Fast Data and Sports

How Sports Data is Reshaping How We Look at the World
Topics

• Data Ownership v. Data Possession / Use
• Privacy
• Data Integrity
• Data Security / Compliance
• Data Monetization
Speakers

PANELISTS

Maggy Carlyle
Pac-12 Networks

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Oakland Athletics

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Microsoft Corporation

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Stinson Leonard Street LLP

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What is sports data?

Sports data includes:

- Statistics
- Names
- Numbers & nicknames
- Photos & likenesses
- Biographical data
- Biometric data

“This fascination . . . where many fans . . . argue, debate, and commiserate over the statistical value of each player and where his or her achievements fall in the history of football or basketball. Few activities invoke such fervor among so many over so little.”

How is sports data generated?

• Scoring officials
  • record statistics for league records
  • prepare summary reports for the media

• Cameras and other sensors
  • monitor environments to generate next-generation statistics, e.g., biomechanical data

• Wearable technologies
  • monitor individuals to generate next-generation statistics, e.g., biomechanical data and biometric data
How is sports data used?

• Develop better players
  • Assess player strengths, weaknesses, and tendencies
  • Enhance practice and training
  • Monitor nutrition, hydration levels, sleep, and fatigue

• Build winning teams
  • Create tailored game plans
  • Make in-game tactical decisions
  • Influence front office roster decisions, including scouting and recruiting

• Enhance fan experience
  • Track in-stadium movement and activities to predict fan behavior
  • Mine social media streams to gain broader understanding of fan sentiment
  • Improve story-telling abilities and create immersive experiences
  • Maintain integrity of the game and of the fan experience
Who owns sports data?

- teams
- athletes
- leagues
- gaming companies
- tech companies
- public domain
Can Leagues Own Data Rights When It Comes To US Sports Betting?

John Holden, May 29, 2018 05:00 PDT  @johnsportslaw

Nearly as quickly as “integrity fees” began to emerge in state sports betting bills — starting in the Midwest and then spreading nationwide — questions began to emerge regarding what an integrity fee actually is.

Before what the fee paid for was clearly defined, the cost of protecting integrity in sports betting was lowered in some states from one percent of all wagers, to .25 percent of the handle.

There now appears to be a pivot from the “integrity fee” push to a data rights fee, which is effectively a legislative requirement that betting operators use official league data. Various sports league representatives have referenced “our intellectual property” leading to the question, what is the intellectual property of the NBA, MLB, NFL, NHL and NCAA that the executives are referencing?

Leagues or affiliated rights holders (teams, distribution entities—MLBPA, NFL Films etc.) own extensive intellectual property rights. Every televised broadcast contains a statement about the league’s ownership of the broadcast: “this broadcast is copyrighted by NFL productions....”

Relatedly, the league and teams have intellectual property interests in their team names, logos, uniforms and even some of the colors they use. But what sports information beyond the broadcast and other enumerated property is owned by sports leagues is something of an open question.

Who owns what in sports?

The United States — in a Supreme Court filing by the Office of the Solicitor General — noted that while the broadcast of a sporting event is copyrightable, the events on the field do not constitute a performance, meaning they are outside the scope of things that can be copyrighted, the SG’s office stated:

Can Leagues Own Data Rights When It Comes To US Sports Betting?

When a television network broadcasts a live sporting event, no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work.*

Similarly, in 1997, the Second Circuit Court of Appeals overruled the federal court for the Southern District of New York and stated that: “In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship....’”

In 2004, an antitrust case filed against the PGA Tour by Morris Communications argued that the PGA was violating antitrust laws by creating what was effectively a monopoly on real-time golf scores. The Eleventh Circuit Court of Appeals found: “In this case, PGA met its business justification burden by showing that it seeks to prevent Morris from “free-riding” on PGA’s RTSS technology.”

Free-riding is a term that was recently mentioned by MLB Commissioner Rob Manfred, and applies in some circumstances where one entity invests costs into developing something, and then another profits on the end product. But it is important to note that Morris was an antitrust case, not an intellectual property case, as the Eleventh Circuit articulated this case was: “not about copyright law, the Constitution, the First Amendment, or freedom of the press in news reporting.”

More recently, the Eighth Circuit Court of Appeals decided a case between a season-long fantasy company and MLB Advanced Media, an affiliate of MLB, over the ownership of data that facilitates the production of fantasy games.

The Eighth Circuit said: “the information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a First amendment right to use information that is available to everyone. It is true that CBC’s use of the information is meant to provide entertainment, but “[s]peech that entertains, like speech that informs, is protected by the First Amendment because ‘[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.”

Where does this ownership of sports data come from?

While the above-mentioned cases may appear to be less than favorable to the ability of sports leagues to demand compensation from gambling operators, overseas a series of cases in the last decade have reached slightly different conclusions and may serve as a basis for the call for data rights compensation.

Football Dataco Ltd. v. Sportradar GmbH & Sportradar AG

The case involved Football Dataco, who was contracted with various UK soccer leagues to manage data generated from matches in real-time and facilitate its distribution.

Sportradar was providing results of matches over the internet. Dataco claimed that Sportradar had infringed on their proprietary database by using information contained therein to facilitate the production of information on Sportradar’s own website.

The decision from the European Court of Justice (ECJ) is primarily focused on jurisdictional issues associated with online products and targeting of persons in different locales within the European Union and the responsibilities of complying with national laws, but did find that Football Dataco had protected interests in their databases. In the sports betting context, the ruling was meaningful because it supported the finding of a sui generis right in the creation of databases under the European Union’s database directive.

Football Dataco v. Yahoo

In March of 2012, the ECJ ruled, in a case between Football Dataco and Yahoo, that schedules for matches do not satisfy the requirements for copyright protection, noting that the copyright protection for databases is concerned with the structure of the database and not the contents of the database.

Additionally, the ECJ noted that “no other criteria than that of originality is to be applied to determine the eligibility of a database for the copyright protection provided for by the directive.”
The sports leagues likely face an uphill battle in justifying a legal basis to receive data rights fees in the new world of legalized sports betting.

One interesting connection between the European cases and the integrity fee is that:

- A Sportradar subsidiary, Sportradar US, is a data partner with the NFL, NBA, NHL and NASCAR
- Football Dataco has partnerships with Genius Sports and the Perform Sports Content Group
- Genius has a data partnership with the NCAA and an integrity partnership with MLB.

The challenge in converting the sui generis database rights recognized by the European Union to the United States is two-fold: first, the United States is not a member of the European Union and therefore not bound by the ECJ’s decision; and second, the United States has a constitution that contains the First Amendment, which may pose a formidable obstacle to the leagues hopes of monetizing data that is in the public domain.

The search for a direct means for leagues to generate profit from betting operators has an uncertain end, it also remains to be seen what influence the existing jurisprudence will have on state lawmakers.

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COMMERCIALISATION OF SPORTS DATA: RIGHTS OF EVENT OWNERS OVER INFORMATION AND STATISTICS GENERATED ABOUT THEIR SPORTS EVENTS

I. INTRODUCTION

Sports data has become an important factor in professional sports worldwide. Since the publication of Michael Lewis's nonfiction book *Moneyball* -- about the Oakland Athletics' approach to assembling a competitive baseball team based on empirical analyses of players--the fundamental importance and influence of statistics on professional sports has become mainstream knowledge. Data on match events and player performance is gathered and analysed in professional sports leagues around the globe. Sports governing bodies have, in more recent years, sought to commercially exploit data collected in their respective sports. Centralized collection and effective marketing of sports data to betting or media organisations have emerged as integral parts of the business of sport. Major sport event owners, as well as federations, sports leagues, and clubs, have partnered with global brands such as International Business Machines (IBM) and Systems, Applications, and Products (SAP) to develop software solutions to facilitate the viable collection, management, and dissemination of sports data.

*56 Notwithstanding the foregoing, the law regarding the ownership of sports data is still unsettled. A comparative analysis of the legal situations in Australia, the United States, and Europe reveals that sports data is subject to copyright only in certain situations. Event owners, therefore, must rely on other proprietary rights and supplementary contractual measures to establish their rights over event-related facts and information.

Betting, media, and sports data organisations frequently refute the notion that event owners retain an exclusive right to collect and exploit sports data related to their events, often citing certain constitutional rights, such as freedom of information and freedom of the press. Alternatively, such organisations simply operate their businesses within jurisdictions where event owners will find it difficult or impossible to enforce any rights of ownership they may possess. From an event owner's perspective, the current state of the law regarding ownership of sports data is uncertain and does not adequately restrain the unlicensed collection and use of sports data.

This Article first provides a definition of sports data and a description of the sports data industry (Part II) before analysing the legal framework with regard to the legal protection of sports data in Australia, the United States, and Europe (Part III). This comparative analysis will illustrate that the obstacles confronting event owners as they attempt to protect their commercial interest in their event-related data are common in all jurisdictions. Hence, there is a need for specific legislation to ensure appropriate protection of their investments and adequate financial participation in the revenue streams generated from the exploitation of event-related data by the sports data industry (Part IV).
II. THE FACTUAL BACKGROUND: SPORTS DATA, ITS GENERATION, AND UTILIZATION

A. What Is Sports Data?

Sports data can be defined as all facts and information in relation to a sports event or sporting competition. According to its generation, content, and refinement level, sports data can be divided into the following categories: fixtures; event data and performance data; and raw data and refined data.

1. Fixtures

Perhaps the most fundamental examples of sporting data are the fixture lists drawn up by the respective sports bodies, be it for a league competition, a tennis tournament, or a horse race. Scheduling the single matches, match days, and kick-off times or laying down the starting grids, these fixtures are the bases for staging an event and the initial points for all facts and information generated about an event. This set of data is distinct from other sports data in one important respect: fixtures are created by a governing sports body as the core element of its organisational tasks. The creation of fixture lists comprises a comprehensive procedure consisting of several stages and taking into account multiple factors, such as the:

- start and end of a season;

- number of matches that must be played;

- dates reserved to other national, European, or international competitions;

- home-away sequence;

- competitive balance of the competition;

- requests by a club to play its fixture against another club at home or away on a particular date; and

- possible conflicts with other events and interests of other stakeholders, for example, the capacities of the federal or state police.

For this purpose, event owners have developed special databases and computer software where the above criteria are entered to calculate the match schedule and, finally, produce a readable version of the fixture list. This fixture list is then reviewed, first internally and then by other relevant stakeholders, such as law enforcement organisations. The manual review, on one hand, allows for corrections to the computer-calculated fixtures, which might be necessary. In addition, the rather schematic software-based process may be adapted with regard to individual aspects, like competitive balance, to ensure fair and thrilling competition over an entire season.
2. Event Data and Performance Data

Another category of sports data is the vast array of data accumulated during the conduct of a sporting contest or competition. Such data is commonly subdivided into two categories: event data and performance data. Event data relates to all facts and information collected regarding:

- the external circumstances and conditions of an event, such as the weather, temperature, and attendance; and
- the single events occurring on the playing field or court (i.e., goals, fouls, assists, unforced errors, etc.).

Performance data measures the tactical and physical performance of athletes during a game, such as their movement, overall distance covered, or maximum speed for a single sprint.¹⁰

Event data and performance data are distinguishable by the manner in which the data is collected. Event data is assembled by manual research and observation of the game, either inside the stadium or from a televised recording of the sporting competition. Trained operators collect relevant information related to a sporting contest and enter it into a central database for further analysis. The database cumulates and aggregates the raw event data into statistics on players, teams, and the overall competitions (e.g., league tables and foul statistics).¹¹ More comprehensive products created from event data are player ratings or historical comparisons that, in addition to the database calculations, require an editorial processing of the event data.¹²

Performance data is also generated through camera-based systems, which track players and the ball after a pitch or on the court. Each player and the ball are assigned X- and Y-coordinates that the camera system captures over the match time. The raw X- and Y-coordinates are then entered into high-tech software to compute into statistics and graphics on positions, movement, and speed. An alternative to camera-based tracking systems is a sensor-based system, like Adidas miCoach, which is used by Major League Soccer (MLS).¹³ These systems involve small data cells that fit into a player's base-layer clothing.¹⁴ “Connected by a series of electrodes and sensors woven into the fabric of the base layer, the cell wirelessly transmits . . . [[performance] data . . . from each player to a central computer,” which then displays the data in a software application.¹⁵ Examples for end products created by using performance data include heat maps showing the movements of a single player or comparisons on ball possessions during a match.¹⁶

3. Raw Data and Refined Data

A further distinction can be made between raw data and refined sports data. Raw data refers to the single event data or performance data collected on a match or an athlete (e.g., a yellow card or a goal in soccer). Refined data relates to aggregated and cumulated information in the form of statistics (e.g., the match-day results, the league ladder, or statistics on overall passes in a soccer match or on unforced errors in a tennis match).

Distinguishing between these two categories is also legally relevant. Each refinement step may create new proprietary rights, particularly if a statistic is visualized in graphics or otherwise illustrated. Ownership of sports data may, therefore, change depending on the level of refinement of the raw data and the manner of display.
B. Generation of Sports Data--The Market Players

There are three main players in the sports data market who collect and utilize event and performance data: private companies, event owners, and clubs. Private companies first recognized the commercial potential of sports data. Some of these companies commenced trading in the sports data market as early as the 1980s. In the last decade, event owners themselves have entered the sports data market and started to collect data, including commissioning third parties with the collection of data. Finally, the clubs participating in professional sports leagues generate sports data to analyse player and team performance.

1. Private Companies Specialized in the Collection and Distribution of Sports Data

Private companies involved in the sports and media business first recognized the commercial value of accumulated sports data. In the United States, STATS LLC (STATS) was founded in 1981 out of Project Scoresheet, a non-profit network created by Bill James to collect baseball statistics. In the following years, STATS developed a reporter network for Major League Baseball (MLB) and introduced the baseball scorecard, a tool for assembling baseball statistics. By 1990, STATS also started operations for the National Football League (NFL). It also joined forces with Associated Press in 2005 and continues to evolve to maintain its status as one of the leading companies in the sports data industry.

Other companies in the market have undergone a similar evolution. In Germany, IMPIRE AG (IMPIRE) was founded in 1988 with a focus on creating a database for supplying broadcast right holders with sports data related to Bundesliga matches. IMPIRE expanded its operations significantly since then and today services a broad range of national and international leagues, clubs, and media companies with event and performance data of soccer matches. In 2014, deltatre, the Italian market leader in digital sports media services, acquired IMPIRE, thus forming a company that provides sports data services for various stakeholders in European sports.

This combination of a company with an intimate knowledge of sports and sports data and a leading firm within the mainstream media industry mirrors the overall trend in the sports data market. In the United Kingdom, PERFORM Group, a media powerhouse listed on the London Stock Exchange, recently acquired Opta and is now responsible for data collection regarding the top three soccer leagues in Europe. Bloomberg Sports LLC’s establishment of its own sports data subsidiary is a further indication of the value that major media organisations accord to the collection and dissemination of sports data.

The previous years have also led to further market concentration through mergers of sports data collection specialists. Prozone Sports Ltd., a Leeds-based company specializing in performance data analysis, merged with Sports Universal Process, the owner of the French market leader Mastercoach Amisco, in 2011 to form a “global industry leader in sports data and performance analytics.” Sportradar, which focuses on sports data collection for betting purposes, recently acquired SportsData, a live sports data provider specializing in United States sports, to enhance its global offering.

In addition to these established companies, smaller independent firms operate in the market and offer sports data-related products. They commonly collect sports data by observing televised sports events and often distribute the sports data with broadcasting footage, which visualizes the information and statistics. These companies frequently operate without a license from event owners and are often based in foreign jurisdictions where enforcement of the event owners’ rights is almost impossible. Some also try to collect sports data physically inside a venue, thereby breaching an event owner’s ticketing terms and conditions. This grey market significantly jeopardises the commercial value of event-related data for event owners.
2. Collection and Distribution of Sports Data by Sports Bodies

While private enterprises recognized early on the value of a systematic collection and commercialisation of sports data, most sports bodies did not actively participate in the market for a long time. This trend changed because the strategic and commercial value of sport data has been fully recognized.

In recent years, many professional sport leagues set up their own databases into which they transfer, store, and distribute sports data from their competitions. In 2001, the Premier League founded Football DataCo Ltd., which acts on behalf of the professional football leagues in the United Kingdom to protect, market, and commercialise the sports data related to the leagues’ matches. Liga de Fútbol Profesional followed a similar scheme when partnering with the broadcasting company Media Pro and commissioning Opta and TRACAB with the collection of match data for all matches of the first and second Spanish division. The Bundesliga tendered the contract for sports data collection for all matches in 2013. At the same time, it invested in creating its own database for the storage and distribution of event and performance data and established a licensing scheme for the marketing of this data by third companies.

Other professional sports bodies have not fallen behind in their development. The National Basketball Association (NBA) announced an agreement with STATS in 2013 to install player-tracking systems at all NBA games. The National Rugby League engaged with Prozone Sports for a collection and analysis of performance data. In professional tennis, the Australian Open partnered with IBM and set up a “real-time analytics and immediate video replay technology,” which involves “processing the data emerging from several matches across the grand slam tournament, [and] computing every fault, forced error and break point.” Such data is made available to accredited journalists and fans via mobile applications. Today, many leagues and other sports bodies act in the sports data market themselves and thereby compete with the established private companies. This leads to the legal question: to what extent the former may exclude the latter from data collection and distribution in relation to their events?

3. Clubs

Finally, the clubs participating in the professional leagues generate match data themselves to analyse player and team performance. Usually, the clubs will commission the match data collection to one of the private sports data collection companies. Thus, clubs are a determining factor for the overall industry. On the one hand, clubs influence the industry standards for the data quality with the data demands for comprehensive and precise statistics and applications. On the other hand, clubs act as both buyers and sellers of sports data in the market and are strategically and economically important players in the industry.

C. Utilization of Sports Data

Sports data is utilized in four main purposes: analysis of athlete and team performance, creation of bets, media and gaming industry, and sponsorships.

1. Performance Analysis of Players and Teams

As described above, the analysis of team and player performance was the starting point for the utilization of data in the sports industry. Initially limited to rather general statistics on the game, today, detailed data on players and teams is available, including information on tactical and physical performances. This comprehensive set of sports data is used by virtually every club in the top professional leagues and most international federations to further enhance athletes’ performance and, thus, the sporting success. The customer lists of sports data providers include not only an extensive list of all prominent soccer clubs but also include international federations of all major sports.
2. Betting Industry

The betting industry has utilized sports data for a long time. Because no bet can be created without having teams, players, or starting grids available, fixture lists are essential for the betting companies and bookmakers' businesses. Today, various forms of live betting on almost every single event within a game are also available. Online betting companies, such as Bwin and Betfair, and independent bookmakers, therefore, are main customers of sports data firms, like Sportradar and Running Ball, which have specialized in the collection and distribution of live sports betting data. The betting industry, hence, is an important revenue generator, both for sports data companies and event owners. At the same time, however, the use of fixture lists and other event data by betting companies raises a legal question: to what extent the consent of an event owner is required for such utilization? Not surprisingly, the industry gave rise to many of the leading cases concerning property rights regarding sports data.

3. Media and Gaming Industries

Furthermore, sports data is increasingly exploited in the media and gaming industries. Whereas line-ups, results, and league tables have been used in print media and broadcasts for decades, technical developments in the digital era allow for far more comprehensive live applications. Sport broadcasters worldwide make use of these opportunities and improve their products with heat maps and other real-time graphics, which visualize statistics on the screen. Besides, sports data is essential for the creation of fantasy leagues and other electronic games, which are based on real-life data on players and teams. Examples of the gaming industry's use of sports data include FIFA 14, a soccer manager game published by Electronic Arts; fantasy sports leagues marketed by leagues, newspapers, and sports magazines; and trading cards and stickers offered by companies like Topps. The sale and purchase of sports data by media and gaming companies have become important factors in the sports data industry.

4. Sponsorships

Finally, sports data becomes increasingly more relevant in the context of sponsorships. The best known example is the Castrol Index, a player grading system based on match data, which is part of the sponsorship agreement between Castrol and FIFA. Another approach to commercialise sports data in sponsorships is by granting rights to a data collection partner to trade under the designation of an “official data supplier.” Such an agreement combines the commissioning of data supply services with sponsorship elements. However, sports data still plays an ancillary role in sponsorship agreements; event owners and the commercialisation of sports data in the sponsorship segment is still developing.

III. RIGHTS OVER SPORTS DATA--THE LEGAL FRAMEWORK IN AUSTRALIA, THE UNITED STATES, AND EUROPE

Despite the expanded utilization and commercialisation of sports data in the last decade, the legal status regarding the collection and ownership of sports data is still unclear. As a comparative analysis of the legal situation in Australia, the United States, and Europe shows, event owners face similar legal obstacles regarding the protection of fixture lists, racing fields, and other event-related facts and information.

