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William Nesnidal

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THE STORY OF THE NATIONAL BASKETBALL ASSOCIATION V. MOTOROLA

INTRODUCTION

What binds more than 300 million Americans is not an overarching ethnic or religious affiliation but a civic identity that has been heavily influenced by sport. For example, baseball was a major part of the soldiers' lives during the civil war and many soldiers would pick up a game or two during lulls in the fighting. The game of baseball also inspired a radical change in many Americans' feelings on race as Jackie Robinson helped to lead the civil rights movement when he broke the color barrier; Robinson achieved this accomplishment an incredible seven years before the Supreme Court ruled "separate but equal" unconstitutional in Brown v. Board of Education.

The American culture revels in sport. Sports are a high priority in households across America today but this is not a new phenomenon. Even President Hoover recognized the importance of sports in America as he said,

Sports... have risen to a national purpose far more important than even their output of constructive joy. This growth over the years has been possible only because of their own rigid voluntary rules of right and wrong coupled with the training that success depends on team play. Thereby has the high purpose of sportsmanship become second only to religion as a moral influence in our country.

President Herbert Hoover spoke these words to many college coaches, putting sports right next to religion.

While sports have been popular since the time of the gladiators, technology has greatly increased sports' popularity since that time and technology has helped spur economic growth around sport. Like those involved in the sporting industry, the courts have been forced to deal with changing and growing technologies as well. One important case that realized the influence of technology on current copyright law

2. Id.
3. Id.
was *International News Service v. Associated Press*, which recognized that, as technology has steadily increased the speed and quantities of information transmission, new challenges to copyright law will continue to transpire. Although *International News Services* did not involve the sports industry, similar challenges as those faced in *International News Service* have also arisen in the context of sports.5

This article will highlight this important case decided under the Copyright Act and show how sports and technology influenced the decision. Ultimately, the story of *The National Basketball Association v. Motorola* will explain the decision’s impact on current copyright law.

I. COPYRIGHT LAW AND SPORTS

a. The Copyright Act

For copyright purposes, a sport can be broken up into the broadcast of the event and the underlying game. Under Section 102(a) of the Copyright Act, protection subsists in “original works of authorship fixed in any tangible medium of expression.”6 Broadcasts of sporting events meet the requirement that the original work be fixed in any tangible medium of expression because the telecasts and games are videotaped at the same time they are broadcast, which complies with the Copyright Act’s requirement that audiovisual works’ fixation be “made simultaneously with its transmission.”7 Furthermore, Section 102(a) of the Copyright Act lists the categories for works of authorship,8 which include audiovisual works9 and sounds recordings. Regarding the authorship requirement, a house report stated that “when a football game is being covered by four television cameras, with a

6. The Copyright Act of 1976, 17 U.S.C. § 102(a) (1976). According to § 102(a), “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.*
8. 17 U.S.C. § 102(a). Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. *Id.*
9. Under 17 U.S.C. § 101, audio visual works are defined 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.”
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.’ Courts have long recognized that photographing or filming an event involves creative labor, which, thus, constitutes authorship.

On the other hand, the underlying games are not original works of authorship as listed under Section 102 (a) of the Copyright Act. Although there is considerable preparation for a game, “the preparation is as much an expression of hope or faith as a determination of what will actually happen.” There is no hard and fast underlying script for games and unlike movies and plays, it is often the very unpredictability of the game itself that makes sports popular and successful. However, just because sports are a popular commercial activity, it does not necessarily follow that they should be granted copyright protection. According to Nimmer:

Although the commercial value of professional sports cannot be doubted, and although judges should not determine copyrightability according to their subjective evaluation of an artistic work, nonetheless copyright extends only to ‘works of authorship,’ not to every commercially valuable activity. Failure to appreciate that distinction would result in according copyright protection not only to athletic events, but also to a heart surgeon’s operation on diseased tissue or the twisting of knobs in the control center of a nuclear power plant – both important and commercially valuable activities, to be sure, but neither remotely capable of copyright protection.

