

NFL Broadcasts and the "Home System" Defense of the Federal Copyright Act

*John T. Wolohan
Iowa State University
Ames, Iowa*

■ INTRODUCTION

In April, 1994, Commissioner Paul Tagliabue and the National Football League (NFL) announced that they had developed a new television plan. The new plan, known as "NFL Sunday Ticket," will allow bars and private homes with satellite dishes to purchase a decoder to receive scrambled NFL television signals (Forbes, 1994). The benefits and value of the plan to satellite owners are limited however, since the NFL's plan will still black-out home games within the "home territory" if the game is not sold out 72 hours before kick off.

The NFL argues that it is justified in blacking-out local games because it has exclusive ownership in the copyrights to all NFL games under the 1976 Copyright Act. This article examines the NFL's continued reliance on federal copyright law to prevent the local broadcast of locally blacked-out games and whether such reliance is still justified. The article begins by reviewing the legal history behind the NFL's black-out policy, the reasons for the policy's enactment, and the policy's terms and coverage. Next, this article reviews three legal challenges to the NFL black-out rule where the defendants employed § 110(5) of the 1976 Copyright Act, the "home system" exemption. Two of the cases examine the applicability of § 110(5) to satellite dishes, while the last, and most recent case, examines the applicability of § 110(5) to outdoor antennas. Finally, the article concludes by looking at the future potential effect § 110(5), the "home system" exemption, could have on the of the NFL's black-out policy.

■ THE HISTORY OF THE NFL'S BLACK OUT POLICY

The NFL black-out policy, which has been attacked regularly almost since its inception, has changed over the years to accommodate both market realities and political pressures (Roberts, 1987). Yet despite strong public and political opposition to the NFL black-out policy, the courts and Congress have consistently recognized the NFL's right to impose black-outs in certain geographic areas (Roberts, 1987).

In the early years of the NFL, each team sold the television rights to its games individually. In order to assist smaller market teams, the league's by-laws provided that no team "shall cause or permit a game in which it is engaged to be telecast or broadcast by a station within 75 miles of another league city on the day that the home team of the other city is either playing a game in its home city or is playing away from home and broadcasting" the game back into the territory of the home team (*United States v. NFL, 1953*). The NFL's by-laws define "home territory" as "the surrounding territory to the extent of seventy-five miles in every direction" from the city limits of the club's franchise city" (*United States v. NFL, 1953*).

In 1953, because the NFL's policy restricted the number of NFL games shown on local television, the United States Justice Department in *United States v. National Football League* challenged the black-out policy as a violation of section 1 of the Sherman Act. The League argued that there were two purposes behind the black-out rule. First, the policy encouraged attendance at NFL games and prevented televised games from competing with the home team's ticket sales and profits (*United States v. NFL, 1953*). Second, the NFL argued that the policy protected weaker teams from financial failure and ensured that the League would stay competitive (*United States v. NFL, 1953*).

Judge Grim, the District Court Judge, in his holding both agreed and disagreed with the NFL. Using a rule of reason analysis, Judge Grim held that since the televised game would be competing with the home team's ticket sales and profits the league had a valid reason restricting telecasts of outside NFL games into the home territories of other teams on days when the other teams were playing at home (*United States v. NFL, 1953*). However, Judge Grim found that when a club plays on the road any and all restrictions on broadcasts of other NFL games within the home territory are unreasonable and illegal since the televised game would not be competing with the home team's ticket sales and profits (*United States v. NFL, 1953*). Thus, although Judge Grim's decision restricted the scope of the NFL's black-out policy, the black-out policy had survived and was still in effect.

In 1960, the NFL faced its next major challenge, the formation of the American Football League (AFL) (Neft & Cohen, 1991). One of the first moves by the AFL was to negotiate a four year television contract with ABC for \$1.7 million per year (Neft, & Cohen, 1991). The new contract, thereby, provided each team in the league with an extra \$150,000 in television revenue to assist them in bidding against NFL teams for top college athletes (Neft & Cohen, 1991). The AFL's deal was unique in that for the first time an entire professional sports league pooled its television rights and sold them to a single network.