*66 A. Australia

The legal protection of sports data in Australia is heterogeneous. With regard to the betting industry, the commercial interests of event owners are protected by state laws, which allow event owners to negotiate a contractual agreement with betting and wagering operators as a condition to using racing lists and other event-related information for betting
purposes. Where no specific legislation exists, event owners must rely on established proprietary rights for safeguarding the exploitation of event-related data.

1. State Legislation Regarding the Use of Sports Data for Betting Purposes

All states and territories of the Commonwealth of Australia enacted legislation that governs betting on racing competitions and sports events in general. These regulatory regimes require betting and wagering operators to receive approval of, or enter into an agreement with, sports governing bodies for the use of race fields and other information relating to their sports events. The primary legislative aim of these statutory provisions is to foster the integrity of the industry by disclosing the companies that are involved in sports betting, sharing information regarding the types of bets offered, and placing restrictions on the contingencies, which may be used for creating sports bets. At the same time, however, sports bodies are put into the position to negotiate contractual agreements with sports betting providers and, thus, benefit from the revenue streams of the gambling industry.

In Victoria, for example, the Gambling Regulation Act of 2003 provides that a sports event must be approved by the Victorian Commission for Gambling and Liquor Regulations as a condition to offer bets on such events. Sporting organisations must apply to the Commission for Gambling and Liquor Regulations for approval as the sports controlling body for betting purposes. Once this approval is obtained, the sports controlling body is entitled to negotiate a contractual agreement with the sports betting provider, who is prohibited from offering bets on the sport event prior to the conclusion of such agreement. If no agreement is reached, the Commission for Gambling and Liquor Regulations may determine the terms and conditions the sports betting provider may offer bets for the sports event in question. Furthermore, the Commission for Gambling and Liquor Regulations “prohibit[s] particular contingencies considered inappropriate for betting purposes.”

All major event owners in Victoria must obtain approval as the sports controlling body of their sport for betting purposes. As a result, the event owners can restrict the use of racing fields, fixture lists, and other event-related information for betting purposes if the sport betting provider is not entering into an agreement. Cricket Australia, for example, approved various betting partners who accepted information sharing and other integrity requirements as well as a share of revenue generated from betting on cricket matches played under the auspices of Cricket Australia.

In some states and territories, such as New South Wales, the gambling legislation also imposes a statutory fee for the use of racing field information. Australian-licensed wagering operators must pay a fee to Racing New South Wales, the sports governing body, “equal to 1.5% of the wagering operator’s . . . turnover on [New South Wales] thoroughbred race meetings to the extent that turnover exceeds an ‘exempt turnover threshold”’ of 5 million AUD in a year.

The above-mentioned gambling laws answer the legal question as to who owns the exploitation right to event-related information in favour of the sport governing bodies. Most state legislation is, however, limited in its scope to racing and, in all states, only applies to the utilization of event-related information for betting purposes.

Other sports event-specific legislation under Australian law (e.g., the Major Events Act of 2009 (NSW) and the Major Sporting Events Act of 2009 (Vic)) provides event owners an exclusive right to broadcast or advertise an event but does not relate to the collection and utilization of sports data. Outside the scope of the above-mentioned gambling laws, event owners must, consequently, refer to recognized proprietary rights under Australian law to establish their ownership or exclusive exploitation rights of sports data.

2. Legal Protection for Utilization of Sports Data Outside the Betting Industry
Since the High Court of Australia's decision in *Victoria Park Racing & Recreation Grounds Co v Taylor*, it is a settled position under Australian law that the activities of a sport event are not legally protected. The facts underlying the court's decision involved the unauthorized broadcasting of a sports event. The rationale of this decision, however, is analogous to the collection of sports data. As Chief Judge Latham stated,

> The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see. . . . Further, as I have already said, the mere fact that damage results to a plaintiff from such a description cannot be relied upon as a cause of action.

As a result, the right to exclude third parties from collecting and utilizing event-related data may only be established under general copyright laws or related proprietary rights.

### a. Protection Under Copyright Laws

In accordance with acknowledged international standards, the Copyright Act of 1968 (Cth) establishes the exclusive rights for a creator to reproduce, publish, publicly communicate, or make adaptions to literary, dramatic, *musical*, or artistic works. For copyright protection, a work must be original (i.e., represent the independent application of knowledge, judgment, skill, or labour) and exist in a material form.

To meet the originality standard, a work does not necessarily need to be innovative. Rather, Australian copyright law follows a ‘sweat of the brow’ approach and also rewards quantity of effort, provided that the work represents the independent application of knowledge, judgment, skill, or labour and is original in the form it is expressed. Accordingly, section 10 of the Copyright Act expressly includes compilations in its definition of a literary work.

In *Desktop Marketing Systems Proprietary Ltd v Telstra Corp*, the Federal Court of Australia found that the White and Yellow Pages were original works where copyright subsisted, given the labour and expense involved in compiling these telephone directories. This assessment, however, was questioned in the 2009 High Court decision of *IceTV Proprietary Ltd v Nine Network Australia Proprietary Ltd*. The court emphasized that “copyright does not protect [mere] facts or information” but only “the particular form of expression of [such] information, namely the words, figures and symbols in which [it is] expressed, and the selection and arrangement of that information.” In an obiter dictum, the court suggested that the substantial labour and incurred substantial expense in assembling information are not sufficient for copyright protection. Rather, authors must establish that the intellectual and financial input was directed to the particular form of expression and to the originality of the compilation.

In accordance with the court's approach, the federal court, in a subsequent decision, denied copyright protection for two particular telephone directories because the authors did not establish “independent intellectual effort and / or the exercise of ‘sufficient effort of a literary nature’” in creation of the compilations.

Following these decisions, satisfying the standards for copyright protection of sports data appears difficult. Because mere facts and information cannot be copyrighted, raw event data and performance data do not qualify for protection under copyright law. Also, the collation and structured assembling of such data generally will not suffice to attach a
copyright, even if special skills and knowledge are required and substantial investments are incurred by an event owner in assembling the data. Copyright, however, may subsist in refinements of raw data if it can be established that independent intellectual effort or sufficient effort of a literary nature was required for its creation. In most cases, this will be true for sophisticated applications, which involve additional editorial or graphical work. Fixture lists and other basic statistics generally might fall short of the standard of originality where it cannot be established that independent intellectual effort to create the particular form of expression or its selection and arrangement was required.\(^73\)

b. Protection Under Other Property Laws

Establishing protection of event-related data under other property laws is just as difficult. Contrary to other jurisdictions, unfair competition and unjust enrichment are not recognized as independent actions under Australian law.\(^74\) As a result, the use of fixture lists and other sports data cannot be prohibited based on these legal defenses. In the absence of a general property right for sport events and given the financial investments and the business risks for event owners, the lack of defenses may be criticized for good reasons.\(^75\) The current law, however, does not enable event owners to successfully claim any rights over sports data based on these legal institutions.

Furthermore, the tort of passing off, in most cases, is not applicable for event owners to argue for an exclusive exploitation right regarding event-related data. A passing off claim requires that the reputation and goodwill of a name or business are wrongfully used to represent that other goods or services have a particular association, quality, or endorsement, which subsequently deceives or misleads ordinary consumers of these goods or services.\(^76\) These conditions are rarely met in the context of sports data collection and utilization. The collection of sports data by private companies is based on their own skills and efforts and does not constitute a misrepresentation of the sports bodies' reputation or goodwill, even if the collation is carried out without any authorization of an event owner. The marketing of such raw or refined data will generally occur in the private companies' own trade name and without a specific reference to a sports body's business, other than the use of its name for identification of a particular sporting competition. As held by the court in *S & I Publishing Proprietary Ltd v Australian Surf Life Saver Proprietary Ltd*,\(^77\) the descriptive use of a league or association's name does not constitute a misrepresentation.\(^78\) Even if third parties use fixture lists or other basic statistics created by a sports body, it is doubtful whether such use will result in a wrongful representation regarding the quality or endorsement of such products and thereby deceive or confuse end customers, which in most cases includes commercial enterprises as well.\(^79\) As a result, except in extraordinary circumstances, an event owner will not be able to establish a claim for passing off regarding the collection and utilization of event-related data by third parties.

c. Incidental Intellectual Property Rights and Control of Physical Access to the Venue

Event owners must resort to supplementary measures to safeguard the exploitation of their sports data. One approach is to rely on incidental intellectual property rights, which attach to the fixture lists and other sports data products (e.g., the league logo or the emblem of championship trophies protected by trademarks). Such incidental protection was successfully litigated in other contexts.\(^80\) This incidental protection, however, can only become relevant when a sport governing body markets products created from event and performance data labelled with copyrighted symbols or trademarks are utilized by a third party for business purposes. Furthermore, the incidental intellectual property rights must not fall within the scope of the fair dealing exceptions established under the Copyright Act of 1968 (Cth).\(^81\)

Regarding the initial collection of sports data, event owners may facilitate their exclusive exploitation rights by controlling physical access to the venue. As suggested in *Victoria Park Racing & Recreation Grounds*, event owners are free to restrict access to their events by physical means and corresponding contractual agreements.\(^82\) The court also considered that the contractual restriction of the disclosure of information was legally valid to protect the commercial
exploitation of an event. Hence, by structuring the ticketing terms and conditions and media accreditations accordingly, collection of sports data inside a venue may be prohibited or permitted only after payment of a license fee. These supplementary measures, however, do not protect event owners against the collection of sports data outside a venue (i.e., by observing an event on television).

B. United States

Similar to Australia, event owners in the United States have sought to establish protection of sports data under copyright laws and property laws, namely the torts of unfair competition and publicity. The limited success of such attempts may be exemplified by the following cases, which involve three major sports event owners: the NBA, MLB, and the Professional Golfers Association (PGA), the governing body of the United States professional golf tour.

1. National Basketball Association v. Motorola Inc.

Regarding the copyright protection of sports data, the legal situation in the United States aligns with the above-described legal status in Australia. In *Feist Publications Inc. v. Rural Telephone Service Co.*, 
the U.S. Supreme Court emphasized that United States law requires originality as a “prerequisite for copyright protection” and that facts are not protected under copyright laws. Accordingly, the Court held that a compilation of facts is not copyrightable *per se; rather, the facts are only protected if they “are selected, coordinated, or arranged in such a way that the resulting work as *73 a whole constitutes an original work of authorship.” Thus, the Court rejected the application of the “sweat of the brow” doctrine, concluding, as in Australia, that the mere assembly of raw event or performance data is not copyrightable.

These principles were applied to the collection and commercialisation of sports data in *National Basketball Ass'n v. Motorola, Inc.* The case concerned the collection of event data from NBA matches by the sports data provider STATS. STATS observed the broadcast of NBA matches and transmitted the relevant events to a sports information service of the telecommunications provider Motorola. The NBA, in the appeals proceedings, claimed that the collection and commercial distribution of match-related data infringed its copyright and broadcast of NBA games. The court of appeals, however, denied copyright protection for the NBA games themselves “because they do not constitute ‘original works of authorship’ under [United States copyright laws].” Regarding the game broadcasts, the court found that Motorola and STATS did not infringe the NBA's copyright because they did not retransmit the broadcast but only reproduced facts by observing it. In accordance with the U.S. Supreme Court's decision in *Feist Publications*, the court of appeals held that such facts were not copyrightable and that STATS and Motorola, therefore, did not infringe any protectable rights of the NBA.

In addition to the copyright claim, the NBA asserted an action of unfair competition. Contrary to the High Court of Australia, the United States Supreme Court previously recognized an independent action for unfair competition in *International News Service v. Associated Press*. Subsequently, in the proceedings, the NBA argued that the collection and distribution of the event data by STATS and Motorola constituted a misappropriation of time-sensitive information, which was generated at its expense; thus, the NBA argued the collection and distribution must be considered an illegal free riding of its services of staging and broadcasting professional basketball matches. The court of appeals, however, did not concur with this argument for two reasons. First, the collection and retransmission of event data about the matches occurred at the expense of STATS and Motorola. Second, the data collection and distribution was a different service than the game staging and broadcasting and, thus, did not constitute free riding of the NBA services.
As a result, the NBA could not prevent STATS and Motorola from collecting and commercially distributing NBA game data.  

2. C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.

Another example that illustrates the difficulties faced by the sports leagues in establishing a proprietary right with regard to event-related data is the case of C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.  

CBC markets, distributes and sells fantasy sports products, including fantasy baseball games [which are] accessible over the Internet. . . . In addition to fantasy sports games, CBC's website provides up-to-date information on each player to assist game participants in selecting players for and trading players on their fantasy teams. This information includes [baseball statistics] which [are] typically [available in the public domain,] such as players' batting averages, at bats, hits, runs, doubles, triples, [or] home runs . . . .

In 2005, Major League Baseball Advanced Media (a subsidiary of MLB) refused to grant CBC a new license for its services because it decided to launch *75 its own online fantasy game.  

CBC filed a declaratory relief action, requesting summary judgment that its use of the players' names and the aforementioned baseball statistics did not violate the players' publicity rights or MLB's ownership of the statistics.  

In its decision, the United States District Court of Missouri held that the mere use of player names and publicly known information constitutes neither an infringement of MLB's right of publicity nor of MLB's proprietary right.  

Furthermore, the court expressly held that CBC was protected by the constitutional rights of free speech under the First Amendment.

3. Morris Communications Corp. v. PGA Tour, Inc.

A positive outcome for event owners, however, was achieved in Morris Communications Corp. v. PGA Tour, Inc. Here, the media company Morris Communications brought a claim against the PGA, arguing that the PGA monopolized the publication of golf scores in violation of section 2 of the Sherman Antitrust Act.  

The PGA “developed a Real-Time Scoring System (‘RTSS’) that allow[ed]” for real-time online publication of golf tournament events. Media companies received access to the system under certain conditions, such as a thirty-minute delay to the real-time event before publishing the scores.  

Morris refused to adhere to such conditions and filed an antitrust claim against the allegedly anticompetitive conduct of the PGA.  

The court of appeals, however, held that a company, even if it was a monopolist, which invested in the development of a copyrighted product, is not obliged to grant third parties access to its products or services.  

Furthermore, the court found *76 the PGA had a legitimate business interest in protecting its exclusive rights in RTSS and, therefore, was allowed to prevent third parties from “free-riding” by licensing its product and its derivative only under certain conditions.

In summary, based on the above-described jurisprudence, raw sports data is not copyrightable under United States laws, and event owners cannot prevent third parties from collecting event data from the live broadcast of their events. Furthermore, the use of athletes' names and other publicly available information and statistics are not subject to a proprietary right of the sport governing bodies but can be commercially exploited by the media or gaming industry for their purposes. Generally, such conduct does not result in unfair competition because sport data providers and their customers collect and distribute the particular sports data at their own expense and offer products and services different to the staging or broadcasting of an event.
Event owners are, however, entitled to restrict access to their events and are not required to grant media companies or sports data providers unconditional access to information and statistics that they generate. Rather, if an event owner refines event-related data and produces a marketable end product, the product may be licensed subject to certain conditions such as a time delay of its publication.

C. Europe

Under current European Union law and the legislation of the European Union member states, sports events do not qualify for protection under intellectual property laws. With a view to the matches of the Premier League, the Court of Justice of the European Union (CJEU) stated,

FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works.

To be so classified, the subject-matter concerned would have to be original in the sense that it is its author's own intellectual creation . . .

However, sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.

*77 Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property. 114

Similar to the jurisdictions discussed above, event owners in Europe, therefore, must establish their ownership or exclusive exploitation rights on traditional property rights that are recognized under European Union and national laws. Regarding the protection of sports data, legislation and jurisprudence in the European Union are widely determined by Directive No. 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive). 115 The Database Directive governs the legal protection of databases and gives the CJEU the chance to hand down a series of decisions on the legal protection of fixture lists and sports databases. 116 Following an overview of the interpretation of the Database Directive by the CJEU, this Article will look at the implementation of the European law in the United Kingdom, Germany, and France and the additional legal approaches that are applied in these jurisdictions regarding the protection of sports data.

1. European Union Law-Database Directive and CJEU Decisions

The Database Directive was enacted in 1996 with the aim of protecting the setup of databases and the corresponding financial investments, which, in the view of the European Commission, had not been protected sufficiently under the legislation of the European Union member states. 117 The Database Directive protects the collation, assembly, verification, and presentation of data within a database by establishing a sui generis database, irrespective of whether the database content qualifies for copyright protection or whether the database is innovative or not. 118 A database-
maker is given the right to prevent any extraction or reutilization of the database contents and is, hence, entitled to exclusively exploit the database content by making it available to the public.\textsuperscript{119}

Beginning in 2004, the CJEU decided various cases relating to the protection of fixture lists under the Database Directive. One of the first cases involved Fixtures Marketing Ltd., an enterprise commissioned with the international marketing of Premier League fixture lists, that claimed the unauthorized use of those fixtures by Finnish, Greek, and Swedish betting providers.\textsuperscript{120} In its decisions, the CJEU found that the creation of the fixture lists was an inherent part of the organizational task of the Football Association Premier League.\textsuperscript{121} The CJEU, therefore, concluded that the Premier League had not allocated separate resources or made specific investments for drawing up the fixtures, which would exceed its general expenditures for organizing the league.\textsuperscript{122} Hence, according to the CJEU, it lacked a separate investment regarding creating a database as required by the Database Directive, and, thus, the court denied the existence of a sui generis database right in the fixtures.\textsuperscript{123}

In \textit{British Horseracing Board Ltd. v. William Hill Organization Ltd.},\textsuperscript{124} the CJEU reached a similar conclusion. This case concerned the use of racing lists processed in the database of the British Horseracing Board by the English bookmaking firm William Hill.\textsuperscript{125} The CJEU found that the racing lists were essential for organizing the horse races staged under the auspices of the British Horse Racing Board.\textsuperscript{126} Therefore, it concluded that the storage and utilization of those materials in the British Horseracing Board database did not require a separate investment independent from the resources, which were already spent for the creation of the racing lists.\textsuperscript{127} Accordingly, the CJEU held that the racing lists did not represent a substantial part of the database and did not qualify for protection under article 7 of the Database Directive.\textsuperscript{128}

\textsuperscript{79} Following these decisions it appeared that fixture lists and other database-processed facts and information relating to sport events are not protected under the Database Directive at all, despite event owners' substantial investments in the setup of databases and corresponding software. In 2010, however, Football DataCo again tested the scope of the Database Directive when it brought two cases: (i) against the online platform Yahoo! and its data suppliers and (ii) against the sports data provider Sportradar for an unauthorized use of Premier League fixture lists and match results. Contrary to the proceedings in the \textit{Fixtures Marketing} cases, Football DataCo did not solely base its claim against Yahoo! on the sui generis database right. Rather, before the national courts, it additionally argued that the fixture lists used by Yahoo! were also protected as literary work under English copyright laws.\textsuperscript{129} In accordance with the CJEU precedents, the High Court of Justice rejected protection of the fixture lists under article 7 of the Database Directive and the respective implementation legislation of the Copyright Designs and Patents Act of 1988 (U.K.).\textsuperscript{130} The court, however, found that the creation of the fixture lists required substantial skill and knowledge, so the lists qualified as literary works under the Act.\textsuperscript{131} In the appeal proceedings before the civil division, the High Court of Justice referred the case to the CJEU for a preliminary ruling as to whether such a copyright may exist under European law besides the sui generis right provided for in article 7 of the Database Directive.\textsuperscript{132}

The CJEU, in its decision, held that article 7 of the Database Directive does not exclude the subsistence of general copyrights in databases.\textsuperscript{133} Rather, pursuant to article 3 of the Database Directive, databases may qualify for copyright protection if they, by the selection or arrangement of their content, constitute an original expression of the creative freedom of its author.\textsuperscript{134} The CJEU, however, emphasized in determining this question that neither the labour and skill required to set up the database nor the effort of creating the database content are relevant. Instead, the originality and creativity in the selection or arrangement of the data itself is decisive and may justify copyright protection for a database that expresses such characteristics.\textsuperscript{135} The CJEU did not decide whether the Premier League fixture lists met
this standard but referred the case back to the national court. However, the CJEU noted that the procedures for creating the lists, as described by the court of appeal, did not suffice for copyright protection under article 3 of the Database Directive.

Football DataCo Ltd. v. Sportradar GmbH gave the CJEU the opportunity to further clarify the scope of the Database Directive regarding the reutilization of a sports database in the online environment. Football DataCo claimed that Sportradar, in its “Football Live” service, made available to the public contents of the Football DataCo database, containing the results and further information on the Premier League and other English and Scottish leagues. The CJEU confirmed the assessment and found that Sportradar violated Football DataCo's sui generis database right by publishing online the results and information of these soccer leagues to customers in the United Kingdom and Austria. It must, however, be emphasized that protection of the Football DataCo database under the sui generis database right was undisputed in the national proceedings.