Furthermore, any authorship that may exist in the elements of the underlying game must be open to competitors if fans are to be attracted. For example, if the inventor of the wildcat offense or the pick and roll copyrighted those plays or formations, then the sport would eventually cease to be competitive. Furthermore, if the underlying game were copyrightable, the number of joint copyright owners would be overwhelming: because they all contribute to the “work,” the league, teams, athletes, umpires, stadium workers, and fans would all be potential copyright holders. Similarly, courts have

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12. The National Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 846 (2nd Cir. 1997).
13. Id.
15. Id.
16. NBA, 105 F.3d at 846.
17. See id.
18. Id.
also ruled that other “events,” such as a Christmas parade, are not copyrightable but that the broadcasts of those events could still be copyrighted.19

b. Misappropriation

i. The “hot-news” test: International News Service v. The Associated Press

The roots of the law associated with the story of the National Basketball Association v. Motorola started back in 1918 when the Supreme Court decided International News Service v. The Associated Press.20 As one author states, “INS was one of the first cases to address intellectual property issues arising out of technological advances, even though those advances were primitive in comparison to today’s technological standards.”21 In International News Service, The Associated Press (“AP”) gathered news all around the world and distributed the news daily to its members for publication in newspapers.22 The cost of AP’s service was considerable and was paid by the cost of membership services to the association.23 Furthermore, each member agreed to keep the information from non-members.24 The International News Service (“INS”) had a similar business to the AP; INS’s business was to gather and sell news to its customers around the country.25 Additionally, INS and AP were competitors in the distribution of news around the United States.26

The issues in the case arose when the INS bribed employees of the AP newspapers to furnish the AP news to the INS before the AP’s publication of that news.27 The bribed-for news was sent by way of telegraph and telephone; the INS also copied news from bulletin boards and from early editions of AP’s newspapers and sold this news to its own customers.28

The Court noted that the value of the news service depends upon the promptness and impartiality of the news – for it is the timeliness of

23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
the news, not the news itself, that is valuable. The issues were whether there was any property right in the news and if so, how long that property right lasted, as well as whether the INS’s conduct in appropriating for commercial use the news from bulletins and early editions of AP publications constituted unfair competition in trade. The Court noted, “[t]he peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret.” The Court also stated that news has an exchange value to one who can misappropriate it because it takes “elaborate organization and a large expenditure of money, skill, and effort” to acquire and transmit the news.

The Court stated that there was no copyright in facts, upholding the common law rule, and, through the tort of unfair competition, developed the common law doctrine of misappropriation. The Court held that AP’s news was not copyrightable as the information respecting current events contained in the literary production is “not the creation of the writer but is a report of matters that ordinarily are publici juris; it is the history of the day.” The Court also stated that the framers of the Constitution did not intend “to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.” Therefore, the Court stated that news can hold a quasi-property right as news is “stock in trade to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it.” The Court characterized INS’s behavior as misappropriation and used this unfair competition principle as a way to find INS’s actions illegal. Therefore, on account of the economic value of the news, a company can have a limited proprietary interest in it against a competitor who would attempt to take advantage, or misappropriate, the information.

The Court narrowed this quasi-property right to exist only when the information is “hot-news.” Due to the tenuous value of this “hot-

29. Id.
30. Id. at 218.
31. Id. at 219.
32. Id. at 220.
33. See id. at 221.
34. Id. at 219.
35. Id.
36. Id.
37. See id. at 220.
38. Id.
39. See id. at 221.
news,” the Court narrowed the period for which the property right would apply.\textsuperscript{40} The “hot-news” doctrine “postpones participation by complainant’s competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant’s efforts and expenditure.”\textsuperscript{41} Therefore, in the realm of copyright law, only the “hot-news” misappropriation claim survives the preemption.\textsuperscript{42} Conversely, certain forms of misappropriation will survive preemption, even if within the general scope, “if an ‘extra element’ is ‘required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie ‘within the general scope of copyright, and there is no preemption.”\textsuperscript{43} This test is not to be applied to allow state claims to survive preemption easily.\textsuperscript{44}

\textit{ii. The Copyright Act’s Preemption}

Although the story of \textit{The National Basketball Association v. Motorola} reveals much about the application of copyright law to sports, the main question in the case concerned the question of the Copyright Act’s scope in preempting state law. The Copyright Act\textsuperscript{45} protects broadcast rights and preempts state law claims that enforced rights “equivalent” to exclusive copyright protections “when the work to which the state claims was being applied fell within the scope of copyright protection.” More specifically, a state law claim is preempted

