"SportsTrax: They Love This Game!" A Comment on the *NBA v. Motorola*

I. INTRODUCTION

The consummate basketball fan from New York city dreams of the New York Knicks playing the Chicago Bulls in the National Basketball Association's (NBA) Eastern Conference Finals, and winning. That fan would love to be in Madison Square Garden to see the Knicks earn a shot at the NBA finals with a win in game seven of the series. Unfortunately, those tickets are difficult to come by, so the fan will settle to watch the game on television, and if the t.v. is on the fritz he will surely huddle around a radio. But what happens when prior commitments prevent the fan from getting to the arena, a television, or a radio? Luckily for the fan, emerging media can now give you basketball excitement via the Internet, telephone, and pagers. The question then becomes, is the fact that Michael Jordan has scored twenty points in the first half of a game, but the Bulls are still losing by four points a fact, or entertainment? At first glance it appears to simply be a fact, but when these facts are reported within the constraints of an ongoing NBA game the answer becomes less clear.

Mike Lupica, a sportswriter for the New York Daily News, once said that a sporting event was the greatest form of entertainment available because the drama and intrigue unfold differently every game. There are never repeats, every game is an original.[1] Knowledge that each and every game will be played out differently increases the value of the events as they unfold. Knowing that the Knicks have the possession arrow in their favor, or that the Bulls are in the bonus has tremendous value during games when the outcome is unknown. When the games end these facts may be irrelevant because they played no part in the outcome of the game. But while the game is in

1. "Unlike movies, plays, television programs or operas, athletic events are competitive and have no underlying script." Nat'l Basketball Ass'n v. Motorola Inc., 105 F.3d 841, 846 (2nd Cir. 1997) (hereinafter "Motorola").

progress, they are part of the plot that keeps you tuned into find out what happens next.

Sportsphone, "ESPNet to Go," 1-800-HEAR-NBA, and SportsTrax are forms of the type of emerging media that allow the fan to have a part in the excitement of NBA games absent a live presentation. All but SportsTrax pay the NBA for media credentials and abide by guidelines in using the NBA's property rights from their games.

SportsTrax, a hand held pager, produced by Motorola and Sports Team Analysis and Tracking Systems, Inc., ("Stats") disseminates real-time game information without media credentials by watching or listening to television or radio broadcasts.[2] The NBA sued for an injunction to prevent SportsTrax from misappropriating this information.[3] They relied principally on two bodies of law in making their arguments: copyright and misappropriation.[4] The United States District Court for the Southern District of New York granted the injunction on misappropriation grounds despite rejecting the NBA's copyright argument.[5] The Second Circuit Court of Appeals affirmed the rejection of the copyright argument, but overturned the misappropriation decision and vacated the injunction order.[6]

This comment will argue that SportsTrax's use of the facts from NBA games, violates New York misappropriation law by taking for their own use a commercially valuable NBA prop-

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2. *Id.* at 843-4.
3. *Id.* at 843.
4. *Id.*
5. *Id.*
6. *Id.* On August 7, 1996 the District Court granted a permanent injunction, until August 26, 1996 when that order was stayed pending an expedited appeal. Nat'l Basketball Ass'n v. Sports Team Analysis and Tracking Systems, Inc., 939 F. Supp. 1071, 1074 n.1 (S.D.N.Y. 1996) *aff'd* in part, *rev'd* in part, Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841 (2d Cir. 1997) (hereinafter "Stats"). On September, 3 1996, the District Court granted the NBA's motion pursuant to Rules 59(e) and 60(b) and issued an Amended Judgment for Permanent Injunction that prohibited Stats and Motorola from transmitting real-time NBA game information not only by the SportsTrax device, but also via the Stats site on America On-Line ("AOL") or through any other equivalent means. *Id.* On August 7, 1996 the same day the District Court's Judgment was entered, AOL filed a law suit against the NBA in federal court in Virginia seeking to re-litigate in a different forum the same issues decided by the district court. *Id.* The NBA moved to transfer to the Southern District of New York. *Id.* That motion was granted on September 16, 1996. *Id.* On January 31, 1997 the Second Circuit Court of Appeals affirmed on Motorola's cross-claim, but reversed and vacated the District Court's permanent injunction. *Id.* On the same day AOL dropped its suit against the NBA. *Id.*

erty right without compensating the NBA. It will analyze, in depth, misappropriation and copyright law and the interrelation between the two. Parts II and III will provide factual background of the businesses of the NBA and SportsTrax. Part IV will analyze the copyrightability of the NBA game and the broadcasts of NBA games. Part V will analyze misappropriation law, in general and in New York, and its preemption by the Copyright Act of 1976.

II. The Business of the National Basketball Association

A. *The Value of Real Time NBA Game Action*

The twenty-nine member teams of the NBA play a schedule of games produced in accordance with a specified format, played under NBA rules, and leading to a series of playoff games that culminate each year in the determination of an NBA champion.[7] In its suit against Motorola and Stats, the NBA contends that its principal product is the action and excitement these NBA games generate while in progress, delivered to fans, sponsors, and advertisers in arenas and via a variety of media throughout the world.[8] The District Court agreed, "Through the SportsTrax product . . . the defendants disseminated to NBA fans, game information on a real-time basis. In so doing, they have misappropriated the essence of the NBA's most valuable property — the excitement of an NBA game in progress."[9] "NBA games achieve [their greatest value] while they are in progress. In fact, roughly eighty percent of the NBA's revenues are derived from the promotion of NBA games while they are in progress."[10]

The NBA exploits its real time action in the national media through contracts with the National Broadcast Company (NBC) and Turner Broadcasting.[11] NBC pays nearly three million dollars per telecast for the national network television

7. Brief for the Nat'l Basketball Ass'n at 5, Nat'l Basketball Assn. v. Sports Team Analysis, 939 F. Supp. 1071 (S.D.N.Y. 1996), *aff'd* in part, *rev'd* in part, Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841, (2d Cir. 1997).

8. *Id.*

9. *Stats*, 939 F. Supp. at 1075.

10. *Id.*, at 1077. In fact, NBA footage is so valuable that at the conclusion of a game, broadcasts are sold from $1000 to $5000 per minute of footage. *Id.* at 1077 n.6.

11. *Id.*

broadcast rights to NBA games, and currently has a four-year deal with the NBA worth seven hundred and fifty million dollars to broadcast NBA games through the 1997-98 season.[12] With so much invested in the real time dissemination of NBA games, NBC submitted an *amicus* brief for the NBA, contending that a line must be drawn to prevent new media like online services from taking away the value of a live game or television broadcast.[13] Although Turner Broadcasting did not submit a brief, it too has much invested in the real-time action of NBA games. It pays the NBA approximately one million dollars per telecast for one-hundred fifteen regular season and playoff games.[14] Meanwhile, ESPN radio pays from "$50,000 to $100,000 per game for the national radio distribution rights of NBA games."[15] In addition, NBC and Turner Broadcasting rights coexist with local and regional licensing agreements.[16]

The NBA also exploits its proprietary interest in real time NBA game action through the telephone.[17] TRZ Communications has a licensing agreement with the NBA whereby audio descriptions of NBA games are distributed via 1-800-HEAR-NBA to listeners who are not in the vicinity of a radio or television broadcast of an NBA game.[18] "Callers are charged a fee in exchange for which they can select a game currently in progress and hear a play-by-play broadcast of the game."[19] The New York based Sportsphone updates scores every few minutes to callers, but has agreed to abide by the NBA's limits on how frequently press representatives may issue updates, in exchange for press credentials for games.[20]

The NBA protects its proprietary interest by issuing media credentials.[21] "These media credentials ensure that entities, despite the legitimacy of their news gathering and dissemina-

12. Lawrie Mifflin, *Sports Service Battles NBA In Round Two. Real Time Game Scores: News or Entertainment?* N.Y. TIMES Oct. 21, 1996 at D1.

13. *Id.*

14. *Stats*, 939 F. Supp. at 1077.

15. *Id.*

16. *Id.* For example, in New York and New Jersey, the NBA has agreements with Madison Square Garden Network and Sports Channel which carry New York Knicks and New Jersey Nets games respectively. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Mifflin, *supra* note 12, at D6.

21. *Stats*, 939 F. Supp. at 1078.

tion functions, are not able to disseminate real-time information which is comparable to that provided by the NBA's paying licensees without compensating the NBA."[22] Media with valid credentials are "admitted to the arenas and are permitted to provide post-game reports and, to a more limited extent, reports of NBA games while they are in progress."[23] Accordingly, the 1995-96 NBA Media Pass requires television and radio stations to use "excerpts from NBA games only in the manner and on the terms and conditions set forth in the NBA's Video and Audio Highlights licenses."[24] The NBA requires prior specific written approval for any other use of their property.[25]

The ESPN owned SportsTicker has also paid for media credentials from the NBA.[26] "Based on game updates from its representatives in the arenas, SportsTicker distributes electronically the score and time remaining three times per quarter and once at the end of the quarter. It creates a data feed with this information and sells that information to its clients."[27]

B. NBA's Real Time System: GameStats

Currently, the NBA is seeking to protect its proprietary interest in its games by capturing and disseminating statistical information about ongoing NBA games through its own system, GameStats.[28] GameStats is to be developed in four

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22. *Id.*

23. *Id.* These limitations include the requirement that reporters admitted to NBA arenas use information obtained there only for news reporting, rather than for commercial entertainment purposes. *Id.* In addition, the NBA prohibits the electronic media (other than licensed broadcasts) from transmitting scores or other information about games in progress more than three times in any quarter or more than once at the end of each quarter. *Id.* (quoting the 1995-96 NBA Media Pass).