In summary, according to the jurisprudence of the CJEU, article 7 of the Database Directive does not protect database-processed sports data, particularly fixture lists, if the collation, storage, and processing of such data is covered by the resources and financial investments that are necessary for organizing the league. In other words, if no independent deployment of resources or financial investment is required for the collection, storage, processing, or reutilization of event-related data, a sui generis database right does not subsist in such data. Notwithstanding article 3 of the Database Directive, database-processed fixture lists and other sports data may be subject to copyrights as creative works under national legislation (under the so-called database right). When determining whether such database right exists in the processes data, solely the originality and creativity in the selection or arrangement of this data may be taken into consideration. Labour and skills for setting up the database, in contrast, cannot justify copyright protection of the processed data.

2. Legal Status Under the Legislation of European Union Member States

Regarding copyright protection, legislation in the United Kingdom, Germany, and France is widely determined by the Database Directive, which has been implemented by these European Union member states and the jurisprudence of the CJEU. Similar to Australia and the United States, supplementary protection through application of other quasi-proprietary rights may apply in certain cases. France also enacted a specific “event right” that protects sports federations and certain sport event owners in the commercial exploitation of an event.

a. United Kingdom

All CJEU cases discussed above had their origin in the United Kingdom, and the CJEU’s decisions were adopted accordingly in the national proceedings. Following the CJEU’s decision in Football DataCo Ltd. v. Yahoo! UK Ltd., Football DataCo conceded that it could not assert intellectual property rights in the Premier League fixture lists. As a result, the High Court of Justice “issu[ed] a sealed Order declaring that fixture lists are not protected by database copyright or database rights in the [United Kingdom].” This decision put an end to the “sweat of the brow” approach applied to fixture lists under English law according to what intellectual property protection in fixture lists could be obtained if substantial “labour, skill, judgment or ingenuity” were involved in its creation of the assembling of the data.
While this decision dashed event owners' hopes of establishing copyright protection of sports data as literary work, the court of appeals' decision in *Football DataCo Ltd. v. Sportradar GmbH* first recognized the protection of sports databases under article 7 of the Database Directive. The court found that the live collection of the results and further data relating to the professional leagues in the United Kingdom and the processing in Football DataCo's databases constituted a substantial investment by Football DataCo, which met the standards under European law for *sui generis* protection. The court of appeals distinguished the case from *British Horseracing Board Ltd. v. William Hill Organisation Ltd.* where it confirmed the CJEU restrictive interpretation of the Database Directive because the data reutilized by Sportradar was not inherently connected to the organization of the sporting competition but was separately collected by Football DataCo on the field. The court precisely differentiated between sports data that is tied to the organization of the sporting competition, such as fixture lists, and sports data that is generated separately by observing the game. Following this decision, sports bodies and sport event owners may successfully establish an infringement of their *sui generis* database right under United Kingdom copyright law, provided they can prove that the sports data contained in their databases is extracted and reutilized without their consent.

Because the decision is based on an application of article 7 of the Database Directive, its rationale can be extrapolated to other European Union member states. If this approach is litigated, however, sports database owners must prove that the particular data is de facto gathered from their databases—not collected independently by a third-party (e.g., by observing the broadcast of an event). In this context, the above-mentioned supplementary protection measures, such as restrictions on data collection inside a venue, may become pertinent. If implemented, the restrictions may enable event owners to successfully establish that the utilized data may only originate from their database or the data was gathered in breach of a contractual obligation.

*Germany*

Germany implemented the Database Directive in its national Copyright Act. Databases may subsist in copyright protection as a “database work” under section 4 of the German Copyright Act and the *sui generis* database right in section 87a of the German Copyright Act. While German courts have not applied these provisions in the sports industry context yet, academic articles have frequently discussed the copyright protection of fixture lists and other sports data. Prior to the CJEU decision in *Football DataCo Ltd. v. Yahoo! UK Ltd.*, many authors argued for protection of fixture lists as database works, given the comprehensive process of their creation. In accordance with these assessments, the Deutsche Fußball Liga (DFL) initially announced in 2011 it would enforce its rights in the Bundesliga fixture lists against any unauthorized use. However, after the enactment of a new state treaty on gambling, the DFL dropped the approach.

Notwithstanding the creative human input that is undisputedly required for creating fixtures, in *Football DataCo Ltd. v. Yahoo! UK Ltd.*, the court expressly held that the process applied by the Premier League for creation of its fixtures did not meet the standards under article 3 of the Database Directive. Because this interpretation of the European law also applies to the German implementation legislation, it appears unlikely that copyright protection of fixture lists will be successfully litigated.

The same is true for raw event and performance data. Similar to Australia and the United States, under German copyright law, mere facts are not copyrightable. Event owners, thus, cannot prevent the collection of sports data from broadcasts—provided that no contractual restrictions for the commercial use of the broadcast exist. In view of this legal situation, the DFL implemented a contractual provision that restricts its broadcasting partners from utilizing...
the footage of Bundesliga matches for data collection purposes. Correspondingly, the broadcasting partners must mirror such prohibition in their contracts with end customers. By this means, commercialisation of the copyrighted broadcast for purposes other than private consuming can be excluded, at least in situations where a contractual relation to the end customer exists.

Actions based on the tort of privacy, unjust enrichment, and unfair competition face similar legal obstacles in the jurisdictions analysed above. These legal institutions are established as statutory actions under German law. Their conditions essentially correspond to the legal status under common law and require a misappropriation of efforts, skills, knowledge, goodwill, or another quasi-proprietary right. Event owners will, therefore, generally struggle to claim unfair competition or unjust enrichment regarding the independent collection of sports data by third parties, even if by observing the copyrighted broadcast of an event.

Establishing a privacy tort claim is just as difficult. The constitutional right of privacy protects names and other personal information, and this right can be claimed if personal information is used without authorization. The application of the tort of privacy in the collection and exploitation of sports data will, in most cases, be unsuccessful however. On one hand, information on the height, age, and weight of players is generally available in the public domain. Additionally, if such data is used for information purposes only, sport data providers and media companies can argue for a free use exception under the constitutional rights of freedom of the press and freedom of information under article 5 of Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany). Only if names and other personal information are exploited solely for commercial purposes, like in the gaming industry, may their unauthorized use be prohibited by the players or in their name by the governing sport body.

Based on the decisions of the CJEU and the High Court of Justice, the DFL and other owners of sports databases under German law may claim a sui generis right under article 7 of the Database Directive, provided that the database owners can overcome procedural hurdle of proving an illegal extraction and reutilization of the database content. Furthermore, supplementary protection can be achieved by restricting the physical access to an event. German courts have clarified that event owners, even if they own a monopoly, are not required to grant media companies free access to their events under the constitutional rights of freedom of the press and freedom of information. As a result, event owners can safeguard their commercial interests in exploiting event-related data by structuring the media accreditations accordingly and establishing licensing schemes for sports data collection inside a venue.

c. France

In contrast to the United Kingdom and Germany, sporting federations and certain sport event owners in France are in a more comfortable situation because they can rely on a specific event right. Article L. 333-1 Code du sport (Sports Code) establishes that “sports federations, as well as the organisers of sports events . . . are the owners of the exploitation rights for the sports events or competitions which they organise.”

Based on this provision, in 2008, the Tribunal de Grande Instance de Paris held that the Ligue de Football Professional, the governing body for the French professional soccer league, has the exclusive right to license its fixture lists to betting companies. This decision was eventually implemented in article L. 333-1-1, which now expressly provides that offering bets on sporting events requires a license or permission from a respective event owner.

Sports betting providers, concerned by the mandatory licensing system, challenged the validity of article L. 333-1-1 in 2011. The Conseil d'État (French Administrative Court) found, however, that the commercialisation of sporting events is not a public right (bien public) but that the provision establishes an exclusive exploitation right for the governing sport
bodies. The French Administrative Court justified this finding because of event owners' substantive financial investments in the development of their sport and the staging of the respective competitions.\textsuperscript{174}

Consequently, the French sport governing bodies are not required to resort to copyright protection for the exploitation of their fixture lists but can rely on the statutory exploitation right granted under the French Sports Code. Moreover, they are not restricted in claiming other intellectual property rights regarding event-related data (e.g., they may also claim the \textit{sui generis} databank right, provided the respective conditions for its application are met).\textsuperscript{175}

\section*{IV. CONCLUSION}

Despite the different legal regimes in Australia, the United States, and the European Union, event owners encounter similar legal obstacles in protecting the commercial exploitation of event-related data. None of these jurisdictions provide protection for mere facts and information. Thus, raw event and performance data is not copyrightable.\textsuperscript{87}

Copyright protection of refined sports data only exists when the requirements of originality and creativity under the respective copyright laws are met. Statistics, which reselect or rearrange the raw data, may subsist in copyright if the selection or arrangement expresses originality and creativity. Sports data products that involve editorial or graphical processing (i.e., comprise historical and background information, commentary, and illustration) are copyrightable as well.\textsuperscript{176} Fixture lists and other basic statistics fail, however, to comply with the “creativity standard.”

In the United Kingdom, Germany, and France, sports databases are additionally protected under a \textit{sui generis} database right implemented under the influence of European Union law. Such rights, however, may only be facilitated regarding sports data that is not inherently connected to the organization of the sporting competition but collected separately on the pitch. Provided they can prove an illegal extraction and reutilization of their database, sport event owners may take legal action against the use of event-related data on the basis of the \textit{sui generis} right.

In the absence of a comprehensive protection of event-related data under copyright laws, event owners must resort to other property rights and supplementary contractual measures. Even in jurisdictions where unfair competition, unjust enrichment, or publicity and privacy rights are recognized as general torts, event owners will, in most cases, fail to establish an action against the collection and distribution of event-related data by third parties. This is because sports data collection requires independent skills and knowledge and can be distinguished from the staging and broadcasting of an event. Third parties, in most instances, also will market the data in their own name without any specific reference to an event owner's business. Except in rare cases, event owners will, therefore, struggle to argue for an illegal misappropriation of their investments in an event or a misrepresentation of their name, products, and services.

Contractual measures, such as setting restrictions or conditions for the physical access to an event, only cover the in-venue collection of sports data. In particular, event owners cannot prevent sports data providers from collecting sports data from a broadcast of their events, even if a broadcast itself is copyrighted. A supplementary measure is to structure the broadcasting agreements accordingly: oblige the rights holders to implement a prohibition for data collection from their broadcast in the end consumer agreements. This is, however, only feasible when contractual agreements with the end consumer exist. Furthermore, it will not prevent the grey market from operating in a jurisdiction where enforcement of such contractual provisions is hard to achieve.

As a result, from the perspective of an event owner, the applicable laws and supplementary contractual measures leave unsatisfactory loopholes for unlicensed collection and commercialisation of sports data. To a certain extent, the free use of event-related information may be justified under constitutional rights, such as freedom of the press and freedom of information. In particular, by publishing fixture lists, squads, and match results, the media industry not only serves the legitimate interests of informing the public, it also contributes to the prominence of the league or tournament and, hence,
is a valuable event-marketing feature. These arguments, however, do not justify “free riding” in the utilization of sports data by solely commercial businesses, particularly in the betting and gaming industries.

In some jurisdictions, these issues are addressed in legislation (e.g., in France, which has enacted a comprehensive statutory event right for sport federations and certain event owners). Event owners in most other jurisdictions, however, do not enjoy similar protection. Given the substantial human resources and the financial investments in staging an event and developing their sport, the current protection for event owners regarding the exploitation of event-related data is insufficient.

To ensure adequate financial participation in the revenue streams of adjacent industries that rely on the utilization of event-related data, statutory protection for event-owners’ legitimate interests in exploiting an event and refinancing their investments are required. The right to consent to betting in Australia and the sports event right in France illustrate the two alternatives in how such protection could be implemented.

However, a specific regulation for the use of fixture lists for betting purposes covers only one industry, while the commercial utilization of sports data in the media and gaming industries and for sporting purposes is outside the scope. The enactment of a general event right for sporting competitions, thus, would be the most suitable solution. It would not only address the legal inadequacies illustrated above regarding the protection of sports data but also include the exploitation of other event-related activities and assets. Considering that sports data products in the media, gaming, and betting industries are often offered in combination with audiovisual material, player images, and other event-related values, a comprehensive event right would reflect the manifold forms exploitation of sports events in the commercial marketplace most appropriately.

Lobbying for such right has, however, proven difficult in the past. In 2011 and again in 2013, the Parliament of the European Union in two resolutions argued for a general property right in favour of sport event organisers:

[The European Parliament] reaffirms its position that sports bets are a form of commercial use of sporting competitions; recommends . . . that sporting competitions should be protected from any unauthorised commercial use, notably by recognising the property rights of sports event organisers, not only in order to secure a fair financial return for the benefit of all levels of professional and amateur sport but also as a means of strengthening the fight against sports fraud, particularly match-fixing.[180]

So far, no legislative action has been taken in Europe though. Other examples of legislators’ reluctance in addressing the issue from the national level are the ongoing political discussion on a general “neighbouring right” for sport events in Germany and the non-consideration of the Australian government in establishing a sui generis right for databases.182

One reason for this reluctance might be the extraordinary media right revenues generated by the top sports events, which make other forms of commercial exploitation of an event appear marginal. Furthermore, protection of event owners by traditional property rights and the control of physical access to a venue are often wrongly considered sufficient. A recent study on sports organisers’ rights in the European Union, for example, concluded that

* Organisers of sports events seem to be fairly well protected as a matter of substantive law, against unauthorized acts of exploitation of live transmitted or recorded sports events on the basis of a combination of the “house right”, [sic] the law of contract, and original or derivative rights of intellectual property.
Finally, the large amount of stakeholders with divergent interests involved in the sports industry make it difficult to agree on the appropriateness, form, and scope of a legal protection for sports events:

The universe of sports and media is a complex network of social and commercial relationships with a variety of stakeholders, each one of whom can claim rights or specific interests in the value chain of organizing and exploiting sports events, such as clubs, leagues, athletes, federations, fans, media content providers, sponsors, owners of sport facilities, sports betting operators and news media. 185

Against this backdrop, it is highly uncertain whether appropriate legislation will be enacted in the near future. Thus, for the time being, event owners will have to cope with the existing legal framework regarding the protection and commercialisation of sports data.

Footnotes

1 Legal Counsel at DFL Deutsche Fußball Liga GmbH, the governing body for the German professional football leagues. The Article is based on a research paper originally prepared during his studies in the Master of Laws program of the University of Melbourne.

2 All translations in the text and footnotes are the Author's own. The Author's native language is German, so some words throughout the Article are in European form.


8 Id.

9 See Röhl, supra note 5; Der Spielplan: Ein Meisterwerk von Mensch und Computer, supra note 6.


13  Id.

14  Id.

15  Id.


18  STATS LLC, supra note 17.

19  Id.

20  Id.


22  Id.


*See, e.g.*, Racing Act 1999 (ACT) pt 5B div 5B.1; *Racing Administration Act 1998* (NSW) s 33 (Austl.); *Gambling Regulation Act 2003* (Vic) ss 2.5.19, 4.5.1 (Austl.); *Betting Control Act 1954* (WA) s 27D.


*See Gambling Regulation Act 2003, s 4.5.1.*

*Id.*

*Id.*

*Id.* at s 4.5.4(2).

*Sports Betting, supra note 47; see also Gambling Regulation Act 2003, ss 4.5.1(3)(d), 4.5.4(2).*


See Racing Administration Act 1998 (NSW) s 33 (Austl.).


See generally Major Events Act 2009 (NSW); Major Sporting Events Act 2009 (Vic) (Austl.).

(1937) 58 CLR 479, 496 (Austl.).

Id. at 480-81.

Id. at 496.

See Copyright Act 1968 (Cth) s 31(1) (Austl.).

See Sellenger, supra note 48, at 19 (citing Copyright Act 1968, s 32(1)).

See id.

Copyright Act 1968, s 10(1).

See generally (2002) 119 FCR 491 (Austl.).

Id. at 497; see also Tanya Aplin, When Are Compilations Original?, 23 EUR. INTELL. PROP. REV. 543, 543 (2001).

See generally (2009) 239 CLR 458 (Austl.).

Id. at 472.

Id. at 480.

Id. at 472, 480; see also Laila Hamzi & Amelia Lynch, Australian & European Approach to Fixture List Rights, 10 WORLD SPORTS L. REP. 3, 3 (2011).

Telstra Corp Ltd v Phone Directories Co Pty Ltd [2010] FCA 44 (8 February 2010) ¶ 344 (Austl.).

See Hamzi & Lynch, supra note 71.


See generally (1998) 88 FCR 354 (Austl.).

Id. at 363; see also Sellenger, supra note 48, at 13.

Sellenger, supra note 48, at 17.

See, e.g., Joined cases C-403 & C-429/08, Football Ass'n Premier League Ltd. v. QC Leisure, 2011 E.C.R. I-09083, ¶ 149; Football Association Premier League Ltd. v. Panini UK Ltd., [2003] EWCA (Civ) 995 [27], [37], [[2004] 1 WLR 1147 (Eng.).

See Copyright Act 1968 (Cth) ss 40-42 (Austl.). For a discussion on incidental use of trademarks and copyrighted symbols in the context of the sports industry, see Panini, [2003] EWCA (Civ) [27], [39].
83  Id. at 526-27.
85  Id. at 351, 356.
86  Id. at 356 (quoting 17 U.S.C. § 101 (1976)).
87  Id. at 357.
88  See generally 105 F.3d 841 (2d Cir. 1997).
89  Id. at 843-44.
90  Id. at 844.
91  Id.
92  Id. at 846.
93  Id. at 847.
95  Motorola, 105 F.3d at 844.
97  See Motorola, 105 F.3d at 847-48.
98  Id. at 854.
99  Id. at 853-54.
100  Id. at 854.
102  Id. at 1080.
103  Id. at 1081.
104  Id. at 1081-82. See generally Joshua Waller, The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting the Exploitation of the First Amendment?, 9 UCLA ENT. L. REV. 59 (2001). With particular regard to the sports industry, see Beth A. Cianfrone & Thomas A. Baker III, The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity, 20 J. LEGAL ASPECTS SPORT 35, 60-61 (2010).
107  See generally 364 F.3d 1288 (11th Cir. 2004).
108  Id. at 1290 (referencing 15 U.S.C. § 2 (1890)).


Id. PP 8, 10-11.

Id. ¶ 17.

Id. P 80.


Football DataCo Ltd. v. Brittens Pool Ltd. [2010] EWHC (Ch) 841 [[2] (Eng.).

Id. at [101].

Id. at [100].

Id. at [101]; see also Rachel Montagnon & Mark Shillito, Requirements for Subsistence of Database Copyright and Other National Copyright in Databases Referred to the ECJ: Football DataCo Ltd v. Yahoo!, 33 EUR. INTELL. PROP. REV. 324, 325 (2011).

Id. at 28-32.

Id. at 38.

Id. at 53.

Id. at 44.


Id. at 15.

Id. at 47; see also Rachel Montagnon & Joel Smith, Suing Under Sui Generis Rights--Getting Closer to Off-Shore Servers, 8 J. INTELL. PROP. L. & PRACT. 197, 199 (2013).

See Football DataCo Ltd., 2012 E.C.R. at 19.

See generally Football DataCo Ltd., 2012 E.C.R. 642.


See Football League Ltd. v. Littlewoods Pools Ltd. [1959] Ch 637 at 651 (Eng.); see also Nick Fitzpatrick & John Cloke, Sporting Data: Rights in Sporting Data After Football Dataco v Stan James, 8 WORLD SPORTS L. REP. (2010)); Sellenger, supra note 48, at 21.

See Fitzpatrick & Cloke, supra note 145.


Id. at [106].

See id. at [41] (referencing Case C-203/02, British Horseracing Bd. Ltd. v. William Hill Org. Ltd. 2004 E.C.R. I-10415 (Eng.)); see also Boothroyd, supra note 128; Bray & Otterwell, supra note 128.

See British Horseracing Bd. Ltd., [2005] EWCA (Civ) 863 [64]-[66].

See Football DataCo Ltd., 2013 F.S.R. [46-47].

See id. at [37]-[41].

See supra Section III.A.2.c.

Gesetz über Urheberrecht und verwandte Schutzrechte [[Urheberrechtsgesetz] [Copyright Act], Sept. 9, 1965, BUNDESGESETZBLATT [BGBL] I at 1273, § 1, no. 4 (Ger.).

Id.; § 6, no. 87a.

See generally Lentze, supra note 6; Röhl, supra note 5; Thomas Summerer & Holger Blask, Rechte an Spielplänen und Tabellen von Profiligen am Beispiel der DFL [ Rights Towards Fixtures and TablesIllustrated by Way of Example to DFL], SPURT 50 (2005).


See supra Section II.A.1.