\begin{itemize}
\item 40. \textit{Id.}
\item 41. \textit{Id.}
\item 42. \textit{Nat'l Basketball Ass'n}, 105 F.3d at 852.
\item 43. \textit{Computer Assoc. Int'l, Inc. v. Altai, Inc.}, 982 F.2d 693, 716 (2nd Cir. 1992) (quoting \textit{1 NIMMER ON COPYRIGHT § 1.01[B] at 1-15}).
\item 44. \textit{Nat'l Basketball Ass'n.}, 105 F.3d at 851.
\item 45. 17 U.S.C. § 301(a) specifies copyright laws preemption:
\begin{quote}
On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to — (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or (2) any cause of action arising from undertakings commenced before January 1, 1978; (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106[.]
\end{quote}
\item \textit{Id.}
\end{itemize}
under Section 301 when the state law seeks to vindicate legal or equitable rights that are equivalent to one of the exclusive rights under Section 306,\textsuperscript{46} the general scope requirement, and the particular work in question falls within the type of work in the Copyright Act under Sections 102 and 103,\textsuperscript{47} the subject matter requirement.\textsuperscript{48} The subject matter requirement is met when the "work of authorship being copied or misappropriated falls within the ambit of copyright protection."\textsuperscript{49}

II. The National Basketball Association v. Motorola

a. The Story

The story of The National Basketball Association v. Motorola occurred in the 1990s, when the Internet started invading Americans' households and the speeds and quantity of data transmission greatly increased.\textsuperscript{50} Moreover, individuals, at work, home, or elsewhere, could use a computer or similar device to obtain all different kinds of information at will.\textsuperscript{51} The story begins when Motorola and Sports Team Analysis and Tracking Systems ("STATS") collaborated to create a sports statistics pager known as SportsTrax.\textsuperscript{52} SportsTrax had an

\textsuperscript{46} Under 17 USC § 106:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

\textit{Id.}

\textsuperscript{47} 17 U.S.C. 103 specifies compilations and derivative works:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. (b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

\textit{Id.}

\textsuperscript{48} NBA, 105 F.3d at 848.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 845.

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 843.
inch-and-a-half by inch-and-a-half screen and operated in four basic modes: current, statistics, final scores, and demonstration. The "current" mode gave rise to the dispute and displayed updated information of professional basketball games in progress. This statistical information was updated every two to three minutes and more frequent updates occurred near the end of the first half and end of the game. SportsTrax was able to display all of the following information: the teams playing, score changes, the team in possession, whether the team is in free throw bonus, the quarter of the game, and the time remaining. SportsTrax received this information from a data feed that was produced by reporters who were watching the games on television or listening to them on the radio. The reporters would then transmit the information to a host computer that compiled, analyzed, and formatted the data for retransmission. Finally, the statistical information was sent to a common carrier, which would distribute it by way of satellite to various local FM radio networks that would then emit the signal received by each Sportstrax pager. Because of the long route the statistical information needed to travel to reach the customers’ SportsTrax pagers, there was a lag of approximately two minutes between events in the game itself and when the information actually appeared on the pager.

Motorola produced the devices used to retrieve this information and the product became available in 1996 for $200. The retail box device stated that SportsTrax would give the customer “exciting basketball in the palm of your hand.” Furthermore, the user’s guide stated that SportsTrax was the consumer’s “personal viewing window into the exciting world of Pro Basketball” and was “designed for those times when you cannot be at the arena, watch the game on TV, or listen to the radio.” In addition to information through SportsTrax, STATS also updated NBA game information on an AOL website, which featured slightly more comprehensive and detailed real-time

53. Id.
54. Id.
55. Id.
56. Id. at 844.
57. Id.
58. Id. at 844.
59. Id.
60. Id.
61. Id.
62. Id.
64. Id.
game information than SportsTrax. On the AOL site, the game scores were updated much more frequently; game scores were updated every fifteen seconds to a minute and player and team statistics were updated every single minute.

The National Basketball Association ("NBA") was a highly profitable business that achieved the apex of its value while its games were in progress. About 80% of the NBA’s revenue was derived from promotions of the NBA games while in progress from broadcast distribution licenses and arena admissions fees. Furthermore, the NBA already had in place two methods of controlling the dissemination of real-time data. The NBA’s first manner of controlling real-time data was through its multiple licensing agreements with local and national broadcasting companies, such as the National Broadcasting Company, Turner Broadcasting, and ESPN radio. The second way that the NBA attempted to control the dissemination of real-time data was through its media credentials. The media guidelines specifically restricted the dissemination of real-time data, which also showed the interest that the NBA had in the real-time statistics from its games. Furthermore, the NCAA was developing its own system, Gamestats, for disseminating in-game statistical information. At this time in the story, while the NBA was in the process of developing a data feed and pager product for Gamestats, the Gamestats system only provided statistics to on-site monitors for broadcasters for updated scoring information.

