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## Kentucky Fried Blog: How the Recent Ejection of a Blogger from the College World Series Raises Novel Questions About the First Amendment, Intellectual Property, and the Intersection of Law and Technology in the 21st Century

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**KENTUCKY FRIED BLOG: HOW THE RECENT EJECTION OF A BLOGGER FROM THE COLLEGE WORLD SERIES RAISES NOVEL QUESTIONS ABOUT THE FIRST AMENDMENT, INTELLECTUAL PROPERTY, AND THE INTERSECTION OF LAW AND TECHNOLOGY IN THE 21ST CENTURY**

*Christian J. Keeney\**

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**I. INTRODUCTION**

*“The law, as happens in many cases, has not kept up with technology. . . . [T]his is just the latest skirmish in a longer-term war.”<sup>1</sup>*

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1. Joe LaPointe, *Blogger’s Ejection May Mean Suit for NCAA*, N.Y. TIMES, June 14, 2007, at D5 (quoting Northwestern University Journalism Professor Rich Gordon), available at <http://www.nytimes.com/2007/06/14/sports/baseball/14blogs.html?ex=1339473600%20and%20en=af2e93ba39d5fd78%20and%20ei=5090%20and%20partner=rssuserland%20and%20emc=rss>.

The evolution of sports reporting to include blogs written as an athletic contest unfolds has collided with event organizers, such as the National Collegiate Athletic Association (NCAA), desire to protect its contractual commitments with broadcasters such as ESPN. Brian Bennett, a sports reporter for the *Courier-Journal* newspaper in Louisville, Kentucky, learned this lesson the hard way when the NCAA ejected him from the College World Series of Baseball for blogging live updates during an NCAA baseball game.<sup>2</sup> The NCAA claimed Bennett's blog violated the exclusive broadcast rights it granted to ESPN to televise the game.<sup>3</sup> By contrast, Bennett claimed the ejection violated his First Amendment right to report on a newsworthy event.<sup>4</sup> As new technologies emerge, speech and property interests will continue to conflict with one another. Yet, how should courts balance these apparently competing interests at a time when the law can barely keep up with technology? Beyond the world of sports reporting, the Bennett case could have wide-ranging implications for how the public receives information, regulation on the Internet, and a host of legal issues.<sup>5</sup>

"It's clearly a First Amendment issue," Bennett's editor, Bennie Ivory said.<sup>6</sup> According to Ivory, the blog is just "part of the evolution of how we present the news to our readers."<sup>7</sup> The paper's attorney, Jon Fleischaker, added, "It's a real question that we're being deprived of our right to report within the First Amendment from a public facility. . . . The blog wasn't a simulcast or a recreation of the game. It was an analysis."<sup>8</sup> Yet, where does Bennett's right to report end and the NCAA's and ESPN's right to protect their broadcast rights begin?

According to the NCAA's general counsel, Scott Bearby, Bennett's case "doesn't really have a First Amendment angle to it."<sup>9</sup> Moreover, Bearby argued the NCAA policy on blogging is just "a logical extension

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2. Brian Bennett, *Ejected and Dejected*, LOUISVILLE COURIER-JOURNAL, June 10, 2007, <http://www.courier-journal.com/blogs/bennett/2007/06/ejected-and-dejected.html>.

3. *Id.*

4. *Id.*

5. *See, e.g.*, LaPointe, *supra* note 1, at D5 ("The eviction of a newspaper reporter from a baseball press box for blogging about a game while it was in progress has stirred a debate about First Amendment rights, intellectual property rights and contract law.").

6. Rick Bozich, *Courier-Journal Reporter ejected from U of L Gram*, COURIER-JOURNAL, June 11, 2007, at 1C (quoting *Courier-Journal* executive editor Bennie Ivory).

7. *Id.*

8. *Id.* (quoting Jon Fleischaker, attorney for the *Courier-Journal*).

9. LaPointe, *supra* note 1 (quoting Scott Bearby, associate general counsel for NCAA).

of the rights that have been around for years and years.”<sup>10</sup> Among commentators there seems to be little consensus about which position is correct.

This Article examines how the courts have, and should, balance these potentially competing speech and property interests in the context of new communications technologies. First, the background of this Article explains the relevant facts of Bennett’s case and describes “blogs” in greater detail. Part I of the analysis examines the relevant First Amendment issues applicable to blogs, Part II considers the various intellectual property concerns, and Part III addresses the public policy concerns highlighted by Bennett’s case. Finally, this Article concludes with recommendations for how courts should balance free speech and intellectual property interests in blogging and other communications technologies going forward.

## II. BACKGROUND

### A. *Facts of Bennett’s Case*

The *Courier-Journal* assigned Brian Bennett to cover the University of Louisville (Louisville) baseball team in the 2007 College World Series.<sup>11</sup> Bennett blogged every Louisville game during the first two weeks of the tournament without incident—none of these games were televised.<sup>12</sup> Louisville’s first televised game was against Oklahoma State on June 10.<sup>13</sup> Throughout the tournament, the NCAA issued a series of memos regarding blogging—each one different from the one before.<sup>14</sup> Approximately one hour before the Oklahoma State game, the NCAA circulated yet another memo regarding blogging.<sup>15</sup> The memo read, in part:

The College World Series Media Coordination staff along with the NCAA Broadcasting group needs to remind all media coordinators

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10. *Id.*

11. Bennett, *supra* note 2.

12. Telephone Interview with Jon Fleischaker, General Counsel, *Courier-Journal*, (June 17, 2007) [hereinafter Fleischaker].

13. *NCAA Baseball Tournament Schedule, Results*, ESPN, June 25, 2007, <http://sports.espn.go.com/ncaa/news/story?id=2884867>.

14. Daniel Terdiman, *Blogger Removed from NCAA Baseball Game for Blogging*, June 11, 2007, [http://www.news.com/8301-10784\\_3-9728156-7.html](http://www.news.com/8301-10784_3-9728156-7.html).

15. Bennett, *supra* note 2.

that any statistical or other live representation of the Super Regional games falls under the exclusive broadcasting and Internet rights granted to the NCAA's official rights holders and therefore is not allowed by any other entity. Since *blogs are considered a live representation of the game*, any blog that has action photos or game reports, including play-by-play, scores or any in-game updates, is specifically prohibited. In essence, no blog entries are permitted between the first pitch and the final out of each game.<sup>16</sup>

The NCAA did not include this restriction in the press credential issued to Bennett, nor did he ever agree to such a limitation.<sup>17</sup> Accordingly, Bennett continued to blog as he had throughout the tournament.<sup>18</sup> At some point early in the game, the NCAA discovered, contrary to their latest guidelines, Bennett was still blogging.<sup>19</sup> Accordingly, the NCAA requested Louisville remove Bennett from the game.<sup>20</sup> Initially, Louisville refused, and for the next several innings the two parties discussed what to do about Bennett.<sup>21</sup> Ultimately, Louisville left the decision to the NCAA, which chose to eject Bennett from the game.<sup>22</sup>

The ejection drew strong criticism from newspapers, Internet commentators, and the legal community.<sup>23</sup> In its defense, the NCAA claimed the ejection was necessary to preserve broadcast rights it granted to ESPN to cover the tournament.<sup>24</sup> The NCAA has lucrative licensing

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16. *Id.* (quoting NCAA memo) (emphasis added).