At the same time, NFL teams were still individually selling the television rights of their games which allowed teams from large television markets to quickly gain a financial advantage over those clubs in small television markets. Faced with growing competition from the AFL and the increasing importance of television revenues, the NFL, in an attempt to alleviate the financial problem facing smaller market teams and to help teams stay competitive, entered into a contract with CBS for the television rights of the entire league. The NFL, however, faced one problem. Since the NFL's new agreement with CBS restricted competition among the teams, there was a possibility that it violated Judge Grim's 1953 decision in *United States*

v. *NFL* and would therefore be void. Seeking an interpretation of his earlier decision, the NFL petitioned Judge Grim, who found that the contract violated his earlier decision and barred the NFL from entering into the agreement. (*United States v. NFL*, 1961).

Barred by the court from entering into the agreement and believing that the NFL was at a competitive disadvantage, Commissioner Pete Rozelle, approached Congress seeking special legislation which would allow the league to pool its members' television rights (Roberts, 1987). After hearing from Commissioner Rozelle and the heads of the other professional sports leagues, Congress passed the Sports Broadcast Act of 1961. The Act allows the NFL, and the other professional sports leagues, to pool and sell the league's television rights as a package (15 U.S.C. § 1291). The Act also codified Judge Grim's earlier decision and restricts the ability of the leagues to define the geographical area into which the pooled telecasts may be broadcast (15 U.S.C. § 1291). The Act therefore forced NFL teams to allow televised NFL games into the home area when the team was on the road, thereby competing with the home team's local television audience (15 U.S.C. § 1291). The Act, however, still allowed the NFL to black-out all games within the home territory of a team playing a game at home that day (Roberts, 1987).

The NFL's black-out policy would undergo two more major changes before reaching its current stage. First, in 1965, the NFL on an experimental basis, lifted the total ban on NFL games within the home territory on days the home team was playing at home. The new policy allowed CBS to televise one NFL game per week into the home team's market, thereby allowing for the first time, football fans in the local market an opportunity to watch NFL games in direct competition with the home team's ticket sales (Roberts, 1987). The NFL allowed CBS the right to televise the games, even though it might diminish ticket sales to home games because the increased television fees paid by CBS would more than offset any loss the teams felt in ticket sales (Roberts, 1987). Allowing the game to be televised locally was also important in the NFL's continuing competition with the AFL. The AFL allowed one game per week to be shown in each market; therefore, if the NFL was to keep their fans interested and not watching AFL games, it was forced to lift its total black-out policy (Roberts, 1987). The policy was permanently adopted in 1966 when the AFL and NFL merged into one league.

The last major change in the NFL's black-out policy occurred in 1972, when the NFL made the mistake of enforcing its black-out policy during a Washington Redskins play-off game, even though the game was sold out well in advance of the game (Roberts, 1987). By the beginning of the next football season, members of Congress, upset that they could not obtain tickets or see the game on local television, filed and passed legislation requiring the NFL to televise all home games within the blacked-out area if the games were sold out 72 hours before the game (47 U.S.C. § 331). Congress enacted the legislation for a three year test period, during which time it was to be determined whether the new legislation hurt the home team's attendance (47 U.S.C. § 331). In 1976, with Congress ready to reenact the legislation on a permanent basis, the NFL voluntarily agreed to televise games in the home territory, if the game was sold out 72 hours before the game (Roberts, 1987). The NFL is still following this voluntary policy today.

■ CASE HISTORY: SECTION 110(5) AND THE NFL'S BLACK OUT RULE

Satellite Dishes

In 1976, two events occurred that would have a profound impact on the NFL and its network television partners. The two events, while impacting upon each other, both came about independently of each other. The first event was the passage of the Copyright Act of 1976. The new Copyright Act "broadened its scope" of copyright protection to include a variety of works, including "motion pictures and other audiovisual works," not previously subject to copyright protection. (17 U.S.C. §102(a)). A live broadcast of a football game would be protected if fixation (e.g., a videotape) was being made simultaneously with the transmission (17 U.S.C. §110)

The second event was the building of the first "home earth station" or home satellite dish (DuBoff, 1987). This new invention, which was not even thought of when Congress passed the Copyright Act of 1976, allows the user to receive television signals directly from communication satellites, thereby avoiding network imposed black-outs (DuBoff, 1987).