24. *Id.*

25. *Id.* Video highlights restrictions include: "game highlights may be used only for news purposes in regularly scheduled news programs up to seventy-two hours after the completion of the game, may not exceed two minutes for any one game that has been completed, may only include highlights of the first half of an ongoing NBA game, and may not incorporate announcer commentary from game telecasts." *Id.* at 1078-9 (quoting the 1995-96 Media Pass).

26. Sports Ticker business activities will be a major source of discussion under the Misappropriation section of this comment. Why should ESPN pay all this money to satisfy all licensing requirements, if SportsTrax can provide a product without paying for a license or media pass, and without abiding by any regulations? *Id.*

27. *Stats*, 939 F. Supp. at 1079.

28. *Stats*, 939 F. Supp. at 1078.

phases.[29] Phase I is the "development and implementation phase of the software used to operate GameStats," and is almost completed.[30] GameStats data is displayed over video monitors and used for a variety of purposes by the official game scorers, working press, and television and radio announcers, but as of now is unable to be transmitted outside of the arena.[31]

"In particular, GameStats is the source for score updates, graphical displays, and other information supplied during NBA television broadcasts."[32] Further, the NBA hopes to bridge the gap from merely providing data to broadcasters to distributing real time information from NBA games in progress directly to consumers through pager products, on-line services, and other new media.[33] It has already conducted negotiations with ESPN, Time Warner, Intel, and Motorola for the licensing of GameStats in connection with such products.[34] These developments coming together would amount to a completion of what are phases II through IV.

The NBA has invested time, and money over many years to generate a high level of public interest in basketball games. As demonstrated, the bulk of their investment goes towards exploiting their most valuable asset, the real-time action of ongoing games. The Second Circuit Court of Appeals overlooked these efforts by the NBA and its licensees and held Motorola and Stats had not misappropriated the NBA's property by transmitting real-time game action and excitement taken from licensed television and radio broadcasts.[35] The next section will demonstrate how SportsTrax benefits from the NBA's investment without compensating them.

III. The Business of SportsTrax

A. *"Any Game, Any Team, Any Time, Any Where"*[36]

Motorola launched SportsTrax, a hand held pager with an

29. *Id.*
30. *Id.*
31. *Id.*
32. Nat'l Basketball Ass'n brief, *supra* note 7, at 8.
33. *Id.*
34. *Id.*
35. *Motorola*, 105 F.3d at 848.
36. *Stats*, 939 F. Supp. at 1078.

inch and one-half by inch and one-half screen, that provides real time information supplied by Stats, about NBA games in progress.[37] Motorola and Stats intended to supply the NBA fans with "basketball action wherever [they] go."[38]

SportsTrax design is similar to a television in that each "channel" of SportsTrax shows a different basketball game and there is a channel for every game being played that day.[39] Once a game has started, the consumer may flip the channels to get live updates on the status of each and every on-going game.[40]

Information is transmitted through the pager usually within two minutes of the on-court activity.[41] Towards the end of "competitive games," where the score is very close, SportsTrax updates more frequently.[42] Although there is no official policy for updating, the pager does provide up to fourteen updates in the final thirty seconds of a typical competitive NBA game.[43]

Motorola markets the product as coming directly from the arena and directly from the press table.[44] In actuality the updates presented by SportsTrax are presented to Motorola by Stats.[45] "Stats, however, does not have reporters in the arenas or at the press table."[46] Rather, Stats pays reporters $10 per

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37. *Motorola*, 105 F.3d at 843-4. "Although this case only addresses SportsTrax, the NBA offered evidence at trial concerning Stats' America On-Line ("AOL") site. Starting in January, 1996, users who accessed Stats' AOL site, typically via a modem attached to a home computer, were provided with slightly more comprehensive and detailed real-time game information than is displayed on SportsTrax. On the AOL site, game scores are updated every fifteen seconds to a minute, and player and team stats are updated each minute." *Id.* at 844.

38. *Stats*, 939 F. Supp. at 1080. "More specifically, it allows the consumer to follow NBA games, including playoff games, being played around the nation at any particular time by regularly updating its displays of the score, quarter, ball possession, time remaining, and team in the bonus while the games are in progress." *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1081.

42. *Id.*

43. Nat'l Basketball Ass'n brief, *supra* note 7, at 9.

44. *Stats*, 939 F. Supp. at 1081. In a January 1996 press release, Motorola stated, "SportsTrax provides 'updated game information direct from each arena' which 'originates from the press table in each arena.'" *Id.* This press release was predicated on a mistaken notion by SportsTrax Products, President Michael Marrs that "Stats actually gathered information in this manner." *Id.*

45. *Id.*

46. *Id.*

game to watch or listen to an NBA licensed broadcast and type information, "such as made and missed shots, fouls, and clock updates, into computers which calculate various stats and relay them for transmission to the pager."[47] To ensure the correctness of the information broadcast, Stats has built in corrective features in their software, and pays editors to address any discrepancies between the reporters covering the games.[48]

According to Stats its pager system is "exciting basketball action in the palm of your hand."[49] In fact, according to affidavits from SportsTrax President Michael Marrs and Chief Executive Officer John Dewan, "SportsTrax is designed and marketed as a commercial entertainment product for NBA fans."[50]

The NBA wanted to develop a paging device providing real-time information and initiated discussions with Motorola in January 1996.[51] Motorola was already conducting business with Stats for a Major League Baseball pager (through a license with Major League Baseball)[52] and had hoped to have a basketball version by the start of the 1995-96 NBA season.[53] It had received favorable press coverage regarding its baseball pager and looked to capitalize on this good will by getting to the market with a pager before a competitor, and hoped to reduce its reliance on the baseball pager in light of the 1994 player's strike.[54]

Motorola had its target date in mind and was therefore unwilling to wait for the four phases of GameStats to be completed.[55] When the 1995-96 basketball season approached, Motorola abandoned its joint venture plans with the NBA and undertook to accomplish this project without the NBA.[56] It

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47. *Id.*
48. *Id.*
49. *Id.*
50. *Stats*, 939 F. Supp. at 1081. "It is designed for those times when you cannot be at the arena, watch the game on t.v., or listen to the radio, and a slight delay is acceptable." *Id.*
51. *Id.*
52. Robert M. Kunstadt, *'Misappropriation' Theory Scores Game Point - But Will It Count?*, N.Y.L.J., Jan. 21, 1997, at 1.
53. *Stats*, 939 F. Supp. at 1084.
54. *Id.*
55. *Id.*
56. *Id.*

never informed the NBA that it was proceeding with its plan independent from the NBA.[57]

In May of 1994, the NBA and Stats began to have discussions regarding the possibility of a future business venture.[58] Stats informed NBA officials that it was "looking to be the exclusive provider of information of NBA developed information."[59] The plan was to have GameStats, in association with the NBA, "to provide raw information to Stats, which would then customize the information [and feed it to] a real-time product made by Motorola."[60] This never occurred because talks were abruptly broken off by Stats and Motorola, after it began doing business without the NBA.[61] Mr. Dewan and Mr. Marrs questioned their own business tactics when they stated in their affidavits that they believed that down the road they would have to make an accounting to the NBA for the use of the NBA's property.[62]

IV. The Copyrightability of NBA Games and Broadcasts

The Copyright Clause of the United States Constitution empowers Congress "to 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."[63] Under this authority, Congress drafted the Copyright Act of 1976, which entitles certain works to federal copyright protection. "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed . . . ."[64]

The NBA alleges, *inter alia,* that Stats and Motorola infringed its copyright in both the NBA games and broadcasts of games in violation of the Copyright Act of 1976.[65]

"To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of

57. *Id.*
58. *Id.*
59. *Stats*, 939 F. Supp. at 1084.
60. *Id.*
61. *Id.* at 1084-5.
62. *Id.*
63. U.S. Const. art. I, § 8, cl.8.
64. 17 U.S.C. § 102(a) (1997).
65. *Stats*, 939 F. Supp. at 1085; 17 U.S.C. § 501 (1997).

constituent elements of the work that are original."[66] Therefore, to prove copyright infringement the NBA must show that it owns valid copyrights in either NBA games, broadcasts, or both, and it must prove that protectable portions of these works were in fact copied by Stats and Motorola.

