

Senator Leahy's Questions

1. (a) Will the NFL commit to maintaining the Super Bowl on free, over-the-air television during Commissioner Goodell's tenure?

The Super Bowl is consistently the most watched television program of the year – and has iconic status – *because* it is on free, over-the-air television. It is the premier example of the strength of the relationship among the NFL, over-the-air broadcasters, and our fans. We want the Super Bowl to maintain its iconic status and therefore to have it remain on free, over-the-air television for many years to come. We hope that our broadcast partners share our commitment on this issue.

(b) As the NFL makes arrangements to have more NFL games available through pay television, will the NFL commit to maintaining the number of games currently available each week on free, over-the-air television?

It bears emphasis that no NFL game is televised on a pay-per-view basis. Instead, all regular-season NFL games are now shown on free, over-the-air television, and that all NFL post-season games (including the Super Bowl) are shown exclusively on free, over-the-air television. Free, over-the-air broadcasting of every regular season and post-season game is the centerpiece of the NFL's television policy. As a result, during each week of the regular season, at least three (and in most markets, four or five) games are available via free, over-the-air broadcasting to every fan. Over the course of a season, NFL fans in general have available on free television 90 or more regular and post-season games, a far higher percentage of the League's schedule than that of any other sports league, and truly avid fans have pay-television access to all of the rest of the League's games through NFL Sunday Ticket and other complementary NFL television offerings.

The NFL's long-standing commitment to mass distribution of the bulk of its games via free, over-the-air television will not diminish as long as the broadcast industry remains healthy, vibrant, and interested in NFL telecasts.

2. (a) What plans does the NFL have to make available instantaneous statistics to satisfy these fans?

(b) Does the NFL agree that real time statistics from NFL games, for use in games such as fantasy football, are public and can be used by anyone?

The NFL does *not* agree that *during the time that a game is being played*, detailed game statistics and information are in the public domain. This position is supported by black-letter law dating back to the early days of radio, the first medium that permitted instantaneous distribution of information from sporting events. Those cases hold that because sports clubs and leagues create, promote, and operate sporting events, they have a property interest in "pictures, descriptions, and accounts" of the event while it is in progress and "for a reasonable time following the game" (quotes taken from what remains the leading case on this issue, *Pittsburgh Athletic Company v. KQV Broadcasting Company*, 24 F. Supp. 490 (E.D. Pa. 1938)). After this

protected period, the information moves into the public domain. (This protection is comparable to that afforded to real-time stock quotes, while quotes made available for no charge on non-subscription internet sites are typically delayed for 20 minutes; instantaneous quotes are available on a licensed basis.) The principle underlying these holdings is one seeking to curb “free-riding”: If third parties are able freely to exploit for their own profit data and content that others have invested to generate, they are “reaping where they have not sown” and are unjustly enriched. See *International News Service v. Associated Press*, 248 U.S. 215 (1918); *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1296, 1298 (11th Cir. 2004) (recognizing the PGA’s interest in “compiled real-time golf scores” and holding that “[t]he prevention of free-riding. . . provides a valid business justification” for the PGA’s restricting real-time access to such data).

That being said, the NFL provides real-time statistics to fantasy players for no charge on NFL.com, licenses third parties to provide less-detailed, but still real-time, statistics to their customers, and also acquiesces in third parties providing freely and without a license certain information (e.g., a game score, or a record-setting touchdown pass) that should be widely and freely available to the public the instant it is generated.