

# MORRIS COMMUNICATIONS V. PGA TOUR: BATTLE OVER THE RIGHTS TO REAL-TIME SPORTS SCORES

By *Andrea Freeman*

The new form of instantaneous communication made possible by the Internet has created an exciting attraction for sports enthusiasts: real-time sports scores. Now, fans stuck at work or lacking access to live or televised sporting events can follow sports in real time by logging on to any number of sports websites. Major producers of sports news, such as Sports Illustrated and ESPN, sponsor websites that provide real-time sports scores, as do all of the major sports franchises, such as the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), and Major League Baseball (MLB). These sites appeal to a wide range of sports consumers, from high-stakes gamblers to casual fans.

Real-time scores represent a significant potential source of revenues for sports conglomerates.<sup>1</sup> This potential has created a competitive market for the scores and has led to litigation over who controls the right to disseminate and thereby profit from the information. Parties seeking to compete in the market have proceeded on different legal theories, including misappropriation, anticompetitive behavior, and copyright infringement.<sup>2</sup> Sports scores do not fit neatly into any intellectual property definition, and the only two cases to address the issue to date—*NBA v. Motorola, Inc.* and *Morris Communications v. PGA Tour*—drew different conclusions as to the proper categorization. While the *Motorola* court determined that real-time sports scores are mere facts that no one can own,<sup>3</sup> the *PGA Tour*

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1. See Louis Klein, *Misappropriation Doctrine: National Basketball Association v. Motorola, Inc.: Future Prospects for Protecting Real-Time Information*, 64 BROOK. L. REV. 585, 585 (1998) (“[R]eal-time information . . . may be the most sought after, highly prized species of information available.”); Gary R. Roberts, *The Scope of the Exclusive Right to Control Dissemination of Real-Time Sports Event Information*, 15 STAN. L. & POL’Y REV. 167, 168 (2004) (arguing that the ability to profit from the sale of real-time information hinges on sports promoters’ ability to gain exclusive rights to the information).

2. Bruce Keller argues that statutory law is inadequate to address the demands of high technology represented by real-time sports scores. Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 428 (1998).

3. Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997).

court suggested that a compilation of scores constitutes property that the company who created the compilation may legally protect.<sup>4</sup>

This Note explores legal tactics and theories applicable to controversies over real-time sports scores. Part I describes the most recent case in the field, *PGA Tour*. Part II discusses two legal regimes that parties have used in attempts to create or deny ownership of real-time sports scores: the Sherman Act and the doctrine of misappropriation. In Part III, this Note compares the Second Circuit's treatment of real-time sports scores in *Motorola* to the Eleventh Circuit's analysis in *PGA Tour*, and concludes that, although both emphasized free-riding as central to their holdings, the courts ultimately based their decisions on varying interpretations of property issues. Next, the Part addresses these underlying property issues and contemplates how they may inform future attempts to protect real-time sports scores. Finally, this Note examines the broader interests of consumers and producers in the dissemination of real-time sports scores and how the courts might best serve those interests.

## I. CASE SUMMARY

### A. Facts

Plaintiff Morris Communications is a media company that publishes print and electronic newspapers;<sup>5</sup> defendant PGA Tours ("PGA") sponsors the most popular series of professional golf tournaments in the world.<sup>6</sup> PGA invested a substantial sum to develop a Real-Time Scoring System ("RTSS") to compile tournament scores. To operate the RTSS, PGA engaged volunteer "walking scorers" to follow each group of golfers on the course and tabulate the scores of each player.<sup>7</sup> "Hole reporters" then relayed this information to a production truck that compiled the scores and transmitted them to electronic leaderboards, distributed along the golf course, which typically reflected the scores of only the top ten or fifteen players, as well as to the on-site "media center" and the webpage "pga-tour.com."<sup>8</sup> PGA prohibited the use of wireless devices by the press or public during tournaments, making the RTSS the sole source of compiled golf scores for the full list of tournament players.<sup>9</sup>

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4. *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1296 n.13 (11th Cir. 2004) [hereinafter *PGA Tour III*].

5. *Id.* at 1290.

6. *Id.*

7. *Id.* at 1290-91.

8. *Id.* at 1291.

9. *Id.*

PGA required media organizations to agree to a set of terms and conditions called the On-Line Service Regulations (“OLSR”) to gain access to the media center. The OLSR mandated a delay in publishing scoring information until (1) thirty minutes after a player’s shot or (2) PGA published scoring information on pगतour.com.<sup>10</sup> PGA revised the OLSR in January 2000 to prohibit credentialed media from selling or syndicating scoring information to uncredentialed third-party website publishers without a special license purchased from PGA.<sup>11</sup>

Prior to PGA’s revision of the OLSR, Morris Communications—PGA’s only major competitor in the syndication market for real-time golf scores<sup>12</sup>—had contracted with several Internet publishers to sell real-time scores from PGA tournaments.<sup>13</sup> In an effort to retain the potential profits from these agreements,<sup>14</sup> Morris Communications sought to enjoin PGA from enforcing the OLSR, alleging that the rules constituted four separate violations of section 2 of the Sherman Act: (1) a monopolization of the Internet markets; (2) an unlawful refusal to deal; (3) monopoly leveraging; and (4) an attempted monopolization of the Internet markets.<sup>15</sup>