Id.

Id.

See Bürgerliches Gesetzbuch [Civil Code], Jan. 2, 2002, BGBl. I at 42, 2909, §§ 1, 12, 812, 823, (Ger.); Gesetz gegen den unlauteren Wettbewerb [[Act Against Unfair Competition], Mar. 3, 2010, BGBl. I at 254, §§ 3, 4 (Ger.). With regard to the application of these actions to the protection of fixture lists, see Peter W. Heermann, Schutz von Spielplänen im Licht einer Entscheidung des High Court of Justice [Protection of Fixture Lists in Light of a Decision of the High Court of Justice], in 3 CAUSA SPORT 227, 231 (2010).

Paepke & Blask, supra note 161, at 547.

Grundgesetz für die Bundesrepublik Deutschland [Basic Law of the Federal Republic of Germany], July 11, 2012, BGBl. I at 1478, art. 5 (Ger.).

For the successful action of DFL Deutsche Fußball Liga against the gaming publisher Konami, see Landgericht Frankfurt [District Court of Frankfurt], Dec. 12, 2008, SPORT UND RECHT [SPURT] 227 (Ger.).

See discussion supra Section III.C.2.a.

Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 8, 2005, 154, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 377, 2006 (Ger.).

Hungary and Poland, in 2009 and 2011, implemented a right in favour of event owners to consent to betting on sports events. These provisions have, however, not been enforced in practice yet and, thus, are not taken into consideration. See ASSER INST., supra note 114, at 145, 153.


See Loi 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne [Law No 2010-476 of May 12, 2010 on the Opening of the Online Gambling and Betting Sector to Competition and Regulation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 12, 2010, p. 8881. For a detailed description of the regulatory requirements regarding the marketing of betting licenses by sports event owners, see ASSER INST., supra note 114, at 138-41.

CE, Mar. 30, 2011, Rec. Lebon 342142; see also ASSER INST., supra note 114, at 39.

ASSER INST., supra note 114, at 126.


Id.

Online Gambling in the Internal Market, EUR. PARL. DOC. (INI 2012/2322) 57 (2013); see also Online Gambling in the Internal Market, EUR. PARL. DOC. (INI 2011/2084) 40 (2011).

See Paepke & Blask, supra note 161, at 564.

See Fitzpatrick & Cloke, supra note 145.

For the importance of media right revenues for top sports events, see, e.g., ASSER INST., supra note 114, at 65.

Id. at 178. But see Bailey, supra note 178, at 11.

ASSER INST., supra note 114, at 1.
MORRIS COMMUNICATIONS CORPORATION, a Georgia Corporation, Plaintiff, v. PGA TOUR, INC., Defendant.

Synopsis
Media company brought antitrust action challenging professional golf tournament promoter's restriction on its right to syndicate “real-time” golf scores provided by promoter. On cross-motions for summary judgment, the District Court, Schlesinger, J., held that promoter had valid business reason for restricting media company's access to its proprietary score information.

Plaintiff's motion denied; defendant's motion granted.

See also 117 F.Supp.2d 1322.

West Headnotes (12)

[1] Antitrust and Trade Regulation
Sports
Professional golf tournament promoter had property right in real-time scores it compiled by use of its proprietary system, and thus it had valid business reason for restricting media competitors' access to scores and free riding on its investment, up until time scores were published in public domain. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

1 Cases that cite this headnote

Use of Common Expressions, Historical Facts, or Other Material from Public Domain
Copyright law does not protect factual information.

[3] Antitrust and Trade Regulation
Sports
Professional golf tournament promoter had right to sell or license its product, championship golf, and its derivative product, golf scores, on Internet in same way it sold or licensed such products to television broadcasting stations, for purpose of determining whether it had valid business justification for restricting media company's access to real-time scoring information generated by promoter's proprietary system. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

Cases that cite this headnote

[4] Antitrust and Trade Regulation
Relevant Market
Antitrust and Trade Regulation
Intent
Elements of monopolization claim are: (1) possession of monopoly power in relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as consequence of superior product, business acumen, or historic accident. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

Cases that cite this headnote

[5] Antitrust and Trade Regulation
Sports
Professional golf tournament promoter did not have monopoly power in market of providing real-time golf scores over Internet, absent showing of any reduction in output. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

Cases that cite this headnote
Antitrust and Trade Regulation

Refusals to Deal
To prevail on claim for refusal to deal, plaintiff must show both existence of monopoly power and anticompetitive intent. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

Cases that cite this headnote

Sports
Restrictions which professional golf tournament promoter placed on media competitors' access to real-time scores it had compiled by use of its proprietary system did not constitute unlawful refusal to deal, absent showing of illegal intent; promoter had valid business reason of preventing free riding on its investment. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

1 Cases that cite this headnote

Essential Facilities
Elements of essential facilities claim are: (1) control of essential facility by monopolist, (2) competitor's inability to duplicate facility, (3) denial of facility, and (4) feasibility of providing facility.

1 Cases that cite this headnote

Sports
Media center where professional golf tournament promoter collected real-time scoring information was not “essential facility,” which could not be unfairly withheld from competing media companies; rather, collected information was proprietary until published in public domain. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

1 Cases that cite this headnote

Antitrust and Trade Regulation

Elements in General
Antitrust and Trade Regulation
Chance of Success in the Relevant Market
Antitrust and Trade Regulation
Intent
Elements of attempted monopolization claim are: (1) defendant's specific intent to achieve monopoly power through predatory or exclusionary conduct, (2) defendant engages in such conduct, and (3) there exists dangerous probability that defendant will succeed. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

1 Cases that cite this headnote

Construction
Florida Deceptive and Unfair Trade Practice Act (FDUPTA) is to be construed consistently with antitrust law. West's F.S.A. § 501.201, et. seq.

1 Cases that cite this headnote

Torts
Defense, Justification or Privilege in General
If tortious interference defendant interferes with contract in order to safeguard preexisting economic interest of his own, defendant's right to protect his own established economic interest outweighs plaintiff's right to be free of interference, and defendant's actions are usually recognized as privileged and nonactionable.

4 Cases that cite this headnote
This cause is before the Court on Defendant's Motion for Summary Judgment (Doc. No. 109, filed June 24, 2002) and Plaintiff's Response (Doc. No. 136, filed June 24, 2002); Plaintiff's Motion for Partial Summary Judgment on Liability (Doc. No. 125, filed June 24, 2002) and Defendant's Memorandum of Law in Opposition (Doc. No. 139, filed June 24, 2002); and Defendant's Motion to Strike Plaintiff's Second Notice of Supplemental Authority (Doc. No. 150, filed July 16, 2002). Following a hearing during which both sides presented oral argument on the summary judgment motions, all pending motions are ripe for consideration.

As an initial matter, Defendant's Motion to Strike is DENIED.

I. Background

Introduction

Many issues revolve around the periphery of this case, and the Court will take a minute to address what the case is and is not about. The quintessential issue is who has the right to instantaneous information and its value. This case is not about the ability or right of a publisher to disseminate and profit from information and facts released into the public domain through radio or television broadcasts or through a web site. Nor is this case about the ability of the media to cover and publish information for a story in the next day's paper or even in that evening's television news coverage.

The First Amendment freedom of the press, while at first blush might appear to be relevant, is not involved. See National Broadcasting Co. v. Communications Workers of America, 860 F.2d 1022, 1024 (11th Cir.1988) (stating that the First Amendment right of Free Press does not apply absent state action). The case, in general, does not resolve issues of journalistic integrity. This case is to some extent about Morris's claimed ability or need to track a single player, ranked 100, from a small town who is not currently covered by the leader-board or being covered by the broadcast station. Morris needs access to all the players' scores to relate to a local following in that small town where its native son or daughter stands in relation to the other players in the tournament. Finally, this case is not about “streaming” video and audio or “webcasting.”
more than simply about golf scores. Rather, it presents a novel and compelling question of who has the “right” to report the news, produced and gathered by others, in an age of near-instantaneous information.

PGA Tour events are covered extensively by a number of different print, broadcast, and electronic media organizations. Although these events are conducted on private golf courses, the PGA Tour issues credentials to members of the media who are thereby invited to its tournaments for the purpose of providing media coverage. Traditionally, Morris and its subsidiary publications have been among the entities that have received media credentials to PGA Tour tournaments. Both the PGA Tour and members of the media have traditionally benefitted from this arrangement in that the media are better positioned to satisfy the public's demand for golf-related information, and the PGA Tour enjoys enhanced publicity, which in turn generates greater demand for its golf tournaments and related goods and services, thus producing revenue for the PGA Tour.

Real Time Golf Scores

The parties' dispute in this case concerns the on-line publication of “real-time” golf scores. Real-time scores, as the term suggests, are scores that are transmitted electronically nearly contemporaneously to their actual occurrence on the golf course. In this way, Internet users are able to track during a golf tournament each participating player's progress on a hole-by-hole basis. In order to improve its scoring capabilities for its tournaments, including transmission of real-time golf scores over the Internet, the PGA Tour has designed and implemented an elaborate electronic relay known as the Real–Time Scoring System (“RTSS”).

RTSS works as follows: During a given golf tournament, volunteer workers called “hole reporters” follow each group of golfers on the golf course and tabulate the scores of each player at the end of each hole. The scores are then collected by other volunteers located at each of the eighteen greens on the golf course, who, with the aid of hand-held wireless radios, relay the scoring information to a remote production truck staffed by personnel employed by the PGA Tour. The scores of all participating golfers are then processed at the remote production truck and transmitted by the PGA Tour to its Internet web-site, pgatour.com. The PGA Tour claims that it takes “about five minutes” for the information to be routed from the production truck to pgatour.com. At the same time, real-time scores are also transmitted to an on-site media center where accredited members of the media are able to access the scores. The same information is also transmitted to various electronic “leaderboards” located throughout the golf course for public viewing by spectators. The leaderboards do not simultaneously show the real time scores of all participating golfers. Rather, they typically show only the top ten or fifteen scores.

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

Although the exact amount is unknown, it appears that the PGA Tour has invested tens of millions of dollars in RTSS, dating back to the early 1980s. Nevertheless, not all of this investment has been devoted solely to developing Internet-based scoring. The Internet did not rise to prominence until at least the mid–1990s, and pgatour.com did not become operational until 1997. Moreover, the evidence in this case shows that RTSS was, and continues to be, developed with an eye toward enhancing the on-site scoreboards for live spectators and for television broadcasts. For example, Ken Finchem, who is presently the Commissioner of the PGA Tour, noted in 1990 that “the electronic scoreboard system was created to provide the growing number of spectators at PGA Tour tournaments with up to the minute information on action all around the course.”

Additionally, the Internet presently represents only a small fraction of the PGA Tour's overall revenue. For
example, the PGA Tour's annual revenues from its Internet syndication contracts is approximately $130,000. In contrast, a 1999 financial audit of the PGA Tour revealed “direct” revenues of $306,510,000, which included revenues from television and tournaments.

Nevertheless, the PGA Tour has made no secret in this litigation of its desire to maintain a commercial advantage in the market for selling real-time golf scores and has vigorously defended its right to protect its proprietary investment in RTSS. To that end, it has enacted a series of regulations designed to prevent potential competitors from immediately selling scores obtained in the media center to third parties.

On Line Service Regulations

Prior to 1999, credentialed members of the media could view scores in the media center and then re-key them directly into their own computers for transmission to their company’s Internet servers. The result was that competitors of pgatour.com, including Morris, were able to publish real-time scores on their web sites as fast as or possibly faster than pgatour.com. Beginning in January 1999, shortly after the PGA Tour entered into an exclusive syndication contract with USA Today, it instituted Online Service Regulations (“OLSR”) applicable to all credentialed media invitees. Around the same time, Morris began publishing scores from PGA Tour tournaments on its web sites and selling them to third parties, and Morris appears to have been the PGA Tour’s only major competitor in the syndication market.

Under the terms of the original OLSR, scoring information obtained from the media center could be published on any web site, but not sooner than 30 minutes after the actual occurrence of the shots. The PGA Tour's admitted purpose for the new regulations was to allow it to have the first opportunity to post the real-time scores on its web site and those of its syndicates.

In April 1999, the PGA Tour amended its OLSR so that scoring information, obtained in the media center, could appear on an unaffiliated web site either no sooner than 30 minutes after the actual occurrence of the shots or when the information became legally available as public information. Shortly afterwards, the PGA Tour agreed to allow Morris to immediately publish scores obtained from the media center on its own web-sites, but not on the web-sites of non-credentialed third parties. In January 2000, the PGA Tour again amended its OLSR so that “no scoring information may be used by, sold, given, distributed or otherwise transferred to, any party other than the Credentialed Site in any manner whatsoever, without the prior written consent of the PGA Tour.” Violators were subject to revocation of their media credentials.

In May 2000, the PGA Tour learned that Morris was planning to sell scoring information obtained directly from the media center to the Denver Post, in violation of the January 2000 OLSR. The PGA Tour reminded Morris of the prohibition against syndicating scores obtained in the media center. After some discussion between the parties, the PGA Tour agreed to allow Morris to syndicate scores to the Denver Post for one tournament only.

In August 2000, after some additional negotiations, the PGA Tour agreed to waive the restriction on selling real-time golf scores to third parties on the condition that Morris agree to collect the scores to be sold for syndication from pgatour.com rather than the on-site media center. Morris attempted to gather real-time golf scoring information using this alternative method but ultimately abandoned it as unworkable. Among other problems, there was an inevitable delay in scores taken directly from pgatour.com because of the time needed to re-key the scores from that web site onto Morris’s servers. In the meantime, Morris continued to negotiate syndication contracts with a number of third parties, apparently assuming that some satisfactory resolution would be reached with the PGA Tour.

On September 13, 2000, Morris informed the PGA Tour that its attempts at obtaining real-time scores through pgatour.com had failed and requested that it be credentialed to syndicate real-time scores directly from the on-site media center. The PGA Tour refused to accommodate this request. It subsequently informed Morris that media credentials would only be provided on the condition that scoring information collected from the on-site media center be used only in publications within the Morris Communications Group, as required under the OLSR.

Motion for Preliminary Injunction

On October 11, 2000, Morris filed its Complaint and Motion for Preliminary Injunction, alleging violations
of Section 2 of the Sherman Act, 15 U.S.C. § 2, the Florida Antitrust Act, Fla. Stat. § 542.19, and the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 et seq. Morris alleged that the PGA Tour possesses monopoly power over access to its golf tournaments and has unfairly used that power by attempting to stifle competition in the separate market for syndicated real-time golf scores. In response, the PGA Tour argued that it enjoys a property right in RTSS and that its regulations restricting the syndication of real-time golf scoring information gathered and generated by RTSS constitute a reasonable safeguard against would-be free riders seeking to unfairly capitalize on its product.

This Court denied Morris's Motion for Preliminary Injunction, finding that Morris *1276 had failed to meet its high burden for proving entitlement to injunctive relief. See Morris Communications Corp. v. PGA Tour, 117 F.Supp.2d 1322, 1326 (M.D.Fla.2000). The Court found that Morris had failed to show a substantial likelihood of success on the merits of its Section 2 monopolization claims. 10 Even assuming that the PGA Tour possessed monopoly power in the market for real-time golf scores, Morris had not shown that the PGA Tour lacked a legitimate business justification for its restrictions on syndication of real-time scores. Specifically, the Court was without sufficient evidence regarding the extent to which it would be condoning free riding on the PGA Tour's proprietary investment in RTSS if it ordered the PGA Tour to allow Morris unconditional access to its on-site media centers. Id. at 1326–30.

Effects of the On Line Service Regulations

Both parties have submitted substantial evidence regarding the OLSR's possible effects on competition. Not surprisingly, the evidence is somewhat contradictory in this regard. For example, the PGA Tour produced the deposition transcript of the new media sports producer of The Augusta Chronicle, which is owned by Morris. He stated that at least one Internet syndication customer, insidetheropes.com, “never made any demands as to time length [between the occurrence of scores and their real time publication].” Similarly, Mike McLeod, the project manager for golf at CNN/SI, with whom Morris has a syndication contract, stated that even when Morris was required to transmit golf scores remotely, i.e., off of pgatour.com rather than directly from the media center, “for CNN/SI's editorial purposes, the scores were reported fast enough to be editorially acceptable.”

This evidence, however, is belied by other evidence presented by Morris suggesting that both consumers 11 in the syndication market and the PGA Tour itself place a premium on speed. This evidence suggests that OLSR have the effect of harming competitors' ability to compete for the sale of syndicated real-time golf scores. For example, Mr. McLeod's comments notwithstanding, it appears that the value of Morris's syndication contract with CNN/SI has decreased dramatically since the OLSR were implemented. Under the original syndication agreement, executed in 1999, CNN/SI agreed to pay Morris approximately $431,666 annually for real-time golf scores. In 2001, when the OLSR were in effect, that amount was $185,599. By 2002, it had been further reduced to $150,000. By the same token, the record reflects that the PGA Tour has raised the prices for real-time golf scores in its own syndication agreements with USA Today. Moreover, in its most recent contract with USA Today, the PGA Tour no longer promises exclusive syndication rights, which arguably makes the agreement less valuable to USA Today despite the higher price. 12 The higher prices for real-time scores may reflect a consumer preference *1277 for more up-to-date scores, which is reflected elsewhere in the record. For example, hits on pgatour.com have increased by 50 to 100% since the PGA Tour first instituted its OLSR.

Perhaps most tellingly, the PGA Tour itself has acknowledged that the OLSR were implemented in order to maintain a commercial advantage. In a January 1999 letter to Carl Cannon, Vice President of Morris and Publisher of the Florida Times Union, Commissioner Finchem stated that:

The primary reason for requiring this delay [in the OLSR] is so that pgatour.com, the PGA TOUR's own web site, can have a window of exclusivity for the provision to the public of our basic product, official real time scores from our events. We have found that the appearance of exclusive real time scores on our web site drives tremendous traffic volume to the site during times when
tournaments are being conducted, particularly outside the television coverage window. Requiring a thirty (30) minute delay in the dissemination of scores enables us to preserve the value of our real time scoring.

Thus, the record seems to clearly indicate that the OLSR have the purpose and effect of giving the PGA Tour a commercial advantage in the syndication market and disadvantaging potential competitors, including Morris. As discussed below, this does not necessarily mean that the PGA Tour has violated any antitrust laws. Nevertheless, it is important to identify the OLSR's potentially deleterious effect on competitors, if not competition.

Moreover, Morris notes that if the PGA Tour is either unable or unwilling to publish real time golf scores from its tournaments on pgatour.com, consumers are foreclosed from obtaining such information on the Internet. Morris cites the example of the recent World Golf Championship, where pgatour.com did not publish real-time scores. As a result, the real-time scores were simply unavailable on line.

In its summary judgment papers, Morris responds to the concerns raised in the Court's Preliminary Injunction Order by arguing that it has successfully demonstrated a lack of any pro-competitive justification for the OLSR. For its part, the PGA Tour continues to assert that it has a proprietary right in RTSS and the OLSR represent a commercially reasonable way to protect its investment. The PGA Tour also argues that Morris cannot show monopoly power in any relevant market, a prerequisite to prevailing on a monopolization claim. Specifically, it asserts that there is no distinct product market for “real-time” golf scores, and Morris's monopolization claims must therefore be dismissed.

II. Standard of Review

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(e). The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991). When a moving party has discharged its burden, the nonmoving party must then “go beyond the pleadings,” and by its own affidavits, or by “depositions, answers to interrogatories, and admissions on file,” designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

*1278 In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, Key West Harbour v. City of Key West, 987 F.2d 723, 726 (11th Cir.1993), and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir.1989).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the Court should not grant the summary judgment motion. Augusta Iron and Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir.1988). It must be emphasized that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, “the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute about a material fact is “genuine” if the “evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. The inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 251–52, 106 S.Ct. 2505.

The parties assert, and the Court agrees, that there is no genuine issue of material fact, and summary judgment is appropriate.

III. Analysis

A. Antitrust claims

Morris asserts four antitrust claims: 1) monopolization of the Internet markets, 2) unlawful refusal to deal, 3)
monopoly leveraging, and 4) attempted monopolization of the Internet markets. Before addressing the elements of each of the antitrust claims, the Court will first address the PGA Tour’s assertions that valid business reasons justify the exclusionary practice found in the OLSR, because valid business reasons are a defense to the antitrust claims. Once the PGA Tour asserts valid business justifications for its action, Morris bears the burden of proving that the proffered business justification is pretextual. See U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986, 1002 (11th Cir.1993).