65. *NBA*, 105 F.3d at 844.
66. Id.
68. Id.
69. Id at 1078.
70. Id. at 1077-78.
71. Id. at 1078.
72. Id. The media guidelines stated:

No electronic media personnel shall transmit scores and/or other game information out of an NBA arena (by telephone or by any other means) more than three times during each quarter and once during each of the two quarter breaks without the prior specific written approval of the NBA; provided, however, that in the event that such game involves one or more “overtime” periods, two additional transmissions per overtime period (once during the overtime period and once during the break immediately prior to the start of such overtime period) shall be authorized without the prior written approval of the NBA; and provided, further, that no such transmission shall exceed thirty seconds in length. The limitation on transmissions contained in the preceding sentence shall not be applicable during pre-game, post-game, or half-time of the game.

73. Id. at 1079.
74. Id. at 1079-80.
As SportsTrax attempted to enter the market, some of its marketing was under scrutiny. First, although there is not any conclusive evidence that Motorola ever advertised that the NBA licensed, sponsored, or approved of SportsTrax, a few companies made this very mistake when marketing SportsTrax. One example of this was the store Brookstone, a retailer of SportsTrax, which stated in one of its retail advertisements that SportsTrax was "officially licensed by the National Basketball Association." Second, Motorola tried to market SportsTrax in negotiation, promotion, and sales agreements with four NBA teams. These teams eventually had discussions with the NBA and ceased doing business with Motorola for SportsTrax.

Furthermore, the NBA and Motorola were in negotiations to create a real-time statistics product. Motorola's main objective was to release the basketball SportsTrax by the start of the 1995 basketball season because it wanted to preempt any possible competitors and wanted to take advantage of its recent favorable press coverage from its prior baseball SportsTrax product. When Motorola realized its negotiations with the NBA would not lead to an agreement before the 1995 basketball season, Motorola decided to develop SportsTrax without the NBA's involvement and without informing the NBA of its decision. At one point, the NBA was also in separate negotiations with STATS to become the NBA's data wholesaler. Meanwhile, STATS was also involved in separate negotiations with Motorola for SportsTrax. STATS and Motorola eventually reached an agreement to create SportsTrax and the NBA sued.

After the district court ruled in favor of the NBA, as will be discussed supra, a backlash occurred from media groups around the country. One magazine article stated:

The NBA and other sports groups are no longer satisfied with the huge sums they receive from selling TV and radio stations the right to broadcast sporting events. Now they want to control all the information about the games. Before the Motorola ruling, if you invited a bunch of friends over to watch a football game on TV and talk about it over chips and beer, it was called The Great American Pas-
time. Now, it's become a living room conspiracy to rip off the NFL.84

The article also expressed its belief that the courts were being pressured by huge entertainment entities, like the NBA, and were thus removing public domain information from its citizens' hands.85 According the New York Times Company's general counsel, "[t]he notion of someone saying, 'Honey, I've got to run into the den and see how the game's going on my computer' rather than on TV is ridiculous."86 As a result, news organizations including The New York Times, The Associated Press, and America Online filed briefs supporting Motorola; these organizations understood the decision's harmful effects on their industry.87 Interestingly, NBC, another large news organization, filed an amicus brief for NBA, "contending that a line must be drawn to prevent new media like on-line services from taking away the value of a live game or television broadcast of the game."88 NBC's position may have had something to do with its $750 million contract to broadcast NBA games though the 1997-98 season.89

b. The Decision

i. The District Court

In the case of The National Basketball Association v. Motorola, the district court correctly recognized that copyright law does not protect the underlying facts of the game.90 This is the commonly accepted fact/expression dichotomy, which states that while underlying facts and ideas cannot be protected under copyright law, the authors' original expression of those facts can garner copyright protection.91 While the NBA asserted six different claims of relief, the district court dismissed all of them but the question of misappropriation and copyright law, as well as a false advertising claim under the Lanham Act.92 Even though the claims were dismissed regarding the copyright of the

86. Id.
87. Id.
88. Id.
89. Id.
90. NBA, 105 F.3d at 847.
91. Id.
92. Id.
game, including both the broadcasts and underlying games, the Court’s opinion still sheds light on a subject that is often a discord in copyright law.93