While the NFL has been unable or unwilling to stop individuals who intercepted locally blacked out games until it introduced the "NFL Sunday Ticket" plan, the NFL has brought more than one dozen cases to prevent bars and restaurants from showing locally blacked-out football games (see index for a complete list of cases). Without exception, the courts have confirmed that the broadcasts are the property of the NFL, and that the NFL has a valid legal right to impose local black-outs. The following three cases perhaps best demonstrate the court's position concerning the broadcasting of locally blacked-out NFL games. The three cases also provide an in-depth analysis of the effect § 110(5) of the 1976 Copyright Act, the "home system" exemption, could have on NFL's black-out policy.

The first case, and the only one to reach the appellate level, is *NFL v. McBee & Bruno's*. (621 F. Supp. 880 (E.D. Mo. 1985), aff'd, 792 F.2d 726 (8th Cir. 1986)). In *McBee*, the NFL and the St. Louis Cardinals argued that the defendants, the owners of several St. Louis restaurants and bars within 75 miles of St. Louis, infringed on their copyright by showing locally blacked out Cardinals' home games within the St. Louis area. The defendants, all of whom owned satellite dishes, used their satellite dishes to pick up the "clean feed" of the Cardinals' home games and showed the blacked out games within the St. Louis territory.

The "clean feed" referred to in *McBee* is the satellite signal of the game transmitted from the "an earth station outside the stadium ... to network headquarters" via a communication satellite (*McBee, 1986*). It is called a clean feed because the signal contains no commercials or commentary from network control or individual local stations. Once the signal is received by network headquarters in New York, "commercials and other interruptions, such as station breaks," are added, and the signal, the "dirty feed," is then sent to each affiliate that is televising that particular game. It is this dirty feed that is registered and recorded with the copyright office.

In response to the lawsuit filed by the NFL and the St. Louis Cardinals, the defendants in *McBee* presented the following four arguments: 1) the NFL and the Cardinals had failed to show any harm or irreparable injury, which they say is necessary to justify a permanent injunction under copyright law; 2) the defendants' display of the blacked-out games fell into the category of non-infringing act under § 110(5) of the 1976 Copyright Act; 3) since the defendants intercepted the clean feed, and it was the dirty feed which was "fixed" under the Act, no infringement could have taken place; and 4) under 17 U.S.C. § 411, no action for infringement could be taken until the work had been registered (*McBee*, 1986).

Since the purpose of this article is to examine the effect of § 110(5) on the NFL's black-out policy, this article will only review the defendants' second, and best argument, that their display of the blacked out games fell into the category of non-infringing act under § 110(5). Section 110(5) provides that:

"Notwithstanding the provisions of section 106 [exclusive rights in copyrighted works], the following are not infringements of copyright: (5) 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, unless -(A) a direct charge is made to see or hear the transmission; or (B) the transmission thus received is further transmitted to the public" 17 U.S.C. § 110(5).

The defendants argued that the legislative intent behind §110(5) was to "exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment" (*McBee*, 1986). In rejecting the defendants' argument, the court held that the question in the case was "how likely the average patron who watches a blacked out Cardinals game at one of the defendant restaurants is to have the ability to watch the same game at home" (*McBee*, 1986). If the answer was that it was likely that the average patron could watch the same game at home, then satellite dishes would be an apparatus of a kind commonly used in private homes and §110(5) would apply (*McBee*, 1986).

Using this test, the court found that since "there were less than 1,000,000 satellite dishes, many of which were for commercial establishments," and the average price of a dish system was around \$3,000.00, satellite dishes were not "commonly found in private homes" (*McBee*, 1986). The court reached this conclusion even though the defendants were able to show that between 1980, when residential satellite systems first came on the market, and 1986, the total number of home satellite dishes had increased from approximately 4,000 to one million. (*McBee*, 1985).

The NFL's victory however was not complete. Instead of settling the issue, the court left open the possibility that some day satellite dishes would be covered under section 110(5), when it concluded by making the point that "the number of such receivers (satellite dishes) has been growing" and that "*some day these antennae may be commonplace*" (emphasis added) (*McBee*, 1986).

For each of the next four years, the NFL was in court attempting to prevent the unauthorized showing of NFL games and to demonstrate that satellite dishes were

still not “commonly found in private homes.” The next case, and the most recent to examine the use of satellite dishes, is *National Football League v. Beachland Ventures, Inc.*, No. 89-2311-Civ-Hoeverler (S.D. Fla. Apr. 3, 1990). In *Beachland Ventures*, the NFL and the Miami Dolphins, relying on *McBee*, brought suit against several bar owners seeking a permanent injunction prohibiting the bar owners from using satellite dishes to receive and display locally blacked out Dolphins games (*Beachland Ventures*, 1990). The NFL and the Dolphins argued that the defendants, all of whom owned satellite dishes, used their satellite dishes to infringe on their copyright by showing locally blacked out Dolphins home games within the Miami territory (*Beachland Ventures*, 1990).