## B. Procedural History

Morris Communications filed a complaint and motion for a preliminary injunction in the district court in October 2000, seeking to prevent PGA from conditioning Morris Communications’ accreditation for the Tampa Bay Classic on an agreement not to syndicate real-time scores.<sup>16</sup> Finding that “real-time golf scores represent the end product of a system which defendant has deliberately designed for their production,” and that Morris Communications’ claims constituted an attempt to free-ride on PGA’s RTSS technology, the court denied Morris Communications’ motion.<sup>17</sup>

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10. *Id.*

11. *Id.*

12. In fact, Morris Communications published real-time golf scores on the Internet before PGA. Initial Brief of Appellant at 8, *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004) (Nos. 03-10226, 03-11502).

13. *Morris Communications Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322, 1325 (M.D. Fla. 2000) [hereinafter *PGA Tour I*].

14. Morris stood to lose approximately \$280,000 due to the change in PGA’s terms. See Jonathan Ringel, *PGA Media Fight Set to Tee Off at 11th Circuit*, FULTON COUNTY DAILY REP., Jan. 5, 2004 (reporting that Morris’ contracts with CNN dropped from \$430,000 to \$150,000 under the new rules), <http://www.law.com/jsp/article.jsp?id=1071719761758>.

15. *PGA Tour III*, 364 F.3d at 1292.

16. *PGA Tour I*, 117 F. Supp. 2d at 1326.

17. *Id.* at 1329.

In December 2002, the district court granted PGA's motion for summary judgment on all counts, finding that PGA's desire to prevent Morris Communications from free-riding on PGA's investment in the RTSS constituted a valid business justification for the OLSR.<sup>18</sup> Morris Communications subsequently filed a motion for relief from judgment based on PGA's adoption of new terms of service.<sup>19</sup> Finding these new conditions beyond the scope of the initial lawsuit, the court denied the motion.<sup>20</sup>

### C. The Eleventh Circuit's Analysis

The Eleventh Circuit reviewed *de novo* the district court's decision to grant PGA's motion for summary judgment on all counts, and further reviewed the court's denial of Morris Communications' motion for relief from judgment due to abuse of discretion.<sup>21</sup> Declaring intellectual property and First Amendment issues irrelevant, the court considered only whether PGA's restrictions on Morris Communications violated section 2 of the Sherman Act.<sup>22</sup> The court found that they did not.

Asserting that any company, even a monopolist, that invests in a valuable product has a right not to provide that product to competitors for free, the court labeled Morris Communications' demands to syndicate the scores compiled by the RTSS without paying a license fee a "classic example of free-riding."<sup>23</sup> The prevention of free-riding provided PGA with a legitimate, pro-competitive reason to impose restrictions on the media's access to its events;<sup>24</sup> the court's finding of a legitimate business justification for PGA's conduct effectively disposed of Morris Communications' claims.

The court only briefly reviewed each of Morris Communications' four antitrust claims. Referring to the first claim—monopolization of Internet markets—the court merely described the rules and elements of monopolization. It then concluded that "even if PGA is monopolistic, and even if

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18. See *Morris Communications Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1285-87 (M.D. Fla. 2002) [hereinafter *PGA Tour II*].

19. The new terms required organizations wishing to use the information displayed on the PGA website for commercial purposes to purchase a license from PGA. See *PGA Tour III*, 364 F.3d at 1291.

20. *Id.* at 1292.

21. *Id.*

22. A summary of Morris Communications' attorney's arguments on these issues appears in John Hanusz, *11th Circuit Takes Swing at Real-time Golf Score Dispute*, FULTON COUNTY DAILY REP., Jan. 22, 2004, <http://www.law.com/jsp/article.jsp?id=1074259249111>.

23. *PGA Tour III*, 364 F.3d at 1298.

24. *Id.*

PGA refused to deal with Morris Communications, it has not violated section 2 of the Sherman Act” because PGA had a legitimate business justification for its actions.<sup>25</sup> The court then quickly disposed of the fourth claim—attempt to monopolize—in a footnote, explaining that its dismissal of the monopolization claim rendered this claim irrelevant.<sup>26</sup> The court then proceeded to the second claim: refusal to deal. As with the first claim, the court merely set out the attributes of a refusal to deal claim and then dismissed the claim without further analysis. Finally, the court declined to examine the monopoly leveraging claim, due to its similarity to the refusal to deal claim.<sup>27</sup>