Free-riding
Morris asks the Court to force the PGA Tour to provide Morris with the compilation of scores, for which the PGA Tour spends considerable money and time creating, at no cost to Morris. While Morris does invest its own cost in re-keying the scores for syndication, Morris free-rides on the PGA Tour’s efforts in compiling the scores. As Morris admits in its Memorandum of Law, “Morris cannot duplicate the functions of RTSS, which depends on the efforts of hundreds of volunteers each week.” Even if it is the efforts of “volunteers”, the PGA Tour has still invested time and money in the organization and technology to make RTSS possible. 14

Morris contends that it is not free-riding and cites to the Kodak, Motorola, and Aspen cases. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992); Nat’l Basketball Ass. v. Motorola, Inc., 105 F.3d 841, 854 (2nd Cir.1997); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). However, none of these cases is applicable to the instant case. In Motorola, the court found that Motorola did not free-ride when it created a network that disseminated scores from NBA basketball games. See Motorola, 105 F.3d at 854. Three distinctions between Motorola and the instant case make Morris’s claim untenable. First, the Motorola court used a very high standard for free-riding that is applicable only in cases with the hot-news exception, which will be discussed in greater detail below. More importantly, the information that Motorola used to create its product was in the public domain, having been broadcast on television or radio. See id. at 843. Specifically, Motorola-paid reporters, who had heard the radio or television broadcast scores, reported the information to a central location and merely relayed what had been known to the world. See id. at 844. Golf, unlike basketball, precludes a single person gathering all the information occurring on all 18 holes.

Reliance on the Kodak case is similarly misplaced. Kodak claimed that the independent service providers (ISP) of Kodak’s copiers free-rode on Kodak’s investment in product development. See Kodak, 504 U.S. at 485, 112 S.Ct. 2072. “According to Kodak, the ISPs are free-riding because they have failed to enter the equipment and parts markets,” the Court rejected Kodak’s free-riding claim. Id. However, this is not the type of free-riding that the PGA Tour is trying to prevent. The PGA Tour is not arguing that Morris free-rides on the PGA Tour’s investment in the promotion of championship golf tournaments, but on its investment in the compilation of golf scores. Morris wants to commercially exploit information that the PGA Tour has expended money in gathering and has not reaped the full benefit possible from its investment.
Morris claims that the plaintiff in *Aspen* could not have won, if this Court accepts the PGA Tour's definition of free riding. However, *Aspen* was not a case about free riding, as the plaintiff ski company in *Aspen* did not free ride on defendant ski company's investments. The defendant, in *Aspen*, refused to sell plaintiff lift tickets at any price or even honor vouchers for tickets and discontinued a profitable joint arrangement with the plaintiff without a business justification. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 594–95, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). The plaintiff in *Aspen* was not free riding, because it was willing and attempted to pay for its customers to ski at defendant's resort.

Morris further argues that although even if it is free-riding on the collection of scores, antitrust law does not condemn such free-riding. The Court agrees with Morris in its assertion that free-riding on “positive externalities” is accepted by society and courts. See Areeda, Antitrust Law, Vol. III, ¶ 1613(b). However, what Morris seeks is not a positive externality. If Morris were selling the scores after the scores were released on a website, Morris would be benefitting from PGA Tour's positive externality, i.e., the public's interest in information about championship golf. 21 As the near instantaneous scores are not in the public domain and as the PGA Tour maintains an interest in the score until they are in the public domain, the scores are not externalities until the PGA Tour has reaped its reward or forgone that possibility.

Morris additionally argues that even if there is free-riding, it must reach the level that would justify a “hot news” property right. However, the Court finds that to be a business justification free-riding does not have to reach the level that the *Motorola* court held necessary for a hot news exception. The *Motorola* court required the free-riding to be so pervasive that all incentives to undertake an activity would be lost. See *Motorola*, 105 F.3d at 853. However, to be a valid business reason, a much lower level of free riding will justify excluding competitors. See Areeda, Antitrust Law, Vol. III, ¶ 658(f)(“once a proffered business purpose has been accepted as asserted in good faith and not as pretense, the defense does not require ‘balancing’ *1281 of social gains against competitive harms...”).

Property Right in the Scores

[1] The PGA Tour claims that the restrictions have a valid business justification, because they are necessary to protect a property right in the scores that it compiled by use of RTSS. Morris argues that the PGA Tour lacks a property right in the score, thus negating the claimed business justification. For the following reasons, the Court finds that the PGA Tour does have a property right in the scores compiled by the use of RTSS, but that property right vanishes when the scores are in the public domain. 22

[2] The PGA Tour's property right does not come from copyright law, as copyright law does not protect factual information, like golf scores. See *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). However, the PGA Tour controls the right of access to that information and can place restrictions on those attending the private event, giving the PGA Tour a property right that the Court will protect.

In the early half of the 20th Century, the Supreme Court dealt with a similar issue in several cases, known as the “ticker cases”. In *Board of Trade of the City of Chicago v. Christie Grain and Stock Company*, 198 U.S. 236, 25 S.Ct. 637, 49 L.Ed. 1031 (1905), the appellee sought an injunction preventing the use and distribution of “continuous quotations of prices on sales of grain.” See id. at 245, 25 S.Ct. 637. There the Supreme Court held, “plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself.... The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public.” *Id.* at 250, 25 S.Ct. 637. The Supreme Court further stated, “[t]ime is of the essence in matters like this ... if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough.” *Id.* at 251, 25 S.Ct. 637.

In *Moore v. New York Cotton Exchange*, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926), plaintiff sought an injunction forcing defendant to furnish plaintiff with a ticker and a declaration that defendant was a monopolist. See *id.* at 603, 46 S.Ct. 367. The Supreme Court held that the allegations did not support a claim under the Sherman Act and refused to grant the injunction. See *id.* at 603–05, 46 S.Ct. 367. The Supreme Court reiterated the holding of the *Christie* Court that the exchange had a property right
in the information “which relates solely to its own business upon its own property.” Id. at 606–07, 46 S.Ct. 367. Further, the exchange was able to determine to whom it will sell: “the ordinary right of a private vendor of news or other property.” Id. at 605, 46 S.Ct. 367. Accordingly, the Court found that the exchange’s actions were appropriate and legitimate to protect and to further its business. See id. at 606, 46 S.Ct. 367.

Like the “ticker cases”, the instant case deals with facts that are not subject to copyright protection. The compiler of the information in both cases collects information, which it created, at a cost. Also the events occur on private property to which the general public does not have unfettered access, and the creator of the event can place restrictions upon those who enter the private property. The vastly increased *1282 speed that the Internet makes available does not change the calculus or the underlying property right. Accordingly, the PGA Tour, like the exchanges in the ticker cases, has a property right in the compilation of scores, but that property right disappears when the underlying information is in the public domain.

**Broadcast Rights on the Internet**

[3] Whether the PGA Tour has a separate right to license or sell broadcast rights on the Internet, like sports and entertainment producers currently enjoy in dealing with television and radio, is a novel question. The Supreme Court indirectly addressed the issue in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), when deciding the constitutionality of Communications Decency Act. In *Reno*, the Supreme Court held that the Internet, which the Supreme Court repeatedly referred to as a new medium, was not like traditional broadcast media, i.e., television or radio. Id. at 867, 117 S.Ct. 2329. The Supreme Court distinguished the Internet and the radio transmission found in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748–50, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) based on three distinctions. First, the Internet has not historically been regulated by an agency familiar with the medium. Second, available frequencies on the Internet are not scarce as they are on radio. And finally, affirmative steps are required to access information on the Internet. See *Reno*, 521 U.S. at 868–69, 117 S.Ct. 2329. The Supreme Court concluded that because of these differences, Congress cannot regulate the Internet the same way it can regulate radio. However, none of those differences mandates treating the Internet differently from radio or television in terms of property rights. Whether the government can regulate the Internet does not limit the value of Internet broadcasting or provide a rationale for restricting the use of that information. Both parties would certainly agree that the Internet provides an opportunity to profit from a product by selling advertisement. Television, radio, and print media operate on a similar, if not identical, principle: the selling of advertisement to viewers, listeners, or readers of entertainment, be it sports, entertainment, or news. 23 Therefore, the Court finds that the PGA Tour has a right to sell or license its product, championship golf, and its derivative product, golf scores, on the Internet in the same way the PGA Tour currently sells its rights to television broadcasting stations. 24

Accordingly, the Court finds that the PGA Tour is justified in its restrictions because (1) Morris free-rides on the PGA *1283 Tour’s* efforts, (2) the PGA Tour has a property right in the scores before they are in the public domain, and (3) the PGA Tour has the right to license or sell broadcasting rights of its products over the Internet.

**Monopolization of the Internet Markets**

[4] Monopolization, an offense under Section 2 of the Sherman Act, requires two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Eastman Kodak Co. v. Image Tech. Services Inc.*, 504 U.S. 451, 481, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).

1) Possession of Monopoly Power

[5] Morris argues that the PGA Tour has monopoly power in the relevant market, real-time golf scores, and that power is evidenced by a reduction in output, citing *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). Morris misreads the import of that decision. In *NCAA*, the district court found that absent the NCAA’s regulation more college football games would be broadcast, and therefore the restrictions limited output. See id. at 119, 104 S.Ct. 2948. In the instant case, Morris argues that the PGA Tour’s restrictions have reduced output as evidenced by the reduced number of web sites with real-time golf scores. Morris misconstrues...
outlets with output. Although the number of web sites with real-time golf scores might be reduced, the output of the product is not. Output is restricted in the same manner as an exclusive television broadcast contract: only one station is broadcasting any given tournament. Certainly there would be greater output if two television stations broadcast the golf tournament at the same time, but this is not the output reduction condemned by the NCAA court. There the Supreme Court's concern was the number of games being broadcast, not the number of stations broadcasting a single game. Morris further argues that when the PGA Tour's web site does not work, viewers have no access to real-time golf scores on the Internet. The Court disagrees with that argument, as the logical conclusion would be to force the PGA Tour to allow several television stations to broadcast a tournament, because occasionally one of the stations has technical difficulties. Output has not been reduced, and consumers have not been harmed, evidencing an absence of monopoly power exerted by the PGA Tour.²⁵

2) Willful acquisition or maintenance of that power “Liability [on the second element of a § 2 claim] turns, then, on whether valid business reasons can explain” those actions. See Kodak at 483, 112 S.Ct. 2072. As the Court has already found legitimate business reasons, Morris fails to meet the second element of a § 2 claim.

As Morris has failed to prove either element of a § 2 claim as a matter of law, the PGA Tour's motion for summary judgment on Morris's claim of monopolization of the Internet markets is GRANTED.

Unlawful Refusal to Deal

[6] Under certain circumstances, a unilateral refusal to deal may constitute an antitrust violation. See Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc., 919 F.2d 1517, 1522 (11th Cir.1990). However, in order to prevail on a claim for refusal to deal, the *1284 plaintiff must show both the existence of monopoly power and anticompetitive intent. See id. (“It is clear that monopolistic or other anticompetitive intent is the key factor in determining whether a violation of § 2 has occurred.”); see also Mid–Texas Communications Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1388 (5th Cir.1980); Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir.1970). Courts have used two tests to determine whether a refusal to deal is a violation of antitrust law: intent test and essential facilities test.

1) Intent Test

[7] “The intent test considers whether, under the circumstances of a case, a monopolist’s conduct demonstrates an illegal intent to destroy competition.” Consolidated Gas of Fla., Inc. v. City Gas Co. of Fla., 912 F.2d 1262, 1302 (11th Cir.1990). It is not just an intent to destroy competition, for that is the nature of a competitive market, but an illegal intent as evidenced by, “conduct that unnecessarily excludes or handicaps competitors.” Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985).

Morris asserts that Aspen controls the outcome of this case. Morris argues that, like in Aspen, the PGA Tour's restriction is a stark departure from past practice and against the PGA Tour's economic interest. The facts indicate that the PGA Tour's actions are a departure from the unfettered access previously granted to the media. However, where the defendant in Aspen refused to deal only in order to injure the plaintiff, offering no valid justification, the PGA Tour has provided valid business justifications. See id. at 610, 105 S.Ct. 2847; see also Areeda, Antitrust Law, Vol. IIIA, ¶ 773, pg. 211 (“A legitimate purpose renders any accompanying purpose irrelevant; regardless of motive no firm has a general duty to injure itself in order to benefit a rival.”) Also, unlike in Aspen, the PGA Tour is not discontinuing a profitable joint arrangement with Morris like the defendant in Aspen. See Areeda, ¶ 658(f), pg 136 (arguing for a narrow reading of Aspen to unexplained interruptions of preexisting arrangement). The Court finds that the PGA Tour's actions do not unnecessarily exclude competition or handicap competitors, but are reasonable means to protect a valuable property right.

Also, Morris argues that the restrictions hurt the PGA Tour's interest by limiting the amount of press coverage of its tournament; Morris's claim is disingenuous at best. The PGA Tour's ability to profit from marketing its compilation of scores does not reduce the amount of coverage that the press has traditionally provided of the PGA Tour's tournaments. The posting of real-time golf scores on the Internet supplements traditional press coverage. The PGA Tour's restrictions, then, are not against its self-interest, as the PGA Tour has the
traditional press coverage, plus the coverage and income generated by the real-time scoring on the Internet.26

Consequently, the Court finds that although the PGA Tough might have an intent to harm a competitor, it is not an illegal intent.

*1285 2) Essential Facilities

[8] The withholding of an essential facility is a violation of antitrust law, and an essential facility is one without which a competitor cannot enter or compete in a market. See Covad Comm. Co. v. BellSouth Corp., 299 F.3d 1272, 1285–86 (11th Cir.2002). An essential facilities claim requires a showing of four elements: 1) control of the essential facility by a monopolist, 2) competitor's inability to duplicate the facility, 3) denial of the facility, and 4) feasibility of providing the facility. See id.

[9] Initially, the Court finds that access to the media center is not an essential facility. This Court can find no case to indicate that access to proprietary information, not in the public domain, is an essential facility. Although it may be true that Morris will not be able to compete as effectively with the PGA Tour without access to RTSS, that alone does not make access an essential facility. See Alaska Airlines v. United Airlines, 948 F.2d 536, 544 (9th Cir.1991) (“plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible.”) Additionally, other web sites, such as www.thegolfchannel.com, www.nbc.com, and www.golfonline.com, who do not have access to the media center, still compete with the PGA Tour's web site in the Internet distribution of golf scores. “Essentiality is not proven when actual or potential rivals other than the plaintiff are able to compete without the claimed facility....” See Areeda, Antitrust Law, Vol. IIIA, pg 204. Many competitors would compete more efficiently with access to proprietary information, but a court's role is not to force access to proprietary information in the name of competition, as that would reduce incentive to innovate and ultimately harm consumers. See id. Vol. III, pg 129 (“It would be inconsistent with patent policy to use the antitrust laws to dissipate monopoly power still resting entirely or almost entirely on the unexpired patents that first created it.”)

Assuming arguendo that access to the media center is an essential facility, one who controls an essential facility must provide access “upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.” United States v. Terminal R. R. Ass'n of St. Louis, 224 U.S. 383, 411, 32 S.Ct. 507, 56 L.Ed. 810 (1912). However, in this case, Morris is seeking access to the media center and the scoring system at no cost, putting it at a competitive advantage to the PGA Tour.27 The PGA Tour offers access to the scores through a license as evidenced by its contract with USA Today, and Morris is free to negotiate for the purchase of a license which would put it on a competitive plane with the PGA Tour.

As this Court stated in its denial of a preliminary injunction, “it is not unlawful for a Defendant even one who possesses monopoly power- to refuse to deal with its competitors if there are legitimate pro-competitive reasons for that refusal.” Morris Communications Corp. v. PGA Tour, Inc., 117 F.Supp.2d 1322 (M.D.Fla.2000). As the Court finds that the PGA Tour's restrictions are justified and not against its economic self interest, Morris's claim under the intent test or essential facilities test cannot stand as a matter of *1286 law. Accordingly, the PGA Tour's motion for summary judgment on Morris's claim of unlawful refusal to deal is GRANTED.

Monopoly Leveraging

Monopoly leveraging refers to a monopolist's use of its market power to gain a competitive advantage in a different level or in a different market. See Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, 912 F.2d 1262, 1284–85 (11th Cir.1990)(Tjoflat, C.J., dissenting). Neither the Eleventh Circuit nor the Supreme Court has accepted this theory of antitrust violation, and the Court finds that it is unnecessary to determine its applicability in the instant case. See Aquatherm Industries Inc. v. Florida Power and Light Co., 971 F.Supp. 1419, 1432 (M.D.Fla.1997).

Under the Second Circuit's analysis of monopoly leveraging, a plaintiff must make a showing of anticompetitive intent or an unlawful exercise of power. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272–75(2d Cir.1979). As the Court found supra,
the PGA Tour's conduct is not anti-competitive nor an unlawful exercise of power. Although it might harm Morris, the conduct is an attempt to protect proprietary information and avoid free-riding by a competitor. Accordingly, the PGA Tour's motion for summary judgment on Morris's claim of monopoly leveraging is GRANTED.

Attempted Monopolization of the Internet Markets

[10] Attempted monopolization has three elements: 1) the defendant's specific intent to achieve monopoly power through predatory or exclusionary conduct, 2) the defendant engages in such conduct, and 3) there exists a dangerous probability that the defendant will succeed. See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir.1993). “Specific intent does not merely mean intent to prevail over one's rivals; it goes beyond that to include an intent to control prices or to restrain competition unreasonably.” General Industries Corp. v. Hartz Mountain Corp., 810 F.2d 795, 801 (8th Cir.1987). The Court will not address elements two or three, as it finds the first element dispositive.

A finding of legitimate pro-competitive business reasons forecloses a finding of predatory or exclusionary conduct. See Technical Resource Services, Inc., v. Dornier Medical Systems, Inc., 134 F.3d 1458, 1467 (11th Cir.1998)(“A defendant can escape § 2 liability if the defendant's actions can be explained by legitimate business justifications.”) As the Court has already found the PGA Tour's conduct justified by legitimate business reasons, the PGA Tour's Motion for Summary Judgment on Morris's claim of attempted monopolization is GRANTED.

B. Florida Deceptive and Unfair Trad Practice Act Claims

[11] Along with the antitrust claims, Morris brings a claim under the Florida Deceptive and Unfair Trade Practice Act (FDUPTA), Section 501.201, et. seq. FDUPTA defines violation of the act in subsection 501.203(3), as “any violation of this act and may be based upon any of the following:(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. s. 41 et seq. or this act; (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; (c) Any law, statute, rule, regulation or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.” Mack v. Bristol–Myers Squibb Co., 673 So.2d 100, 103–04 (Fla. 1st DCA 1996). FDUPTA is to be construed consistently with antitrust law. See id., at 103. Morris is correct in its assertion that FDUPTA is not limited *1287 to antitrust violations, but Morris points only to antitrust law as a foundation for its FDUPTA claim. As this Court has found no violation of antitrust law and as Morris asserts no other basis for a claim under FDUPTA, the PGA Tour's Motion for Summary Judgment on Morris's FDUPTA claim is GRANTED.

C. Claim of Torts of Interference

[12] The PGA Tour raises three reasons for its Summary Judgment Motion, but the Court will only address the last: the PGA Tour's actions were justified and not actionable. Florida courts recognize that, “If a defendant interferes with a contract in order to safeguard a preexisting economic interest of his own, the defendant's right to protect his own established economic interest outweighs the plaintiff's right to be free of interference, and his actions are usually recognized as privileged and nonactionable”. Heavener, Ogier Servs. Inc., v. R.W. Florida Region Inc., 418 So.2d 1074, 1076 (Fla. 5th DCA 1982); see also Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1321 (11th Cir.1998); Ethyl Corp. v. Balter, 386 So.2d 1220, 1224 (Fla. 3d DCA 1980). As the Court has already found the PGA Tour's actions were designed to protect its property interest and not improper, the Court finds that the PGA Tour's actions are privileged. Accordingly, the PGA Tour's Motion for Summary Judgment on Morris's claim of tortious interference is GRANTED.

IV. Conclusion

As discussed above, the PGA Tour's Motion for Summary Judgment on all of Morris's claims is GRANTED. Because Morris's Motion addresses the same issues which the Court has discussed above, Morris's Motion for Partial Summary Judgment on liability is DENIED.

The clerk shall enter judgment accordingly and close the file. Further, the PGA Tour's Motion to Continue Trial (Doc. No. 167, filed December 4, 2002) is DENIED as moot.
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All Citations


Footnotes

1 The summary judgment motions and responses were originally filed under seal, and were unsealed by Court Order on June 24, 2002.