A. The Copyrightability of NBA Games

To be copyrightable subject matter, a work of authorship must be fixed in a tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine.[67] Unfixed works, such as lectures and live performances, may qualify for state common law copyright protection, but are ineligible for federal protection.[68]

In order to be federally protected, a work must also be original.[69] Congress delineated eight categories of works of authorship which if fixed and original are protected.[70] Sporting events are not one of the categories listed. However, works of authorship are not limited to these broad categories. The House Report from 1976 explicitly states that these categories are "'illustrative and not limitive', and do not necessarily exhaust the scope of 'original works of authors' that the bill is intended to protect."[71] Congress purposely left the phrase "works of authorship" undefined.[72] A flexible definition was intended that would neither "freeze the scope of copyrightable subject matter at the present stage of communications technology or . . . allow unlimited expansion into areas completely outside the present congressional intent."[73]

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66. *Stats*, 939 F. Supp. at 1088 (citations omitted); *see also* Donald S. Chisum and Michael A. Jacobs, UNDERSTANDING INTELLECTUAL PROPERTY LAW, § 4F (1992).

67. Fiest Publications v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991); Harper & Row v. Nation Enterprises, 471 U.S. 539, 547-9 (1985); *see also* Chisum, *supra* note 66 at § 4C(4).

68. *Fiest*, 499 U.S. at 344-5.

69. *Id.* at 345.

70. 17 U.S.C. § 102(a) (1997) includes: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographed works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

71. 1 Melvin Nimmer and David Nimmer, NIMMER ON COPYRIGHT § 2.03(A), pp. 2-29. (quoting H.R. REP. No. 2222 at 53 (1976)).

72. H.R. REP. No. 2222 at 51.

73. *Id.*

The case law on the copyrightability of events is scarce. Yet, what there is points to exclusion from the categories of authorship. In *Production Contractors v. WGN Continental Broadcasting*,[74] the plaintiff organized a Christmas parade to take place on public streets in Chicago.[75] The defendant proposed to telecast the parade using its own personnel and equipment.[76] The Court dismissed the plaintiff's suit for copyright infringement because a parade, like a sporting event, is not an original work of authorship and because the defendant could not infringe any copyright in the broadcast until it had been fixed.[77] Live events are therefore not protected under federal copyright law.

However, in *Baltimore Orioles, Inc. v. Major League Baseball Players Association*,[78] the Seventh Circuit Court of Appeals ruled that a baseball game is a copyrightable work.[79] The court summarily concluded in a footnote that the players' performances possess the modest creativity required for copyrightability.[80] According to the court, "the great commercial value of the players' performances indicates that the works embody a modicum of creativity."[81]

Judge Preska attacked the logic of this conclusion at the District Court level, using an analysis from Nimmer on Copyright.[82] There was no precedent upon which the Seventh Circuit Court of Appeals could possibly have based its opinion, and in fact the only law on the issue was in opposition to its conclusion.[83] Consequently, within the *Baltimore Orioles* opinion itself, the court expressed doubt as to the creativity of baseball games.[84]

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74. 622 F. Supp. 1500 (N.D. Ill. 1985).
75. *Id.* at 1501.
76. *Id.* at 1501-2.
77. *Id.* at 1503-4.
78. 805 F.2d 663 (7th Cir. 1986) *cert denied*, 480 U.S. 941 (1987).
79. *Id.* at 668-9.
80. *Id.* at 669 n.7.
81. *Id.*
82. *Id.*
83. *Id. See* Zacchini v. Scripps Howard Broad. Co., 433 U.S. 562 (1977) (Justice White distinguished between a broadcast of "a copyrighted dramatic work," on the one hand, and "a baseball game," on the other, implying different legal theories apply to those distinct categories).
84. *Baltimore Orioles*, 805 F.2d at 669 n.7. The first such doubt is expressed at the close of the very footnote in which the court determines games are copyrightable. *Id.* The second comes in the court's discussion of preemption. *Id.* at 676. "Regardless of the crea-

The court's sweeping conclusion is made heavily in reliance on the commercial value of a baseball player's performances.[85] There is no doubt that the performance of athletes is of great commercial value, but the copyright law does not and is not intended to extend to every commercially valuable activity.[86] "The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts."[87]

Granting copyright protection to sporting events would not forward these goals. Further, it would be too difficult to ascertain who authors these events.[88] Therefore, since copyright's goal is to increase the wealth of arts and sciences, and not to protect the commercial value of an athlete's performance, it is not sound public policy to afford sporting events copyright protection.

B. The Copyrightability of NBA Broadcasts

Unlike the NBA game itself, the broadcast of the game is deserving of copyright protection because it is an original expression fixed in a tangible medium, and displays a modicum of creativity.[89] "The many decisions that must be made during the broadcast of a basketball game concerning camera angles, types of shots, the use of instant replay and split screens, and shot selection similarly supply the creativity required for the copyrightability of the telecasts."[90]

The House Report on the 1976 Act explains the problem of live works, that is, works that are created simultaneously with their performance or broadcast.[91] "The bill seeks to resolve,

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tivity of the player's performances, the works in which they assert rights are copyrightable works which come within the scope of § 301(a) because of the creative contributions of the individuals responsible for recording the Player's performances." *Id.*

85. *Id.* at 669 n.7.

86. *See* 17 U.S.C. § 102(a) (1996). "Copyright protection subsists . . . in original works of authorship. . . ."

87. *Feist*, 499 U.S. at 349.

88. For example, in the context of basketball, if a coach draws up a play and a player makes the slightest variation in executing that play, to whom do we afford protection? Also, is it realistic to think that every time a coach uses another coach's play he will be considered to have violated a copyright?

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

90. *Baltimore Orioles*, 805 F.2d at 668. (*quoting* H.R. REP. No. 94-1476 (1976), *reprinted in*, 1976 U.S.C.C.A.N. 5748.)

91. H.R. REP. No. 94-1476 (1976), *reprinted in*, 1976 U.S.C.C.A.N. 5748. "When a football game is being covered by four television cameras, with a director guiding the

through the definition of 'fixation' in section 101, the status of live broadcasts — sports, news coverage, live performances of music, etc. — that are reaching the public in unfixed form, but that are simultaneously being recorded."[92] Congress specifically had sporting events in mind when amending the Copyright Act, thus telecasts of NBC, TNT, and regional providers of NBA telecasts are all entitled to copyright protection for their broadcasts.

The District Court, as well as the Second Circuit Court of Appeals, in its analysis of the copyrightability of NBA broadcasts correctly evaluated television broadcasts, but neglected to provide the proper basis for the copyrightability of radio broadcasts. Stats President and C.E.O. John Dewan testified that Stats' reporters watched television broadcasts or listened to radio broadcasts of NBA games in order to produce their product.[93] Therefore, the NBA's damages claim covers the eligibility of both radio and television broadcasts for copyright protection.

Radio broadcasts of original, creative material fall under the congressional category of sound recordings, so long as the live broadcast is simultaneously recorded in a tangible medium.[94] The broadcaster performs on the air and his rendition or performance is determined by his view of the ongoing NBA game.[95] In *Bleistein v. Donaldson Lithographing Co.*,[96] Justice Holmes declared that any vocal rendition, be it musical or spoken, contains, "something irreducible, which is one man's alone! . . . the inflection, timing, tone, or emphasis can all be original to the performer."[97] Therefore both radio and television broadcasts of NBA games are protected by the federal copyright law.

Copyright protection in NBA broadcasts does not presume infringement on the part of Stats and Motorola. The NBA

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activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship'. . . Thus, assuming it is copyrightable . . . the content of a live transmission should be regarded as fixed and should be accorded statutory protection if it is being recorded simultaneously with its transmission." *Id.*

92. H.R.REP. No. 94-1476 (1976) at 53.
93. *See supra* note 44 and accompanying text.
94. 17 U.S.C. §102(a)(7) (1997).
95. *Stats*, 939 F. Supp. at 1094.
96. 188 U.S. 239 (1903).
97. *Id.* at 250.

must also prove that elements of the copyrightable work were copied,[98] and in fact the specific material copied is original and protectable.[99] In addition to these limitations, "section 102(b) is universally understood to prohibit any copyright in facts."[100] "Facts are not protectable because they lack originality."[101] "Likewise, ideas are not protectable because they are not expressions of originality."[102]

To infringe, Stats and Motorola must create a product that derives from the copyrighted broadcast, directly or indirectly, and be substantially similar in expression to the broadcast. If Motorola received from Stats a running account of the broadcaster's play-by-play, and then displayed these words on the pager it would be infringing. Actions of this sort would involve deriving a work out of the broadcaster's original expression.[103]

What Stats and Motorola have done, was not derive their work from copyrighted expression, but based their work on the information from NBA games, incorporated within a copyrighted television or radio broadcast. Copyright protection does not extend an exclusive right to copy and disseminate this information about NBA games, but misappropriation law does.[104] Nor does copyright law protect the NBA's hard work in organizing and marketing the NBA game. Copyright law

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98. *Feist,* 499 U.S. at 348. Even if direct evidence exists of copying, a defendant is not liable for infringing a copyright if the defendant copied only unprotectable elements of the copyrighted work. *Id.* "The mere fact that a work is copyrighted does not mean that every element of the work may be protected." *Id.*

99. *Id.* 17 U.S.C. § 102(b) states in pertinent part: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1997).

100. *Stats,* 939 F. Supp. at 1090 (quoting Warner Bros., Inc. v. American Broadcasting Cos., Inc., 720 F.2d 231, 240 (2d Cir. 1983).