For the claim of monopolization, once the court found that PGA’s efforts to prevent Morris Communications from free-riding constituted a valid business justification for creating and enforcing the OLSR, the burden shifted to Morris Communications to show that PGA’s proffered justification was merely pretextual. To meet this burden, Morris Communications relied on a series of cases involving defendants who prevented the sale of products that the plaintiffs had created or purchased themselves.<sup>28</sup> The court found these cases distinguishable because it was PGA, not Morris Communications, who compiled the golf scores.<sup>29</sup> The court also contrasted cases where defendants refused to sell to plaintiffs with the case at bar, where PGA had in fact demonstrated its willingness to sell by offering Morris Communications a license.<sup>30</sup> The Eleventh Circuit affirmed both the district court’s summary judgment in favor of PGA on all counts and its denial of Morris Communications’ motion for relief from judgment.<sup>31</sup>

## II. LEGAL BACKGROUND

### A. Section 2 of the Sherman Act

In *PGA Tour*, Morris Communications attempted to foreclose PGA’s imposition of restrictions on Morris Communications’ ability to sell compiled real-time golf scores to third parties by alleging violations of the

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25. *Id.* at 1295.

26. *See id.* at 1293 n.10. The court also indicated that the attempt to monopolize claim was harder to prove because of the additional intent requirement. *Id.*

27. *Id.* at 1294 n.11.

28. *Id.* at 1297 (citing *Eastman Kodak v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Lorain Journal v. United States*, 342 U.S. 143 (1951); and others).

29. *Id.*

30. *Id.*

31. *Id.* at 1298.

Sherman Act.<sup>32</sup> Section 2 of the Sherman Act ensures that “[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.”<sup>33</sup> Monopolization has two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>34</sup> The plaintiff need not show that an attempt was successful; the Sherman Act also protects against “dangerous probability.”<sup>35</sup>

With respect to the first element of monopolization, courts have defined monopoly power as the ability to control prices or exclude competition.<sup>36</sup> The relevant market generally refers to “commodities reasonably interchangeable by consumers for the same purposes.”<sup>37</sup> To identify the relevant market, a trier of fact must decide whether a product is unique or has suitable substitutes.<sup>38</sup> Parties may be competing with each other either in or for the relevant market.<sup>39</sup>

As for the second element, “willful acquisition” requires predatory or unreasonably exclusionary acts or practices that prevent or exclude competition.<sup>40</sup> An act is predatory if it attempts to exclude rivals on a basis other than efficiency.<sup>41</sup> Finally, to satisfy an attempt to monopolize claim, a plaintiff must prove (1) predatory or anticompetitive conduct; (2) specific intent to monopolize; and (3) dangerous probability of achieving monopoly power.<sup>42</sup>

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32. These claims were: (1) monopolization of the Internet markets; (2) unlawful refusal to deal; (3) monopoly leveraging; and (4) attempted monopolization of the Internet markets. *See id.* at 1292.

33. 15 U.S.C. § 2 (2000).

34. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

35. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951).

36. *United States v. Griffith*, 344 U.S. 100, 107 (1948) (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809, 811, 814 (1946)).

37. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

38. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986).

39. *Id.*

40. *See Trans Sport Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2d Cir. 1992).

41. *Id.* at 189 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)).

42. *See United States v. Microsoft Corp.*, 253 F.3d 34, 80 (D.D.C. 2001).

Under the Sherman Act, possession of monopoly power is not unlawful unless the second element of monopolization is satisfied.<sup>43</sup> A defendant may also escape section 2 liability by demonstrating a valid business justification for its anticompetitive acts.<sup>44</sup> Under these circumstances, the burden shifts to the plaintiff to show that the justification is merely pretextual.<sup>45</sup> Consumer welfare is often a significant consideration when analyzing the validity of business practices.<sup>46</sup> By protecting competition, antitrust law ensures that a free-market system benefits consumers with prices regulated naturally by the marketplace.<sup>47</sup>

Generally, “a firm possessing monopoly power has no duty to cooperate with its business rivals.”<sup>48</sup> However, some refusals to deal that extend monopoly power from one market into another violate the Sherman Act.<sup>49</sup> Courts have analyzed these types of claims using two primary tests: the essential facilities doctrine and the intent test.<sup>50</sup> Under the essential facilities doctrine, the owner of a facility that cannot easily be duplicated and to which access is necessary in order to compete in the relevant market must make that facility available to competitors on nondiscriminatory terms.<sup>51</sup> The facility in question need not be completely indispensable, but its duplication should be economically infeasible and denial of its use must inflict a “severe handicap” on potential competitors.<sup>52</sup> Under the intent test, a monopolist may not impair competition by intentionally excluding competitors unnecessarily.<sup>53</sup>

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43. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 879 (2004) (“[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”).

44. *See Aspen Skiing*, 472 U.S. at 597. However, in a later decision, the Court determined that a defendant need not demonstrate valid business justification to escape section 2 liability in refusal to deal cases. *Trinko*, 124 S. Ct. at 881.

45. *Starter Sportswear*, 964 F.2d at 191.

46. *Fishman v. Wirtz*, 807 F.2d 520, 535 (7th Cir. 1986).

47. *Id.* at 536.

48. *Aspen Skiing*, 472 U.S. at 600.

49. *Fishman*, 807 F.2d at 539 (explaining that control of an essential facility may violate section 2 because it extends monopoly power beyond one market or production stage).