17. *Id.* See also LaPointe, *supra* note 1 (stating that the NCAA likely could have contracted to condition access to the event with a restriction against blogging such as “[t]hou shalt not blog.”). Bennett, *supra* note 2 (noting that a restriction would only have prevented Bennett from blogging from the press box. Bennett could still have blogged from other parts of the stadium open to the public or by watching the television broadcast.).

18. Bennett, *supra* note 2.

19. *Id.*

20. Eric Crawford, *NCAA Showed What It's About—Cash and Control*, COURIER-JOURNAL, June 13, 2007, available at <http://www.courier-journal.com/apps/pbcs.dll/article?Date=20070613&Category=COLUMNISTS02&ArtNo=706131193&SectionCat=SPORTS02&Template=printart>.

21. Fleischaker, *supra* note 12.

22. *Id.*

23. See, e.g., Troy Johnson, Commentary, *Blog This: NCAA Wrong for Pulling the Plug*, COLUMBUS LEDGER-INQUIRER, June 13, 2007, at B1; Eric Crawford, *NCAA Showed What It's About: Cash and Control*, COURIER-JOURNAL, June 13, 2007, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20070613/COLUMNISTS02/706131193>; Andrew Wolfson, *NCAA Criticized for Ejecting Reporter Who Blogged at a Game*, COURIER-JOURNAL, June 12, 2007, at 1C.

24. Bennett, *supra* note 2.

deals with networks such as CBS and ESPN to broadcast its championship sporting events.<sup>25</sup> For instance, CBS recently agreed to pay the NCAA six billion dollars for the right to broadcast the NCAA Men's Basketball Tournament.<sup>26</sup> Blogging, as the Bennett case shows, is perceived by some as a threat to this valuable source of NCAA revenue.

After the negative publicity the NCAA received over Bennett's ejection, it amended its blogging policy to allow some blogging at its sporting events.<sup>27</sup> Consequently, Bennett and the *Courier-Journal* chose not to litigate.<sup>28</sup> However, Bennett's case is just one of several recent blogging controversies.<sup>29</sup> Thus, a clear solution is necessary.

### B. Background on Blogs

The term "blog" is short for web log, an online journal containing a series of entries arranged in reverse chronological order, written by one author or a common set of authors.<sup>30</sup> A "Blogger" is an author of blogs, and "blogging" is the act of writing a blog.<sup>31</sup> Typically, a blog is devoted to a particular subject such as sports or politics,<sup>32</sup> but many cover more.<sup>33</sup>

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25. 2007-08 NCAA BROADCAST MANUAL CHAMPIONSHIP GUIDELINES, § 7 (2005) URL, <http://www1.ncaa.org/eprise/main/Public/CBA/BrdcstMan/Sect7/Rights> ("The NCAA owns the television rights to all 88 championship events.") (last visited Feb. 17, 2008).

26. Richard Sandomir, *CBS Will Pay \$6 Billion for Men's NCAA Tournament*, N.Y. TIMES, Nov. 19, 1999, at D5, available at <http://query.nytimes.com/gst/fullpage.html?res=9A01E6D6173CF93AA25752C1A96F958260&n=Top/News/Business/Companies/CBS%20Corporation>.

27. Associated Press, *NCAA Says Live Updates Via Blog Limited to Score, Time Remaining Only*, ESPN, June 21, 2007, <http://sports.espn.go.com/ncaa/news/story?id=2912100>.

28. Fleischaker, *supra* note 12.

29. See, e.g., *FOCUS: Blogs by Olympic Participants to be Banned*, YAHOO! ASIA NEWS, Jan. 30, 2005, <http://asia.news.yahoo.com/060130/kyodo/d8feluig7.html>. Several commentators have reported a perceived bias against online reporters, and private entities have allegedly continued to discriminate against Internet journalists by refusing to grant credentials. See, e.g., David Noack, *Bias Against Online News Reporters: The Second Class Citizens of Journalism*, EDITOR & PUBLISHER, Jan. 31, 1998, at S13. Noack noted that in 1998, organizations such as the National Collegiate Athletic Association were consistently discriminating against Internet journalists because they were not traditional reporters; the NCAA cited its own "exclusive" rights to provide coverage of its events. *Id.*

30. See Wikipedia, *Blog*, <http://en.wikipedia.org/wiki/Blog> (describing history and types of blogs) (as of Feb. 4, 2008, 9:50 EST).

31. *Id.*

32. *Id.*

33. *Id.*

Initially, blogging provided a format for writers not associated with the mass media, to present information and commentary to the public.<sup>34</sup> Now, blogging has evolved into a staple of the established press. Today, nearly every major newspaper maintains a web site, and within the web site, a blog or multiple blogs. Blogs have become so popular that Technorati, the leading site tracking the growth of blogging, currently estimates there are more than ninety-five million blogs published worldwide.<sup>35</sup>

Event-blogs, also called “game-blogs” or “live-blogs” are no different from other blogs. In fact, an event-blog is often just a regular blog updated more frequently during a particular game or event.<sup>36</sup> Bennett’s blog is typical in this regard. He maintains a standing blog on the *Courier-Journal* web site and simply updates it more frequently during games he covers for the paper.<sup>37</sup> In sports, blogs provide current updates on the progress of a sporting event where radio and television are unavailable.<sup>38</sup> However, blogs may also be used to provide current information on other newsworthy events, such as a political speech<sup>39</sup> or criminal trial.<sup>40</sup>

In recent years, disputes over blogs covering live events have become more frequent. For instance, the Japanese Olympic Committee refused to credential bloggers for the Nagano Olympic Games.<sup>41</sup> In another example, the NCAA denied credentials to online reporters who wanted to cover the Division I Men’s Basketball Tournament, effectively eliminating the chance to report real time scores from the event.<sup>42</sup> Finally, the New York Islanders professional hockey team—not knowing quite what to do with bloggers—created a separate press box for them, which of course, made everyone unhappy.<sup>43</sup>

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34. See *id.*

35. Technorati Weblog, <http://www.technorati.com> (last visited Feb. 8, 2008).

36. See, e.g., John Clay, *Sidelines*, LEXINGTON HERALD-LEADER, Feb. 8, 2004, <http://johnclay.typepad.com/sidelines/>.

37. See Bennett, *supra* note 2.

38. *Id.*

39. See, e.g., Michael Coren, *Bloggers Get Set for State of the Union*, CNN, Feb. 2, 2005, <http://www.cnn.com/2005/ALLPOLITICS/02/02/union.blog/index.html?iref=newsearch>.

40. See, e.g., *Enron: Trialwatch*, HOUSTON CHRON. ONLINE, Oct. 24, 2006, <http://blogs.chron.com/enrontrialwatch/>.

41. Kevin M. Goldberg, *Watch Out or Real-Time Coverage Will be Shot Down*, ASNE, May 22, 1998, <http://www.asne.org/index.cfm?ID=1842>.

42. Julie Panna, *Why Can't I Get One of These?*, QUILL, Sept. 1, 2000, available at 2000 WL 6462073.

43. See Eric McErlain, *The Blog Box Fails The New Media Test*, FANHOUSE, Oct. 9, 2007, <http://sports.aol.com/fanhouse/2007/10/09/the-islanders-blog-box-fails-the-new-media-test/>.

Ultimately, blogs are a form of speech.<sup>44</sup> The First Amendment ordinarily protects that speech.<sup>45</sup> However, holders of various rights, such as copyrights, also have constitutional protections.<sup>46</sup> Thus, a solution that properly balances these interests is needed.