2 Morris claims that journalistic integrity requires a journalist to report on news firsthand, if possible, instead of relying on what the creator of the news reports to the journalist or in some fashion to have the ability to verify questionable facts that come to their attention before publishing them. Morris's goal in this suit is to get access to the PGA Tour's scoring system, which will allow Morris to report scores of golfers, but only the scores that the PGA Tour relays to Morris, through a procedure the PGA Tour developed and has in place to gather simultaneous scores in its golf tournament. If Morris were to prevail on its claims, its journalists would, by its own standards, publish information gathered by others. Morris employees do not actually view the action they report on, but merely copy numbers provided by PGA Tour, whether in the media tent or through the PGA Tour's web site. If Morris's reporters believe the PGA Tour's information is incorrect, they may ask that the PGA Tour verify it in order to maintain journalistic integrity, but Morris would only seek to verify unusual scores. For example, if a golfer scores a 9 on a par 3 hole (par is the average or expected number of strokes a player would use to complete the hole), Morris contends that it would alert the PGA Tour and ask that the unusual score be verified. However, Morris would not ask to verify a golf score of 2 or 4 on a par 3 hole, even though that score might be as inaccurate as the score of 9.


4 The parties do not dispute the facts, only their import.

5 Morris Communications Corp. v. PGA Tour, Inc., 117 F.Supp.2d 1322 (M.D.Fla.2000).

6 Under newly developed technology known as "Shotlink," the walking scorers themselves will be able to relay scores directly to the production truck. In addition, the new technology allows the scorers to transmit additional data such as club selection, the lie of the ball, and the distance to the pin. Morris has not sought to syndicate any information obtainable from Shotlink other than the raw score.

7 Morris has also argued that it would be socially wasteful for it to duplicate the PGA Tour's efforts in implementing such a system.

8 While Morris was the only major competitor in the syndication market, many competitors, such as www.thegolfchannel.com, www.nbc.com, and www.golfonline.com, still vied for market share in the distribution of golf scores on the Internet.

9 Although it is a matter of contention when the scoring information becomes legally available to the public, the PGA Tour has conceded that golf scores are in the public domain once they are published on pgatour.com or are publically broadcasted on either television or radio.

10 The Court also concluded that Morris had not satisfied its burden with respect to showing irreparable harm or that the balance of harms and the public interest weighed in favor of injunctive relief. Morris, 117 F.Supp.2d at 1330–31.

11 The “consumers” in the syndication market refer generally to web-site publishers who pay other publishers for real-time scoring information; advertisers, who usually represent the primary source of revenue for Internet web sites; and Internet users, who log on to the various web sites.

12 PGA Tour counters by noting that "cash" consideration (as opposed to promotional equivalents) is the same and that the new contract provides USA Today with more advertising funds and greater technical assistance, as well as expanded use of PGA Tour trademarks.

13 Free-riding is obtaining a benefit at another's expense without contributing to it. See Garner, Black's Law Dictionary, 7th ed. at 676.

14 Morris's claim that replication of RTSS would be socially wasteful belies its claim that it does not free-ride. Replication would be wasteful, precisely because the PGA Tour has invested time, money, and resources that Morris has not and does not wish to expend.

15 Similarly, any single spectator at a basketball, baseball, or football game knows the score of the game, as all the action takes place within his or her sight.
As the Court finds the “hot-news” claim inapplicable, it does not address the five requirements to prove a “hot-news” claim. See Motorola, 105 F.3d at 845.

Nor can a single spectator at a golf tournament know the score of all the players.

The PGA Tour also publishes the scores of the top players to the spectators, who are present under a license from the PGA Tour which prevents their dissemination of the scores off the course.

Currently, the PGA Tour allows Morris to publish the scores as quickly as it can re-key them from the media center, but the PGA Tour does not allow Morris to sell or syndicate that information. Also, a compiler of information can limit the dissemination of that information through contracts, including contracts found on tickets. See ProCD Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir.1996)

Even if the information were in the public domain, the PGA Tour would have the ability to limit the use of the information it provides to Morris under contract law. See ProCD Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir.1996)(holding that producers of a CD, consisting of the content of publicly available phone books, could, under contract law, enjoin purchasers from selling the information, which was clearly in the public domain and not protected by copyright).

Morris has been capitalizing on this type of externality, ever since it has included golf scores in its newspapers’ sports sections.

The Court, in its discussion of free-riding supra, found that the information and scores when first published in the media center are not in the public domain.

In Bruce v. Weekly World News, Inc., 150 F.Supp.2d 313 (D.Mass.2001), the court accepted the opinion of both sides’ experts who agreed that the Internet was a separate medium, distinct from print media, requiring a separate license for use on the Internet. The court awarded additional damages because of the infringing use on the Internet. Id. at 321. If a separate license is required to use a copyrighted picture on the Internet, the producers of a marketable product, like golf scores, should also be able to sell rights on that new medium.

With the emergence of “web-casting” and “streaming” video and other rapid advancements in technology, a negative answer to the question of whether the PGA Tour has broadcast rights on the Internet would stymie advancement and reduce incentive to create entertainment and sports programming by foreclosing a lucrative market. See generally, Kellis, Note: A new Technology Question of Olympic Proportions: Should NBC's License to Broadcast the Games Include Internet Broadcasting Rights?, 8 J. Intell. Prop. L. 245 (2001). To hold otherwise would be similar to a court finding that Major League Baseball could not sell broadcasting rights to television stations in the 1940s with the advent of television.

Whether it would be a violation of antitrust law for the PGA Tour to be the sole outlet of golf scores on the Internet without offering to sell or license that information is not a question before the Court.

Theoretically, the PGA Tour could limit the media’s access to the tournament and the media center to those willing to pay a fee or to the one willing to pay the highest price. Although such a practice would be a departure from its past practice, it would not violate Aspen. The PGA Tour could justify the change with the business justification that the PGA Tour would be better off charging the press an access fee, than gaining the corollary benefit of increased publicity. A court would not be in a position to second guess the business model selected by a company, unless it unnecessarily excluded competitors.

If the Court were to rule for Morris, the Court would have to decide what price Morris would need to pay in order for it to be placed on an equal footing with the PGA Tour. Such rate making is not the appropriate role for a court. See generally, Consolidated Gas Co. of Florida v. City Gas Co., 912 F.2d 1262, 1320 (11th Cir.1990)(Tjoflat, C.J.dissenting).
ATLANTA — Once again, we have a little national anthem controversy in the NFL. But this time, it’s not the players — it’s the singer.

Gladys Knight sung a gorgeous rendition of the national anthem to open Super Bowl Sunday night. Listen closely to the final seconds:

Hear that? Knight appears to say “brave” twice. So here’s the question: Is the song over when the singer hits all the words, or is the song over when the singer stops singing?

Some books are grading the national anthem as an UNDER, ruling that the song ended before Gladys Knight said “brave” for a second time.
— OddsShark (@OddsShark) February 3, 2019

For the purposes of prop betting, it’s not an inconsequential question. Knight’s first time singing “brave” kept the song under the over/under of 1:50, the most common prop bet time. But the second “brave” took her well past the limit. Bovada, for instance, has posted her official time at 1:49.

As we discussed here earlier this week, nobody’s going to get rich or go bankrupt on the national anthem prop bet; most books keep limits somewhere between $50 and $500. But when you’re talking about bettors and their money, there’s no gray area allowed, and no “close enough” either.

UPDATE: At least one sportsbook, BetOnline.ag, decided to just make everyone winners:

National Anthem length grading update:
Our rules stated clock ended at end of first “Brave”. That went about 1:49. Therefore the Under is the official winner.
However...
We have decided to pay out the Over as well. Both sides win. Thank this guy>
@BetOnlineBurns
— Dave Mason (@DaveMasonBOL) February 4, 2019
A new national anthem controversy: Did Gladys Knight go over or under the prop bet?

Jay Busbee  
Yahoo Sports  Feb 3, 2019 6:25 PM
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Gladys Knight had a gem of an anthem, but how long was it? (Getty)

Jay Busbee is a writer for Yahoo Sports. Contact him at jay.busbee@yahoo.com or find him on Twitter or on Facebook.

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Mike Francesa blasts Rams, Sean McVay for Super Bowl LIII performance

NBC Sports Boston

How Beginners Can Invest In Marijuana Stocks

Cannabis Insider’s Report Spotted

Tom Brady reveals what Bill Belichick told Patriots before Super Bowl LIII

NBC Sports Boston
National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (1997)
65 USLW 2506, 1997-1 Trade Cases P 71,705, 1997 Copr.L.Dec. P 27,591...

105 F.3d 841
United States Court of Appeals,
Second Circuit.

The NATIONAL BASKETBALL ASSOCIATION
and NBA Properties, Inc., Plaintiff–Counter–
Defendant–Appellee–Cross–Appellant,
v.
MOTOROLA, INC. doing business as
SportsTrax, Defendant–Counter–
Claimant–Appellant–Cross–Appellee,
Sports Team Analysis and Tracking
Systems, Inc. doing business as Stats, Inc.,
Defendant–Appellant–Cross–Appellee.

Nos. 822, 824, Dockets 96–7975, 96–
7983 (CON) and 96–9123 (XAP).

Argued Oct. 21, 1996.


Synopsis
Professional basketball league brought action against
manufacturer and promoter of hand-held pagers that
provided real-time information about professional
basketball games, alleging copyright infringement,
commercial misappropriation under New York law, false
advertising and false designation of origin under Lanham
Act, and violations of Communications Act. League also
sought to enjoin site with online service provider which
provided similar information. The United States District
Court for the Southern District of New York, Loretta A.
Preska, J., granted relief, 939 F.Supp. 1071, and appeal
was taken. The Court of Appeals, Winter, Circuit Judge,
held that: (1) professional basketball games were not
“original works of authorship” entitled to copyright protection. 17 U.S.C.A. § 102(a).

Affirmed in part, reversed in part; injunction vacated.

West Headnotes (13)

[1] Copyrights and Intellectual Property
Remedies
States
Copyrights and patents
“Hot-news” misappropriation claim that
survives preemption under Copyright Act is
limited to cases where: plaintiff generates or
gathers information at a cost; information is
time sensitive; defendant's use of information
constitutes free ride on plaintiff's efforts;
defendant is in direct competition with
product or service offered by plaintiff; and
ability of other parties to free ride on efforts of
plaintiff and others would so reduce incentive
to produce product or service that its existence
or quality would be substantially threatened.

25 Cases that cite this headnote

Other works
Professional basketball games were not
“original works of authorship” entitled to

10 Cases that cite this headnote

Other works
Providers of hand-held pagers that displayed
updated scores and statistics of professional
basketball games as they were played did
not infringe professional basketball league's
copyright in broadcast of the games;
pagers reproduced only the facts from the
broadcasts, not expression or description
of the game that constituted broadcast. 17

4 Cases that cite this headnote

Where challenged copying or misappropriation relates in part to copyrighted broadcasts of professional basketball games, subject matter requirement for preemption under Copyright Act is met as to both the broadcast and the games. 17 U.S.C.A. § 301.

24 Cases that cite this headnote

   Remedies
   States
   Copyrights and patents
   Subject matter requirement for preemption under Copyright Act is met when work of authorship being copied or misappropriated falls within ambit of copyright protection. 17 U.S.C.A. § 301.

44 Cases that cite this headnote

   Remedies
   States
   Copyrights and patents
   Although broadcasts of professional basketball games were copyrightable while underlying games were not, Copyright Act did not distinguish between the two in analyzing preemption of misappropriation claim, based on copying or taking from copyrightable work. 17 U.S.C.A. § 301.

14 Cases that cite this headnote

[7] Copyrights and Intellectual Property
   Remedies
   States
   Copyrights and patents
   Copyrightable material often contains uncopyrightable elements within it, but Copyright Act preemption bars state-law misappropriation claims with respect to uncopyrightable as well as copyrightable elements. 17 U.S.C.A. § 301.

41 Cases that cite this headnote

[8] Copyrights and Intellectual Property
   Remedies
   States
   Copyrights and patents
   Under general scope requirement, Copyright Act preempts only those state-law rights that may be abridged by Act which, in and of itself, would infringe one of exclusive rights provided by federal copyright law; however, certain forms of commercial misappropriation otherwise within general scope requirement will survive preemption if "extra-element" test is met. 17 U.S.C.A. § 301.

50 Cases that cite this headnote

[9] Copyrights and Intellectual Property
   Remedies
   States
   Copyrights and patents
   Extra elements in addition to elements of copyright infringement that allow “hot-news” claim to survive preemption are: time-sensitive value of factual information, free-riding by defendant, and threat to very existence of product or service provided by plaintiff. 17 U.S.C.A. § 301.

34 Cases that cite this headnote

[10] Copyrights and Intellectual Property
    Remedies
    States
    Copyrights and patents
    Professional basketball league's “hot-news” misappropriation claim against providers of hand-held pagers that displayed updated scores and statistics of league's games as they were played was preempted by Copyright Act; pagers did not have competitive effect on league's primary products, and did not "free-
ride” on league’s proposed pager product. 17 U.S.C.A. § 301.


Misstatements in advertising for hand-held pager displaying updated scores and statistics of professional basketball games as they were played, indicating that pager provided “updated information direct from each arena” which “originated from the press table in each arena” were not material and did not support professional basketball league's Lanham Act false advertising claim; although statistics originated from broadcast of games, statements would not influence consumers in obtaining updated game scores on the pagers, which were only product on market. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

19 Cases that cite this headnote

[12] Antitrust and Trade Regulation

Falsity of statement, as required to support Lanham Act false advertising claim, may be established by proving that advertising is literally false as factual matter, or, although advertisement is literally true, it is most likely to deceive or confuse consumers. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

61 Cases that cite this headnote

[13] Antitrust and Trade Regulation

In addition to proving falsity, plaintiff in Lanham Act false advertising action must also show that defendants misrepresented inherent quality or characteristic of product; this requirement is essentially one of materiality. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

79 Cases that cite this headnote

Attorneys and Law Firms


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Floyd Abrams, Cahill Gordon & Reindel, New York City, for Amici Curiae Interactive Services Association.


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Before: VAN GRAAFFEILAND, WINTER, and ALTIMARI, Circuit Judges.
Motorola, Inc. and Sports Team Analysis and Tracking Systems (“STATS”) appeal from a permanent injunction entered by Judge Preska. The injunction concerns a handheld pager sold by Motorola and marketed under the name “SportsTrax,” which displays updated information of professional basketball games in progress. The injunction prohibits appellants, absent authorization from the National Basketball Association and NBA Properties, Inc. (collectively the “NBA”), from transmitting scores or other data about NBA games in progress via the pagers, STATS's site on America On–Line's computer dial-up service, or “any equivalent means.”

The crux of the dispute concerns the extent to which a state law “hot-news” misappropriation claim based on International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918) (“INS”), survives preemption by the federal Copyright Act and whether the NBA's claim fits within the surviving INS-type claims. We hold that a narrow “hot-news” exception does survive preemption. However, we also hold that appellants' transmission of “real-time” NBA game scores and information tabulated from television and radio broadcasts of games in progress does not constitute a misappropriation of “hot news” that is the property of the NBA.

The NBA cross-appeals from the dismissal of its Lanham Act claim. We hold that any misstatements by Motorola in advertising its pager were not material and affirm.

I. BACKGROUND

The facts are largely undisputed. Motorola manufactures and markets the SportsTrax paging device while STATS supplies the game information that is transmitted to the pagers. The product became available to the public in January 1996, at a retail price of about $200. SportsTrax's pager has an inch-and-a-half by inch-and-a-half screen and operates in four basic modes: “current,” “statistics,” “final scores” and “demonstration.” It is the “current” mode that gives rise to the present dispute. In that mode, SportsTrax displays the following information on NBA games in progress: (i) the teams playing; (ii) score changes; (iii) the team in possession of the ball; (iv) whether the team is in the free-throw bonus; (v) the quarter of the game; and (vi) time remaining in the quarter. The information is updated every two to three minutes, with more frequent updates near the end of the first half and the end of the game. There is a lag of approximately two or three minutes between events in the game itself and when the information appears on the pager screen.

SportsTrax's operation relies on a “data feed” supplied by STATS reporters who watch the games on television or listen to them on the radio. The reporters key into a personal computer changes in the score and other information such as successful and missed shots, fouls, and clock updates. The information is relayed by modem to STATS's host computer, which compiles, analyzes, and formats the data for retransmission. The information is then sent to a common carrier, which then sends it via satellite to various local FM radio networks that in turn emit the signal received by the individual SportsTrax pagers.

Although the NBA's complaint concerned only the SportsTrax device, the NBA offered evidence at trial concerning STATS's America On–Line (“AOL”) site. Starting in January, 1996, users who accessed STATS's 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 a SportsTrax pager. On the AOL site, game scores are updated every 15 seconds to a minute, and the player and team statistics are updated each minute. The district court's original decision and judgment, National Basketball Ass'n v. Sports Team Analysis and Tracking Sys. Inc., 931 F.Supp. 1124 (S.D.N.Y.1996), did not address the AOL site, because “NBA's complaint and the evidence proffered at trial were devoted largely to SportsTrax.” National Basketball Ass'n v. Sports Team Analysis and Tracking Sys. Inc., 939 F.Supp. 1124 (S.D.N.Y.1996), did not address the AOL site, because “NBA's complaint and the evidence proffered at trial were devoted largely to SportsTrax.”
The NBA's complaint asserted six claims for relief: (i) state law unfair competition by misappropriation; (ii) false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (iii) false representation of origin under Section 43(a) of the Lanham Act; (iv) state and common law unfair competition by false advertising and false designation of origin; (v) federal copyright infringement; and (vi) unlawful interception of communications under the Communications Act of 1934, 47 U.S.C. § 605. Motorola counterclaimed, alleging that the NBA unlawfully interfered with Motorola's contractual relations with four individual NBA teams that had agreed to sponsor and advertise SportsTrax.

The district court dismissed all of the NBA's claims except the first—misappropriation under New York law. The court also dismissed Motorola's counterclaim. Finding Motorola and STATS liable for misappropriation, Judge Preska entered the permanent injunction, reserved the calculation of damages for subsequent proceedings, and stayed execution of the injunction pending appeal. Motorola and STATS appeal from the injunction, while NBA cross-appeals from the district court's dismissal of its Lanham Act false-advertising claim. The issues before us, therefore, are the state law misappropriation and Lanham Act claims.

II. THE STATE LAW MISAPPROPRIATION CLAIM

A. Summary of Ruling

Because our disposition of the state law misappropriation claim rests in large part on *preemption by the Copyright Act, our discussion necessarily goes beyond the elements of a misappropriation claim under New York law, and a summary of our ruling here will perhaps render that discussion—or at least the need for it—more understandable.

The issues before us are ones that have arisen in various forms over the course of this century as technology has steadily increased the speed and quantity of information transmission. Today, individuals at home, at work, or elsewhere, can use a computer, pager, or other device to obtain highly selective kinds of information virtually at will. *International News Service v. Associated Press*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918) ( "INS") was one of the first cases to address the issues raised by these technological advances, although the technology involved in that case was primitive by contemporary standards. *INS* involved two wire services, the Associated Press ("AP") and International News Service ("INS"), that transmitted newsstories by wire to member newspapers. *Id.* at 231, 39 S.Ct. at 69–70. INS would also take factual stories from east coast AP papers and wire them to INS papers on the west coast that had yet to publish because of time differentials. *Id.* at 238, 39 S.Ct. at 72. The Supreme Court held that INS's conduct was a common-law misappropriation of AP's property. *Id.* at 242, 39 S.Ct. at 73–74.

With the advance of technology, radio stations began "live" broadcasts of events such as baseball games and operas, and various entrepreneurs began to use the transmissions of others in one way or another for their own profit. In response, New York courts created a body of misappropriation law, loosely based on *INS*, that sought to apply ethical standards to the use by one party of another's transmissions of events.

Federal copyright law played little active role in this area until 1976. Before then, it appears to have been the general understanding—there being no caselaw of consequence—that live events such as baseball games were not copyrightable. Moreover, doubt existed even as to whether a recorded broadcast or videotape of such an event was copyrightable. In 1976, however, Congress passed legislation expressly affording copyright protection to simultaneously-recorded broadcasts of live performances such as sports events. *See* 17 U.S.C. § 101. Such protection was not extended to the underlying events.

The 1976 amendments also contained provisions preempting state law claims that enforced rights "equivalent" to exclusive copyright protections when the work to which the state claim was being applied fell within the area of copyright protection. *See* 17 U.S.C. § 301. Based on legislative history of the 1976 amendments, it is generally agreed that a "hot-news" *INS*-like claim survives preemption. H.R. No. 94–1476 at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748. However, much of New York misappropriation law after *INS* goes well beyond "hot-news" claims and is preempted.

[I] We hold that the surviving "hot-news" *INS*-like claim is limited to cases where: (i) a plaintiff generates or gathers
information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. We conclude that SportsTrax does not meet that test.

B. Copyrights in Events or Broadcasts of Events
The NBA asserted copyright infringement claims with regard both to the underlying games and to their broadcasts. The district court dismissed these claims, and the NBA does not appeal from their dismissal. Nevertheless, discussion of the infringement claims is necessary to provide the framework for analyzing the viability of the NBA's state law misappropriation claim in light of the Copyright Act's preemptive effect.