50. The Supreme Court has never explicitly approved of the essential facilities doctrine. *See Aspen Skiing*, 472 U.S. at 611 n.44 (“Given our conclusion that the evidence amply supports the verdict . . . we find it unnecessary to consider the possible relevance of the ‘essential facilities’ doctrine.”).

51. *Fishman*, 807 F.2d at 539.

52. *Id.* (quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.D.C. 1977)).

53. *See PGA Tour III*, 364 F.3d 1288, 1294 (11th Cir. 2004) (citing *Mid-Texas Communications Sys. v. AT&T*, 615 F.2d 1372, 1388 (5th Cir. 1980)).

## B. Misappropriation

The Second Circuit used the doctrine of misappropriation to analyze claims involving real-time sports scores in *NBA v. Motorola, Inc.*<sup>54</sup> The doctrine of misappropriation, first declared in 1918, underwent a series of significant changes throughout the twentieth century and nearly disappeared after the abolition of federal common law in 1938.<sup>55</sup> In 1997, the *Motorola* court revitalized the doctrine, setting forth a list of elements for a “hot news” misappropriation claim.<sup>56</sup>

The Supreme Court created the federal common law claim of misappropriation in *International News Service v. Associated Press* (“*INS*”).<sup>57</sup> In *INS*, defendant International News Service’s (INS) copied news stories from the bulletins and early editions of plaintiff Associated Press (AP) east coast newspapers, selling the stories as its own in west coast markets.<sup>58</sup> The Court analyzed the case according to the principles of unfair competition law and determined that although news generally is not copy-rightable, under the facts of the case, where AP had invested great effort and expense in its product, AP could enjoin INS from replicating and selling its stories.<sup>59</sup> Significantly, the Court afforded AP protection of its news stories only as long as the stories retained commercial value due to their newsworthiness.<sup>60</sup> Courts later interpreted this condition to mean that only parties in direct competition with each other that derive value from the de-

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54. 105 F.3d 841, 852 (2d Cir. 1997). A number of interesting articles explore the significance of the *Motorola* decision. See generally Alan D. Lieb, *NBA v. Motorola and Stats, Inc.: The Second Circuit Properly Limits the “Hot News Doctrine”*, 16 J. MARSHALL J. COMPUTER & INFO. L. 197 (1999) (predicting that sports leagues will never be able to claim exclusive rights over real-time game information); Clifford N. MacDonald, *Gamecasts and NBA v. Motorola: Do They Still Love This Game?*, 5 N.C. J.L. & Tech. 329 (2004) (arguing that Congress should amend the Copyright Act to protect gamecasting).

55. See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). For an extensive history of the misappropriation doctrine, see Edmund J. Sease, *Misappropriation Is Seventy-Five Years Old; Should We Bury It or Revive It?*, 70 N.D. L. REV. 781 (1994). Some commentators lament both the creation and return of the misappropriation doctrine. See Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621 (2003); Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875 (1991) (suggesting a revision of the misappropriation doctrine based on the incorporation of competitive principles).

56. *Motorola*, 105 F.3d at 852.

57. 248 U.S. 215 (1918)

58. *Id.* at 231.

59. *Id.* at 242.

60. See *id.* at 245.



lay in the dissemination of information may succeed on a misappropriation claim.<sup>61</sup>

*INS* remained good law until 1938, when *Erie Railroad v. Tompkins* abolished federal common law, making federal misappropriation claims obsolete.<sup>62</sup> The tort of misappropriation survived as state law in many states, where courts often allowed it as a cause of action in cases involving copyright law.<sup>63</sup> Subsequent cases developed the “competitive injury requirement” more fully. In *National Football League v. Governor of Delaware*, the court refused to find misappropriation of the NFL’s investments and reputation by a state football lottery, partly because the parties’ businesses did not compete with each other and thus the defendants’ actions did not harm the plaintiff in its primary market.<sup>64</sup> Later, in an influential dissent in *Board of Trade v. Dow Jones & Co.*, Justice Simon argued that in misappropriation cases, to preserve intellectual property’s policy goal of balancing the incentives of authors and inventors with the public good, the owner of the property at issue must show that defendant’s free-riding will inhibit the owner’s continued production of the product or service at issue.<sup>65</sup>

In *Motorola*, the Second Circuit further clarified what remains of the misappropriation doctrine created in *INS*. The NBA sought to enjoin Motorola from disseminating real-time basketball scores and other statistics on a “Sportstrax” pager, which Motorola designed specifically for this purpose.<sup>66</sup> Motorola gathered information through reporters who watched games on television or listened to the games on the radio, sending information to a host computer that retransmitted the data via satellite to individual pagers.<sup>67</sup> Claiming that Motorola’s actions infringed its rights to the scores, the NBA filed a claim of misappropriation. Because Motorola used its own resources to collect the data it transmitted on Sportstrax, the Second Circuit found that Motorola did not free-ride on the NBA’s “hot news” property.<sup>68</sup>

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61. See *Nat’l Football League v. Governor of Delaware*, 435 F. Supp. 1372, 1377 (D. Del. 1977).

