendants might raise a novel question of law with respect to the plaintiffs' claim under section 605 of the Federal Communications Act. Defendant Sports Page Lounge arguably received a blacked out game when the game already was a public transmission. For this reason, *Beachland*, at least with respect to Sports Page Lounge, is distinguishable from the cases which preceded it, for in all other cases, the defendants clearly intercepted a *private* transmission. As a result of this factual distinction, the court may have to premise any finding of liability in *Beachland* on copyright grounds alone.