### III. ANALYSIS

#### A. First Amendment Concerns

*“No one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight.”<sup>47</sup>*

Freedom of speech is one of the preeminent rights protected by the U.S. Constitution.<sup>48</sup> The First Amendment provides, in part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>49</sup> The Supreme Court has interpreted this right to apply to all branches of the federal government,<sup>50</sup> and through the Due Process Clause of the Fourteenth Amendment to the states as well.<sup>51</sup> Free speech, however, is not absolute. For instance, the First Amendment does not protect speech that

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44. See generally C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Steven Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998); Neil Weinstock, *Netanel Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

45. See *supra* note 44.

46. See generally Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

47. Included in the “cardinal rights” mentioned is the right to free speech. *Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103, 135 (1937) (Sutherland, J., dissenting).

48. See generally David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991).

49. U.S. CONST. amend. I.

50. *N.Y. Times Co. v. United States*, 403 U.S. 713, 716 (1971) (Black, J., concurring).

51. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); see also *Lowell v. City of Griffin*, 303 U.S. 444, 450 (1938).



incites “imminent lawless action,”<sup>52</sup> libelous speech,<sup>53</sup> fighting words,<sup>54</sup> obscenity,<sup>55</sup> or child pornography.<sup>56</sup> The Court has concluded that in each of these instances, the right to free speech is outweighed by a more substantial government interest.<sup>57</sup> Consequently, if a blog does not fall under one of these narrow exceptions, it is protected by the First Amendment.

Although some state action is necessary for the First Amendment to apply,<sup>58</sup> an exhaustive analysis of state action issues is beyond the scope of this Article. It is only relevant to note that if the actor is considered a state actor, then the actor is subject to the First Amendment.<sup>59</sup> Conversely, if the actor is not considered a state actor, the First Amendment does not apply.<sup>60</sup> It is also outside the scope of this Article to consider whether bloggers may claim First Amendment protection under the speech clause or press clause. Although there is scholarly debate as to whether the press clause should provide any constitutional protection beyond that provided by the speech clause,<sup>61</sup> the Court has never granted any special protections under the press clause.<sup>62</sup> Accordingly, none are considered here. Instead,

52. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam) (finding that a state cannot prosecute Ku Klux Klansmen for making extremely derogatory remarks about blacks and Jews where the Klansmen did not *incite imminent lawless action*) (emphasis added).

53. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing the framework for courts to analyze libel claims).

54. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that fighting words are not protected under the First Amendment).

55. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 742-48 (1978) (Stevens, J., announced the opinion of the Court and was joined by Burger, C.J., and Rehnquist, J. in stating that offensive speech should receive less than full protection when broadcasted over the radio).

56. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

57. See, e.g., *Pacifica Found.*, 438 U.S. at 742-48.

58. *Cooper v. Aaron*, 358 U.S. 1, 17 (1938).

59. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721 (1961) (finding that no precise formulation for recognition of state responsibility under Equal Protection Clauses has been or could be fashioned or applied; “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”).

60. See *Cooper*, 358 U.S. at 16-17; see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-50 (1974) (“The Due Process Clause of the Fourteenth Amendment . . . ‘however discriminatory or wrongful’ . . . offers no shield” against private conduct).

61. See, e.g., Joseph S. Alonzo, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 751, 755-56 (2006); see, e.g., Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45, 52-53 (2006); see, e.g., David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 436 (2002).

62. Anderson, *supra* note 61, at 436 (“[The Court] has never had to decide whether a particular litigant was ‘press.’ In most cases the question does not arise because the claimed right would be protected as fully by the Speech Clause as by the Press Clause.”).

this Article will analyze First Amendment concerns assuming there is sufficient state action present and without any distinction between the press and speech clauses of the First Amendment.

Courts continually struggle to adapt the First Amendment to new technologies.<sup>63</sup> For years, courts have used a medium-specific approach, to determine the level of First Amendment protection that should be afforded to new technologies.<sup>64</sup> Under this medium-specific approach, speech conveyed through print historically enjoyed the highest level of First Amendment protection.<sup>65</sup> However, as new technologies emerged, courts applied different First Amendment rules, often affording less First Amendment protection than was applied to print.<sup>66</sup> Thus, rather than a predictable framework for applying the First Amendment to new technologies, the Court created “a body of law complicated enough to inspire comparisons with the Internal Revenue Code.”<sup>67</sup>

### 1. Radio and Television Broadcasting

Like the Internet today, the development of television and radio broadcasting challenged courts to apply the First Amendment to new technologies. Ultimately, two cases, *National Broadcasting Co. v. United States*<sup>68</sup> and *Federal Communications Commission (FCC) v. Pacifica Foundation*,<sup>69</sup> set forth the justifications for limiting speech in broadcasting. In *National Broadcasting*, the Supreme Court established the doctrine of “spectrum scarcity” as a basis for restricting speech in

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63. Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: the Internet, the Printing Press, and Freedom of Speech*, 20 SEATTLE U. L. REV. 711, 720-22 (1997) (For example, Wallace and Green point out the Court’s struggle to adapt the First Amendment to telephone communications, moviewes, and the radio).

64. See, e.g., *City of Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (“Different communications media are treated differently for First Amendment purposes.”); *FCC v. Pacifica Found.*, 438 U.S. at 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment Problems.”).

65. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-25 (2d ed. 1988) (explaining that “[t]he First Amendment guarantee of freedom from government intrusion reigns most confidently in the realm of the print media, since newspapers and pamphlets were the most significant modes of mass communication in the world of the Framers.”).

66. See, e.g., ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 381 (1941).

67. Wallace & Green, *supra* note 63, at 723-24 (quoting STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 2-3 (1990)).

68. 319 U.S. 190 (1943).

69. *Pacifica*, 438 U.S. at 726.

broadcasting.<sup>70</sup> In applying speech restrictions to broadcasting that would be unconstitutional if applied to print, the Court reasoned that because of the scarcity of available broadcasting frequencies, the FCC could license broadcasters based on “public interest, convenience, and necessity.”<sup>71</sup>

In *Pacifica*, the Court used “pervasiveness” as another reason to limit free speech on the radio.<sup>72</sup> Often called the “Seven Dirty Words” case, *Pacifica* involved the airing of an indecent monologue during an afternoon radio broadcast.<sup>73</sup> In *Pacifica*, the FCC argued that broadcast media should receive a reduced level of constitutional protection.<sup>74</sup> The Court agreed, observing that broadcast communication differs from print communication due to its “uniquely pervasive presence in the lives of all Americans.”<sup>75</sup> Due to its pervasiveness, the government may regulate broadcasting in ways that would be contrary to the First Amendment if the regulations were applied to print.<sup>76</sup> Because of the doctrines of pervasiveness and scarcity, broadcasting is accorded “the most limited First Amendment protection” of any form of mass communication.<sup>77</sup>

## 2. Telephone Communications

Today, courts give full First Amendment protection to telephone communications. However, this was not always the case. For instance, in *City of Richmond v. S. Bell Tel. & Tel. Co.*,<sup>78</sup> the Supreme Court denied telephone companies use of the public right of way for their wires, which had been granted to telegraph companies for years, because telephone communications were not in writing.<sup>79</sup> Later, in *Sable Communications of California, Inc. v. FCC*,<sup>80</sup> the Court determined that telephone communications deserve greater First Amendment protection than

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70. *Nat'l Broad.*, 319 U.S. at 226 (showing where the Court stated “Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 286 (1969) (applying spectrum scarcity doctrine to television broadcasting).