62. 304 U.S. 64 (1938).

63. For example, in *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987), plaintiffs accused defendants of misappropriating plaintiff’s “time and effort” in creating a map and document.

64. See 435 F. Supp. at 1378.

65. 456 N.E.2d 84, 91-92 (Ill. 1983) (Simon, J., dissenting).

66. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 843 (2d Cir. 1997).

67. *Id.* at 844.

68. Free-riding is the third essential element of a “hot news” misappropriation claim. *Id.* at 845.

After surveying the history of misappropriation claims, the Second Circuit laid out the elements of a "hot news" misappropriation claim:

- (i) the plaintiff generates or collects 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,
- (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened[.]<sup>69</sup>

Analyzing the NBA's claims according to these elements, the court found that Motorola's Sportstrax product did not interfere in any way with the NBA's primary markets, namely, live and television audiences for basketball games.<sup>70</sup> In fact, Motorola designed its product specifically to appeal to individuals unable to participate in either of these markets. Recognizing the existence of a separate market for "real-time transmission of factual information," the court determined that Motorola's Sportstrax did not free-ride on the NBA's similar Gamestats product because each company bore its own costs of collecting the information and the NBA did not demonstrate any damage arising from Motorola's alleged free-riding.<sup>71</sup>

Generally, courts analyzing claims under both the misappropriation doctrine and the Sherman Act have struggled to find a balance between regulating inappropriate behavior and allowing the free market to flourish.<sup>72</sup>

### III. DISCUSSION

#### A. Sherman Act Violations

The *PGA Tour* court's determination that the prevention of free-riding constituted a valid business justification precluded any analysis of Morris

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69. *Id.* at 852.

70. *Id.* at 853-54.

71. *Id.* at 854.

72. First Amendment concerns may also weigh against findings of misappropriation in real-time sports score cases. See Note, *Nothing But Internet*, 110 HARV. L. REV. 1143 (1997).

Communications' antitrust claims, and thus left open the question of how a court would rule on the allegations if this justification did not exist. Additionally, the court's decision not to apply the essential facilities doctrine to the facts foreclosed an examination into whether denying Morris Communications access to the media center represented an exclusionary act that Morris Communications might have had better success litigating under the Sherman Act. This Note argues that because Morris Communications had the right to copy a compilation of facts under copyright law, the court should have rejected the prevention of free-riding as a valid business justification and proceeded with a thorough analysis of all of Morris Communications' claims.

### 1. *Monopolization*

Had the court analyzed Morris Communications' Sherman Act claims instead of relying on PGA's proffered business justification to dispose of them, the court would have concluded that PGA's monopoly of the compiled real-time scores was not unlawful.

When analyzing a monopolization claim, a court must identify the relevant market.<sup>73</sup> Although PGA's primary market was the market for golf tournaments or, more generally, large sporting events (placing it in competition with other popular spectator sports such as tennis and hockey), its success in these markets allowed it to expand and compete in other, related markets, such as the Internet. On the Internet, PGA competed for a share of the market for sports or golf-related websites and for dominance in the sub-market for real-time golf scores.

Morris Communications, whose primary market is print and electronic newspapers, competed with PGA in the market for real-time golf scores and its syndication. PGA held a monopoly in this market attributable either to its superior ability to satisfy consumers or to its exclusionary or predatory behavior towards its competitors. The court likely would not have found PGA's conduct to be predatory or exclusionary because PGA did not forcibly shut Morris Communications out of the syndication market for real-time scores. Instead, PGA used its position in the market to require a licensing fee from competitors in exchange for certain rights associated with access to PGA's private events. This conduct merely represents sharp business acumen, a lawful source of monopolization under the Sherman Act.

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73. See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

An analysis of monopolization should also take into account potential harms or benefits to consumers flowing from the monopolist's actions.<sup>74</sup> In this case, different consumer interests would be served by PGA's monopoly than by Morris Communications' ability to compete for syndication, and it is unclear which would weigh more heavily.

On one hand, Morris Communications could decide not to pay PGA's licensing fee. Morris Communications might choose instead simply to abandon its contracts to syndicate the scores.<sup>75</sup> As a result, pgtour.com would have no competitors, and thus PGA would have little need to improve its site for an already captive audience of fans seeking real-time golf scores. The incentive for competitors to draw consumers by other means would increase, possibly creating more desirable golf-related websites, which would contribute to an overall increase in satisfaction for Internet-using golf fans.

On the other hand, Morris Communications could decide to pay the licensing fee. This would likely divert resources from other areas of its business that may have provided valuable services to consumers. However, if pgtour.com had to compete with other providers of real-time golf scores, PGA might devote more resources to its own website, thereby increasing consumer satisfaction. In light of these considerations, the court might have concluded that PGA's monopoly was not an unlawful one simply because it did not create a situation affecting consumers or the market greatly enough to satisfy the second element of monopolization. While this would dispose of the plaintiff's claims of monopolization and attempted monopolization, the court would still need to consider the refusal to deal and monopoly leveraging claims.