*846 1. Infringement of a Copyright in the Underlying Games

[2] In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute “original works of authorship” under 17 U.S.C. § 102(a). Section 102(a) lists eight categories of “works of authorship” covered by the act, including such categories as “literary works,” “musical works,” and “dramatic works.” The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.

Sports events are not “authored” in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run.

What “authorship” there is in a sports event, moreover, must be open to copying by competitors if fans are to be attracted. If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering. Even where athletic preparation most resembles authorship—figure skating, gymnastics, and, some would uncharitably say, professional wrestling—a performer who conceives and executes a particularly graceful and difficult—or, in the case of wrestling, seemingly painful—acrobatic feat cannot copyright it without impairing the underlying competition in the future. A claim of being the only athlete to perform a feat doesn’t mean much if no one else is allowed to try.

For many of these reasons, Nimmer on Copyright concludes that the “[f]ar more reasonable” position is that athletic events are not copyrightable. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 2.09[F] at 2–170.1 (1996). Nimmer notes that, among other problems, the number of joint copyright owners would arguably include the league, the teams, the athletes, umpires, stadium workers and even fans, who all contribute to the “work.”

Concededly, caselaw is scarce on the issue of whether organized events themselves are copyrightable, but what there is indicates that they are not. See Production Contractors, Inc. v. WGN Continental Broadcasting Co., 622 F.Supp. 1500 (N.D.Ill.1985) (Christmas parade is not a work of authorship entitled to copyright protection). In claiming a copyright in the underlying games, the NBA relied in part on a footnote in Baltimore Orioles, Inc. v. Major League Baseball Players Assn., 805 F.2d 663, 669 n. 7 (7th Cir.1986), cert. denied, 480 U.S. 941, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987), which stated that the “[p]layers' performances” contain the “modest creativity required for copyright ability.” However, the court went on to state, “Moreover, even if the [p]layers' performances were not sufficiently creative, the [p]layers agree that the cameramen and director contribute creative labor to the telecasts.” Id. This last sentence indicates that the court was considering the copyright ability of telecasts—not the underlying games. *847 which obviously can be played without cameras.

We believe that the lack of caselaw is attributable to a general understanding that athletic events were, and are, uncopyrightable. Indeed, prior to 1976, there was even doubt that broadcasts describing or depicting such
events, which have a far stronger case for copyrightability than the events themselves, were entitled to copyright protection. Indeed, as described in the next subsection of this opinion, Congress found it necessary to extend such protection to recorded broadcasts of live events. The fact that Congress did not extend such protection to the events themselves confirms our view that the district court correctly held that appellants were not infringing a copyright in the NBA games.

2. Infringement of a Copyright in the Broadcasts of NBA Games

As noted, recorded broadcasts of NBA games—as opposed to the games themselves—are now entitled to copyright protection. The Copyright Act was amended in 1976 specifically to insure that simultaneously-recorded transmissions of live performances and sporting events would meet the Act's requirement that the original work of authorship be “fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). Accordingly, Section 101 of the Act, containing definitions, was amended to read:

A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C. § 101. Congress specifically had sporting events in mind:

[T]he bill seeks to resolve, 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.

H.R. No. 94–1476 at 52, reprinted in 1976 U.S.C.C.A.N. at 5665. The House Report also makes clear that it is the broadcast, not the underlying game, that is the subject of copyright protection. In explaining how game broadcasts meet the Act's requirement that the subject matter be an “original work[ ] of authorship,” 17 U.S.C. § 102(a), the House Report stated:

When a football game is being covered by four television cameras, with a director guiding the 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.”

[3] Although the broadcasts are protected under copyright law, the district court correctly held that Motorola and STATS did not infringe NBA's copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast. The “fact/expression dichotomy” is a bedrock principle of copyright law that “limits severely the scope of protection in fact-based works.” Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340, 350, 111 S.Ct. 1282, 1290, 113 L.Ed.2d 358 (1991). “‘No author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author's originality.’” Id. (quoting Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 547, 105 S.Ct. 2218, 2224, 85 L.Ed.2d 588 (1985)).

We agree with the district court that the “[d]efendants provide purely factual information which any patron of an NBA game could acquire from the arena without any involvement from the director, cameramen, or others who contribute to the originality of a broadcast.” 939 F.Supp. at 1094. Because the SportsTrax device and AOL site reproduce only factual information culled from the broadcasts and none of the copyrightable expression of the games, appellants did not infringe the copyright of the broadcasts.
C. The State–Law Misappropriation Claim

The district court's injunction was based on its conclusion that, under New York law, defendants had unlawfully misappropriated the NBA's property rights in its games. The district court reached this conclusion by holding: (i) that the NBA's misappropriation claim relating to the underlying games was not preempted by Section 301 of the Copyright Act; and (ii) that, under New York common law, defendants had engaged in unlawful misappropriation. Id. at 1094–1107. We disagree.

1. Preemption Under the Copyright Act

a) Summary

When Congress amended the Copyright Act in 1976, it provided for the preemption of state law claims that are interrelated with copyright claims in certain ways. Under 17 U.S.C. § 301, a state law claim is preempted when: (i) the state law claim seeks to vindicate “legal or equitable rights that are equivalent” to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106—styled the “general scope requirement”; and (ii) the particular work to which the state law claim is being applied falls within the type of works protected by the Copyright Act under Sections 102 and 103—styled the “subject matter requirement.”

The district court concluded that the NBA’s misappropriation claim was not preempted because, with respect to the underlying games, as opposed to the broadcasts, the subject matter requirement was not met. 939 F.Supp. at 1097. The court dubbed as “partial preemption” its separate analysis of misappropriation claims relating to the underlying games and misappropriation claims relating to broadcasts of those games. Id. at 1098, n. 24. The district court then relied on a series of older New York misappropriation cases involving radio broadcasts that considerably broadened INS. We hold that where the challenged copying or misappropriation relates in part to the copyrighted broadcasts of the games, the subject matter requirement is met as to both the broadcasts and the games. We therefore reject the partial preemption doctrine and its anomalous consequence that “it is possible for a plaintiff to assert claims both for infringement of its copyright in a broadcast and misappropriation of its rights in the underlying event.” Id. We do find that a properly-narrowed INS “hot-news” misappropriation claim survives preemption because it fails the general scope requirement, but that the broader theory of the radio broadcast cases relied upon by the district court were preempted when Congress extended copyright protection to simultaneously-recorded broadcasts.

b) “Partial Preemption” and the Subject Matter Requirement

The subject matter requirement is met when the work of authorship being copied or misappropriated “fall[s] within the ambit of copyright protection.” Harper & Row, Publishers, Inc. v. Nation Enter., 723 F.2d 195, 200 (1983), rev'd on other grounds, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985). We believe that the subject matter requirement is met in the instant matter and that the concept of “partial preemption” is not consistent with Section 301 of the Copyright Act. Although game broadcasts are copyrightable while the underlying games are not, the Copyright Act should not be read to distinguish between the two when analyzing the preemption of a misappropriation claim based on copying or taking from the copyrightable work. We believe that:

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 preemption under § 301(a). Thus, if a baseball game were not broadcast or were telecast without being recorded, the Players' performances similarly would not be fixed in tangible form and their rights of publicity would not be subject to preemption. By virtue of being videotaped, however, the Players' performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted.

Baltimore Orioles, 805 F.2d at 675 (citation omitted).
Copyrightable material often contains uncopyrightable elements within it, but Section 301 preemption bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements. In Harper & Row, for example, we held that state law claims based on the copying of excerpts from President Ford’s memoirs were preempted even with respect to information that was purely factual and not copyrightable. We stated:

[T]he [Copyright] Act clearly embraces “works of authorship,” including “literary works,” as within its subject matter. The fact that portions of the Ford memoirs may consist of uncopyrightable material ... does not take the work as a whole outside the subject matter protected by the Act. Were this not so, states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of material not meeting federal statutory standards.

723 F.2d at 200 (citation omitted). The legislative history supports this understanding of Section 301(a)'s subject matter requirement. The House Report stated:

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.

ProCD's software and data are “fixed in a tangible medium of expression”, and the district judge held that they are “within the subject matter of copyright”. The latter conclusion is plainly right for the copyrighted application program, and the judge thought that the data likewise are “within the subject matter of copyright” even if, after Feist, they are not sufficiently original to be copyrighted. [ProCD, Inc. v. Zeidenberg, 908 F.Supp. 640 at 656–57 (W.D.Wis. 1996)]. Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 676 (7th Cir.1986), supports that conclusion, with which commentators agree.... One function of § 301(a) is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain, which it can accomplish only if “subject matter of copyright” includes all works of a type covered by sections 102 and 103, even if federal law does not afford protection to them.

ProCD, 86 F.3d at 1453 (citation omitted). We agree with Judge Easterbrook and reject the separate analysis of the underlying games and broadcasts of those games for purposes of preemption.

c) The General Scope Requirement
Under the general scope requirement, 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." Computer Assoc.Intl., Inc. v. Altai, Inc., 982 F.2d 693, 716 (2d Cir.1992) (quoting Harper & Row, 723 F.2d at 200). However, certain forms of commercial misappropriation otherwise within the general scope requirement will survive preemption if an “extra-element” test is met. As stated in Altai:

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.”

Id. (quoting 1 Nimmer on Copyright § 1.01[B] at 1–15).

ProCD was in part an application of the extra-element test. Having held the misappropriation claims to be preempted, Judge Easterbrook went on to hold that the plaintiffs could bring a state law contract claim. The court held that the defendants were bound by the software's shrink-wrap licenses as a matter of contract law and that the private contract rights were not preempted because they were not equivalent to the exclusive rights granted by copyright law. In other words, the contract right claims were not preempted because the general scope requirement was not met. ProCD, 86 F.3d at 1455.

We turn, therefore, to the question of the extent to which a “hot-news” misappropriation claim based on INS involves extra elements and is not the equivalent of exclusive rights under a copyright. Courts are generally agreed that some form of such a claim survives preemption. Financial Information, Inc. v. Moody's Investors Service, Inc., 808 F.2d 204, 208 (2d Cir.1986), cert. denied, 484 U.S. 820, 108 S.Ct. 79, 98 L.Ed.2d 42 (1987) (“‘misappropriation’ of ‘hot’ news, under International News Service, is a branch of the unfair competition doctrine not preempted by the Copyright Act according to the House Report” (citation omitted)). The crucial question, therefore, is the breadth of the “hot-news” claim that survives preemption.

*851 In INS, the plaintiff AP and defendant INS were “wire services” that sold news items to client newspapers. AP brought suit to prevent INS from selling facts and information lifted from AP sources to INS-affiliated newspapers. One method by which INS was able to use AP's news was to lift facts from AP news bulletins. INS, 248 U.S. at 231, 39 S.Ct. at 69–70. Another method was to sell facts taken from just-published east coast AP newspapers to west coast INS newspapers whose editions had yet to appear. Id. at 238, 39 S.Ct. at 72. The Supreme Court held (prior to Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)), that INS's use of AP's information was unlawful under federal common law. It characterized INS's conduct as

“Misappropriation” is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as “misappropriation” is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting “hot” news, whether in the traditional mold of International News Service v. Associated Press, 248 U.S. 215 [39 S.Ct. 68, 63 L.Ed. 211] (1918), or in the newer form of data updates from scientific, business, or financial data bases.

H.R. No. 94–1476 at 132, reprinted in 1976 U.S.C.C.A.N. at 5748 (footnote omitted). 5 see also FII, 808 F.2d at 209 (“‘misappropriation’ of ‘hot’ news, under International News Service, is a branch of the unfair competition doctrine not preempted by the Copyright Act according to the House Report” (citation omitted)). The crucial question, therefore, is the breadth of the “hot-news” claim that survives preemption.
legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news.

INS, 248 U.S. at 240, 39 S.Ct. at 72–73.

The theory of the New York misappropriation cases relied upon by the district court is considerably broader than that of INS. For example, the district court quoted at length from Metropolitan Opera Ass'n v. Wagner–Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (N.Y.Sup.Ct.1950), aff'd, 279 A.D. 632, 107 N.Y.S.2d 795 (1st Dep't 1951). Metropolitan Opera described New York misappropriation law as standing for the “broader principle that property rights of commercial value are to be and will be protected from any form of commercial immorality”; that misappropriation law developed “to deal with business malpractices offensive to the ethics of [ ] society”; and that the doctrine is “broad and flexible.” 939 F.Supp. at 1098–1110 (quoting Metropolitan Opera, 101 N.Y.S.2d at 492, 488–89).

However, we believe that Metropolitan Opera ‘s broad misappropriation doctrine based on amorphous concepts such as “commercial immorality” or society's “ethics” is preempted. Such concepts are virtually synonymous for wrongful copying and are in no meaningful fashion distinguishable from infringement of a copyright. The broad misappropriation doctrine relied upon by the district court is, therefore, the equivalent of exclusive rights in copyright law.

Indeed, we said as much in FII. That decision involved the copying of financial information by a rival financial reporting service and specifically repudiated the broad misappropriation doctrine of Metropolitan Opera. We explained:

We are not persuaded by FII's argument that misappropriation is not “equivalent” to the exclusive rights provided by the Copyright Act.... Nor do we believe that a possible exception to the general rule of preemption in the misappropriation area—for claims involving “any form of commercial immorality,”... quoting Metropolitan Opera Ass'n v. Wagner–Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483, ...—should be applied here. We believe that no such exception exists and reject its use here. Whether or not reproduction of another's work is “immoral” depends on whether such use of the work is wrongful. If, for example, the work is in the public domain, then its use would not be wrongful. Likewise, if, as here, the work is unprotected by federal law because of lack of originality, then its use is neither unfair nor unjustified.

FII, 808 F.2d at 208. In fact, FII only begrudgingly concedes that even narrow “hot news” INS-type claims survive preemption. Id. at 209.

Moreover, Computer Associates Intern., Inc. v. Altai Inc. indicated that the “extra element” test should not be applied so as to allow state claims to survive preemption easily. 982 F.2d at 717. “An action will not be saved from preemption by elements such as awareness or intent, which alter ‘the action's scope but not its nature’.... Following this ‘extra element’ test, we have held that unfair competition and misappropriation claims grounded solely in the copying of a plaintiff's protected expression are preempted by section 301.” Id. (citation omitted).

*852 In light of cases such as FII and Altai that emphasize the narrowness of state misappropriation claims that survive preemption, most of the broadcast cases relied upon by the NBA are simply not good law. Those cases were decided at a time when simultaneously-recorded broadcasts were not protected under the Copyright Act and when the state law claims they fashioned were not subject to federal preemption.
For example, Metropolitan Opera, 101 N.Y.S.2d 483, involved the unauthorized copying, marketing, and sale of opera radio broadcasts. As another example, in Mutual Broadcasting System v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup.Ct.1941), the defendant simultaneously retransmitted the plaintiff's baseball radio broadcasts onto telephone lines. As discussed above, the 1976 amendments to the Copyright Act were specifically designed to afford copyright protection to simultaneously-recorded broadcasts, and Metropolitan Opera and Muzak could today be brought as copyright infringement cases. Moreover, we believe that they would have to be brought as copyright cases because the amendments affording broadcasts copyright protection also preempted the state law misappropriation claims under which they were decided.

Our conclusion, therefore, is that only a narrow “hot-news” misappropriation claim survives preemption for actions concerning material within the realm of copyright. See also 1 McCarthy on Trademarks and Unfair Competition (4th ed. 1996), § 10:69, at 10–134 (discussing National Exhibition Co. v. Fass, 133 N.Y.S.2d 379 (Sup.Ct.1954), Muzak, 30 N.Y.S.2d 419, and other cases relied upon by NBA that pre-date the 1976 amendment to the Copyright Act and concluding that after the amendment, “state misappropriation law would be unnecessary and would be preempted: protection is solely under federal copyright”).

In our view, the elements central to an INS claim are: (i) the plaintiff generates or collects information at some cost or expense, see FII, 808 F.2d at 206; INS, 248 U.S. at 240, 39 S.Ct. at 72–73; (ii) the value of the information is highly time-sensitive, see FII, 808 F.2d at 209; INS, 248 U.S. at 231, 39 S.Ct. at 69–70; Restatement (Third) Unfair Competition, § 38 cmt. c.; (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it, see FII, 808 F.2d at 207; INS, 248 U.S. at 239–40, 39 S.Ct. at 72–73; Restatement § 38 cmt. c.; McCarthy, § 10:73 at 10–139; (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff, FII, 808 F.2d at 209, INS, 248 U.S. at 240, 39 S.Ct. at 72–73; (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened, FII, 808 F.2d at 209; Restatement, § 38 at cmt. c.; INS, 248 U.S. at 241, 39 S.Ct. at 73 (“[INS’s conduct] would render [AP’s] publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return.” *853) 8

INS is not about ethics; it is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit seeking entrepreneurs. If services like AP were not assured of property rights in the news they pay to collect, they would cease to collect it. The ability of their competitors to appropriate their product at only nominal cost and thereby to disseminate a competing product at a lower price would destroy the incentive to collect news in the first place. The newspaper-reading public would suffer because no one would have an incentive to collect “hot news.”

[9] We therefore find the extra elements—those in addition to the elements of copyright infringement—that allow a “hotnews” claim to survive preemption are: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.

2. The Legality of SportsTrax

[10] We conclude that Motorola and STATS have not engaged in unlawful misappropriation under the “hot-news” test set out above. To be sure, some of the elements of a “hotnews” INS claim are met. The information transmitted to SportsTrax is not precisely contemporaneous, but it is nevertheless time-sensitive. Also, the NBA does provide, or will shortly do so, information like that available through SportsTrax. It now offers a service called “Gamestats” that provides official play-by-play game sheets and half-time and final box scores within each arena. It also provides such information to the media in each arena. In the future, the NBA plans to enhance Gamestats so that it will be networked between the various arenas and will support a pager product analogous to SportsTrax. SportsTrax will of course directly compete with an enhanced Gamestats.

However, there are critical elements missing in the NBA’s attempt to assert a “hot-news” INS-type claim. As framed by the NBA, their claim compresses and confuses three different informational products. The first product 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 the games. The first and second products are
the NBA's primary business: producing basketball games
for live attendance and licensing copyrighted broadcasts
of those games. The collection and retransmission of
strictly factual material about the games is a different
product: e.g., box-scores in newspapers, summaries of
statistics on television sports news, and real-time facts
to be transmitted to pagers. In our view, the NBA has
failed to show any competitive effect whatsoever from
SportsTrax on the first and second products and a lack of
any free-riding by SportsTrax on the third.

With regard to the NBA's primary products—producing
basketball games with live attendance and licensing
copyrighted broadcasts of those games—there is no
evidence that anyone regards SportsTrax or the
AOL site as a substitute for attending NBA games or
watching them on television. In fact, Motorola markets
SportsTrax as being designed “for those times when you
cannot be at the arena, watch the game on TV, or listen
to the radio ....”

The NBA argues that the pager market is also relevant to
a “hot-news” INS-type claim and that SportsTrax's future
competition with Gamestats satisfies any missing element.
We agree that there is a separate market for the real-time
transmission of factual information to pagers or similar
devices, such as STATS's AOL site. However, we disagree
that SportsTrax is in any sense free-riding off Gamestats.

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

To be sure, if appellants in the future were to collect facts
from an enhanced Gamestats pager to retransmit them to
SportsTrax pagers, that would constitute free-riding and
might well cause Gamestats to be unprofitable because it
had to bear costs to collect facts that SportsTrax did not. If
the appropriation of facts from one pager to another pager
service were allowed, transmission of current information
on NBA games to pagers or similar devices would be
substantially deterred because any potential transmitter
would know that the first entrant would quickly encounter
a lower cost competitor free-riding on the originator's
transmissions.

However, that is not the case in the instant matter. SportsTrax and Gamestats are each bearing their own
costs of collecting factual information on NBA games,
and, if one produces a product that is cheaper or otherwise
superior to the other, that producer will prevail in the
marketplace. This is obviously not the situation against
which INS was intended to prevent: the potential lack of
any such product or service because of the anticipation of
free-riding.

For the foregoing reasons, the NBA has not shown any
damage to any of its products based on free-riding by
Motorola and STATS, and the NBA's misappropriation
claim based on New York law is preempted.

III. THE NBA'S CROSS–APPEAL

dismissal of its false advertising claim under Section 43(a)
of the Lanham Act, 15 U.S.C. § 1125(a). This claim
was based on a January 1996 Motorola press
release stating that SportsTrax provides “updated game
information direct from each arena” which “originate[s]
from the press table in each arena” and on a statement
appearing on the spine of the retail box and on the retail
display stand that SportsTrax provides “game updates
from the arena.”