71. *Id.* at 225-26.

72. *See generally Pacifica*, 438 U.S. at 726.

73. *Id.* at 729-30.

74. *Id.* at 731.

75. *Id.* at 748.

76. *Id.*

77. *See Pacifica*, 438 U.S. at 748 (“[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”).

78. 174 U.S. 761 (1899).

79. *Id.*

80. 492 U.S. 115 (1989).

broadcasting.<sup>81</sup> Distinguishing *Sable* from its holding in *Pacifica*, the Court explained telephone communications are unlike broadcast communications because they do not bombard a “captive audience” with unwanted material.<sup>82</sup> Instead, the telephone user is required to “take affirmative steps to receive the communication.”<sup>83</sup> Thus, telephone communications receive full First Amendment protection.

### 3. The Internet

Due to its versatility, the Internet blurs many of the distinctions courts make between different communication mediums. Nonetheless, courts are still attempting to apply the medium-specific approach. In *Reno v. ACLU*,<sup>84</sup> the Supreme Court held that the First Amendment applies to the Internet the same as it does to print.<sup>85</sup> The Court reasoned that the Internet, unlike broadcast media, is neither scarce nor pervasive—the two classic justifications for limiting free speech in new technologies.<sup>86</sup> Regarding scarcity, the Court explained:

[T]he Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that “[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.” This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of [w]eb pages . . . and newsgroups, the same individual can become a pamphleteer.<sup>87</sup>

Regarding pervasiveness, the Court relied on the district court’s finding that “[c]ommunications over the Internet do not ‘invade’ an individual’s

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81. See *id.* at 127 (noting that unique attributes of broadcasting justify granting lower level of protection to broadcasting than that to telephone communications).

82. *Id.* at 128.

83. *Id.*

84. 521 U.S. 844 (1997).

85. See *id.* at 868-69.

86. *Id.*

87. *Id.* at 870.

home or appear on one's computer screen unbidden."<sup>88</sup> Instead, communications on the Internet "require[] a series of affirmative steps more deliberate and directed than merely turning a dial."<sup>89</sup> Thus, due to the lack of pervasiveness and scarcity, the Court found "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."<sup>90</sup>

#### 4. Blogs

Court decisions applying the First Amendment to blogs are scant.<sup>91</sup> Moreover, the current "patchwork"<sup>92</sup> approach to free speech and new technology consisting of "a complex set of compromises,"<sup>93</sup> rather than a readily-identifiable framework to apply free-speech principles to new technology fosters continued uncertainty. However, analogical reasoning may provide an answer where legal precedent does not.

Analogies find "similarit[ies] between two things, on which a comparison may be based."<sup>94</sup> Moreover, "[a]nalogical reasoning plays a profoundly important role whenever a court must decide the proper legal rules to apply to a new technology."<sup>95</sup> As noted communications scholar, Ithiel de Sola Pool explained:

Courts like to treat new phenomena by analogy to old ones. When the telephone was invented, the question was whether, at law, the telephone was a new kind of telegraph or something different. If the phone was a telegraph, a body of law already existed that would apply. The decisions sometimes went one way, sometimes the other; but the model of the telegraph was always there to be considered.<sup>96</sup>

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88. *Id.* at 869 (quoting 929 F. Supp., at 844 (finding 88)).

89. *Reno*, 521 U.S. at 854.

90. *Id.* at 845.

91. *See, e.g.*, *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1457 (Ct. App. 2006) (holding that online reporters were entitled to same statutory protections as print reporters).

92. *Wallace & Green, supra* note 63, at 723.

93. *Id.*

94. Dictionary.com, Definitions on "analogy," <http://dictionary.reference.com/browse/analogy> (last visited Feb. 4, 2008).

95. *Wallace & Green, supra* note 63, at 720.

96. *Id.* (quoting ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM IN 1983: OF FREE SPEECH IN AN ELECTRONIC AGE* 100 (1983)).

Blogging is closely analogous to print and, in fact, may be “a far more speech-enhancing medium than print.”<sup>97</sup> Judge Dalzell, in the district court case of *ACLU v. Reno*, gave four reasons why Internet communications, including blogs, may contribute to free speech more than print:

First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.<sup>98</sup>

Stated more bluntly, “Blogging is writing. Period.”<sup>99</sup> Undoubtedly, writing is speech. Even speech that seems trivial or irrelevant is protected under the First Amendment.<sup>100</sup> Moreover, it is irrelevant whether a blogger is connected to the established press. As the Court said in *Branzburg v. Hayes*:<sup>101</sup>

[L]iberty of the press is the right of the lonely pamphleteer . . . as much as of the large metropolitan publisher . . . [it] is a “fundamental personal right” which “is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”<sup>102</sup>

Thus, blogs have “con-verted ‘the lonely pamphleteer’ from a romantic ideal to a powerful reality.”<sup>103</sup> Much like Revolutionary Era pamphlets, blogs serve as “a vehicle of information and opinion.”<sup>104</sup> Consequently, blogs are entitled to no less First Amendment protection than is accorded to printed material.

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97. *ACLU v. Reno*, 929 F. Supp. 824, 882 (E.D. Pa. 1996).

98. *Id.* at 877.

99. David L. Hudson, Jr., “Blogging,” First Amendment Center, [www.firstamendmentcenter.org/Press/topic.aspx?topic=blogging](http://www.firstamendmentcenter.org/Press/topic.aspx?topic=blogging) (last visited Apr. 23, 2008).

100. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 672-73 (1990).

101. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

102. *Id.* at 704.

103. Anderson, *supra* note 61, at 434.

104. *Branzburg*, 408 U.S. at 704.

## B. Intellectual Property Concerns

*“As a journalist, you’re inclined to wave the First Amendment flag. . . . [however], [t]he media trends are at odds with the leagues’ goal of controlling distribution and extracting a ransom.”*<sup>105</sup>

“Intellectual property” is an umbrella phrase for various legal rights associated with “commercially valuable products of the human intellect.”<sup>106</sup> Copyrights and state tort laws are the two primary forms of intellectual property protections applied to broadcast rights.<sup>107</sup> This Part analyzes the relevance of each in relation to blogs.

### 1. Copyrights

*“Speakers . . . are invited to convey the ideas and facts contained within the copyright holder’s work . . . so long as they do so in words, graphics, or other expressive components that are not ‘substantially similar’ to those that comprise the copyright holder’s work.”*<sup>108</sup>

The Federal Copyright Act (Act)<sup>109</sup> entitles broadcast rights holders to a “limited monopoly” over their work. Congress’s authority to do this stems from the Copyright Clause of the Constitution, which states in part that “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>110</sup> Pursuant to Congress’s power under the Copyright Clause, the Act establishes a “bundle of rights”<sup>111</sup> for copyright owners including exclusive

105. Lapointe, *supra* note 1 (quoting Rich Gordon).

106. BLACK’S LAW DICTIONARY 359 (2d Pocket ed. 2001).

107. Thomas G. Field, Jr., *What is Intellectual Property?*, Jan. 2006, <http://usinfo.state.gov/products/pubs/intelprp/>.

108. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 13-14 (2001).

109. See generally Copyright Act of 1976, Pub. L. No. 94-553, § 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. § 101 (2000)).