101. *Id.* at 1088.

102. *Id.* at 1089. (citing Feist, 499 U.S. at 345); *see also,* Harper & Row 471 U.S. 545. The distinction between an idea and an expression of an idea is necessary to further the primary goal underlying copyright protection: "to increase and not to impede the harvest of knowledge" available to the public. *Id.*

103. If Motorola and Stats denied viewing or listening to broadcasts, the NBA would need to prove access. "Access means the opportunity to perceive, and may be inferred from the copyrighted work's widespread dissemination but there must be evidence of a reasonable possibility of access. Access must be more than a bare possibility and may not be inferred through speculation or conjecture." Chisum, *supra* note 66 at § 4F(1)(C); *see* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).

104. *See infra* part V.

only seeks to increase the wealth of creativity and artistic expression.

Stats and Motorola, at most, have copied the idea of an NBA broadcast.[105] They did not derive their work from the broadcaster's choice of inflection or the cameraman's artistic perception. Motorola and Stats merely capitalized on the popularity of NBA games, and the public's desire to discover factual information about these games. By providing Motorola with these facts and enabling them to be transmitted through SportsTrax, Stats has increased the harvest of knowledge available to the public regarding NBA games.

V. Commercial Misappropriation

"In contrast to federal copyright law which focuses on the value of rewarding creative ideas, state misappropriation law is designed simply to protect the labor that goes into a work."[106] "Misappropriation is defined as converting to one's own use and profit another's labor."[107] In addition to its copyright claim, the NBA alleges that Motorola misappropriated NBA's property interest in NBA games and the broadcasts of NBA games in violation of New York common law. The analysis of the misappropriation doctrine, and New York's application of that doctrine follow, as does an in depth look at the preemption clause of the 1976 Copyright Act.

A. The Misappropriation Doctrine

The law regards competition, even competition calculated to eliminate competition, as lawful and in the public interest.[108] Early unfair competition law focused narrowly on two unfair competition methods: deception as to the origin or nature of goods, and use of breaches of confidences and improper means to obtain competitively useful information.[109] The former, known as passing off, is the foundation of modern trademark law, and the latter is the foundation of modern trade

105. *Stats*, 939 F. Supp. at 1093.

106. Kelly A. Ryan, *Copyright Law: Do State Misappropriation Rights Survive Feist Publications Copyright Laws?* 1992-93 Ann. Surv. of Am. L. 329, 329 (citing Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 239 (1918).

107. *Id.*

108. Restatement (Third) of Unfair Competition §1 cmt. a. (1993).

109. Chisum, *supra* note 66 at § 6(F).

secret law.[110]

The Supreme Court's 1918 *International News Service. v. Associated Press*[111] ("*Int'l News*") decision provoked debate on whether unfair competition law could encompass misappropriation, or whether a second competitor's unauthorized taking of publicly disclosed information that a first competitor invests time and effort to create when the taking diminishes or eliminates the first competitor's incentive to continue to create the information.[112] The Supreme Court found that *Int'l News* misappropriated Associated Press' ("AP") hard work and labor for its own benefit, in violation of unfair competition law.[113]

> To reach this result, the Court relied on four critical findings that now comprise the elements of the "hot news" misappropriation tort: (1) AP generated its news bulletins at the cost of enterprise, organization, skill, labor, and money . . . ; (2) the information gathered by AP had significant commercial value, particularly during the period while it is fresh; (3) [*Int'l News*] systematically took the news accounts generated by AP for its own commercial purposes, without engaging in efforts or incurring costs similar to those of AP . . . ; and (4) AP and [*Int'l News*] were in competition with one another with respect to the information in question.[114]

The NBA alleged, *inter alia*, that Motorola and Stats misappropriated the NBA's property interests in NBA games and the broadcast of NBA games in violation of New York Common Law.[115] New York courts tend to apply the misappropriation expansively. For example, in *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*,[116] the court granted Metropolitan Opera Association (Met) and Columbia Records, its authorized recording company, an injunction restraining the defendant from recording and distributing phonorecords of the Met's performances, which American Broadcasting Company broad-

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110. *Id.*

111. 248 U.S. at 215.

112. Chisum, *supra* note 66 at § 6(F).

113. *Int'l News*, 248 U.S. at 239. *But see* Bonito Boats, Inc. v. Thunder Craft Boats, 489 U.S. 141 (1989) (Supreme Court held it proper to copy the hull of a boat by direct molding, since the hull was neither patentable or copyrightable despite a state statute prohibiting such direct molding.)

114. Nat'l Basketball Ass'n brief, *supra* note 7, at 16 (citing *Int'l News*, 248 U.S. at 235-40).

115. *Stats*, 939 F. Supp. at 1075.

116. Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. N.Y. Co. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1952).

casted with the Met's permission.[117] The court took an expansive view of the misappropriation doctrine stating:

> [T]his branch of law . . . originated in the conscience, justice and equity of common-law judges. It developed within the framework of a society dedicated to freest competition, to deal with business malpractice offensive to the ethics of that society. . . . [T]he legal concept of unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions. . . .[118] The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality. . . ."[119]

The Second Circuit Court of Appeals has previously applied the misappropriation doctrine liberally. In *Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broadcasting System, Inc.*,[120] the court held that the defendant's unauthorized broadcast of a compilation of Charlie Chaplin's films after his death constituted misappropriation under New York law because it diminished the marketability of plaintiff's films.[121] Despite the presence of the preemption clause of the 1976 Copyright Act, the court noted that New York courts have found an "incalculable variety of illegal practices falling within the unfair competition rubric."[122] "It is a broad and flexible doctrine that depends more upon the facts set forth . . . than in most causes of action."[123]

Despite this history of liberally applying the misappropriation doctrine, the Second Circuit Court of Appeals, in *Motorola*, held that only a narrowly construed doctrine applied in New York.[124] That theory will be analyzed in the section that follows.

B. Copyright Preemption by Section 301 of the 1976 Act

Congress amended the Copyright Act in 1976. In doing so,

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117. *Id.* at 805, 101 N.Y.S.2d at 500.
118. *Id.* at 792, 101 N.Y.S.2d at 488.
119. *Id.* at 797, 101 N.Y.S.2d at 493.
120. 672 F.2d 1095 (2d Cir. 1982).
121. *Id.* at 1106.
122. *Id.* at 1105.
123. *Id.*
124. *Motorola*, 105 F.3d at 843.

it provided, *inter alia*, for the preemption of state law claims that are interrelated with copyright claims in certain ways.[125] Specifically, section 301 of the act imposes a two part preemption test: first, the subject matter must come within the subject matter of copyright as defined in sections 102 and 103 of the act;[126] secondly, the rights granted under state law must be equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 of the copyright act.[127]

The legislative history of section 301(b) sheds little light on whether Congress intended for misappropriation to survive preemption. Observe this exchange between Congressmen Railsback and Seiberling:

> Mr. Railsback: [T]he gentleman in no way is attempting to change the existing state of the law . . . in certain States that have recognized the right of recovery relating to misappropriation; is that correct?[128]
>
> Mr. Seiberling: That is correct. All I am trying to do is prevent the citing of them as examples in the statute. We are, in effect, adopting a rather amorphous body of state law and codifying it, in effect. Rather I am trying to have this bill leave the State law alone and make it clear we are dealing with copyright laws. . . .[129]

Unfortunately, this section has been anything but clear. It has resulted in courts, like the Second Circuit Court of Appeals,

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125. 17 U.S.C. § 301 provides in pertinent part: ". . . all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . ." 17 U.S.C § 301 (1997).

126. 17 U.S.C. § 301(a) (1997). 17 U.S.C. § 103(a) provides: "The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." 17 U.S.C. § 103(a) (1997). 17 U.S.C. § 103(b) provides in pertinent part: ". . . copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." 17 U.S.C. § 103(b) (1997).

127. 17 U.S.C. § 301(b) (1997). 17 U.S.C. § 106 provides in pertinent part: " . . . the owner of copyright under the title has the exclusive rights to do and to authorize any of the following: (1) to reproduce . . . ; (2) to prepare derivative works . . . ; (3) to distribute copies . . . ; (4) . . . to perform . . . publicly; (5) . . . to display . . . publicly." 17 U.S.C. § 106 (1997).

128. 122 CONG. REC. H10910 (daily ed. Sept. 27, 1976) (statement of Rep. Railsback).

129. 122 CONG. REC. H10910 (daily ed. Sept. 27, 1976) (statement of Rep. Seiberling).

restricting the misappropriation doctrine and at times giving inconsistent decisions.

The District Court concluded that the NBA's claim was not preempted because NBA basketball games were not within the subject matter of copyright.[130] The Second Circuit Court of Appeals reversed, ruling that New York common law misappropriation is preempted by the 1976 Copyright Act, with the exception of *Int'l News* type "hot news" cases.[131] Thus, for a misappropriation claim to succeed, it must satisfy the elements of a "hot news" claim. This part of the comment will argue that the NBA's claim should have survived the preemption doctrine because it falls neither within the subject matter of copyright nor the scope of copyright protection. Thus, the appropriate misappropriation law to apply is New York common law.

