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Alan D. Lieb

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COMMENTARY

NBA V. MOTOROLA AND STATS, INC.: THE SECOND CIRCUIT PROPERLY LIMITS THE “HOT NEWS DOCTRINE”

by ALAN D. LIEB†

I. THE SCORE IS . . .

Millions of people watch and listen to sports events on a yearly basis. Arguably more people know who Michael Jordan is than who is the vice-president of the United States. In your father's day the only way to get the sports report was to go to the game, listen on the radio, or pick up the morning paper. With the advent of television, games were brought into the homes of sports fanatics worldwide. While the outcome of the game was never certain, the one constant with every game was that phrase that arrived with the two-minute warning that said, “this telecast may not be reproduced without the express written consent of . . .” Although most Americans learned to block out that phrase through the excitement of the game, the fact is that federal law provides that the broadcast of “games” on television are protected from copyright infringement.¹

One of the newest ways to stay up to date with the sports report is through the use of a personal computer or a hand-held pager. Anybody who wishes to make his or her computer or pager into an instant wire service could do so with the payment of a modest fee. For the ultimate sports fan, real-time sports information is a dream come true. Scores of the latest games are available to subscribers twenty-four hours a day, seven days a week, three hundred sixty-five days a year.

† Alan D. Lieb, the author of this Commentary, is general counsel to STATS, Inc. Mr. Lieb is a partner in the Chicago law firm of Deutsch, Levy & Engel, Chtd.

1. The recorded broadcast of live events such as baseball games were not protected by federal copyright statutes until 1976. See 17 U.S.C. § 101 (1997).

Recently, in the case of *The National Basketball Association and NBA Properties, Inc. v. Motorola, Inc. and Sports Team Analysis and Tracking Systems, Inc. d/b/a STATS, Inc.*,² the Second Circuit Court of Appeals dismissed the NBA's claim that the use of real-time sports data from its games was a violation of federal copyright law. The NBA argued that STATS³ and Motorola did not have the right to use real-time game statistics without the consent of the league.⁴ The Court found that STATS use of game statistics was not a misappropriation of the NBA's property under the hot news doctrine.⁵ The Court's decision provides guidelines to enable businesses to use information technology to rapidly disseminate news and information obtained from the public domain.

II. THE NBA FIGHTS BACK

In 1994, Motorola, launched a dedicated pager for major league baseball called the SportsTrax. In order to deliver real-time sports to subscribers, Motorola contracted with STATS. STATS would provide updates of scores and information to its subscribers via a network of reporters.⁶ In 1995, STATS agreed to deliver real-time sports information on National Basketball Association games in progress to Motorola's SportsTrax.⁷ The SportsTrax was commercially marketed beginning in 1996.

STATS also provides scores and other statistics of ongoing professional sports games, including major league baseball and NBA basketball games, through STATS' site on American Online, as well as STATS' proprietary on-line computer system, each of which can be accessed through a personal computer.⁸ In addition, it provides similar informa-

2. 105 F.3d 841 (2d Cir. 1997).

3. Sports Team Analysis and Tracking Systems of Missouri, Inc.

4. *STATS*, 105 F.3d at 845. The District Court dismissed the NBA's copyright infringement claim because (1) the actual games played were not works with the subject matter of copyright and (2) STATS and Motorola took only unprotected facts from NBA broadcasts which did not violate the NBA's copyrights. *The National Basketball Association and NBA Properties, Inc. v. Sports Team Analysis and Tracking Systems Inc., d/b/a/ STATS, Inc., and Motorola, Inc. d/b/a/ SPORTSTRAX*, 939 F. Supp. 1071, 1093-94 (S.D. N.Y. 1996). In addition, the court ruled that the NBA's claim for unfair competition by misappropriation was not preempted under 17 U.S.C. § 301(a). *Id.* at 1098.

5. See *infra text* section IV for discussion of Hot News doctrine.

6. STATS would collect game statistics from reporters located in cities where games were broadcast on free, cable, or satellite television and radio.

7. While watching the game, each reporter for STATS would use a personal computer and modem to send updated information to STATS subscribers as the event happened.

8. The information entered by reporters is then analyzed by STATS' computer, which creates a data feed carried on American Online ("AOL") and STATS' proprietary on-line services and which is provided to STATS' business customers. A user who accesses STATS' AOL site or proprietary on-line services sees a changing "scoreboard" for each NBA game in progress which shows (1) the period and time remaining in the period, (2) a quarter-by-quarter score recap which changes with each point scored, (3) a report that shows the last

tion to the press, including Turner Sports and ESPN, through its parallel STATS Pro-Line System.