110. U.S. CONST. art. I, § 8, cl. 8.

111. See 17 U.S.C. § 106 (2002); see also H.R. REP. NO. 94-1476, at 61 (1976) (“The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction,

rights to control how their works are performed, displayed, copied, distributed, recorded, and adapted.<sup>112</sup> To enforce these rights, the Act allows a copyright owner to sue any person or entity who infringes these rights.<sup>113</sup> To prove infringement, the material must first be copyrightable and second, the alleged copies must be “substantially similar” to the original material.<sup>114</sup>

#### a. The Underlying Game Is Not Copyrightable

There is a “general understanding that athletic events were, and are, uncopyrightable.”<sup>115</sup> In reaching this conclusion, the Second Circuit in *National Basketball Association v. Motorola*,<sup>116</sup> relied on one of the fundamental principles of copyright law—that only original works of authorship may be copyrighted.<sup>117</sup> As the *Motorola* court explained, “[s]ports events are not ‘authored’ in any common sense of the word.”<sup>118</sup> Since the landmark case of *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court has consistently held that originality is a necessary element of a copyrightable work.<sup>119</sup>

No one may claim originality as to facts. . . . This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence . . . . [Thus,] [t]he same is true of all facts - scientific, historical, biographical, and news of the day. “[T]hey

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adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called ‘bundle of rights’ that is a copyright, are cumulative and may overlap in some cases.”)

112. 17 U.S.C. § 106 (2002).

113. *See id.* § 501.

114. To prevail in a copyright infringement action, the plaintiff must show that he has ownership of the copyright, that the defendant had access to the copyrighted work and that there is a substantial similarity between the copyrighted work and the defendant’s work. *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984). However, since access is not disputed in Bennett’s case and it is not likely to be disputed in other blogging cases, it is assumed that the blogger has access throughout this Article. Thus, the only elements analyzed here are whether the material is copyrightable and whether a blog may be considered substantially similar to a television or radio broadcast.

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

116. *Id.*

117. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

118. *Motorola*, 105 F.3d at 846.

119. *Feist Publ’ns*, 499 U.S. at 345. *See also* James E. Schatz et al., *What’s Mine Is Yours? The Dilemma of a Factual Compilation*, 17 U. DAYTON L. REV. 423, 427 (1991).



may not be copyrighted and are part of the public domain available to every person."<sup>120</sup>

Factual game information falls firmly within the Court's definition of unoriginal, and thus uncopyrightable, fact.<sup>121</sup> The *Motorola* decision merely reinforces this long understood principle. In *Motorola*, the second circuit was faced with whether a pager, which displayed statistical information about professional basketball games, violated the NBA's exclusive right to broadcast games.<sup>122</sup> The court held that since the pager "reproduce[d] only factual information culled from the broadcasts and none of the copyrightable expression of the games, [the pager] did not infringe the copyright of the broadcasts."<sup>123</sup>

Prior to *Motorola*, only two decisions—one from the Supreme Court case of *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>124</sup> and the other from the Seventh Circuit case of *Baltimore Orioles, Inc., v. Major League Baseball Players Association*<sup>125</sup>—touched on the copyrightability of underlying games. In *Zacchini*, Court dicta distinguished between a "copyrighted dramatic work" and an uncopyrightable baseball game.<sup>126</sup> By contrast, in a footnote from *Baltimore Orioles*, the Seventh Circuit stated "[p]layers' performances" contain the "modest creativity required for copyright ability."<sup>127</sup> However, the court added that "even if the [p]layers' performances were not sufficiently creative, the [p]layers agree that the cameramen and director contribute creative labor to the telecasts."<sup>128</sup> As the *Motorola* court said, "[t]his last sentence indicates that the court was considering the copyright/ability [sic] of telecasts—not the underlying games . . ."<sup>129</sup>

120. *Feist Publ'ns*, 499 U.S. at 347-48 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 2.11[A], 2.03[E] (1990)); accord *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (holding that "no author may copyright his ideas or the facts he narrates").

121. See generally Clifford N. MacDonald, *Gamecasts and NBA v. Motorola: Do They Still Love This Game?*, 5 N.C. J.L. & TECH. 329 (2004); Note, *Nothing But Internet*, 110 HARV. L. REV. 1143, 1155 (1997) [hereinafter Harvard Law Review Note]; Thomas O'Connor, *NBA Games Not "Original Works of Authorship"—No Protection Under Federal Copyright Act*, 9 LOY. CONSUMER L. REP. 225 (1997).

122. *Motorola*, 105 F.3d at 846.

123. *Id.* at 847.

124. 433 U.S. 562 (1977).

125. 805 F.2d 663 (7th Cir. 1986).

126. *Zacchini*, 433 U.S. at 575.

127. *Baltimore Orioles*, 805 F.2d at 669 n.7.

128. *Id.*

129. *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841, 846 (2d Cir. 1997).

More recently, a federal district court in *C.B.C. Distribution & Marketing, Inc., v. Major League Baseball Advanced Media, L.P.*,<sup>130</sup> confronted the copyrightability of factual information from underlying games.<sup>131</sup> Specifically, the dispute in *C.B.C.* revolved around the use of statistics in fantasy baseball—“a game whereby players manage imaginary baseball teams based on the real-life performance of [Major League] baseball players, and compete against one another using those player’s statistics to score points.”<sup>132</sup> The *C.B.C.* court found that statistical information is “purely factual information which any patron of . . . [a] game could acquire from the arena.”<sup>133</sup> As such, it lacked the “*sine qua non* of copyright—originality.”<sup>134</sup> Accordingly, the court held the information was not copyrightable.<sup>135</sup>

Thus, the weight of existing case law strongly suggests underlying games and thus, the resulting facts, are not copyrightable. The lone indicia that either may be—the *Baltimore Orioles* footnote indicating player performances are sufficiently original to be copyrightable—was couched in language that indicates the court was considering the copyrightability of the telecasts rather than the underlying games.<sup>136</sup> Moreover, *Baltimore Orioles* has been heavily criticized for indicating that a baseball game could be considered an original work of authorship.<sup>137</sup> As the Court has consistently held, facts of any kind are part of the public domain and not copyrightable.<sup>138</sup> Thus, blogs should not be subject to copyright infringement claims on the basis of reporting factual information from underlying games.

130. 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

131. *Id.* at 1102-03.

132. See Wikipedia, *Fantasy Baseball*, [http://en.wikipedia.org/wiki/Fantasy\\_baseball](http://en.wikipedia.org/wiki/Fantasy_baseball) (describing history and game details) (as of Feb. 4, 2008, 14:00 EST).

133. *C.B.C.*, 443 F. Supp. at 1102 (quoting *Motorola*, 105 F.3d at 847).

134. *Id.* at 1103.

135. *Id.*

136. See *Motorola*, 105 F.3d at 846.

137. See, e.g., *Brown v. Ames*, 201 F.3d 654, 659 (5th Cir. 2000). See also DAVID NIMMER, NIMMER ON COPYRIGHT §§ 1.01[B][1][C], 2.09[F] (1999); Shelley Ross Saxer, *Baltimore Orioles, Inc. v. Major League Baseball Players Association: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 UCLA L. REV. 861, 870 (1989); David E. Shipley, *Three Strikes and They’re Out at the Old Ball Game: Preemption of Performers’ Rights of Publicity Under the Copyright Act of 1976*, 20 ARIZ. ST. L.J. 369, 384-88 (1988).