1. Subject Matter Test

In most instances, it will be clear whether the subject matter is within the ambit of copyright protection: if the material the plaintiff contends was copied, used or otherwise misappropriated is a work of authorship fixed in a tangible medium of expression.[132] However, the most difficult question concerns "ideas or facts" which copyright law does not protect. The Second Circuit Court of Appeals addressed this problem in *Motorola*, and demonstrated how difficult a question it is to answer.[133] Moreover, several circuits have diverging views on whether and in what forms misappropriation is preempted.[134] Therefore, this is an issue that the Supreme Court needs to revisit and settle.

The Second Circuit Court of Appeals relied on *Baltimore Orioles* to hold that NBA games and broadcasts were inextricably linked, and it would be too difficult to have the law separate the game from the broadcast.[135] Therefore, the court held that since the broadcasts come within the subject matter of sections 102 and 103, so too must the games themselves.[136]

130. *Stats*, 939 F. Supp. at 1093.
131. *Motorola*, 105 F.3d at 843.
132. *See* 17 U.S.C. § 102(a) (1997).
133. *Motorola*, 105 F.3d at 847.
134. *See infra* notes 173-82 and accompanying text.
135. *Motorola*, 105 F.3d at 848-9.
136. *Id.*

However, earlier in its opinion, the court specifically drew the distinction between NBA games and the broadcasts of games in order to find copyright protection for the latter but not the former.[137]

In its analysis, the Second Circuit Court of Appeals held that: "[O]nce a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purposes of preemption under section 301."[138] However, the court's analysis is faulty because the Seventh Circuit Court of Appeals, in *Baltimore Orioles*, used these words to say that a work was preempted if the rights sought to be protected were extinguished by the videotaping of the player's performance, such as publicity rights.[139] The court in *Baltimore Orioles* held that players relinquished their publicity rights because publicity rights in their performance are equivalent to the rights contained in the copyright of the telecast.[140] The Seventh Circuit Court of Appeals stated, "a state's interest in affording a cause of action for violation of the right to publicity is closely analogous to the goals of patent and copyright law."[141]

This is not true of misappropriation law. Whereas the goal of copyright law is to encourage the production and dissemination of science and the arts to the public, the goal of misappropriation law is to protect the hard work of artists.[142]

The NBA sought protection for, and only charged misappropriation in the game or broadcast's facts, used in such a way to recreate the excitement of an NBA game.[143] Its goals never equaled the goals of copyright. It only sought to protect its hard work and labor. For this reason, *Baltimore Orioles* is not on point, and is irrelevant as far as the subject matter test is concerned.

Likewise, the court's reliance on *Harper & Row* is specious. The Second Circuit Court of Appeals, relying on its own case held, "The fact that portions of Ford's memoirs may consist of uncopyrightable material . . . does not take the work as a whole

137. *Id.* at 848.
138. *Id.* at 849 (citing *Baltimore Orioles*, 805 F.2d at 675).
139. *Baltimore Orioles*, 805 F.2d at 675.
140. *Id.* at 676.
141. *Id.* at 679.
142. Ryan, *supra* note 106 at 329 (citing *Int'l News*, 248 U.S. at 239).
143. *Motorola*, 105 F.3d at 845-6.

outside the subject matter protected by the Act."[144] The NBA never sought to take the game or the broadcast in their entirety out of the realm of copyright.[145] It argued that the games were protected by copyright and if not, then the facts contained therein are subject to protection under New York state common law misappropriation.[146] Protecting the excitement of an NBA game by not allowing a competitor to take facts or ideas from a copyrightable work does not take the work as whole outside of the subject matter of copyright. It only protects those elements of the work that standing alone are outside the subject matter of copyright, and not protected.

The broadcasts of NBA games are copyrightable even though they contain uncopyrightable facts. Even if the NBA game and the broadcast merge, there is nothing preventing the court from protecting the facts from a copyrightable work. In fact, a simple analysis of the premier misappropriation case, *Int'l News*, and the leading case on the copyrightability of facts, *Feist*, demonstrate that there is room for the common law protection of facts under section 301 of the Copyright Act.[147]

In *Int'l News*, the Supreme Court defined misappropriation as the act of converting to one's own use and profit the product created by the labor or investment of another.[148] *Int'l News* involved the misappropriation of news.[149] The court held that one who gathers news, with his own effort and expense, for the purpose of profitable publication, has a quasi-property interest

144. *Id.* at 849.

145. *Id.* at 844.

146. *Id.*

147. *See* Ryan, *supra* note 106 at 338 n.81 "The preemption clause of the Copyright Act is grounded in the Supremacy Clause of the Constitution." *Id.* Article VI, § 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land." U.S. CONST. art. VI, § 2. According to the Supremacy and Copyright Clauses, Congress has the authority to make copyright laws that preempt state laws. 17 U.S.C. § 301(a) (1997). In *Goldstein v. California*, the Supreme Court interpreted the Supremacy Clause in the Copyright field as forbidding all state laws that stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 412 U.S. 546, *reh'g denied*, 414 U.S. 883 (1973), superseded by Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983).

148. *Int'l News*, 248 U.S. at 240.

149. *Id.* at 239. For a discussion of the development of *Int'l News* as a general misappropriation doctrine, see Douglas Baird, *Intellectual Property and the Legacy of International News v. Associated Press*, 50 U. CHI. L. REV. 411, 415-83 (1983).

in that news.[150]

A dispute arose between Int'l News and AP, two competitive news gathering organizations during World War II.[151] AP, a collection of nine-hundred fifty newspapers sharing news gathering costs, whose members agreed not to permit pre-publication disclosure of AP stories, sought an injunction restraining Int'l News from misappropriating AP gathered news.[152]

Int'l News copied "news from bulletin boards and from early editions of [AP member] newspapers" and sold the stories either in their entirety or after rewriting, to AP customers.[153] Int'l News in turn reported the news to AP's customers almost as soon as AP.[154] The case was set aside for appeal, and the Second Circuit Court of Appeals enjoined Int'l News from any taking of the substance or words of AP news until the commercial value had passed away.[155] The Supreme Court granted certiorari.[156]

The Supreme Court said this case involved unfair competition, not copyright law.[157] Copyright law did not apply because facts are not copyrightable.[158] According to the Court, each participant in a commercial dealing must honestly exercise his own skills, capital, and creativity.[159] When one party in a competitive relationship violates these obligations, the result is unfair competition.[160] The Court used a harvest sowing and reaping metaphor:

> Defendant . . . is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and . . . in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and is appropriating to itself the harvest of those who have sown.[161]

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150. *Int'l News*, 248 U.S. at 239.
151. *Id.* at 229.
152. *Id.* at 229-31.
153. *Id.* at 231.
154. *Id.*
155. *Id.* at 232.
156. 245 U.S. 644 (1917).
157. *Int'l News*, 248 U.S. at 233.
158. *Id.*
159. *Id.* at 235.
160. *Id.* at 238.
161. *Id.* at 238-9.

The Court in creating this often quoted paradigm protected AP's quasi-property right because Int'l News had not expended any effort in creating the property right.[162] Essentially the NBA made the same argument in its case.

Feist, though strictly a copyright case, when viewed with *Int'l News*, sheds light on the relationship between misappropriation and copyright law. Rural Telephone Service Company (Rural) sued Feist Publications (Feist), a publisher of an area wide telephone directory, for copyright infringement because Feist copied listings from Rural's white pages for profit.[163] The Supreme Court held that the directory was not copyrightable because the "selection, coordination, and arrangement of the white pages do not satisfy the minimum constitutional standards for copyright protection."[164]

The Court ruled that the Constitution provides copyright protection only for authors.[165] The *Feist* court defined author as "he to who anything owes its origin; originator; or maker."[166] Therefore, the court reasoned, "the first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.[167] Facts "whether scientific, historical, biographical, [or] news of the day . . . are part of the public domain and not protected by copyright."[168] Lower courts had granted copyright protection under a "sweat of the brow" doctrine, but the Supreme Court rejected that theory as unconstitutional, on the theory it granted copyright protection to facts rather than expression, and because facts themselves lack originality and are therefore not copyrightable.[169]

The Court next examined unfair competition. It noted that the parties' labor expended in producing directories may be protected under the unfair competition doctrine in certain circumstances, provided the protection is not like that afforded by copyright law.[170] The Court stated that its reasoning "should

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162. *Id.* at 241.
163. *Feist*, 499 U.S. at 343-4.
164. *Id.* at 362.
165. *Id.* at 346. *See* U.S. CONST. art. I, § 8, cl. 8. (authorizing Congress to grant authors the exclusive right to their writings for a limited time).
166. *Feist*, 499 U.S. at 346 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).
167. *Id.* at 347.
168. *Id.* at 348.
169. *Id.* at 354-5.
170. *Id.* at 348.

not be construed as demeaning Rural's efforts in compiling the directory, but rather as making clear that copyright rewards originality, not effort."[171] For these reasons the Second Circuit Court of Appeals should have protected NBA broadcasts under a copyright theory, as well as the commercially valuable facts disseminated during on-going games under a misappropriation theory.