The NBA filed suit against both STATS and Motorola in March, 1996, alleging that the real-time sports information transmitted through SportsTrax violated the NBA's right of "ownership" of the games' scores and other statistics.⁹ The league asserted that Motorola and STATS' activities infringed on the NBA's copyright in its game broadcasts, as well as a claimed copyright in actual games themselves.¹⁰ According to the NBA, the games were "original works of authorship" which the league had the exclusive right to republish and sell.¹¹ This argument in part was based on a footnote in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n.*,¹² which stated that "players' performances contain the modest creativity required for copyright ability."¹³ However, the court in *Baltimore Orioles* went on to find that the broadcast of games was copyrightable due to the efforts of the media personnel more than the players actions.¹⁴ Thus both the District Court and the Second Circuit did not find the NBA's position tenable and found that the players performances in games and the actual games themselves were not protected by federal law.¹⁵

shot or foul, whether the shot was made or missed, who made the shot, whether the shot is a foul shot, a two-point or a three-point field goal, and who committed any foul, and (4) a rudimentary box score that changes as game events occur, and such information is displayed with a delay of less than thirty seconds from the actual progress of a game.

9. Soon after the NBA filed suit, their respective brethren joined the two sides in the case in the battle. Amicus curiae briefs were filed by, amongst others, the New York Times, the Associated Press, and America Online in support of the defendants while the other three major sports leagues filed briefs in support of the NBA's position.

10. The primary source of revenue for the NBA was from broadcast licenses and fees associated with the distribution of game footage. *STATS*, 939 F. Supp at 1077. For instance, videotapes of each game are sold to media outlets for a fee of between \$1,000 and \$5,000 per minute. *Id.* Thus, STATS dissemination of real-time statistics to its subscribers was a real bargain, at least for its subscribers. Reporters were paid \$10 per game to watch and report game statistics back to STATS. *Id.* at 1080.

11. On appeal, the NBA predicated its argument on the theory that games were authored just as novels or movies. *STATS*, 105 F.3d at 846. Under 17 U.S.C. § 102, the NBA believed that it was entitled to relief from STATS use of real-time game statistics. Works of authorship under this act include literary works; musical works, dramatic works, pantomimes, pictorials, motion pictures, and sound recordings. *Id.*

12. 805 F.2d 663 (7th Cir. 1986) (discussing the ownership of rights to broadcast of major league games).

13. *Id.* at 669 n.7.

14. *Id.*

15. According to the Second Circuit, there is a "lack of case law [on the issue due] to a general understanding that athletic events were, and are, uncopyrightable". *STATS*, 105 F.3d at 846. If Congress wanted to protect the "events" themselves it would have done so in passing the Copyright Act of 1976. *Id.*

The Second Circuit affirmed the District Court's ruling that there was no copyright protection for basketball games or other sports events because they do not constitute "original works" of authorship under section 102(a) of the Copyright Act of 1976.¹⁶ Since the games are unscripted and the outcome of the games are uncertain they "are not 'authored' in any common sense of the word."¹⁷ The NBA and other professional leagues attract fans by marketing the excitement and thrill of the suspense of the game. The Court implied if the games are "authored" and subject to copyright protection, then fans would have to assume that the unexpected play or mistake was actually planned just like a high-speed chase in action packed motion picture. The lack of precedent on the issue was, according to the Court, attributed to the obvious conclusion from the statutory language that "athletic events were, and are, uncopyrightable."¹⁸

Furthermore, the NBA also claimed that Motorola and STATS were committing misappropriation under New York State law.¹⁹ The NBA argued that the defendants were trying to "reap where they have not sown" when they reported NBA game scores and statistics which they in return then sold to their subscribers.²⁰

The district court first considered whether federal copyright law preempted the NBA's claim for misappropriation under New York State Common Law.²¹ It found that the NBA's misappropriation claim was only partially preempted because federal law did not protect the "work of authorship" in question.²² This partial preemption analysis was unprecedented. According to the court, a state-law claim alleging misappropriation of a copyrighted broadcast is not preempted if the event being broadcast is not itself copyrightable and is created through the "skill,

16. *Id.* at 846.