The defendants, citing *McBee*, argued that while the use of satellite dishes was not commonplace in 1986, in 1990 satellite dishes had become commonplace and therefore fell under § 110(5) the “Home System” exemption. In support of their argument, the defendants showed that at the time of the *McBee* case, there were less than 1,000,000 satellite dishes in use. At the time of the trial there were more than 2.5 million satellite dishes in use (*Beachland Ventures*, 1990). The defendants also pointed out that the price of satellite dishes had also dropped considerably. The court in *McBee* found that 1986, satellite dishes cost from \$3,000.00 up to \$6,000.00, while in 1989, the cost per unit was between \$1,499.00 and \$2,500.00. “Armed with these updated statistics, the defendants attempted to show that satellite dishes are commonly found in the home and thus the reception of blacked out games fell within the section 110(5) “Home System” exemption (*Beachland Ventures*, 1990).

The plaintiffs, on the other hand, argued, and the court agreed, that the situation has not changed since *McBee*, and that satellite dishes were still not apparatus of a kind commonly used in private homes,” therefore, § 110(5), the “Home System” exemption, does not apply (*Beachland Ventures*).

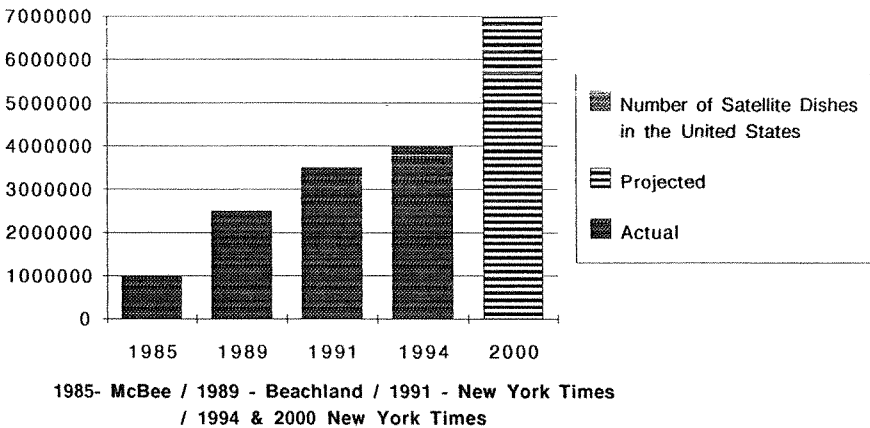


Table 1. Number of Satellite Dishes

Average Cost of Satellite Dish

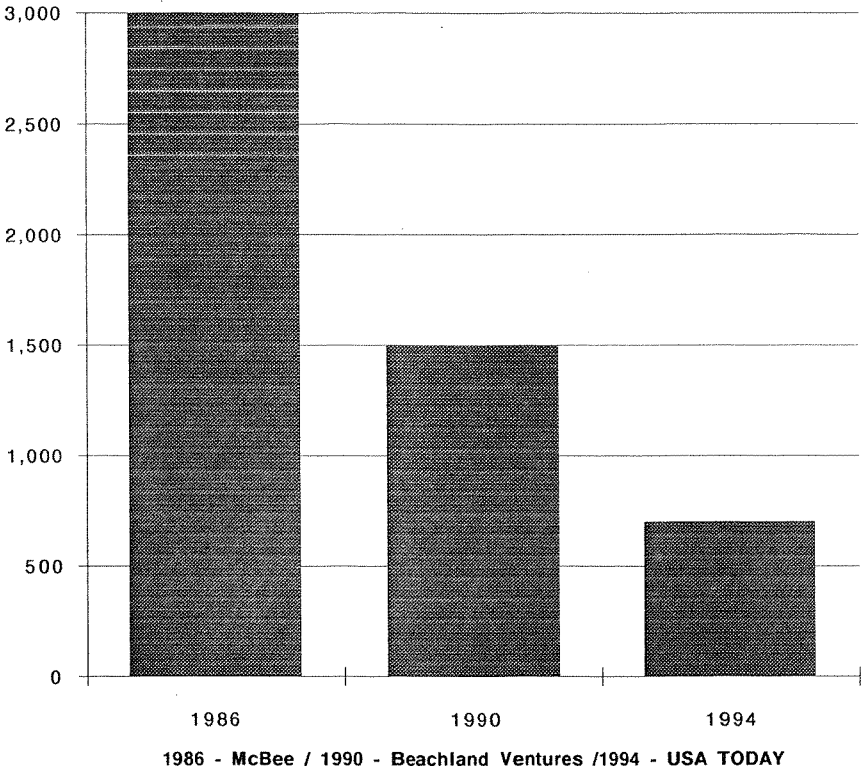


Table 2. Cost of Satellite Dishes

Outdoor Antennas

The last, and the most recent case to use § 110(5) to challenge the legality of the NFL's blackout rule is *National Football League v. Rondor, Inc.*, (1993). Unlike *McBee* and other challenges under § 110(5), the equipment used in *Rondor* was not a satellite dish. Instead, the defendants used outdoor antennas; making this a case of first impression with respect to the equipment used (*Rondor*, 1993). The facts in *Rondor* are similar to those in *McBee* and *Beachland Ventures*. In November 1992, the plaintiffs, the NFL and the Cleveland Browns, sent letters to each of the defendants advising them that plaintiffs owned the copyright in the telecast of Cleveland Browns football games. The NFL also warned each defendant that should it continue to "intercept/or receive transmissions of Browns games not locally broadcast in the Cleveland area by use of satellite dish, special antenna, or any other equipment or device not of a kind commonly used in private homes, the NFL would take appropriate legal action to enforce its right" (*Rondor*, 1993).

Despite receiving advance notice of potential infringement each of the defendants showed Browns' games, which were blacked out in the Cleveland area. The defendants were able to show the games by using an off-air antenna to pick up the game from the NBC affiliate in Toledo (*Rondor*, 1993). On November 20, 1992, the NFL and the Cleveland Browns filed a lawsuit against the defendants to enjoin them from televising locally blacked-out games in violation of Federal Copyright Laws.