However, in *Motorola*, the Second Circuit Court of Appeals, held that only "hot news" misappropriation cases survived the 1976 preemption clause despite the Supreme Court, in *Feist,* leaving the door open for non "hot news" cases to survive the preemption clause.[172] There is no doubt that residents' names and their addresses are not "hot news," yet the Court insinuated that unfair competition law may provide them relief.

The state of the law in the Courts of Appeals is not clear. The Seventh, Second, and Eleventh Circuits have different opinions as to whether facts from copyrightable works survive preemption.[173] This confusion should be a mandate to the Supreme Court to reexamine this issue. If not the Supreme Court, than Congress should re-think their intentions when enacting section 301 of the 1976 Copyright Act.

The Eleventh Circuit Court of Appeals, in *Southern Bell Telephone and Telegraph,*[174] held that state unfair competition law could protect the hard work that went into compiling facts.[175] This decision was made in 1985 despite the presence of the preemption section of the 1976 act. Therefore, *Southern Bell* indicates that misappropriation laws directed at unfair competition practice do not infringe upon copyright subject matter.[176] "Protection . . . of information in the public domain is better afforded under an unfair competition theory."[177]

On the other hand, the Seventh Circuit Court of Appeals recently held in *ProCD v. Zeidenberg,*[178] that non-copyright-

171. *Id.* at 364.

172. *Motorola*, 105 F.3d at 845.

173. *See* ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Southern Bell Tel. Co. v. Assoc. Telephone Directory Publishers, 756 F.2d 810 (11th Cir. 1985); *Motorola.*

174. Southern Bell Tel. and Tel. Co. v. Assoc. Telephone Directory Publishers, 756 F.2d 810 (11th Cir. 1985).

175. *Id.* at 809.

176. Ryan, *supra* note 106 at 342.

177. *Southern Bell*, 756 F.2d at 810 n.9.

178. 86 F.3d 1447 (7th Cir. 1996).

able facts from a copyrighted software program were within the subject matter of copyright.[179] This ruling directly contradicted an early case by the Seventh Circuit Court of Appeals, *United States Trotting Association v. Chicago Downs Association*,[180] in which the court held that there was no preemption where defendant misappropriated plaintiff's racing horse certificates.[181]

Misappropriation does not ask and does not care if a competitor is copying from an original creation. This dichotomy is evidenced in *Feist*, where the Court was unwilling to grant copyright protection to the facts in reward for labor, but allowed the possibility for misappropriation protection for that labor.[182] It is of no consequence if the excitement of the NBA game is misappropriated by copying the facts and ideas from an original expression.

The legislative history of the 1976 amendments specifically stated that there is no preemption for misappropriation cases involving, "newer form[s] of data updates from scientific, business, or financial data bases."[183] So as new technology emerges, it is alarming that the courts have pulled back from granting widespread protection for hard work and labor when it is easier than ever to misappropriate another's work.

The ability to reproduce the facts and excitement of an NBA game through a hand held pager should be included in those "newer form of data updates" devices. Facts and ideas should be free for the public to enjoy and misappropriation law should not prevent the public from obtaining those facts, but it should prevent competitors from using those facts for financial gain without paying for them.[184]

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179. *Id.* at 786. However, in *ProCD*, the Seventh Circuit relied strictly on *Feist* and therefore should be considered to have, just as the Supreme Court in *Feist*, left the door open for misappropriation of facts and copyright of expression to coexist. Victoria A. Cundiff, *Trade Secret Law / Contracts / Misappropriation: Are They Preempted,* 453 PLI/PAT 61 (1996).

180. 665 F.2d 781 (7th Cir. 1981).

181. *Id.* at 786. *Accord* Mayer v. Josiah Wedgewood & Sons, Ltd., 601 F. Supp. 1523 (S.D.N.Y. 1985) (Federal copyright protects only expression of ideas and not ideas themselves. Thus state law that protects ideas is not preempted under section 301.) *Id.* at 1532.

182. *Feist*, 499 U.S. at 348.

183. H.R. No. 94-1476 at 132, *reprinted* 1976 U.S.C.C.A.N. at 5748.

184. *See* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone,* 92 COLUM. L. REV. 333.

The Second Circuit Court of Appeals' decision, in *Motorola,* does not meet that end. Misappropriation is necessary to protect the money, hard work, and efforts of an investor because copyright law does not. Facts and ideas regardless of where they come from, the game itself or the broadcast, are not eligible for copyright protection and thus are not within the purview of sections 102 and 103 of the Copyright Act. Thus, Motorola and Stats engage in activity that simply is not included within the subject matter of copyright, and therefore not preempted. The Second Circuit Court of Appeals should have protected the hard work that goes into producing, performing, and marketing an NBA game until its commercial value has passed. This would in no way thwart Congress' efforts to promote the progress of arts and sciences.

2. The General Scope Test

Section 301 of the Copyright Act requires a second test to also be met in order for there to be preemption.[185] Section 301 preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law.[186] If the state rights are equivalent to section 106 rights then this requirement of preemption is satisfied.[187] "But if an 'extra element' is required instead of or in addition to the acts of reproduction, performance, distribution, or display, in order to constitute a state-created cause of action, then the right does not lie 'within the general scope of copyright' and there is no preemption.'"[188]

The District Court held that the NBA's claim failed to include the "extra element" necessary to render it qualitatively different from its copyright claim.[189] The Second Circuit Court of Appeals analyzed the "extra element" test only so far as "hot news" misappropriation claims were concerned.[190] In doing so, it set forth five elements to a "hot news" claim (generally the same as the elements the Supreme Court used in *Int'l News*):

185. 17 U.S.C. § 301 (1997).
186. 17 U.S.C. § 301 (1997); *see* Computer Associates International v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992).
187. *See supra* note 126-7 and accompanying text.
188. *Computer Assoc.*, 982 F.2d at 716 (quoting 1 NIMMER ON COPYRIGHT §1.01(B) at 1-15).
189. *Stats*, 939 F. Supp. at 1097.
190. *Motorola*, 105 F.3d at 845.

> (1) a plaintiff generates or gathers information at a cost; (2) the information is time sensitive; (3) a defendant's use of the information constitutes free-riding on the plaintiff's efforts; (4) the defendant is in direct competition with a product or service offered by the plaintiff; and (5) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[191]

After delineating these elements, the court summarily held that only three of the five elements survived preemption because *Int'l News* was "not about ethics."[192] It found only, "(1) the time-sensitive value of factual information, (2) the free-riding by a defendant, and (3) the threat to the very existence of the product or service provided by the plaintiff," to survive preemption.[193] The "extra element test" should not only apply to "hot news" elements because the copyright act was not intended to rewrite state law.[194] Therefore, if New York common law contains an "extra element" such that it survives preemption, so should the NBA's claim.

a. New York Misappropriation Law

As was demonstrated in section III, part 1 of this comment, the subject matter of the NBA's claim should not have been limited to "hot news" misappropriation cases. Therefore, the "extra element" test should be judged by New York common law as developed by a series of cases.

New York's misappropriation doctrine developed with a series of early cases "involving palming off that is the fraudulent representation of the goods of the seller as those of another,"[195] and evolved into a doctrine that provides broad and flexible protection such as in *Metropolitan Opera*.[196] It has since been applied to sports cases, "courts repeatedly have protected, through the doctrine of commercial misappropriation, the

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191. *Id.*

192. *Id.* at 853.

193. *Id.* In delineating three elements of the "hot news" test, the Second Circuit Court of Appeals has unfairly transformed the "extra element" test into three extra elements which all misappropriation cases would now have to meet; *see* David Goldberg and Robert Bernstein, *NBA and Motorola: 'Hot News' Protection*, N.Y.L.J., March 21, 1997 at 3.

194. *See supra* note 128-9 and accompanying text.

