

sports

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Follow through ... NBA v Motorola and STATS

New York Second Circuit Court of Appeals

Introduction

This case, which previously featured in the January/February 1997 edition of *SLAP* arose out of a dispute relating to the supply of basketball match statistics.

It will be recalled that the NBA sued Motorola for transmitting real-time game information with a two-minute delay to users of Motorola's "Sports Trax" device, a handheld pager that displays updated scores and statistics of NBA games as they are played, retailing at \$200.

Information available included the score, the team in possession of the ball, the free-throw bonus, the quarter and the time remaining. The NBA also launched a suit against STATS for transmitting slightly more comprehensive real-time game information via the Internet (scores delayed by 15 seconds and statistics by one minute). All data material is supplied by STATS reporters who watch the games on television or listen to them on the radio and forward the information via personal computer, STATS' host computer, common carrier and various local FM radio networks that emit the signal to the individual pagers.

STATS had originally approached the NBA to obtain a licence for this service, but could not agree terms and decided to launch its service without the NBA's permission.

The issue

The District Court had previously found in favour of the NBA. The Court of Appeals now had to decide whether the unauthorised transmission of "real-time" game information of matches in progress constituted an infringement of the

event organiser's copyright or the event organiser's property right. Ultimately, the Court of Appeals overruled the decision of the District Court, which had found in favour of the NBA. The decision could have far-reaching implications for sports bodies and provides some further clarification in relation to the ownership of various proprietary rights in sporting events.

Copyright infringement

The NBA claimed that providing an unauthorised running update of game information was tantamount to a rebroadcast of the game and therefore constituted a copyright infringement.

In general, US copyright law protects "original works of authorship". However, the Court of Appeals in considering originality of NBA games, stressed the distinction between the underlying event and the broadcast of the event. The Court held that sporting events themselves, are not "authored" in any common sense of the word, and accordingly are not copyrightable. Unlike movies, plays, television programmes or operas, sporting events have no underlying script, and result in wholly unanticipated occurrences. Even where an athletic performance could resemble a work of authorship, it could not be copyrighted without impairing the athletic competition in the future. There would be obvious practical problems, not least the number of joint copyright owners which would include the league, the athletes, the umpires, stadium workers and fans.

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Editorial

and were therefore more susceptible to brain damage, and monthly hormonal changes and resultant fluid retention made weight categorisation more difficult. The Board also claimed that the sport as a whole could also face a ban if a female boxer were to be fatally injured whilst participating in a professional bout.

Significantly, however, Ms Couch did not undergo a medical examination by a doctor of the Board, prompting the industrial tribunal to observe "no male boxer would have been rejected on medical grounds without having had a medical investigation". Since there was no evidence available to the tribunal that "boxing poses a higher risk to women than to men or vice versa" and in the absence of a medical investigation of Ms Couch, the tribunal concluded that the Board's decision was founded on "gender-based stereotypes and assumptions" and that there were no valid grounds for denying Ms Couch a licence.

It is understood that Ms Couch will now seek substantial damages against the Board, including a claim for loss of earnings caused by her previous inability to box in Britain. Subsequently, Ms Couch has been recommended for a professional licence by the Board's Western Area Council. The recommendation will now go before the full Board pending medical reports.

Ms Couch was supported in her claim by the Equal Opportunities Commission which is becoming increasingly active in domestic sport, reflecting the greater willingness of women to participate in sports that were previously dominated by men. The Government is currently considering a report from the Commission which, if its recommendations are accepted, may have a significant impact on the way in which private sports clubs structure their affairs, particularly their conditions of membership.

The momentum for change may prove irresistible following the Marylebone Cricket Club's (MCC) decision not to admit women as members. In February, members voted by 6,969 to 5,538 in favour of admitting women. However, this did not satisfy the two-thirds majority apparently required for a change in the MCC policy. It is thought that many members of the MCC would prefer to make the decision to admit women on a voluntary basis rather than be forced

into it by legislation and a further ballot may not be too far away.