In regards to the New York state law misappropriation claim, the district court held that the defendant unlawfully misappropriated the NBA’s property rights in its games.94 The court highly valued these property rights because they were the profits of the NBA’s most valued asset – real-time game information – which is why the NBA tried to protect the information and why Motorola wanted to use the information.95 The court stated that Section 301 did not preempt the misappropriation and that under New York common law, the defendants had engaged in unlawful misappropriation.96 As a result, the district court issued a permanent injunction against Motorola and STATS.97

In addressing the general scope requirement for the Copyright Act’s preemption, the district court stated that the requirement was met.98 In making its decision, the district court did not find any extra element that would render NBA’s misappropriation claim qualitatively different from its copyright claim.99 Therefore, the court ruled that the general scope requirement was satisfied for NBA’s misappropriation claim as it related to both the games and the broadcasts.100

In addressing the subject matter requirement for the Copyright Act’s preemption, the district court stated that the requirement was not met.101 The district court stated that the claim was only partially preempted.102 Partial preemption is the preemption of claims based on the misappropriation of broadcasts but not the preemption of claims based on the misappropriation of underlying facts.103 The district court used “partial preemption” to perform a separate analysis of misappropriation claims relating to the underlying games and misappropriation claims related to the broadcasts.104 The court stated that the defendants misappropriated the NBA’s proprietary interests in the NBA games in violation of New York common law.105 Since the sub-

93. See generally id.
95. Id.
96. Id.
97. Id. at 1115.
98. Id. at 1097.
99. Id.
100. Id.
101. Id. at 1098.
102. Id.
103. NBA, 105 F.3d at 849.
104. Id. at 848.
ject matter requirement was not met, the district court held that misappropriation claim was not preempted.106

ii. The Court of Appeals

On appeal, the second circuit stated that an adoption of a partial preemption doctrine would too greatly expand state law and render Congress' intended preemption doctrine unworkable.107 The court held that "where the challenged copyright or misappropriation relates in part to the copyrighted broadcasts of the games, the subject requirement is met as to both the broadcasts and the games," thus rejecting the partial preemption doctrine.108 The court further explained:

[O]nce a performance is reduced to a tangible form, there is no distinction between the performance for the purposes of preemption under § 301(a). Thus, if a baseball game were not broadcast or were telecast without being recorded, the Players' performances similarly would not be fixed in tangible form and their rights of publicity would not be subject to preemption. By virtue of being videotaped, however, the Players' performances are fixed in a tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted.109

Furthermore, the court stated that while copyrighted material often contain uncopyrightable elements, Section 301 preemption bars state law misappropriation claims to copyrightable and uncopyrightable elements.110 The work need merely fit into a general subject matter category to fall under the scope of Section 301.111 Additionally, the court stated that since Congress left the underlying events out of the scope of copyright protection, Congress intended those underlying facts to be public domain.112 The district court's partial preemption "turns that intent on its head by allowing state law to vest exclusive rights in material that Congress intended to be in the public domain and to make unlawful conduct that Congress intended to allow."113 Therefore, the court of appeals held that the subject matter requirement was indeed met.114 Since the broadcasts are copyrighted, the

106. Id. at 1098.
107. NBA, 105 F.3d at 849.
108. Id. at 848.
109. Id. at 849, citing Baltimore Orioles, 805 F.2d at 675.
110. Id. at 849.
111. Id.
112. Id. at 849.
113. Id. at 849.
114. Id.
underlying facts of those broadcasts fall under the scope of Section 301 as well.\textsuperscript{115}

In turning to misappropriation, the court questioned the breadth of a hot-news claim.\textsuperscript{116} The court studied the district court's analysis and found that the district court relied on cases that were considerably broader than \textit{INS v. AP} and that were New York common law, and were decided before the Copyright Act instituted the federal preemption.\textsuperscript{117} These New York common law cases based their broad misappropriation doctrine on amorphous concepts like "commercial immorality" or society's "ethics."\textsuperscript{118} The court of appeals stated that such concepts are synonymous with wrongful copying and thus are not distinguishable from general copyright infringement, thus, would be equivalent to copyright's exclusive rights.\textsuperscript{119}