138. See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

## b. Game Broadcasts and the “Substantially Similar” Requirement

Whether a claim for copyright infringement could stand for the broadcast of the game as opposed to the underlying game itself is a separate question. The broadcast of a game is copyrightable as a work consisting of sounds, images, or both, that is being transmitted, and is “fixed” or recorded simultaneously with its transmission.<sup>139</sup> The Act expressly protects sports broadcasts: “The bill seeks to resolve . . . the status of live broadcasts [of] sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded.”<sup>140</sup> Thus, “[i]f the program content is transmitted live to the public while being recorded at the same time” it is copyrightable.<sup>141</sup> Sports broadcasts, therefore, are copyrightable.

To infringe upon a copyrighted broadcast, however, would require the copyright holder to prove that the allegedly infringing work was “substantially similar” to the copyrighted work.<sup>142</sup> Courts apply several tests to determine substantial similarity however, most tests use some version of the “ordinary observer” test.<sup>143</sup> This test asks whether an ordinary observer would detect a substantial similarity between the two works.<sup>144</sup>

For example, in *Arnstein v. Porter*, a famous case involving popular music, the Second Circuit, using the ordinary observer test, held there was a substantial similarity where “defendant took from plaintiff’s work so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant

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139. 17 U.S.C. § 101 (2003).

140. H.R. REP. NO. 94-1476, at 52 (1976).

141. *Id.*

142. See Eric C. Osterberg, *The Meaning and Significance of Substantial Similarity*, Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series PLI Order No. 8951, (May 2006). See, e.g., *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021 (2d Cir. 1966).

143. See, e.g., *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994); *Warner Bros. v. Am. Broad. Co.*, 720 F.2d 231 (2d Cir. 1983); *Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315 (2d Cir. 1969); *Ideal Toy Corp.*, 360 F.2d at 1021; *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222 (C.D. Cal. 1997).

144. Judge Learned Hand explained the ordinary observer test by saying that a substantial similarity exists where “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.” *Peter Pan Fabrics*, 274 F.2d at 489.

wrongfully appropriated something which belongs to plaintiff.”<sup>145</sup> Similarly, if a blog took the words of the television broadcasters and posted them verbatim that would likely be considered a substantially similar work, assuming the other elements were met, copyright infringement.<sup>146</sup> However, the only thing a blog takes is uncopyrightable facts.<sup>147</sup> Thus, there is no substantial similarity between a blog and a television or radio broadcast.

## 2. The State Law Tort of Commercial Misappropriation

*“[T]he misappropriation doctrine, which often covered sporting events, developed in state law as a means to protect labor and money expended in collecting information used for business purposes. Generally the information was used in works which were not copyrightable . . . .”*<sup>148</sup>

### a. Misappropriation and “Hot News”

Since underlying games are not copyrightable and copyrighted broadcasts are only infringed by substantially similar works—which blogs are not—any effort by broadcast rights holders to claim exclusive intellectual property rights in real-time data from its games could only be based on a state law tort founded on a proprietary right in that data.<sup>149</sup> This kind of claim is generically referred to as the tort of “commercial misappropriation.”<sup>150</sup> *Black’s Law Dictionary* defines misappropriation as

145. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

146. *See Osterberg, supra* note 142.

147. An event blog, such as Bennett’s, merely posts uncopyrightable facts.

148. Katherine F. Horvath, *NBA v. Motorola: A Case for Federal Preemption of Misappropriation?*, 73 NOTRE DAME L. REV. 461, 461 (1998).

149. *See* Andrea Freeman, *Morris Communications v. PGA Tour: Battle Over the Rights to Real-Time Sports Scores*, 20 BERKELEY TECH. L.J. 3 (2005); 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, 169 (2004); Marc S. Williams, *Copyright Preemption: Real-Time Dissemination of Sports Scores and Information*, 71 S. CAL. L. REV. 445, 447 (1998).

150. “Misappropriation,” BLACK’S LAW DICTIONARY, *supra* note 106, at 449; *see also* U.S. Golf Ass’n v. St. Andrews Sys., *Data-Max, Inc.*, 749 F.2d 1028, 1034-35 (3d Cir. 1984).

The doctrine of “misappropriation,” which is a distinct branch of unfair competition, . . . has been applied to a variety of situations in which the courts have sensed that one party was dealing “unfairly” with another, but which were not covered by the three established statutory systems protecting intellectual property: copyright, patent, and trademark/deception as to origin.

“[t]he common-law tort of using the noncopyrightable information or ideas that an organization collects and disseminates for a profit to compete unfairly against that organization . . . .”<sup>151</sup>

The Supreme Court established the misappropriation doctrine in the 1918 case of *International News Service v. Associated Press*.<sup>152</sup> In *International New Service*, International News Service (INS) copied news stories from early editions of Associated Press (AP) east coast newspapers and sold the stories to west coast markets.<sup>153</sup> The Supreme Court held that INS’s use of AP’s information was an unlawful “misappropriation” under federal common law.<sup>154</sup> As the Court explained:

[INS], by its very act, admits that it is taking material that has been acquired by [AP] as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant’s members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant’s legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news.<sup>155</sup>

Labor courts relied on *International News Service* to limit the dissemination real-time information from sporting events. For instance, a federal district court in the 1938 case of *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,<sup>156</sup> enjoined a radio station from broadcasting Pittsburgh Pirates home games from a vantage point across the street from the stadium.<sup>157</sup> The Pirates ownership had already granted exclusive broadcast rights to another company and according to the *Pittsburgh Athletic* court,

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*Id.*

151. BLACK’S LAW DICTIONARY (8th ed. 2004).

152. 248 U.S. 215 (1918).

153. *Id.* at 231.

154. *Id.*

155. *Id.* at 239-40.

156. 24 F. Supp. 490 (W.D. Pa. 1938).

157. *Pittsburgh Athletic Co.*, 24 F. Supp. at 492.

KQV's competing broadcast interfered with these exclusive rights.<sup>158</sup> Following the rationale from *International News Service*, the *Pittsburgh Athletic* court reasoned, "[t]he Athletic Company has at great expense, acquired and maintains a baseball park, pays the players who participate in the game, and have . . . a legitimate right to capitalize on the news value of their games."<sup>159</sup>

The *International News Service* case and its progeny became synonymous with the "hot news" exception—a narrow exception to the general rule that facts cannot be owned.<sup>160</sup> The phrase "hot news" is used to describe time-sensitive information.<sup>161</sup> Under the exception, "hot news," like other facts, is still not copyrightable; however, it may be protected under state tort law so long as certain elements are met.<sup>162</sup> The necessary elements of a "hot news" misappropriation claim are:

1. "The plaintiff generates or collects information at some cost or expense."<sup>163</sup>
2. "The value of the information is highly time-sensitive."<sup>164</sup>
3. "The defendant's use of the information constitutes free-riding on the plaintiff's costly effort to generate or collect it."<sup>165</sup>
4. "The defendant's use of the information is in direct competition with a product or service offered by the plaintiff."<sup>166</sup>
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 service that its existence or quality would be substantially threatened."<sup>167</sup>

#### b. The Retrenchment of the Misappropriation Doctrine

Even assuming the above elements are met, subsequent developments in the law have sharply limited the misappropriation doctrine as a viable cause of action. First, the legal foundation for the *INS* decision—federal

158. *Id.*

159. *Id.*

160. See 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, 202 (1997) ("The hot news doctrine has its roots in the seminal case of *International News Service v. Associated Press*. . .").

161. *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841, 845 (2d Cir. 1997).

162. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 242 (1918).