The decision of the MCC not to admit women members did not deter the Women's Cricket Association from voting by a substantial majority to join the England and Wales Cricket Board at a meeting held in March. It is anticipated that the move will provide women's cricket with the administrative and financial resources required to promote the game more effectively. Such a move may also act as a prelude to more women's sports associations seeking to centralise administration and merge with their male counterparts in order to reduce costs.

As well as issues relating to sex discrimination, race discrimination is also an ongoing concern in domestic sport. It was significant, for example, that in the first report since its formation, the Government's Football Task Force made a number of wide-ranging recommendations on how to deal with racial abuse in football. The Task Force's recommendations included: incorporating anti-racism pledges into player and manager contracts with breaches of those clauses punishable by heavy fines and, in exceptional circumstances, dismissal; issuing guidance to referees to send players off for racist comments on the field of play; and making the chanting of racial abuse a criminal offence.

Other sports have already taken steps to tackle the problem of racism. For example, the Rugby Football League (RFL) is in the process of formally adopting an equal opportunities policy. The policy was drawn up with the assistance of the Commission for Racial Equality. As part of the policy the RFL will launch coaching clinics to encourage more youngsters from ethnic minorities into the game.

Since it has become the major source of revenue for most sports it is no surprise that matters relating to sports broadcasting rights continue to cause controversy. The debate over the so-called "listed events" causes particular excitement. It will be recalled that the Government set up a review of the current arrangements and appointed a group to make recommendations how to improve matters.

It now seems that the advisory group report is likely to be accepted by the Government. The main recommendation put forward was

the creation of so-called A and B lists. The A list will contain events protected from being screened exclusively live on pay television. The B list would be made up of a list of events which could be shown on pay television, but which must have at least highlights or other secondary coverage made available to "free" television.

It would seem likely that if the current proposals are accepted, domestic test cricket would appear on the B list. This would come as welcome news to the England and Wales Cricket Board (ECB) who have actively campaigned to have domestic test matches de-listed to enable a "proper market" for the broadcasting rights to be established. As previously observed the current listing of domestic cricket tests means that the BBC is the only likely bidder. The ECB is keen to move away from a one-customer market and be able to negotiate in an open environment where it can obtain a fair price for its most valuable asset.

Previous broadcasting Acts and amendments to the relevant regulations have often failed to anticipate developments in pay television and in the sports market place and have left loopholes which have been carefully exploited. Some observers remain sceptical that the legislators can get it right this time. Clearly, there is a difficult balance to strike. The interests of terrestrial broadcasters, cable and satellite broadcasters looking to extend their pay television activities, the consumer anxious to secure access to high quality sport at the cheapest price, and sports governing bodies who are keen to maximise their income to reinvest in development activities at all levels are difficult to reconcile. It remains to be seen, therefore, whether domestic sports will be given the opportunity to achieve an appropriate mix of broadcasting arrangements which cater for their short, medium and long-term sporting and financial interests.

Darren Bailey

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The Court of Appeals contrasted the position of recorded broadcasts of sporting events, which it held to be copyrightable. As an independent product, they constitute an "original work of authorship" due to coordination among cameramen and director. As required by US copyright law, the

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broadcast is a work that is fixed in a tangible medium of expression.

Yet the Court of Appeals found that Motorola and STATS did not infringe the NBA's copyright in the recorded broadcasts because they only reproduced facts, not the protected expression or description of the game that constitutes the broadcasts. The Court further held that, by not using any of the images of the broadcast, but merely factual information which anyone could acquire from the arena without the involvement of cameramen and director, they did not infringe the copyrightable expression of the game.

Misappropriation of NBA's property right

Under US law an event organiser has a property right in his event. If a third party attempts to derive a commercial benefit from the event without the organiser's permission, he may claim unlawful misappropriation of his property right.

In this case, however, the state law misappropriation claim of the NBA was pre-empted by the supreme, federal copyright law. The Court of Appeals found both the subject matter requirement and the general scope requirement of the applicable pre-emption clause of the *Copyright Act* were met.