In \textit{INS v. AP}, the Supreme Court stated that the INS's actions "would render AP's publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return."\textsuperscript{120} In light of Section 301 of the Copyright Act and \textit{INS v. AP}, the court of appeals held that only a narrow "hot-news" misappropriation claim survives preemption. The court limited surviving "hot-news" INS-type claims by proffering five "hot-news" factors.\textsuperscript{121} Under this "hot-news" test, the misappropriation claim will survive preemption if: 1) the plaintiff generates or collects information at some cost or expense; 2) the value of the information is highly time-sensitive; 3) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; 4) the defendant's use of the information is in direct competition with a product of service offered by the plaintiff; and 5) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or services that its existence or quality would be substantially threatened.\textsuperscript{122}

Furthermore, the court stated that "[INS] is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit seeking entrepreneurs;" if AP's competitors had access to the information, the public would suffer because AP would not have an incentive to continue its busi-
ness. Thus, the court also stated three extra elements, in addition to the elements of copyright infringement, that allow a “hot-news” claim to survive preemption. The elements are: “(i) the time-sensitive value of factual information; (ii) the free riding by a defendant; and (iii) the threat to the very existence of the product or service provided by the plaintiff.”

In the story of The National Basketball Association v. Motorola, the court of appeals concluded that Motorola did not engage in unlawful misappropriation under the “hot-news” test. While the court does state that some elements of the exception were met, such as the in-game statistical information being time-sensitive, there were critical elements missing. First, the court held that Motorola did not free ride on the NBA’s product. The NBA’s claim confuses three different information products: playing the games; transmitting live, full descriptions of the games; and collecting and retransmitting strictly factual game information. While the first and second products are the NBA’s primary business, the NBA failed to show any competitive effect from SportsTrax on those two products. There was no evidence that using SportsTrax or STATS’ AOL website was any substitute for either attending NBA games live or watching them on television. Furthermore, Motorola did not free-ride, an indispensable element of an INS “hot-news” claim, because the company expended its own resources and costs to collect factual information generated by the NBA games. In this instance, an example of free riding would be if Motorola were to use facts from an enhanced Gamestats pager because Gamestats would have to bear all of the costs, but since both companies would be collecting and transmitting the information on their own, there would be no freeriding, and the cheaper or superior product would win over the marketplace. Therefore, the court held that the NBA’s state law misappropriation claim was preempted by Section 301 of the Copyright Act.

123. Id. at 853.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 854.
132. Id.
133. Id.
134. Id.
Additionally, the court only briefly addressed STAT's AOL website. While the NBA offered evidence concerning this website, the briefs of the parties and arguments were mostly based on the SportsTrax device. Therefore, the court focused mostly on SportsTrax but regarded the legal issues and holding as identical with respect to both products.

III. The Aftermath

The court in *The National Basketball Association v. Motorola* likely recognized the economic impact of the case. In the United States today, the professional sports industry continues to boom; the NBA's revenue in 2009 was over four billion dollars. According to one source, "there is an energetic cycle of one thing spawning another and further spawning other business opportunities in the field of sports. Access to other sports and statistics may just promote interests in other teams and other sports because people are made aware of other close games." This is similar to how the NBA's in-game statistics spawned Motorola's SportsTrax device. The Second Circuit surely understood the practical benefits of its decision to the economy. The decision reflects the importance of sports in the American culture and how that importance can lead to economic growth.

While copyright law can be applicable to issues arising from new technology, as the Second Circuit did in *National Basketball Association v. Motorola*, other courts have found that the first amendment may also deal with similar property rights. The first amendment often stands in tension with exclusive intellectual property rights; managing this tension requires a balancing of the incentive benefits of exclusive rights with the expressive benefit of free public use. This tension has come into play for sports statistics, especially in baseball where, as of 2005, an estimated six million people spent more than

135. *Id.* at 844.
136. *Id.*
137. *Id.*
140. See C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 818 (8th Cir. 2007).
one billion dollars annually on fantasy baseball. In trying to capture this market, Major League Baseball has tried to claim the exclusive rights over the online use of these statistics to force Internet fantasy baseball providers to buy a license for use of the statistics. In *CBC Distribution and Marketing, Inc. v. MLBAM*, the court ruled that the plaintiff's first amendment rights trumped MLB Advanced Media's exclusive rights. CBC sold fantasy sports products on the Internet; its products incorporate the names, performance, and biographical data of actual major league baseball players. In fantasy baseball, participants “draft” players for the game and a participant’s success depends on the players’ actual performance during the Major League Baseball season. CBC had a reasonable apprehension that it would be sued by Advanced Media for using the information so it brought a declaratory judgment action. While finding that the players’ right of publicity was violated, the court weighed that right against first amendment considerations. The players’ statistics, the court noted, were all readily available in the public domain, “and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.” Thus, the first amendment trumped the right of publicity claim.