17. *Id.*

18. *Id.* at 847.

19. New York misappropriation law developed in response to the case of *International News Service v. Associated Press*, 248 U.S. 215 (1918). This case involved two wire news services that were in competition to gather and sell news articles to the general public. *Id.* at 221. *International News Service* ("INS") allegedly took stories from the *Associated Press's* ("AP") news bulletins and redistributed them as their own product. *Id.* at 232. The Supreme Court held that INS's conduct was a misappropriation of AP's property rights. *Id.* at 242. Even though AP's news reports were not "copyrighted," INS was not entitled to take information gathered by AP and in turn sell that information as its own. *Id.* at 245. This so-called "hot news" may not be subject to copyright protection but is available as a cause of action under tort law.

20. *Id.* at 240.

21. *STATS*, 105 F.3d at 841, 847. Under the Copyright Act of 1976, a state law claim is preempted by 17 U.S.C. § 301 when both the subject matter and general scope requirements of the act are met. *Id.*

22. *Id.*

expenditure, and labor” of another.²³ The court ruled that the defendants’ activities misappropriated the NBA’s property rights in NBA games, based on a series of old New York decisions predating the extension of copyright protection to live broadcasts.²⁴ Those cases found misappropriation where the defendant used the plaintiff’s play-by-play radio broadcasts of sports events to prepare competing play-by-play accounts of game action. The district court held that even though SportsTrax carried only limited scores and displayed no game action, reporting the scores itself misappropriated “the excitement and entertainment of a game in progress.”²⁵

The district court found that STATS and Motorola had violated New York State Common Law by unlawfully misappropriating the NBA’s rights in its games.²⁶ A judgment was entered which permanently enjoined defendants, and persons acting in concert with them from transmitting, via any means, any data or information about NBA games while those games was in progress.

III. MISAPPROPRIATION OF STATS?

On appeal, the Second Circuit reviewed whether the NBA’s claim for misappropriation under New York state law which was based upon the transmission of “real-time” facts from copyrighted broadcasts of NBA basketball games was preempted by Section 301 of the Copyright Act.²⁷

The lower court’s partial preemption analysis was rejected for several reasons. The Court ruled that the old radio broadcasts on which the district court relied were “simply not good law,”²⁸ in light of the amendments to the Copyright Act that extended protection to simultaneously recorded broadcasts. Ironically, the sports leagues themselves supported these amendments.

In addition, the Court noted that Section 301 of the Copyright Act was intended by Congress to be broad in scope. Therefore, any state law misappropriation claims addressing any material contained within copyrightable works (even if those works contained uncopyrightable elements such as facts) was expressly preempted. The Court found that a partial

23. *STATS*, 939 F. Supp. at 1071, 1098.

24. *Id.* See *Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.*, 300 N.Y.S. 159 (1937); *Mutual Broadcasting Sys. v. Muzak Corp.*, 30 N.Y.S.2d 419 (1941).

25. *STATS*, 939 F. Supp. at 1106.

26. Under New York common law, a claim for unfair competition involving misappropriation requires the unauthorized seizure and use of another person’s property. 939 F. Supp at 1099. The Court found that “an effort to profit from the labor, skill, expenditures, name and reputation of others which appears in this case constitutes unfair competition and will be enjoined.” *Id.*

27. 17 U.S.C. § 301 (1997).

28. *STATS*, 105 F.3d at 852.

preemption doctrine would significantly expand the reach of state law claims and would violate the clear and manifest intent of Congress. Although there is a difficulty inherent in attempting to separate the copyrightable work from facts or events that are uncopyrightable, athletic events clearly are not copyrightable in the eyes of the Court.²⁹

Finally the Court considered whether the NBA's state law misappropriation claim addressed rights within the general scope of the exclusive rights granted it under state copyright law. The Court recognized that all state law "misappropriation" claims are not the same for preemption purposes; however, the broad type of "commercial immorality" misappropriation found by the district court under New York law was clearly preempted under existing Second Circuit precedent. The Court held that "commercial immorality" was "virtually synonymous for wrongful copying and . . . in no meaningful fashion distinguishable from infringement of a copyright."³⁰ The only type of state misappropriation claim, which survives preemption, is a narrowly tailored hot-news claim.³¹ The Second Circuit summarily reversed the District Court, holding that the defendants' conduct did not constitute a misappropriation of "hot news."

