

Part 1

On October 12, 2015, two Twitter accounts, the sports blogs SB Nation and Deadspin, were forced to suspend all activity after several major sports leagues sent takedown notices over the sports sites' posting of GIFs of unauthorized sports footage. The leagues that took issue with Deadspin in particular were the National Football League (NFL) and the Ultimate Fighting Championship (UFC), while two major major football conferences, SEC and the Big 12, filed takedown notices against SB Nation. Each website has since been treated as a separate case. @Deadspin only remained offline for roughly two hours, while, as of October 14th, @SBNationGIF is still not running. Nonetheless, both websites are claiming fair use might justify their actions.

Although not all details of the controversy are available to the public, it is clear that these leagues are very sensitive about the use of any broadcast footage. The NFL has held increasingly stringent copyright agreements over all broadcast footage, starting from the 1960s. A few examples of infringing activities include the publicly display, reproduction, distribution, or creation of derivative work without permission. The GIFS of broadcast footage posted on the blogs in question are at most 15 seconds. However, they are posted on sites that are accessible to the public. Because of the nature of digital transmissions, the footage cannot be distributed because it is not in a physical format. Rather, an identical copy is reproduced on the receiving end of the digital transaction. Lastly, these blogs are taking direct clips from league-owned footage, without adding any originality or change. Sports leagues believe that these clips are clearly and immorally stolen without permission by these blogs.

It is important to note that the takedown notices filed cite the Digital Millennium Copyright Act (DMCA). Enacted in 1998, this update to copyright law was meant to address advances in technology. The most relevant issue for this dispute is the concern with promoting electronic commercial enterprises, along with the distribution of digital works, by providing copyrighted works legal protection from piracy. To understand the sports leagues' side, it is helpful to look at past litigation concerning digital distribution of copyrighted works. In *Viacom v. YouTube*, although YouTube allows users to share unauthorized works, the courts decided in favor of YouTube because it was not aware of specific infringement, was not "willfully blind" of infringing acts, and was not able to directly stop any activity that constituted infringement. Interestingly, leagues like the NFL could use this legal precedent in their favor. For example, both blogs had to be aware of specific infringement because, unlike YouTube, these blogs have staff writers as contributors instead of the public. They would have both the right and direct access to control any infringing activity on their sites. This is a very clear contrast from the YouTube case because those posting the works in question, the GIFs, work for the very site on which they post.

SB Nation and Deadspin may not have asked permission, but they feel justified in using league-owned clips and cite the fair use doctrine in their defense. Although they do not give any specific reasons for this defense, I think they may argue that they are simply reporting events that occurred during broadcasted games, by offering highlights in the form of GIFs to site visitors. Further, they might claim that their sites actually help these leagues by drawing more attention to them. The blogs are an outlet for fans to discuss these leagues, helping increasing their loyalty and enjoyment of each sport, and therefore each sport's broadcasts. Lastly, they are not re-airing entire games, but are taking tiny segments of games out of context by using them for the purposes of commentary. Are these

blogs simply expressing their right to freedom of the press?

Although claiming fair use does not clear these blogs of infringement danger, analysis of the fair use doctrine can help determine their chances should they be taken to court. First, what is the purpose of these GIFs on the websites? Although the sites make their money from advertisements, the use of GIFs helps bring traffic to the sites. Therefore, this would qualify the use of the GIFs as commercial. However, I argue that its purpose is transformative, not in character, but in purpose. These GIFs are offered on these blogs not to bring viewers up-to-date on game outcomes and exciting plays, but rather offer a place for people that have already seen the original broadcast to re-watch these portions of the games. The GIFs are posted so fans can comment on which players did well in a game, which players did not, and possible bloopers viewers did not pay close attention to during the original broadcast. Here, the GIFs are meant for commentary, criticism, and reporting, all possible fair uses mentioned in the preamble of the fair use doctrine. The original clips were strictly for reporting the game and did not offer viewers a chance to watch after the broadcast to comment or criticize, thus changing its purpose.

Leagues like the NFL publish all works by registering them with the Copyright Office. I believe the nature of this copyright is very thin. Leagues have made a point of owning their leagues and their media, but how much originality is in this work? How much does it differ from reporting facts? I argue that these broadcasts are compilations; broadcasters choose how to present the events occurring during each game. Still, their choices are mostly dictated by the chronology of events in the game and the decidedly important events people want to focus on during each game (e.g. a homerun). The most contentious part of the argument is probably the amount of footage actually used. Each GIF would have to

be examined to determine its significance in relation to the original work, but how does one determine the “heart” of a competitive sports game when the score is cumulative? A five-second blooper GIF might not be so central, but the winning touchdown would have more significance. Because these GIFs are at most 15 seconds, even if they reveal significant events in a game, they could not give a viewer a sense of the entire broadcast. The GIFs provide just enough footage for users of each site to comment on a play or player, not enough to watch the game again. Lastly, because viewers cannot re-watch games on the blogs and could not replace ticket sales to games or viewings of the original broadcast, use of these GIFs have virtually no market effect.

Although these Twitter accounts made these clips available to the public online, these clips are only fractions of the original, have a transformative purpose, are taken from fact-based, published works, and have no real market effect on the original work. If this dispute were brought to court, I believe the courts would find in favor of these blogs.

Part 2

While libraries and archives have special exceptions in copyright law, they must still be careful in their display, distribution, and reproduction of works. With that in mind, I believe that film archives could post clips of items from a specific collection on their website and safely claim fair use. For example, a local film archive acquires a collection of 1950s commercials. Archives are meant for

research. If researchers do not know that the film archive has such a collection, why does the archive exist? By placing a clip of each commercial, a researcher can determine which commercials are pertinent to their studies in sociology, for example. This is not dissimilar to the case *Perfect 10 v. Amazon*, in which Google was granted the right to post thumbnail versions of images for the sake of online research. Similarly, because film archives contain moving image content, it seems necessary to offer a piece of the moving image in order to best facilitate research. In this case, it is more like a GIF than a thumbnail, perhaps making it more debatable in terms of fair use. Here, the purpose is for research and scholarship at a nonprofit institution. It is transformative in nature because these commercial clips are not meant to sell their original products, but are meant to be studied in their socio-historical context. The original works are published and contain discernible elements of creativity as they are not entirely fact-based and require scripts, sets, actors, etc.

However, the portions being used here, like the GIFS on the sports blogs, are only a small fraction, under 20 seconds of each original, making it appropriate for research. This only offers a viewer a taste of the original. In this case, researchers would then know if a specific commercial was relevant to their research so that they could then contact the archive directly to access the whole work. Lastly, these commercials no longer air on television and the products they sell either no longer exist or have new advertisements. Therefore, posting these clips on a film archive's website would have little to no market effect. Because of the appropriate amount of the clip made available for research, the lack of a market effect, and its use for scholarship at a nonprofit institution, I believe posting small portions of acquired footage would constitute fair use.