Other courts have also recognized a public value in the information about the game and its players and referred to baseball as “the national pastime.” In *Gionfriddo v. Major League Baseball*, the court noted that, around the country, Major League baseball is followed by millions of people on a daily basis. In the court’s words, “the public has an enduring fascination in the records set by former players and in memorable moments from previous games ... The record and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or depreciate) today’s performances.” The court further stated that the recitation and discussion of factual data of the sport commands a “substantial public interest” and is therefore a form of expression that is due substantial constitu-

142. *Id.*
143. *Id.*
144. *C.B.C. Distrib. & Mktg.*, 504 F.3d at 824.
145. *Id.* at 820.
146. *Id.* at 820-21.
147. *Id.* at 821.
148. *Id.* at 822.
149. *Id.* at 823.
150. *Id.*
151. *Id.*
153. *Id.*
tional protection.\textsuperscript{154} The nature of the public domain and the court’s broad language in both of these cases “suggest that the presumptive First Amendment right to use information in the public domain is widely applicable.”\textsuperscript{155}

Although most new technologies can often fit into a current copyright regulation and other laws, it may be worthwhile to amend the Copyright Act in order to encompass creations from new technologies. New technologies will only continue to increase, forcing the courts to fit everything into laws that were written long before the inventions themselves — long before the inventions were even imagined.

\textbf{IV. Is There A Solution?}

The question of whether to let current and future case law deal with copyright law as technology changes or to amend the copyright law to encompass current technologies is a challenging one. Justice Brandeis recognized this issue in his dissent in \textit{International News Service v. The Associated Press}:

The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle . . . Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.\textsuperscript{156}

Much has changed since the Copyright Act was created in 1976 and technology has progressed faster than anyone could have ever predicted. This increasingly fast rate of technology progression may eventually force Congress to create new copyright regulations to suit our ‘wired’ world.

\textbf{Conclusion}

As indicated by the language in the Copyright Clause, “the primary objective of copyright is not to reward the labor of authors, but ‘to

\begin{itemize}
  \item \textsuperscript{154} \textit{Id.}
  \item \textsuperscript{155} \textit{Recent Case: Intellectual Property, supra} note 140, at 1446.
  \item \textsuperscript{156} \textit{Int'l News Serv.}, 248 U.S. at 230-31.
\end{itemize}
promote the Progress of Science and useful Arts.'” The economic philosophy behind Congress granting copyrights is the conviction that encouragement of individual effort is the best way to advance the public welfare through the talents of authors and inventors. “To this end, copyright assures authors the right to their original work, but encourages others to build freely upon their ideas and information conveyed by a work. The basis of copyright law “as a proprietary concept is that it enables one to protect his or her own creations.” The "regulatory basis" of copyright law is that when these creations constitute the expression of ideas presented to the public, they become part of the stream of information whose unimpeded flow is critical to a free society.”

The story of The National Basketball Association v. Motorola fits right into the founders' design in the copyright clause. While the NBA was awarded rights to their original works, i.e. the broadcasts and in-game viewership, Motorola was able to build freely upon the information conveyed by those NBA games in Motorola's creation of SportsTrax. Thus, laws created decades ago can still apply to the technologies of today, but this might not hold up forever.

The story of The National Basketball Association v. Motorola recognized the importance of sports in American culture and formulated the "hot-news" test that was stated seventy-nine years earlier in INS v. AP. This story also helps unravel different copyrightable and uncopyrightable aspects of sports. While current copyright law is forced to be molded to deal with such changes in technology, the Copyright Act, and other laws such as the first amendment, may not be as applicable with regard to future developments in technology. Without further guidance, the courts will continue to mold statutes to fit these developments, potentially in a way that was not originally intended by Congress.

William Nesnidal*

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159. Feist, 499 U.S. at 349-50.
161. Id.

* William E. Nesnidal is a third-year law student at Marquette University who will graduate in May 2011. William will earn a Certificate in Sports Law from the National Sports Law Institute. William is a 2008 graduate of the University of Illinois at Urbana-Champaign, where he earned his B.A.S. in Biology and Spanish.