NBA argues that because STATS reporters collect their
information from television and radio broadcasts, the
information is not “direct from each arena” or even “from
the arena.” Motorola responds that the statement about
information coming from the press table was an isolated
remark occurring only in that press release. It also claims
that the assertion that the game updates come “from the
To establish a false advertising claim under Section 43(a), the plaintiff must demonstrate that the statement in the challenged advertisement is false. “Falsity may be established by proving that (1) the advertising is literally false as a factual matter, or (2) although the advertisement is literally true, it is likely to deceive or confuse customers.” Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir.1995). However, in addition to proving falsity, the plaintiff must also show that the defendants “misrepresented an ‘inherent quality or characteristic’ ” of the product. National Assoc. of Pharmaceutical Mfrs. v. Ayerst Lab., 850 F.2d 904, 917 (2d Cir.1988) (quoting Vidal Sassoon, Inc. v. Bristol–Myers Co., 661 F.2d 272, 278 (2d Cir.1981)). This requirement is essentially one of materiality, a term explicitly used in other circuits. See American Tel. & Tel. Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1428 n. 9 (3d Cir.1994) (plaintiff alleging false advertising must prove “that the deception is material in that it is likely to influence purchasing decisions”) (citations and internal quotation marks omitted), cert. denied, 514 U.S. 1103, 115 S.Ct. 1838, 131 L.Ed.2d 757 (1995); ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 964 (D.C.Cir.1990) (false or misleading ads must be “material in their effects on buying decisions”); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1500 (5th Cir.1990) (deception must be “material, in that it is likely to influence the purchasing decision”); see also 3 McCarthy on Trademarks § 27:35 at 27–54 (there must be “some showing that the defendant's misrepresentation was ‘material’ in the sense that it would have some effect on consumers' purchasing decisions.”).

The district court found, “[a]fter viewing the complained-of statements in this action in their context,” that “[t]he statements as to the particular origin of game updates constitute nothing more than minutiae about SportsTrax.” 939 F.Supp. at 1110. We agree with the district court that the statements in question are not material in the present factual context. The inaccuracy in the statements would not influence consumers at the present time, whose interest in obtaining updated game scores on pagers is served only by SportsTrax. Whether the data is taken from broadcasts instead of being observed first-hand is, therefore, simply irrelevant. However, we note that if the NBA were in the future to market a rival pager with a direct datafeed from the arenas—perhaps with quicker updates than SportsTrax and official statistics—then Motorola's statements regarding source might well be materially misleading. On the present facts, however, the complained-of statements are not material and do not misrepresent an inherent quality or characteristic of the product.

IV. CONCLUSION

We vacate the injunction entered by the district court and order that the NBA's claim for misappropriation be dismissed. We affirm the district court's dismissal of the NBA's claim for false advertising under Section 43(a) of the Lanham Act.

Footnotes

1 The other three SportsTrax modes involve information that is far less contemporaneous than that provided in the “current” mode. In the “statistics” mode, the SportsTrax pager displays a variety of player and team statistics, such as field goal shooting percentages and top scorers. However, these are calculated only at half-time and when the game is over. In the “final scores” mode, the unit displays final scores from the previous day’s games. In the “demonstration” mode, the unit merely simulates information shown during a hypothetical NBA game. The core issue in the instant matter is the dissemination of continuously-updated real-time NBA game information in the “current” mode. Because we conclude that the dissemination of such real-time information is lawful, the other modes need no further description or discussion.

2 The NBA moved initially for a preliminary injunction and a hearing was held on that motion. Subsequently, the parties agreed to consolidate the hearing into a trial on the merits, submitting supplemental briefing and attending an additional oral argument.

3 The text of Section 102(a) reads:

§ 102. Subject matter of copyright: In general
(a) 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, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) motion pictures and other audiovisual works;
(6) sound recordings; and
(8) architectural works.

The relevant portions of the statute, 17 U.S.C. § 301, read:

§ 301. Preemption with respect to other laws
(a) On and after January 1, 1978, 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, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—
(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or ...
(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

Although this passage implies that INS survives preemption because it fails the general scope requirement, Nimmer apparently takes the view adopted by the district court, namely that INS survives preemption because the subject matter requirement is not met. Nimmer § 1.01[B][2][b] at 1–44.2.

State law claims involving breach of fiduciary duties or trade-secret claims are not involved in this matter and are not addressed by this discussion. These claims are generally not preempted because they pass the "extra elements" test. See Altai, 982 F.2d at 717.

Quite apart from Copyright Act preemption, INS has long been regarded with skepticism by many courts and scholars and often confined strictly to its facts. In particular, Judge Learned Hand was notably hostile to a broad reading of the case. He wrote:

"[W]e think that no more was covered than situations substantially similar to those then at bar. The difficulties of understanding it otherwise are insuperable. We are to suppose that the court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter."


The facts of the INS decision are unusual and may serve, in part, to limit its rationale.... The limited extent to which the INS rationale has been incorporated into the common law of the states indicate that the decision is properly viewed as a response to unusual circumstances rather than as a statement of generally applicable principles of common law. Many subsequent decisions have expressly limited the INS case to its facts.

Some authorities have labeled this element as requiring direct competition between the defendant and the plaintiff in a primary market. "[I]n most of the small number of cases in which the misappropriation doctrine has been determinative, the defendant's appropriation, like that in INS, resulted in direct competition in the plaintiffs' primary market ... Appeals to the misappropriation doctrine are almost always rejected when the appropriation does not intrude upon the plaintiff's primary market.", Restatement (Third) of Unfair Competition, § 38 cmt. c, at 412–13; see also National Football League v. Governor of State of Delaware, 435 F.Supp. 1372 (D.Del.1977). In that case, the NFL sued Delaware over the state's lottery game which was based on NFL games. In dismissing the wrongful misappropriation claims, the court stated:
While courts have recognized that one has a right to one's own harvest, this proposition has not been construed to preclude others from profiting from demands for collateral services generated by the success of one's business venture.

Id. at 1378. The court also noted, “It is true that Delaware is thus making profits it would not make but for the existence of the NFL, but I find this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing those of plaintiffs' fans who want to go to the stadium or, indeed, the sidewalk popcorn salesman who serves the crowd as it surges towards the gate.” Id.

It may well be that the NBA's product, when enhanced, will actually have a competitive edge because its Gamestats system will apparently be used for a number of in-stadium services as well as the pager market, resulting in a certain amount of cost sharing. Gamestats might also have a temporal advantage in collecting and transmitting official statistics. Whether this is so does not affect our disposition of this matter, although it does demonstrate the gulf between this case and INS, where the free-riding created the danger of no wire service being viable.

In view of our disposition of this matter, we need not address appellants' First Amendment and laches defenses.

The text of 15 U.S.C. § 1125(a)(1) reads in pertinent part:

§ 1125. False designations of origin, false descriptions, and dilution forbidden
(a) Civil action; any person
(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.
Who owns real-time sports data?
Daniel Dobson attained his 15 minutes of fame in the spotlight last month during the Australian Open tennis tournament in Melbourne. Dobson, a British national, was arrested on-site and accused of “courtsiding” in violation of a new law centered on betting integrity. The practice of courtsiding in tennis dates back to at least 2008 and involves the clandestine transmission of real-time data. The recipients of such transmissions are often those involved in high-stakes sports wagering.

The usefulness of courtsiding stems from its speed. By communicating on-court events as they happen, the recipient can exploit the 5 to 10 second delay attached to data transmissions from “official” mediums or the accompanying television broadcast. A sophisticated sports gambler in possession of information about what has happened on-court before betting odds change is at a decided advantage when live-wagering on a peer-to-peer exchange or via an online sports book. Think of it as arbitrage for sports.

The Dobson kerfuffle is the most recent example highlighting a lingering question that permeates sports analytics of the type to be discussed at the upcoming MIT Sloan event: Who owns sports data?

It's complicated and involves two potential paths. One path pertains to historical data. The other is concerned with real-time sports data. The legal status of the former is fairly well-settled. Newspapers and other media outlets have been publishing box scores from sporting events for over a century without having to pay any type of licensing fee to the league, teams, or athletes involved in the underlying games. In the United States, the First Amendment clearly attaches to the dissemination of factual information about newsworthy events in the public domain.

The second path is trickier. What if live data are gathered by screen scraping copyrighted broadcasts or via on-location courtsiders hired to opaquely re-transmit the information? Certain sports leagues have seemingly taken the position that such data are proprietary. A spokeswoman for the ATP World Tour, a governing body for men’s professional tennis, provided the following illustrative quote when interviewed by Bloomberg’s Danielle Rossingh in 2011 (Note the revealing use of the possessive “our”):

There are a lot of unauthorized people out there collecting our data, either scraping it off our websites or television or sitting in the stands, keying in every shot, often with errors, and selling it for substantial profit.

Last year, a top PGA Tour executive issued the following edict directed towards credentialed golf journalists:

As you know, our media regulations prohibit the use of real-time, play-by-play transmission in digital outlets. In order to enforce these regulations, beginning this year, we will revoke the on-site credentials of all journalists affiliated with outlets that
post play-by-play coverage, whether those posts are originating from tournament site or otherwise.

A number of legal decisions cast doubt on the scope and permissibility of real-time data ownership, making the move towards monetization by sports leagues uncertain. Two cases stand out. The first was decided in 1918 (not a typo). In *International News Service v. Associated Press*, the U.S. Supreme Court conferred a limited property right in what was described as “hot news.” Nearly a century ago, the hot news involved the AP’s reporting from the European battlefields of World War I. Plaintiff AP sued its competitor, alleging that INS misappropriated news the AP had originally gathered by repackaging the material as its own and selling it in different time zones. Ruling in favor of the AP, a splintered Supreme Court concluded that defendant INS was “endeavoring to reap where it has not sown.”

The near-identical issue was litigated in the sports industry 80 years later. In *NBA v. Motorola*, the league sued over a Motorola mobile pager service that offered statistics from basketball games in progress. Motorola was joined in the litigation by co-defendant STATS, a Chicago-based data company. The NBA made a half-dozen legal claims, including misappropriation, false advertising, copyright infringement, and unlawful interception of communications. The only claim that stuck at the trial court level was the NBA’s misappropriation claim, but it was enough for the league to get an injunction barring the service.

On review before the U.S. Court of Appeals for the Second Circuit, Motorola and STATS argued that the NBA should not be protected under the narrow safe harbor enunciated in the 1918 Supreme Court case. Several factual findings proved dispositive. First, the appellate court found that the NBA’s primary products involved “producing basketball games with live attendance and licensing copyrighted broadcasts of those games.” Second, the three judge panel determined that “Motorola and STATS expend their own resources to collect purely factual information generated in NBA games to transmit to [the] pagers.”

These findings moved the court to conclude that the NBA suffered no damage based on any purported “free-riding” by Motorola and STATS. The *NBA v. Motorola* case remains a hurdle for sports entities looking to commodify real-time data.

Sports leagues are trying to effectuate an end run around the precedent in at least three ways. First, they are investing in their own analytics infrastructure. The NBA is a leader in this field, as evidenced by its move to install motion-tracking cameras in every arena and create a vast statistical database for media and fans. By doing so, the NBA will be able to more forcefully posit that it is a direct competitor of a company offering a service similar to Motorola.
Two, numerous sports leagues are making a huge push into the lucrative and data-rich fantasy sports space. This calculated move arose after Congress passed the Unlawful Internet Gambling Enforcement Act in 2006 and included a narrow carve-out for fantasy sports.

Third, some leagues have moved to partner with former courtroom adversaries. Who is the NBA’s collaborator in connection with the high-tech cameras? None other than STATS.

As Pando’s James Robinson detailed last month, the evolving live sports watching experience is being infused with real-time data. Live wagering and quasi-gambling fantasy sports also drive consumer interest in sporting events.

But don’t expect the real-time sports data monetization movement to be smooth – the law usually lags behind technological developments.

[Image via Phil Roeder]

Read this next

**Sporting Innovations wants to turn the live sports watching experience on its head**

*James Robinson*

You’re a Utah Jazz fan seated in the EnergySolutions Arena in Salt Lake City. It’s approaching halftime and the game is tight. Shooting guard Gordon Hayward slashes in and takes an inbound pass from rookie point guard Trey Burke. He slips the defense and puts up a floater. Nothing but net. The crowd roars.

**The real reason nobody is going to pay for Tinder? Creepiness isn't a business model**

*David Holmes*

The dating app Tinder, which lets users accept or reject potential mates in their area by swiping right or left, has plenty of users -- 50 million, according to some sources. But like so many wildly popular products in the new app economy, it doesn't make any money.

**The “Bit” and the “Coin”: The two huge opportunities hidden inside bitcoin**

*Santi Subotovsky, Guest Contributor*

[Editor’s note: This is a guest post by Santi Subotovsky, partner at Emergence Capital. The post went through PandoDaily’s usual editorial process. Mr. Subotovsky was not paid for this post.]
In this series we will explore some of the important case law that is relevant to the sports leagues’ argument that they should be compensated for “data,” “intellectual property,” or whatever other term du jour the sports league executives choose to use.

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The quest for data rights and fees has been one that has evolved since it first emerged in Indiana in January of 2018. The early wave of requests for one percent integrity fees has died down, with the leagues seeking .25 percent in New York.

The question that many are asking is why should the leagues get paid? What is the foundation of their argument? The short answer is that their argument’s foundation is built on sand in a typhoon zone. What follows is an overview of one of the cases that is the basis for the long answer.

The case:

National Basketball Association v. Motorola, and Sports Team Analysis and Tracking Systems, Inc. (STATS)

What happened in the case?
updated information regarding live NBA games. The information was gathered and distributed by STATS via the pagers and online via STATS website.

In January 1996, Motorola released the SportsTrax pager for sale at the retail price of $200 (about $320 today). The pager had four modes: statistics, final scores, demonstration and current. It was the current mode, which the NBA took exception to. The SportsTrax current mode, which was updated every two to three minutes, displayed six different pieces of information:

1. The teams playing
2. Scores
3. Team with the ball
4. Whether a team is in the free-throw bonus
5. Which quarter it was
6. How much time was remaining

SportsTrax relied on STATS reporters, much like integrity monitoring companies still use today. STATS reporters watched (or listened) to broadcasts of games and then entered changes and updates into their own computers. This information was then transmitted to STATS who disseminated it to the SportsTrax pagers via satellite and then to various local FM radio networks, which emitted the signal to the pagers.

The NBA argued that Motorola and STATS had violated state laws regarding unfair competition by misappropriating the rights of the NBA, and that Motorola and STATS had engaged in false advertising. These issues were addressed on appeal at the Court of Appeals for the Second Circuit.

What did the court say?

On the issue of misappropriation by Motorola and STATS, the Court noted that the issues are not new and in fact have their roots in the International News Service v. Associated Press case from 1918. In going through the history of the misappropriation doctrine, the court stated:

With the advance of technology, radio stations began “live” broadcasts of events such as baseball games and operas, and various entrepreneurs began to use the transmissions of others in one way or another for their own profit. In response, New York courts created a body of misappropriation law, loosely based on INS, that sought to apply ethical standards to the use by one party of another’s transmissions of events.

Prior to the Copyright Act of 1976, there was a “general understanding” that live events like sporting events were not copyrightable; in fact, there were even doubts as to whether a recording of a live event was copyrightable prior to passage of Congress’s landmark intellectual property statute in 1976. The Copyright Act extended protection to the broadcasts of live events, but not the events themselves.

In order to have been successful on the misappropriation claim against Motorola and SportsTrax, the NBA needed to satisfy the five-part hot news misappropriation test:

- A plaintiff generates or gathers information at a cost,
- the information is time-sensitive,
- a defendant’s use of the information constitutes free riding on the plaintiff’s efforts,
- the defendant is in direct competition with a product or service offered by the plaintiffs, and
- the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

The NBA was unsuccessful in convincing the Second Circuit that they met the required elements of the hot news misappropriation test.
broadcasts?

The Second Circuit “held that Motorola and STATS did not infringe on the NBA's copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast.”

There is no copyright protection for facts, like scores, and as such, Motorola was able to watch the broadcasts and then redistribute the information. The court noted: “[d]efendants provide purely factual information which any patron of an NBA game could acquire from the arena without any involvement from the director, cameramen, or others who contribute to the originality of a broadcast.”

What did the NBA do?

Perhaps sensing the need to be in direct competition with Motorola and STATS, the NBA launched a service called Gamestats, which provided official play-by-play information to the media at each NBA game. The NBA even planned to launch a pager system to compete with SportsTrax. The Second Circuit noted that no one was confusing the information on the SportsTrax pager for being in attendance at an NBA game or watching a live broadcast, as such the NBA’s primary business—producing basketball games and licensing broadcasts—was not in competition with SportsTrax.

With regards the Gamestats project, the court stated that the SportsTrax pager was still not free-riding on the NBA's work because the statistics for both Gamestats and SportsTrax were independently gathered.

The NBA was defeated.

How does this apply to legalized sports betting?

Despite the loss at the Second Circuit Court of Appeals, the NBA has taken to repeatedly emphasizing their rights in-game information. There appears to be a very real effort by the NBA executives, and other sports league executives, to have state legislators grant them a property right in the information associated with the games themselves. The likelihood that such a grant would survive litigation is uncertain, but it would likely be a costly challenge for any entity seeking to challenge such a property right.

The Motorola and STATS case likely remains one of the most important cases for foreshadowing the outcome of litigation involving sports data in the world of legal sports betting in the United States. The case is possibly a major blow to the sports leagues, as the case appears to uphold the rights of entities to watch games and then disseminate the scores to others provided that the companies are not free riding on the leagues property.

While delays associated with broadcasts may date some information, rendering it no longer useful to bookmakers, there appears to remain lawful means of collecting and disseminating data outside of the framework that the leagues have advocated.

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Washington DC drops "royalty fee" from sports betting bill

29 November 2018

Washington D.C.'s City Council has advanced a bill to legalise sports betting in the state, but removed an amendment awarding a so-called royalty fee for professional sports leagues.

The Committee on Finance and Revenue signed off on Bill B22-0944 during a meeting at the District of Columbia Council yesterday (November 28).

During the meeting, committee chair and councilmember Jack Evans set out how the state intends to authorise the D.C. Lottery to partner with vendors to offer both in-person and online sports wagering.

However, Evans' hopes of adding what he described as a "royalty fee" of 0.25% of revenue to appease the major sports leagues were rejected by his fellow council members before the bill was ratified to go to a hearing before the full council next week (December 4).

Beginning the committee meeting, Evans said state forecasts place revenue at $7.7m (£6.0m/€7.8m) for the city's 2019 fiscal year and $91.7m in revenue over the first four years following the passage of B22-0944, which was originally introduced in September.

Evans then set out four technical amendments to the bill, which he encouraged the committee to accept in order for the bill to progress.

Amendments included specifically excluding fantasy sports from the bill, adding language to reaffirm the D.C. lottery as the contracting authority, setting a two-block exclusivity zone for designated gambling facilities at sports venues, and also language related to a royalty fee.

This final point proved a sticking point for some members of the committee after Evans, who admitted
resulted in a compromise whereby the D.C. Lottery would gain use of the leagues’ logos and trademarks in return for 0.25% of sports betting revenue.

Evans urged the committee to approve the amendment, saying that it could be changed at a later date, either before the first or second reading in the full council.

“I can’t say this is right or wrong, but what I would like to do is keep it as it is and move forward,” Evans said. “This is more about my best efforts to give everybody something and try to do the right thing. I could argue why we shouldn’t do a royalty fee and why we should do it, and there is no right answer that I can come up with.”

However, some members of the committee voiced their displeasure at plans for the integrity fee, with Councilmember Vince Gray saying: “I don’t understand why we have to invest another 0.25% of the revenue when it’s not done anywhere else in the US. I appreciate the efforts you have made to find a compromise here, but this is not something I want to find a compromise on.

“I believe these sports leagues do very well and they don’t need another 0.25% of revenue that could instead go towards supporting valuable programs in DC,” Gray added.

The committee overwhelmingly voted to strike the amendment from the bill, which now goes forward to the full council for a first reading on December 4. The other amendments were all passed, though the designated facilities tenet also caused controversy.

Councilmember White also raised concerns about the amendment on designated facilities and the two-block extension exclusivity. This applies to four major sports venues in D.C., including RFK Stadium, Capital One Arena, Nats Park and Audi Field.

Evans noted there is a strong argument being made by operators that every company should compete in the city, though also noted that others had pushed for the D.C. Lottery to be the exclusive sports betting operator in the state. The state favours the latter approach and Evans said he has tried to come up with a hybrid solution to please all parties.

In terms of how this will work, he spoke of a yet-to-be-announced agreement between MGM and Nats Park. This would mean fans visiting the venue would only be able to bet via the MGM app inside the stadium, while access to other apps would be blocked when within two blocks of the venue. However, when outside of this area and similar exclusion zones, punters would only be able to bet via the D.C. Lottery app.