IV. ARE REAL-TIME STATS "HOT NEWS"?

The hot news doctrine has its roots in the seminal case of *International News Service v. Associated Press*,³² ("INS") which involved the practice of lifting information from AP sources and republishing these news items to its subscribers. The Supreme Court found that AP had a property right in the news it published. Thus the ability of AP's competitors such as INS to take stories from INS and republish them as their own was an infringement on AP's copyright of the news and allowed this "hot news" to avoid preemption. A valid hot-news claim requires proof of each of the following elements to escape preemption:

- (i) the plaintiff generates or collects the information at some cost or expense;
- (ii) the value of the information is highly time-sensitive;
- (iii) the defendant's use of the information constitutes free riding on the plaintiff's costly efforts to generate or collect it;
- (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and
- (v) the ability of others to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence

29. *Id.* at 848.

30. *Id.* at 851.

31. *Id.* at 852.

32. 248 U.S. 215 (1918).

or quality would be substantially threatened.³³

In describing these elements, the Court emphasized the economic basis of *INS*'s holding which is to preserve a marketplace in which competing news gatherers will retain an incentive to engage in their business without having to worry about infringement by cutthroat competitors.³⁴ In the case of the NBA, the Second Circuit ruled that the NBA failed to prove the central elements of a "hot-news" misappropriation claim.³⁵ *STATS*, at its own expense, gathered the information carried on SportsTrax and was not free-riding on the NBA's own statistics-gathering efforts. Perhaps most importantly, unlike *INS*, the NBA games and broadcasts were obviously not in competition with *STATS*' independent activity of collecting and transmitting statistics. The Court viewed the activities of Motorola (as well as *STATS*' activities on AOL and its' proprietary on-line services) as not the type of situation which *INS* was intended to prevent.³⁶

V. THE WINNER IS . . .

The Second Court dismissed the misappropriation claim and vacated the injunction against *STATS* and Motorola.³⁷ This decision has a tremendous impact on the dissemination of "real-time" sports and other information through new technologies. As noted above, the other three major professional sports leagues filed amicus briefs supporting the NBA since a Second Circuit decision rejecting the NBA's claims would bind them as well. As a result of the Court's decision, as long as sports games are broadcast live, the sports leagues will be unable to assert that they own the exclusive rights to real-time game information. The leagues will have no choice but to compete in the marketplace in the field of sports statistics. The decision also makes clear that the games themselves are not copyrightable. Accordingly, sports fans will have access to ever more rapid, comprehensive and cost effective outlets for sports statistics.

The Court's decision may, in certain circumstances, actually enhance the ability of sports statistical services, as well as other media outlets that distribute information to prevent the unauthorized taking or

33. *STATS*, 105 F.3d at 841, 852.

34. *Id.* at 853. The NBA's assertion of a hot news claim was based on three products, which it believed were the sole property of the league. *Id.* First, the playing of games. *Id.* Secondly, is the licensing of copyrighted broadcasts. The third product that the NBA sought to maintain exclusive control over was the collection and redistribution of real-time and post-game information. *Id.* The Second Circuit found that the NBA failed to prove any competitive effect by *STATS* regarding the first two products and a lack of free-loading by *STATS* on the redistribution of game statistics. *Id.*

35. *Id.*

36. *Id.* at 854.

37. *Id.*

“framing”³⁸ of “real-time” information. Companies like STATS will be able to guard against the unauthorized use of their products such as real-time information just as INS did in response to AP’s use of hot news.

Finally, the Court’s ruling provides guidelines to enable businesses to use new information technology to rapidly disseminate information obtained from the public domain to consumers at large. No longer may entrepreneurial activities that fall outside of the limited scope of INS be chilled by claims of proprietary rights in the facts themselves.

In general, the Second Circuit has properly restored *INS* to its original limited scope, clarifying that the essential element of an *INS* claim is whether the defendant is free-riding in a way which threatens “the very existence of the product or service” provided by the plaintiff. The decision also appropriately confirms that an action for copyright infringement is the sole remedy for use of a broadcast of a live event.

The real winners of this decision are the consumers who want real-time sports information. For a relatively small fee subscribers can enjoy the benefits of this new technology without having to worry about paying the high price of a ticket or going through the expense of purchasing a license in order to view a couple of box scores.

38. See *The Washington Post Company, et al. v. Total News, Inc., et al.*, 97 Civ. 1190 (S.D.N.Y. filed Feb. 20, 1997).