Each of the defendants, relying on § 110(5), the "Home System" defense, argued that they were not infringing on the plaintiff's copyright since their "off-air antenna system falls within the "home system" exemption of the Copyright Act" (*Rondor*, 1993). In support of their position, the defendants examined the legislative history of § 110(5). The House Report shows that the intent behind § 110(5) was to "exempt small commercial establishments whose proprietors merely bring onto their establishments standard radio or television equipment and turn it on for their customers' enjoyment" (House Report, Defendants Post Trial Brief).

The court however held that the test for determining whether an antenna system is "common" within the meaning of § 110(5) is "how likely [it is that] the average patron who watches a blacked out game at one of the defendants restaurants has the ability to watch the same game at home" (*Rondor*, 1993). Using the *McBee* test, the court held that since all of the defendants' antennas were substantially larger than those commonly used in private homes, it was "unlikely that the average patron in any of defendants' establishments was able to watch blacked out games at home" (*Rondor*, 1993).

The court rejected the defendants' argument even though the defendants were able to show, and the court agreed, that the equipment used in their establishments was of a kind commonly **available** for use in private homes (*Rondor*, 1993). The court held that the defendants "must go beyond a showing that the equipment was available; they must establish that it is of a kind commonly used in private homes" (*Rondor*, 1993).

The court however failed to take into consideration the increased use of cable television, which has led to the decreased use of out-door antennas. Therefore, perhaps the correct test should have been whether the equipment was of a kind commonly **available** for use in private homes (*Rondor*, 1993). In which case, § 110(5) would have applied.

■ CONCLUSION

Since the Eighth Circuit Court's decision in *McBee*, the NFL has continually relied on *McBee* to enforce and defend the league's black-out policy against attacks under § 110(5), the "Home System" exemption. With the ever increasing development in communication technology, however, the NFL's continued reliance on *McBee* may be shortsighted. At the current rate of sales, availability, and decline in price of satellite dishes (see above), it should only be a matter of time before satellite dishes become an "apparatus of a kind commonly used in private homes" § 110(5). This is especially true with the introduction in October 1994, of RCA's new 18-inch Digital Satellite System. RCA's new system, which is on sale nationally, sells for under \$700 and beams up to 150 TV channels directly into the owners home or business (USA TODAY, 1994).