## 2. *Essential Facilities Doctrine*

Based on the property considerations discussed below, if the court had not accepted PGA's business justification, it might have applied the essential facilities doctrine to its analysis of Morris Communications' claims of refusal to deal and monopoly-leveraging. Morris Communications could make a persuasive argument that PGA's media center is an essential facility that PGA must make accessible to Morris Communications: without access to the center, Morris Communications simply cannot compete in the market for syndicated real-time golf scores. Moreover, the center cannot be duplicated; PGA's prohibition of the use of wireless devices elimi-

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74. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-36 (7th Cir. 1986).

75. This argument assumes that, under the circumstances, this decision would represent an efficient breach of contract.

nated any possibility of creating a system independent of the RTSS that would produce compiled real-time scores.

A finding that the media center is an essential facility would not only suggest that without PGA's valid business justification, Morris Communications would have succeeded on its refusal to deal claim. But, such a finding would also raise the issue of whether courts should allow businesses to deny the press the ability to cover events in order to preserve the organizers' own economic interests. This issue has arisen in relation to local coverage of Olympic events as well as in a recent European case disputing the rights to photographs of a soccer match.<sup>76</sup> *PGA Tour* suggests a leniency towards businesses engaging in self-help remedies and a reluctance to interfere with contracts freely made by independent parties—an approach later adopted by the Supreme Court in another refusal to deal case, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*.<sup>77</sup>

## B. Misappropriation

If the court had analyzed the facts of *PGA Tour* as a misappropriation claim brought by PGA, it would have found that the real-time golf scores do not meet the “hot news” exception and that PGA could not constrain Morris Communications from doing what it wished with the scores, including syndicating the information to third-party real-time sports scores providers. As plaintiff, PGA would probably meet the first four elements of a “hot news” claim: PGA generates and collects the information at some cost or expense; the value of the information is highly time-sensitive; Morris Communications' use of the information constitutes free-riding on PGA's costly efforts to generate or collect it; and Morris Communications' use of the information is in direct competition with a product or service offered by PGA.<sup>78</sup>

However, PGA would not succeed on the fifth element of the claim, which requires that Morris Communications' ability to free-ride on PGA's efforts would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. PGA compiles

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76. See Doreen Carvajal, *Clash Over Internet Sports Photos*, INT'L HERALD TRIB., Oct. 25, 2004 (describing battles in Europe between soccer leagues and newspaper publishers over the right to control the release of photographs: “‘What this is all about is football's awareness of the value of live or near-live publishing’”), <http://www.nytimes.com/2004/10/25/technology/25photo.html?oref=login&th>.

77. 124 S. Ct. 872, 881 (2004).

78. For the elements of a “hot news” misappropriation claim, see *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997).

players' scores via the RTSS to determine the placement order of competitors and to reflect these scores to the players, the fans in attendance, and the general public. In fact, PGA created and maintained the RTSS to meet this essential business need for accurate scoring. Therefore, even if the court did not find misappropriation and allowed Morris Communications access to the real-time scores without requiring the payment of a licensing fee for the right to syndicate them, PGA would undoubtedly continue its operation of the system.

PGA did contend, however, that without the extra revenue it could generate by collecting licensing fees from Morris Communications and other potential competitors, it might not be inclined to invest in improvements to the RTSS.<sup>79</sup> Realistically, the licensing fee represents merely an extra opportunity for PGA to profit; PGA would continue to maintain the highest quality system possible to meet its own goals. Thus, because Morris Communications' actions would not "substantially threaten" the quality or existence of the RTSS, a misappropriation claim under these facts would fail.

### C. Distinguishing *PGA Tour* from *Motorola*

The *Motorola* court based its holding on the fact that Motorola used its own resources to collect scores and thus was not free-riding on the NBA's efforts. Free-riding also informed the holding in *PGA Tour*, where the Eleventh Circuit found the prevention of free-riding to be a valid business justification for PGA's alleged anticompetitive acts.<sup>80</sup> The similarities between these two cases substantially end here.

Several facts distinguished *Motorola* from *PGA Tour*, causing the *PGA Tour* court to allow PGA to control the dissemination of real-time scores where the *Motorola* court refused to allow the NBA to do so. Whereas the public normally has access to basketball scores while a game is in progress, the scores of golfers participating in a PGA tournament are not as readily available.<sup>81</sup> Additionally, Motorola employed its own staff to collect the NBA scores; Morris Communications was unable to do this because PGA prohibited the use of wireless devices at tournaments.<sup>82</sup> This

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79. Brief of Appellee at 11, *PGA Tour III*, 364 F.3d 1288 (11th Cir. 2004) (Nos. 02-10226c, 03-11503-cc) ("[T]o the extent we can't maximize or get some type of return on the investment that we're making in the scoring system, I think we would be less inclined to continue to try to improve it and make a better system.") (quoting PGA vice-president Edward Moorhouse).

80. See *PGA Tour III*, 364 F.3d at 1290.

81. See *Database Protection in the USA*, ius mentis, <http://www.iusmentis.com/databases/us> (last visited Jan. 24, 2005).