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

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

general common law— was eliminated by the Supreme Court in *Erie Railroad v. Tompkins*.<sup>168</sup> Thus, federal misappropriation claims are now obsolete. Moreover, few states have recognized the tort of misappropriation in any context relevant to this Article and some states reject it outright.<sup>169</sup> As the Restatement (Third) of Unfair Competition explained:

The facts of the *INS* decision are unusual and may serve, in part, to limit its rationale. . . . The limited extent to which the *INS* rationale has been incorporated into the common law of the states indicate that the decision is properly viewed as a response to unusual circumstances rather than as a statement of generally applicable principles of common law.<sup>170</sup>

Furthermore, the enactment of the Copyright Act of 1976 effectively preempted most state law misappropriation claims.<sup>171</sup> Under section 301 of the Act, a state law claim is preempted when: (1) the state law claim seeks to vindicate “legal or equitable rights that are equivalent” to any of the exclusive rights already protected by copyright law under 17 U.S.C. §

168. 304 U.S. 64, 78 (1938) (“There is no federal general common law.”).

169. Roberts, *supra* note 149, at 171.

In the years following *INS*, courts in fourteen states recognized the general tort of misappropriation as a matter of their state law, although in two of those states (Alaska and Delaware), the only courts to recognize the tort under the state’s law were local federal courts. Thus, there are thirty-six states that have not recognized it in any context remotely relevant to the subject of this article, and a couple (Massachusetts and Hawaii) in which the courts have appeared to reject it outright.

*Id.*

170. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995).

171. See Paul M. Enright, “*SportsTrax: They Love This Game!*” *A Comment on the NBA v. Motorola*, 7 SETON HALL J. SPORT L. 449, 465-66 (1997) (“Congress amended the Copyright Act in 1976. In doing so, it provided, inter alia, for the preemption of state law claims that are interrelated with copyright claims in certain ways.”); Louis Klein, *National Basketball Association v. Motorola, Inc.: Future Prospects for Protecting Real-Time Information*, 64 BROOK. L. REV. 585, 593-94 (1998) (“The enactment of the Copyright Act of 1976 effectively abolished the dual system of copyright protection that had existed under the 1909 Copyright Act. By including section 301, Congress specifically intended to do away with this dual system and instead adopt a single federal system of statutory protection.”); Roberts, *supra* note 149, at 172 (“[T]he Copyright Act was passed in 1976 and includes a broad preemption of state laws. . . .”); 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, 12-13 (1997) (explaining that only a limited “hot news” exception survives preemption).

106—the “general scope requirement”,<sup>172</sup> and (2) the particular work to which the state law claim is being applied falls within the type of works protected by the Copyright Act under Sections 102 and 103—the “subject matter requirement.”<sup>173</sup> It is beyond the scope of this Article to fully explore the preemptive effect of the Act; however, most commentators agree that only a narrow “hot news” exception survives preemption.<sup>174</sup>

### c. “Hot News” and Blogs

Even if the “hot news” claim survived preemption, at least two elements of a “hot news” claim are not present with blogs: (1) free-riding and (2) direct competition.<sup>175</sup> In a closely analogous case, the *Motorola* court explained the lack of free-riding in the context of a cellular pager:

An indispensable element of an *INS* “hot-news” claim is free riding by a defendant on a plaintiff’s product, enabling the defendant to produce a directly competitive product for less money because it has lower costs. SportsTrax is not such a product. The use of pagers to transmit real-time information about NBA games requires: (i) the collecting of facts about the games; (ii) the transmission of these facts on a network; (iii) the assembling of them by the particular service; and (iv) the transmission of them to pagers or an on-line computer site. Appellants are in no way free-riding on Gamestats. Motorola and STATS expend their own resources to collect purely factual information generated in NBA games to transmit to

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172. See Copyright Act of 1976 § 301(a)-(b), 17 U.S.C. § 301(a)-(b) (2000).

[A]ll 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 . . . 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.

*Id.*

173. See 17 U.S.C. §§ 102, 103 (2000).

174. See, e.g., Roberts *supra* note 149; Claudia Werner, *NBA v. Motorola & Stats, Inc.: Real-Time Basketball Scores—News or Property?*, 7 DEPAUL-LCA J. ART & ENT. L. 288, 289 (1997); Williams, *supra* note 149, at 450.

175. Nat’l Basketball Ass’n v. Motorola, 105 F.3d 841, 845 (2d Cir. 1997) (describing the fourth element of a “hot news” claim as direct competition with a product or service offered by the plaintiff).



SportsTrax pagers. They have their own network and assemble and transmit data themselves.<sup>176</sup>

Similarly, blogs “expend their own resources to collect purely factual information” about sporting and other events.<sup>177</sup> Like the *Motorola* pagers, blogs use their own network to “assemble and transmit data themselves.”<sup>178</sup> Thus, blogs do not free-ride off of the rights holder’s investment in covering a game or event.

Additionally, the direct competition element of a “hot news” claim is missing since there is no direct competition between a blog and a television or radio broadcast in either’s primary market.<sup>179</sup> Direct competition in the primary market is necessary to satisfy the direct competition element of a “hot news” claim; whereas, competition in the secondary market is irrelevant.<sup>180</sup> The secondary market is defined as “collateral services generated by the success of one’s business venture.”<sup>181</sup> In *Motorola*, the court rejected the NBA’s argument that the *Motorola* pagers directly competed with broadcasts of NBA games.<sup>182</sup> As the court explained:

In our view, the NBA has failed to show any competitive effect whatsoever from [*Motorola*]. . . . With regard to the NBA’s primary products—producing basketball games with live attendance and licensing copyrighted broadcasts of those games—there is no evidence that anyone regards [*the Motorola pagers*] as a substitute for attending NBA games or watching them on television. In fact, *Motorola* markets [*their pagers*] as being designed “for those times

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176. *Id.* at 854.

177. *Id.*

178. *Id.*

179. *Id.* at 853.

180. *Motorola*, 105 F.3d at 853.

181. *Id.* at 853 n.8. (citing *Nat’l Football League v. Governor of State of Delaware*, 435 F. Supp. 1372 (D. Del. 1977)).

182. *Id.* at 854; see also Harvard Law Review Note, *supra* note 121, at 1155.

The NBA and *Motorola* participate in different and wholly distinct industries—the creation and marketing of professional basketball games, on the one hand, and the development of pager and wireless technology, on the other. They are not competitors, and therefore, according to the legislative record, New York’s common law of misappropriation should have been preempted—never applied.

when you cannot be at the arena, watch the game on TV, or listen to the radio . . . .”<sup>183</sup>

Similarly, blogs do not directly compete with television or radio broadcasts. Much like the *Motorola* pagers, blogs were designed for people who “cannot be at the arena, watch the game on TV, or listen to the radio.”<sup>184</sup> Also, there is no evidence blogs are used as a substitute for in-person or television viewing. Comments sent to the *Courier-Journal* from blog readers indicated most, if not all, read the blog because they were unable to view the game on television or listen on the radio.<sup>185</sup> Thus, like the *Motorola* pagers, blogs are not in direct competition with television or radio broadcasts. Accordingly, a “hot news” misappropriation claim would be unlikely to prevail against a blog.

### 3. Other Intellectual Property Protections

*“[T]his case is not about copyright law, the Constitution, the First Amendment, or freedom of the press in news reporting. This case is a straight-forward antitrust case . . . .”*<sup>186</sup>

Although most claims in broadcast rights cases arise under copyright or state tort law, a recent federal district court case based on antitrust claims highlights the potential for other types of claims to restrict the dissemination of time-sensitive information from sporting events.<sup>187</sup> In *Morris Communications v. PGA Tour, Inc.*,<sup>188</sup> a federal district court held that under antitrust law, the PGA had a property right in golf tournament scores compiled by the use of a special relay scoring system it developed.<sup>189</sup> Using this relay system,<sup>190</sup> scores from around the

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183. *Id.* at 853-54.