Before the NFL's black-out policy suffers a defeat in court, the league should consider abandoning its current policy and sell the rights to all NFL games without restriction. The "NFL Sunday Ticket," is not the answer. If the league wants, it can sell the rights for a three-year test period. During this period, the NFL and the networks can study the effects of the new policy and determine whether or not the economic benefits to teams from higher television revenue outweighs any revenue the teams might lose due to decreased attendance. Finally, while this idea might sound new or radical to some, it is important to note that the NFL did the same thing in 1965, when the League agreed to modify the black-out rule for an increase in television revenue.

References

- Brooks, A. (Aug. 8, 1993), Relaxing Outdated Restraints. *New York Times*, p. R5.
- Defendants Post Trial Brief at 10, 1993 - *National Football League v. Rondor, Inc.*
- DuBoff, L.D. (1987). Introduction - Art and Law Section of the Association of American Law Schools Symposium, *Columbia - VLA Journal of Law & the Arts*, 11, 359 - 362.
- Forbes, G. (April 12, 1994), NFL TV plan focuses on sports bars. *USA TODAY*, p. 1C.
- Free-Range Couch Potatoes. *New York Times*, p. D1, col. 2.
- Garrett, R.A. & Hochberg, P.R. (1984). Sports broadcasting and the Law, *Indiana Law Journal*, 59, 155-192.
- Landis, D. & Snider, M. (October 6, 1994), Mini-satellite dish owners are beaming. *USA TODAY*, p. 6D.
- Neft, D. S. & Cohen, R. M. (1991). *The Football Encyclopedia: The Complete History of Professional NFL Football from 1892 to the Present*. New York: St. Martin's Press
- Roberts, G.R. (1987). Pirating Satellite Signals of Blacked-Out Sports Events: A Historical and Policy Perspective, *Columbia - VLA Journal of Law & the Arts*, 11, 363-386.

Cases

- National Football League v. McBee & Bruno's*, 621 F. Supp. 880 (E.D. Mo. 1985), aff'd, 792 F.2d 726 (8th Cir. 1986).
- National Football League v. Beachland Ventures, Inc.*, No. 89-2311-Civ-Hoeveler (S.D. Fla. Apr. 3, 1990).
- National Football League v. Rondor, Inc.*, 840 F. Supp. 1160 (N.D. Ohio. 1993).
- United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953). *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

Statutes

Sports Broadcast Act of 1961, 15 U.S.C. § 1291 (1982).

47 U.S.C. § 331(A) Supp. v. 1975 (repealed Dec. 31, 1975).

The 1976 Copyright Act, 17 U.S.C., 90 Stat. 2541 et seq.,

House Report 94-1476 at 87, 94th Cong., 2d Sess. 52, reprinted in 1976 U.S. Code Cong. & Admin. News 5659, 5665.

Other Cases Reviewing § 110(5) and Satellite Dishes

National Football League v. Wet Goods Liquors, Inc., No. 88-8551-Paine (S.D. Fla. Jan. 24, 1989).

National Football League v. Addison Airport Restaurant and Lounge, Inc., No. CA3-87- 2739-H (N.D. Tex. March 10, 1988).

National Football League v. Christopher-Neatherton, Inc., No. H-87-3818 (S.D. Tex. Feb. 24, 1988).

National Football League v. Red Bastille Lounge, No. 86-5255 (E.D. La. April 15, 1987).

National Football League v. Rosie O'Grady's Irish Pub, No. 85-CV-71374-DT (E.D. Mich. June 10, 1986).

National Football League v. In Cahoots, No. CA3-85-1855-H (N.D. Tex. Feb. 3, 1986).

National Football League v. Scoreboard Sports Bar & Grill, No. CA3-84-1354-R (N.D. Tex. June 24, 1985).

National Football League v. The Alley, Inc., No. 83-0701-Civ-JWK (S.D. Fla. Dec. 29, 1983).

National Football League v. Campagnolo Enterprises, Inc., No. 83-1205-Civ-T-13 (M.D. Fla. Dec. 8, 1983).

National Football League v. Big Play Restaurant, No. CIV-83-1293E (W.D.N.Y. Dec. 6, 1983).