82. *PGA Tour III*, 364 F.3d at 1291.

prohibition gave PGA exclusive access to scores for the full list of players. Unlike the NBA, PGA also claimed a proprietary interest in both the system it used to compile scores and the results it produced. Furthermore, by predicating access to the media center on agreement to a set of rules requiring the payment of a licensing fee for the right to syndicate the scores, PGA maintained control over their dissemination.<sup>83</sup>

The Eleventh Circuit's holding in *PGA Tour* depended on PGA's "property interest" in its product.<sup>84</sup> Nonetheless, the court did not identify the source of this interest. In fact, in contrast to the *Motorola* court's in-depth discussion of copyright—the result of extensive briefing on the subject—the Eleventh Circuit began its analysis with an express rejection of copyright's relevance to the case.<sup>85</sup> Although the Eleventh Circuit declined to analyze copyright issues, these issues seem to lie at the heart of both the *Motorola* and *PGA Tour* decisions and to account for the tension that exists between them.<sup>86</sup> By failing to identify the source of the property interest it upheld, the *PGA Tour* court skirted the complex intellectual property issues underlying its holding—issues that the *Motorola* court expressly addressed.

#### D. Copyright Law

Had the Eleventh Circuit analyzed *PGA Tour* under copyright law, it would have found that PGA had no right to protect the real-time scores that it compiled. The compiled scores resemble the data compilations at issue in *Feist*. In that case, the Supreme Court held that despite the extensive labor and resources, or "sweat of the brow," invested in making data compilations such as telephone books, copyright law does not protect such compilations because they consist purely of uncopyrightable facts.<sup>87</sup> The *Feist* Court conceded that some elements of a data compilation, such as its

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83. *Id.*

84. *Id.* at 1296 n.13.

85. *Id.* at 1292 ("Before discussing the antitrust issues in this case, it is important to note what this case is *not* about. Contrary to the arguments of Morris and its *amici curiae*, this case is not about copyright law[.]").

86. For an analysis of *Motorola's* effect on the protection of database contents, see David Djavaherian, *Hot News and No Cold Facts: NBA v. Motorola and the Protection of Database Contents*, 5 RICH. J.L. & TECH. 8 (1998). For commentary on preemption after *Motorola*, see Mark A. Feist, *National Basketball Association v. Motorola, Inc.: Does the Copyright Act Partially Preempt State Misappropriation Claims?*, 24 J. CONTEMP. L. 99 (1998); Jean Tibbetts, *National Basketball Ass'n v. Motorola, Inc.: Second Circuit Clarifies Copyright Preemption for New Technology*, 3 B.U. J. SCI. & TECH. L. 16 (1997).

87. *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991). Facts alone also are not copyrightable. *Baker v. Selden*, 101 U.S. 99, 102 (1880).

arrangement or presentation, could contain a spark of originality that afforded copyright protection to those specific elements.<sup>88</sup> However, the Court maintained that the law still would not protect the data itself.<sup>89</sup> The compiled scores produced by the RTSS were not arranged in any creative order, nor were they presented in a unique fashion; therefore, under copyright law, PGA could not protect these facts or their arrangement.

The *PGA Tour* court avoided this precedent by denying the relevance of any copyright case law. However, by allowing PGA to create and enforce a contract that let it ignore *Feist*'s holding, the court followed an alternate line of copyright cases. *ProCD v. Zeidenberg* and its progeny have condoned the expansion of copyright law through contract and rejected claims of federal preemption.<sup>90</sup> In *ProCD*, the Seventh Circuit upheld the plaintiff's right to control the use of facts contained in its database of telephone numbers by requiring purchasers to agree not to distribute or reproduce the numbers through a "shrinkwrap" license.<sup>91</sup> *ProCD* sparked a controversy over the scope of federal preemption and the extent to which parties may negotiate around the rules of copyright.<sup>92</sup>

Even if a party alleges state law claims that are facially unrelated to copyright, these claims may be preempted because copyright law bears on "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright."<sup>93</sup> Courts decide whether preemption comes into play by determining (1) whether the work falls under the subject matter of copyright<sup>94</sup> and (2) whether the rights granted

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88. *Feist*, 499 U.S. at 361-62.

89. *Id.*

90. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (upholding a contract prohibiting copying of plaintiff's telephone database even though plaintiff had no exclusive rights under the Copyright Act); *Info. Handling Servs., Inc. v. LRP Publ'ns, Inc.*, No. Civ. A 00-1859, 2000 WL 433998, at \*2 (E.D. Pa. Apr. 18, 2000) ("[T]he vast weight of authority holds that state law misappropriation and unfair competition claims that are really claims for unauthorized copying are preempted.").

91. *ProCD*, 86 F.3d at 1455. A shrinkwrap agreement is one that binds a consumer once she removes the packaging containing the product.

92. For more thorough analyses of the issues raised by this trend, see Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111 (1999) (advocating the use of the copyright misuse doctrine and state and federal public policy to supplement contract preemption); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17 (1999).