195. Ted Curtis, *The NBA Wins Victory in Beeper Case*, THE SPORTS LAWYER, vol. XIV, (Sept. 1996) at 8.

196. 199 Misc. 786, 101 N.Y.S.2d 483 (N.Y. Co. 1950).

property rights of those who invest the time and money into the creation of sports events and their broadcasts by limiting the permissible uses which others may make of information regarding ongoing sports events."[197]

In *Twentieth Century Sporting Club v. Transradio Press Service*,[198] Twentieth Century Sporting Club, the promoter of a boxing exhibition, granted NBC the exclusive right to radio broadcasts of a round by round description of the exhibition from the ringside.[199] Transradio sought to learn of the fight events from the ringside and to have them verified by reporters situated strategically outside the arena.[200] The New York court held the plaintiffs owned an exclusive property right in the broadcasting of events of the game, and an unauthorized running account of those events while the fight was in progress amounted to misappropriation.[201]

In *Mutual Broadcasting System v. Muzak*,[202] Mutual acquired the exclusive right to radio broadcast the 1941 World Series Games.[203] Muzak intended to use a radio receiver to pirate plaintiff's broadcast, listening to the broadcast and subsequently re-transmitting the sound through telephone lines to the defendant's customers.[204] The court held that because Mutual expended large sums of money and labor in competition with other broadcasting systems in order to obtain the right to transmit the World Series,[205] Muzak could not transmit Mutual's broadcast of the 1941 World Series through phone lines to the company's customers.[206]

In *National Exhibition Company v. Fass*,[207] Fass listened to broadcasts of play-by-play descriptions of baseball games produced by National Exhibition, and immediately sent out teletype reports of the games to radio stations for immediate rebroadcast.[208] Like SportsTrax, these teletype reports were re-

197. Curtis, *supra* note 195 at 8.
198. 165 Misc. 71, 300 N.Y.S. 159 (Sup. Ct. N.Y. Co. 1937).
199. *Id.* at 72, 300 N.Y.S. at 160.
200. *Id.*
201. *Id.*
202. 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. N.Y. Co. 1941).
203. *Id.* at 490, 30 N.Y.S.2d at 419.
204. *Id.* at 491, 30 N.Y.S.2d at 420.
205. *Id.*
206. *Id.*
207. 143 N.Y.S.2d 767 (Sup. Ct. N.Y. Co. 1955).
208. *Id.* at 768.

layed "within seconds or minutes" and were re-broadcast while the game involved was actually in progress.[209] The court held against the defendants finding that they, "contributed nothing to the performance nor to the facilities necessary to make the performances of the broadcasts or telecasts thereof possible" and the defendant "therefore misappropriated descriptions from the authorized broadcasts and telecasts of plaintiff's games, thus constituting unfair competition."[210] "The court emphasized the commercial value which descriptions of the games possessed, 'under ordinary circumstances, such commercial value extends for a period of at least twenty-four hours after the completion of the game.'"[211]

These cases demonstrate the different rights that misappropriation and copyright seek to vindicate. An "extra element" is present where the scope of the action is altered.[212] Misappropriation does not interfere with the exclusive copying right granted by copyright law because misappropriation laws only grant protection against copying for a limited period of time. The *Fass* court was willing only to allow protection until the competitive value of the broadcasts wore off.[213] That reasoning is derived from *the Int'l News* Court's misappropriation theory which was willing to protect the facts until their competitive value wore off.[214] Therefore, misappropriation law alters the duration of protection and thus alters its scope.

Similarly, the NBA did not seek permanent protection for the facts derived from its hard work. Rather, it sought only to protect its proprietary interest in those facts from competitors who would use them for profit by having an injunction protect those facts until their commercial value wore off.[215] The very nature of SportsTrax demonstrates the time sensitivity and fleeting commercial value of this information. If these facts were truly just news of the day, rather than entertainment, there would be no need to increase the number of updates at the end of commercially valuable games.

The crux of the Second Circuit Court of Appeals' conclusion

209. *Id.* at 775.
210. *Id.* at 777.
211. *Stats*, 939 F. Supp. at 1103 (quoting *Fass*, 143 N.Y.S.2d at 776).
212. *Mayer v. Josiah Wedgewood & Sons*, 601 F. Supp. at 1523 (S.D.N.Y. 1985).
213. *See Fass*, 143 N.Y.S.2d 767 (Sup. Ct. N.Y. Co. 1955).
214. *Int'l News*, 248 U.S. at 246.
215. *Stats*, 939 F. Supp. at 1075.

that New York misappropriation cases fail the "extra element" test is based on its mistaken assertion that misappropriation claims grounded solely in the copying of a plaintiff's protected expression are preempted by section 301.[216] This assertion may be true, but it is irrelevant for the purposes of evaluating the NBA's claim. The Second Circuit Court of Appeals' evaluation should have been based on misappropriation cases grounded in the copying of facts or ideas from a plaintiff's work, not the expression.

In fact, the different expressions of Motorola and the NBA are apparent. The NBA markets the excitement of an NBA game through extensive advertising, broadcast licensing, and by issuing media credentials. Motorola capitalizes on that same excitement, excitement generated exclusively by the NBA, through an unlicensed pager service which is doing nothing more than free-riding on the coattails of the NBA's great expenses. If the excitement and entertainment value of an NBA game was not so valuable, Motorola could broadcast the facts and data at the conclusion of the game. But by immediately re-transmitting them, and advertising its product as an entertainment device, it demonstrates that "extra element" not contained in copyright law: the immediacy and time sensitive nature of an on-going game.

Copyright law protects original expression from the time of creation until fifty years after the death of the author.[217] Misappropriation law, which seeks to protect facts and hard work only for the commercially valuable duration of said facts, contains an "extra element" and therefore falls outside of the exclusive rights of copyright law.

C. Stats and Motorola's Misappropriation

This section of the comment will attempt to discuss the defendant's misappropriation within the scope of the *Int'l News* "hot news" standard. I will prove that accepting the Second Circuit Court of Appeals' three "extra elements" test as applied to the facts at issue here should, nonetheless, result in a victory for the NBA. However, I will further demonstrate that had New York common law been applied, the Second Circuit

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216. *Motorola*, 105 F.3d at 850.
217. 17 U.S.C. §302(a) (1997).

Court of Appeals would have found for the NBA and injected stability into New York misappropriation law.

The Court of Appeals found that three elements of a "hot news" claim survived preemption: "(1) the time sensitive value of factual information, (2) the free-riding by a defendant, and (3) the threat to the very existence of the product or service provided by the plaintiff."[218] The court then analyzed these elements and concluded that NBA information is time sensitive, but SportsTrax does not free-ride the NBA nor is there a product that the NBA produces whose existence is threatened by SportsTrax.[219]

The Second Circuit Court of Appeals concedes correctly that the information transmitted by Motorola through SportsTrax, after receiving the information from Stats, is time-sensitive.[220] There is no question that for the true fan of NBA basketball, the SportsTrax device is worth its price tag, not because it provides the fan with bare bones facts, but because it provides the fan with an exciting way to experience an NBA game when getting to the arena, watching a television, or listening to the radio is not possible. If the fan was interested in only the facts, he could wait and watch the eleven o'clock news or read box scores in morning papers. Reporting news to the public is obviously not Stats' or Motorola's goal, as evidenced by their own advertising campaign: SportsTrax is " . . . exciting basketball action in the palm of your hand."[221] However, the right to the commercial use of the entertainment value of NBA games is the NBA's and the NBA's alone.

The court finds fault in the NBA's claim because it reasoned that the NBA was missing other elements of a "hot news claim."[222] It dissected the business of the NBA, and concluded that the NBA's claim comprises three informational products.[223] "The first is generating the information by playing the games; the second product is transmitting, live full descriptions of those games; and the third product is collecting and retransmitting strictly factual information about those

218. *Motorola*, 105 F.3d at 853.
219. *Id.* at 853-4.
220. *Id.* at 853.
221. *Stats*, 939 F. Supp. at 1080.
222. *Motorola*, 105 F.3d at 853.
223. *Id.*

games."[224] The court concluded that the NBA has failed to show "any competitive effect whatsoever from SportsTrax on the first or second products, and a lack of any free-riding by SportsTrax on the third product."[225]

These conclusions by the Second Circuit Court of Appeals require close scrutiny. The court concluded that there was no competitive effect on the NBA's primary products, licensing and producing games, because nobody viewed the pager as a "substitute" for attending games or watching them on television.[226] This is true, I can not envision a time when a fan would choose to get the excitement of an NBA game from a pager rather than sitting in an arena. However, because SportsTrax is not a substitute for being in the arena, or watching on television, or listening on the radio it is not dispositive proof of a lack of competitiveness.

If an NBA fan wants more than anything to view an NBA game but is unable to get tickets to the arena, that fan will watch the game on television or listen to it on the radio. If they are unable to get to a t.v. or radio, they will call Sportsphone or 1-800-HEAR-NBA. If the phone does not appeal to them, the fan will log on to America On-Line or press a button on SportsTrax. All of these products exploit real-time NBA action. The fact that the pager or on-line service is lower in the pecking order of viewing desirability for the average fan should not allow that product to be produced for free.

Imagine a situation where an ambitious radio station watches a t.v. broadcast and broadcasts their own play-by-play via the radio. To prevent the possibility of copying the broadcaster's protectable play by play analysis, the radio broadcaster turns off the volume on his television set, and relays the information as seen through his own eyes. An NBA fan would not view a delayed radio broadcast of an NBA game as a substitute for a television broadcast, so based on the Second Circuit Court of Appeals' reasoning the NBA would not experience any competitive effect, and thus no misappropriation. Further, there are no original copyrightable expressions being copied therefore there is no copyright infringement.

While the NBA may not have a product that directly com-

224. *Id.*
225. *Id.*
226. *Id.*

petes with SportsTrax, it grants licenses to companies who exploit the excitement of NBA games. Motorola and Stats exploit that excitement for free, and thereby compete with the NBA. The NBA derives revenues from licensing the property rights to broadcast or attend NBA games.[227] Stats has obviated those licensing agreements by watching the broadcasts or listening to the telecasts of NBA games. The NBA, its licensees, and defendants all seek to profit from the same product: real time game information.