The Copyright Act pre-empts state law claims that enforce rights "equivalent" to exclusive copyright protection when the work to which the state claim was being applied falls within the area of copyright protection. Although there is, as shown above, no copyright in the underlying event, pre-emption bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements. In fact, whether an event organiser's misappropriation claim is pre-empted depends on whether an event is broadcast or not. Once a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purposes of the pre-emption. Then, the pre-emption under the Copyright Act refers to both the copyrightable broadcast and the uncopyrightable event.

Accordingly, the Court denied the idea of partial pre-emption of only misappropriation claims related to the broadcast. In support of its analysis, the Court of Appeal drew a comparison

with the personality rights of athletes in their performances. As decided in *Baltimore Orioles Inc v Major League Baseball Player's Association*¹, players' personality rights in their performances are pre-empted by federal copyright law if their performances are broadcast.

The Court further referred to the legislative intent behind the pre-emption clause. Pre-emption of state claims under the Copyright Act prevents states from giving special protection to works that Congress had decided should be in the public domain. Congress, in not extending copyright protection to the underlying event, intended the underlying event to be in the public domain.

No "hot-scores" exemption

In general, the use of strictly factual information such as results and game statistics does not constitute a misappropriation of property. However, if results and game statistics are transmitted simultaneously, the question arises whether they become, as "hot-scores", an asset of the event organiser enjoying legal protection. The NBA claimed legal protection from Motorola and STATS' almost simultaneous transmission of game information by means of an exemption from the pre-emption under the Copyright Act. The Court rejected this argument, stating that legal protection of game information is limited to only a very narrow scope of cases. It defined the narrow scope of exempted cases in reference to the *INS*² decision of 1918, which included a "hot-news" claim of a wire service that transmitted news stories by wire to newspapers.

Scope of exemption

The Court of Appeals concluded that certain forms of misappropriation otherwise within the general scope requirement of the Copyright Act will survive pre-emption if an "extra-element" test is met. If a misappropriation claim involves certain elements, it may not be an equivalent of exclusive rights under the Copyright Act, and should not be pre-empted. Thus, a misappropriation claim may be exempted from pre-emption if all of the following three extra elements are involved: (i) time sensitive value of factual information; (ii) free-riding on a product; and (iii) use of the information in direct competition.

The Court pointed out that the NBA offers three different informational products. The first product is generating the information by playing

the games, the second transmitting live descriptions of the games, and the third product is collecting and retransmitting strictly factual information about the games. According to the Court, none of the three products includes all three elements necessary to justify an exemption. Neither the pager nor the Internet transmission could be seen as being in competition with the first two products of the NBA, the game and the broadcast. Thus, the Court did not consider the pager or the Internet service to any extent a substitute for going to a game or following a radio or television broadcast.

As far as the third product was concerned, collection and retransmission of the information, Motorola and STATS were deemed to be in competition with Gamestats, NBA's product for real-time transmission. Yet, the Court, stressing the fact that they do not collect any information from the Gamestats pager, held that Motorola and STATS do not free-ride on this NBA product.

Both services have their own network and assemble and transmit data themselves, both expend their own resources to collect purely factual information generated in NBA games to transmit to sports pagers. Gamestats does not bear any costs to collect game information that Motorola and STATS did not. The Court of Appeals concluded therefore that the NBA had not suffered any damages to any of its products based on anti-competitive free-riding by Motorola and STATS.

Conclusion

In spite of the general uncertainty about the nature and extent of the various proprietary rights in sporting events, sports bodies and event owners have started to grant exclusive and non-exclusive "on-line rights" or "Internet rights", including real-time transmission, to media companies and Internet providers. The decision of the Court of Appeals provides some clarification in relation to this unsettled area of law, and, thus, may have far-reaching implications for other sports bodies and event owners.

Key

¹ 805 F2d 663, 675 (7th Cir 1986), cert denied, 480 US 941 (1987)

² *International News Service v Associated Press*, 248 US 215 (1918) ('INS')

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