184. *Id.*

185. Telephone Interview with Brian Bennett, Columnist, Louisville Courier-Journal, in Louisville, KY (June 18, 2007).

186. *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1292-93 (11th Cir. 2004), *aff'g* 235 F. Supp. 2d 1269 (M.D. Fla. 2002).

187. *Morris*, 235 F. Supp. 2d at 1269.

188. *Id.*

189. *Id.* at 1281 (“[T]he Court finds that the PGA Tour does have a property right in the scores compiled by the use of [its scoring system].”).

190. *Id.* at 1272-74.

tournament were transmitted to a PGA media center, compiled, and then made available to the public through the PGA web site.<sup>191</sup> Morris wanted access to the media center, so it could post the scores on its web site without having to wait for the scores to first be posted on the PGA's web site.<sup>192</sup> The *Morris* court held that so long as the information was unavailable in the public domain, the PGA had a property right in the information and could restrict Morris's access on that basis.<sup>193</sup> However, the *Morris* court added that the PGA's "property right vanishes [once] the scores are in the public domain."<sup>194</sup>

Although *Morris* is distinguishable from *Motorola* in many ways,<sup>195</sup>

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Due to the nature and size of golf courses, which may span as much as 150 acres, comprehensive real-time scores—that is, up-to-the-minute scores of every competitor—can only be compiled using a relay system such as [the one the PGA developed]. During a golf tournament, different groups of players compete contemporaneously at different holes such that any one spectator can only view a limited number of players at any one of the eighteen holes. Thus, in order to generate real-time scores, it is necessary to have individuals stationed at each hole as the tournament progresses so that the entire golf course can be monitored simultaneously. Acknowledging that some kind of relay system is needed to generate the type of real-time scoring information it wishes to syndicate, Morris submits that it is unable to implement such a system itself due to the PGA Tour rules prohibiting unauthorized use of wireless communication devices on the golf course at its tournaments.

*Id.*

191. *Id.* at 1274.

192. *Id.*

193. *See Morris*, 235 F. Supp. 2d at 1279.

194. *Id.* at 1281.

195. *Id.* at 1279-80.

Three distinctions between *Motorola* and the instant case make *Morris*'s claim untenable. First, the *Motorola* court used a very high standard for freeriding that is applicable only in cases with the hot news exception, which will be discussed in greater detail below. More importantly, the information that *Motorola* used to create its product was in the public domain, having been broadcast on television or radio. Specifically, *Motorola*-paid reporters, who had heard the radio or television broadcast scores, reported the information to a central location and merely relayed what had been known to the world. Golf, unlike basketball, precludes a single person gathering all the information occurring on all 18 holes. So when television and radio cover a basketball game, the score is presented to the public through those media outlets, allowing *Motorola* to obtain the information and republish it. If *Morris* were able to gather scores from all 18 holes through a television or radio broadcast, *Morris* could then republish that information, absent a hot-news exception. However, golf's atypical format prevents any single television or radio broadcast from providing results from all 18 holes live. The

one of the fundamental lessons from both cases is that whether information may be restricted depends on whether the information is available in the public domain. Until it is, courts will likely find broadcast rights holders enjoy some kind of property right in the information. However, once the information is available in the public domain, remedies available to broadcast rights holders are sharply limited or gone.

### C. *The Public Interest*

The First Amendment and the Copyright Clause of the U.S. Constitution are based partly on a strong public interest in the availability of information. As the Supreme Court said in *Turner Broadcasting, Inc. v. Federal Communication Commission*,<sup>196</sup> a fundamental purpose of the First Amendment is to protect the public's access to a broad range of information sources so that each person can "decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."<sup>197</sup> In much the same way, copyrights are intended to foster the development of new sources of information by providing a financial incentive to create and disseminate original expression to the public. Because blogs are a source of information and original expression, there is a strong public policy argument in favor of encouraging their growth.

Rather than be feared, blogs should be seen as valuable tools to spark interest in sporting and other events. As journalist, Gabe DeArmond said, "Ultimately . . . it's just another way to spread the word about their events. . . . I would think they'd want to get the word out to as many people as

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PGA Tour does publish the scores in the media center, but the media cannot disseminate that information except as the PGA Tour's press credentials allow them to do. As a result, the scores, which are not protected by copyright, remain outside the public domain and within the PGA Tour's control, because the PGA Tour provides access with certain restrictions. Finally, Motorola benefited from the NBA's costs in producing and marketing the games and from the radio and television stations who paid for broadcast rights: that is Motorola capitalized on the NBA's positive externalities. However, the NBA and the broadcast stations had already reaped the profits of their investment, and the information was in the public domain at the moment of broadcasting. Additionally, once in the public domain, Motorola "expend[ed] their own resources to collect purely factual information generated in NBA games." While here, Morris does not expend its own resources in gathering information, which is not in the public domain, but instead free-rides on the PGA Tour's compilation of scores.

*Id.*

196. 512 U.S. 622 (1994).

197. *Id.* at 641.

they possibly can.”<sup>198</sup> This is particularly true in sports like college baseball where interest is growing, but coverage in many places is scant. Essentially, blogs are free press for the events they cover. As such, sporting and other event organizers should welcome their presence. Where blogs are already present, the law should protect them.

Legal arguments aside, it seems impossible to prevent blogging anyway. If blogger’s are forced from the press box, there is not much the NCAA or others could do to prevent them from blogging from the stands or across the street in a sports bar. However, this would be an unfortunate result for all, since media credentials provide access to information and sources that can enrich reporting in blogs. The greater depth of reporting made possible by media credentials serves to further enhance interest in the sport and the blog. Thus, the public interest is better served by cooperation, rather than conflict, between event organizers and bloggers.

#### IV. CONCLUSION

The intersection of the First Amendment and intellectual property is nothing new. What is new is how the Internet is changing the interaction between the two. To ensure blogs and other new technologies are allowed to fulfill their potential to enhance communication and foster expression, a fresh approach is needed.

To determine the appropriate level of First Amendment protection for new technologies, the medium-specific approach must be abandoned in favor of analogical reasoning. Because the Internet blurs the distinctions between different mediums of communication, the medium-specific approach is no longer useful. Analogical reasoning is superior because of its adaptability. Regardless of the particular technology, a fitting analogy always will be useful in determining its relation to the First Amendment.

A greater recognition of what copyright protects also will be helpful in fostering the growth of new technologies. An “engine of free expression,” copyright law should encourage new forms of communication rather than inhibit them. However, as *Bennett* illustrates that is not always the case.

As decisions are made about how best to adjust to the shifting relationship between the First Amendment and intellectual property protections caused by new technologies, public policy also must be considered. Public policy favors promoting speech and the availability of

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198. Joe Walljasper, *NCAA Rule on Blogs Does Not Compute*, COLUMBIA TRIB., June 14, 2007 (quoting Gene DeArmond), available at <http://www.columbiatribune.com/2007/Jun/20070614Spor005.asp>.

information through blogs. Blogs are inexpensive, efficient, and easily accessible forms of communication. Rather than compete with existing coverage of events, blogs augment it. A fresh approach that takes into account these considerations is necessary going forward.