The Second Circuit Court of Appeals' ruling will most certainly cause competitive harm to the NBA because Sportsphone no longer needs to pay for media credentials to provide its services, nor does SportsTicker, or "ESPNet to Go." Sportsphone complies with the NBA media guidelines for which it pays a substantial fee, and in return it is restricted in the number of times it may update from the arena.[228] After this decision, the NBA loses control over its proprietary interest in the time sensitive, commercially valuable facts from NBA games it creates. Why would Sportsphone renew its media credentials, when it can hire two reporters to watch every NBA game? It will update as frequently as possible and the NBA will receive no benefit from their labor. This is clearly a harmful competitive effect.

Further, this decision has already sent the wrong message to the public. Andrew Graziani, a spokesman for America On-Line, said the court's ruling means that on-line media can now distribute factual information the same way as any other media.[229] Actually, on-line media can now distribute factual information easier and cheaper than other media. Other media gain media credentials to the arena and by doing so are contractually forbidden from using information for commercial entertainment purposes.[230] Further, media with credentials are forbidden from transmitting scores or other information about games in progress more than three times in any quarter or more than once at the end of each quarter.[231] This ruling al-

227. *See supra*, part II.

228. Mifflin, *supra* note 12, at D6.

229. Michael Rapoport, *Motorola, Stats Inc. Can Transmit Real-Time NBA Data, Court Says*, WALL ST.J., Jan.31, 1997, at B.5.

230. *See supra* note 23.

231. *Id.*

lows SportsTrax to update scores as frequently as possible, and to do so for entertainment purposes.

The ability to take facts from an on-going NBA game that are in the public domain only for a split-second and not only transmit them globally, but to do so in an exciting manner requires heightened scrutiny by the courts. The information super-highway is ever expanding, and such advances in technology should not obviate the long-standing requirement of paying for the use of a property right while that right has commercial value. This could be the first in a long line of cases where technology misappropriates labor like never before possible. For that reason the Second Circuit Court of Appeals should have used greater foresight in setting a standard by which technological innovators would be required to pay for the property that they use.

This is specifically relevant in the NBA case. The court correctly concluded that transmitting real-time information requires: "(1) the collecting of facts about the games; (2) the transmission of these facts on a network; (3) the assembling of them by the particular service; and (4) the transmission of them to pagers or an on line computer site.[232] The NBA was in the process of putting in place a product similar to SportsTrax, called GameStats.[233] Phase I of GameStats is in place.[234] All twenty-nine teams are using GameStats, with the assistance of the NBA's two-hundred page user's manual as the primary system for capturing and inputting the statistics of NBA games.[235] They use this system to generate the official play-by-play game sheet and the half-time and post-game box scores, to provide information to broadcasters announcing the games and to allow television stations to update their on screen graphics, and to distribute to the press.[236] There is no doubt that television and radio broadcasters use this information, produced by GameStats, in their broadcast of NBA games.[237]

The Second Circuit Court of Appeals ignored the hard work and innovation that the NBA sowed in putting phase I of

232. *Motorola*, 105 F.3d at 854.
233. *Stats*, 939 F. Supp. at 1079.
234. *Id.*
235. *Id.*
236. *Id.* at 1080.
237. *Id.*

GameStats into place. "Appellants are in no way free-riding on GameStats."[238] The effort the NBA puts forth in having its broadcasters and television personnel so well prepared with facts and statistics makes the Second Circuit Court of Appeals' sweeping conclusion very susceptible to criticism. How can anyone be certain what Stats is actually assembling and what they are reporting from GameStats?

According to the court the *Int'l News* free-riding analysis hinged on the ability of Int'l News to produce a directly competitive product at a lower cost.[239] Stats and Motorola have made no financial investment in cultivating the level of NBA basketball that now has reached a supreme level of public interest. Nor does SportsTrax bear the cost of media credentials which products like, "ESPNet to Go," Sportsphone, and SportsTicker bear.[240] So, Stats and Motorola do produce a competitive product at a much lower cost than Sportsphone, SportsTicker, and "ESPNet to Go," all of who are licensees of the NBA.

While Stats is expending their own resources to collect and compile information, that is not relevant. Int'l News expended effort and expense in gathering and copying AP news reports, yet the Supreme Court was not concerned with the labor of AP. The relevant question then and the relevant question now is, is one party free-riding on the efforts of another?

There are peripheral benefits that parking lot attendants and store owners in the vicinity of NBA arenas receive from the hard work that the NBA puts forth in making the NBA popular. But these activities are different from the activities of Stats and Motorola. The benefits they reap are not peripheral, they are the ultimate product of the NBA - - real time game information. Motorola and Stats do nothing to help produce that property right, therefore to benefit from it they should have to pay.

It makes no difference that GameStats has not been completely finished so that it can compete with SportsTrax. The court stated that if, "appellants in the future were to collect facts from an enhanced GameStats pager to retransmit them

238. *Motorola*, 105 F.3d at 854.

239. *Id.*

240. *Stats*, 939 F. Supp. at 1077.

to SportsTrax pager, that would . . . be free-riding."[241] Thus, according to the court only if Stats took the facts from an NBA produced pager would they have a competitive effect on the NBA.[242] However, the court cites no authority for this statement, and by doing so, they overlook basic property rights.

The NBA has a right to disseminate its property in any manner and through whatever vehicle it deems appropriate. The NBA's property right in this market and the law's protection of that right is not confined to identical products. The ownership of a property right entitles the owner to a monopoly of that right in the relevant marketplace.[243] Here, the relevant market is not pagers, but any device or medium that exploits the excitement and drama of ongoing NBA games. Hence, Motorola is free-riding in NBA's marketplace in violation of unfair competition laws.

The Second Circuit Court of Appeals dismissed New York common law cases as inapplicable in this case and cases of this type because they were decided prior to the Copyright Act of 1976.[244] Its conclusion being that had the Act been in effect those cases would have been decided on copyright law.[245] Those that would not have been decided by copyright law involved commercial immorality and therefore would have been preempted, because that concept is synonymous with wrongful copying.[246]

The court was referring to *Metropolitan Opera* when it spoke of commercial immorality. However, the court cites no authority for how and in what circumstances commercial immorality is synonymous with wrongful copying. Obviously, those cases where copying was at issue, such as in *Mutual Broadcasting* where the copyrightable expression of broadcasters was copied, misappropriation was synonymous with copying.[247]

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241. *Id.*
242. *Id.*
243. *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 816 (1996). (arguing that a property right is not a property right in the "news," but in a legally structured market position which is justified by general considerations of fair competition and the incentives regarded as necessary to promote enterprise in a particular sphere of life).
244. *Motorola*, 105 F.3d at 852.
245. *Id.*
246. *Id.*
247. *Id.*

The law in New York has traditionally been broad and flexible, so if the facts in those cases had been slightly different there is no doubt that the courts would have decided in the same manner. For example, in *Fass*, a case very similar to the NBA's, the court held simultaneous teletype reports of a broadcast sent to another radio station for immediate rebroadcast violated misappropriation law.[248] Today, such a case would violate copyright law if the teletype reports copied the broadcasters' original expression. But what if they did not copy original expression?

Suppose the reporters watched a television broadcast and sent their own original expression via teletype to a website for rebroadcast over the Internet. This would not violate copyright law, because no original expression is being copied. Under the Second Circuit Court of Appeals' theory, this is commercial immorality and therefore preempted by section 301.[249] If it were to survive preemption it would do so only under a "hot news" test.[250] But following the court's logic, this would fail the *Int'l News* test if the NBA did not have an Internet site because there would be no direct competition with an Internet site.[251]

Under New York misappropriation law, a broad and flexible doctrine, a court would grant an injunction preventing rebroadcast until the commercial value of the game wore off. Similarly, a New York court would, and did, grant an injunction in this and cases of this type because there was a misappropriation a property right belonging to the NBA, of for the commercial advantage of SportsTrax.

VI. Conclusion

Motorola is a complex case concerning a body of law that is amorphous and inconsistent. The Supreme Court could inject stability in this area by taking up the issue of section 301 preemption and deciding once and for all what state laws survive copyright preemption. If this is an issue that the Court thinks requires legislative consideration, then Congress should revisit their amendments and clarify what they had in mind in 1976.

248. *Fass*, 143 N.Y.S.2d at 768.
249. *Motorola*, 105 F.3d at 853.
250. *Id.*
251. *Id.*

Whether the judiciary or legislative branch settles this issue is unimportant so long as consistency can begin to come to copyright and misappropriation law.

Emerging technology by which facts and ideas are transmitted with such sophistication that they become entertainment rather than news is unsettling in light of the Second Circuit Court of Appeals' decision. Competitive effect should be judged by the product being exploited and not the medium in which it is exploited. Such a requirement discourages investment, because the billions of dollars spent cultivating a product is worthless if you do not compete directly through emerging media. The NBA's primary product is the excitement of a game in progress and it owns all rights in that product. The Second Circuit Court of Appeals should have reestablished the misappropriation doctrine (post 1976) to mean that an investor has the right to exploit its primary product in a market, and if another wishes to get in the market they must pay. Stats and Motorola saw this wisdom and admitted that they believed that down the road they thought they would have to reimburse the NBA for the use and exploitation of the NBA's product. Hopefully, their wisdom will reach the Supreme Court or Congress.

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