93. 17 U.S.C. § 301(a) (2000); see also *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n.*, 805 F.2d 663, 676 (7th Cir. 1996) ("[Section] 301(a) preempts all equivalent state-law rights claimed in any work within the subject matter of copyright whether or not the work embodies any creativity.").

94. 17 U.S.C. §§ 102-103.



under state law are equivalent to any of the exclusive rights granted in § 106 of the Copyright Act.<sup>95</sup>

Although the Copyright Act states that facts fall outside of its protection,<sup>96</sup> courts have determined that the Act may nonetheless preempt state laws that protect uncopyrightable facts with copyright-like protection.<sup>97</sup> In such cases, courts have developed the extra element test to analyze the second, or equivalency requirement of preemption. This test asks whether a state law claim requires an element instead of or in addition to any of the exclusive rights listed in § 106 and whether this element transforms the action into something qualitatively different from a copyright infringement claim.<sup>98</sup> If an extra element exists, the claim, such as for breach of contract, survives federal preemption.<sup>99</sup>

Some courts have stated that the mere element of a promise in contract claims, that is, the need to show an offer, acceptance, and bargain during the formation of a contract, constitutes an extra element that allows state law to adjudicate all contract cases dealing with copyright.<sup>100</sup> Other courts, following *ProCD*, have distinguished contract claims from copyright claims based on their differing scopes: “A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’”<sup>101</sup> However, even courts that have recognized the inherent presence of extra elements in contracts have acknowledged that no blanket rule about preemption in contract cases exists.<sup>102</sup>

Applying the extra element test to *PGA Tour*, the court might have found that the licensing agreement embodied in the OLSR constituted an extra element because it regulated activities, such as access to the media

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95. These rights include reproduction, preparation of derivative works, distribution and public performance. *Id.* § 106 (1)-(4).

96. *Id.* § 102(b).

97. *See, e.g.,* Selby v. New Line Cinema Corp., 96 F. Supp. 2d 1053, 1058 (C.D. Cal. 2000) (“An item . . . such as an idea, procedure, process, etc., does not receive copyright protection but is nevertheless within the subject matter of copyright for purposes of preemption.”).

98. *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001)

99. *See id.*; *see also* Ballas v. Tedesco, 41 F. Supp. 2d 531, 536 n.14 (D.N.J. 1999) (listing cases where courts found no preemption in breach of contract actions).

100. *Taco Bell*, 256 F.3d at 456 (“The extra element is the promise to pay.”).

101. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996); *cf. Kabehie v. Zoland*, 125 Cal. Rptr. 2d 721, 731 (Ct. App. 2002).

102. *See Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1338 (Fed. Cir. 2003) (“*ProCD* and the other contract cases are . . . careful not to create a blanket rule that all contracts will escape preemption.”).

center, that do not constitute copyrightable subject matter. However, the central issue—syndication of the scores—falls under at least two of copyright's exclusive rights, namely, reproduction and distribution.<sup>103</sup> Furthermore, PGA's licensing agreement would not transform Morris Communications' cause of action into something qualitatively different from an issue that would be litigated under copyright law. Therefore, courts that have been lenient with the test, allowing almost anything to constitute an extra element, would not find preemption. In contrast, courts requiring a significant departure from copyright issues to satisfy the extra element test likely would find preemption under these facts.

Therefore, if the real-time sports scores compiled by PGA were classified as facts, PGA could not use copyright law to prevent Morris Communications from doing with them what it desired, including syndication. Although this result might seem unfair in light of PGA's investment in the RTSS, in the greater context of copyright law, unfair results occasionally must balance out correct decisions that arise from the same law applied to different sets of facts. Important policy considerations underlie copyright law: it is designed to maintain a rich public domain, while creating incentives for the development of human knowledge and creativity.<sup>104</sup> PGA's inability to add to its annual revenue by collecting licensing fees for real-time golf scores seems like a small sacrifice to make in light of these greater goals.

#### IV. CONCLUSION

To avoid granting too much power over information to sports monopolies, courts deciding future cases concerning real-time sports scores should interpret *PGA Tour's* holding narrowly—thus applying solely to the unique set of facts presented by a golf tournament—where it is impossible for individuals independently to observe and record all of the event's activities. Although a similar set of circumstances might arise at a tennis tournament or other sporting events that take place in several locations simultaneously, applying *PGA Tour's* holding to other sports could harmfully aggrandize sports monopolies such as the NFL and MLB. Taken even further, this type of control over information also raises legitimate concerns regarding the freedom of the press guaranteed by the First

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103. For another point of view, see Marc S. Williams, *Copyright Preemption: Real-Time Dissemination of Sports Scores and Information*, 71 S. CAL. L. REV. 445 (1998) (arguing that the scores and statistics of sporting events do not fall within the subject matter of copyright).

104. U.S. CONST. art. I, § 8, cl. 8.

Amendment. Therefore, courts should constantly guard against removing too much information from the public domain and imposing excessive restrictions on Internet publication. To accomplish this goal, courts should be vigilant about identifying claims preempted by copyright law.