Gamecasts and *NBA v. Motorola*: Do They Still Love This Game?

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For an avid sports fan, it is sometimes challenging to watch every important game while simultaneously keeping other commitments. Consider a law student who must choose between being prepared for class the following day and watching his or her favorite team. Listening to Dick Vitale rant and rave about the next "diaper dandy" while trying to learn the Rule Against Perpetuities is not easy. Fortunately, gamecasts[2] now make it possible for a sports fan that is too busy to watch a game to keep up with sports action. For example, a law student can make the responsible decision to go to the library to study but will also be able to check the status of games via online gamecasts.

A gamecast is a real-time description of a sporting event broadcast over the Internet.[3] An employee or law student may not have access to a television or radio in the office or law library, but most likely can get to a computer and, therefore, can access online gamecasts. There are gamecasts for all of the major sports, and gamecasts are available on a host of commercial websites. Thus, gamecasts are a viable option for keeping up with sports action.

Gamecasting is a relatively new means of communicating information and, as such, there are several unanswered legal questions associated with gamecasts. This Comment explores some of those questions. Part I discusses Major League Baseball's recent assertion that gamecasts are protectable as exhibitions of

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[2] "Gamecasting is the new label for the on-line distribution of as-it-happens information about sports scores, players and action. It's a growing phenomenon on the web." *Can Major League Baseball licence gamecasts?* (Feb. 12, 2003), *at* http://www.out-law.co.uk/php/page.php?page_id= canmajorleaguebas1070365105 (on file with the North Carolina Journal of Law & Technology).

[3] It includes information about the score, players, time, game situation, etc. It conveys this information through text and graphics.

games. Part II looks at the relevant case law, specifically a case involving the National Basketball Association ("NBA") and pagers that delivered real-time information about ongoing games. Part III attempts to extrapolate how a case involving gamecasts might be resolved under the analysis from the NBA case. Part IV suggests a solution to the legal confusion surrounding gamecasts. Congress should add language to the Copyright Act specifically protecting gamecasts, much like the protection sports leagues have for radio and television broadcasts. The ultimate conclusion of this Comment is that while case law may allow sports associations to protect exclusive rights to gamecast, a better solution would be to bring gamecasts under the definition of broadcasts in the Copyright Act.

I. The Problem

Thorny legal issues surrounding gamecasting recently were brought to the forefront by Major League Baseball ("MLB"). Specifically, MLB asserted that it has exclusive rights to transmit real-time information about its games via the Internet.[4] This information includes the score, position players, who (if anyone) is on base, the batter, the pitcher, the pitch count, and descriptions about each pitch and its result. MLB presents its own gamecasts, but many other sports websites, such as ESPN.com, also provide gamecasts of MLB games. Currently, these other websites do not have to pay a license fee to transmit their respective gamecasts; however, MLB seems ready to assert proprietary rights to the gamecasting of MLB games.[5]

MLB believes that anyone desiring to produce a gamecast should get its permission before doing so.[6] Presumably, this permission would include paying a license fee or some other monetary accommodation.[7] MLB believes it is entitled to this

[4] Mark McClusky, *Baseball Throws Web a Curve*, Wired News (Nov. 27, 2003), *at* http://www.wired.com/news/games/0,2101,61119,00.html (on file with the North Carolina Journal of Law & Technology).
[5] *Id.*
[6] *Id.*
[7] *Id.*

compensation because, in the words of Bob Bowman, CEO of MLB Advanced Media, "[i]f someone is communicating information about a game in real time, on a pitch-by-pitch basis, that's an exhibition of that game . . . . There's no difference, in our eyes, between exhibiting a game using text and graphics and doing it on radio or television."[8] Indeed, it is not difficult to imagine a gamecast that provides even more information than television or radio broadcasts of games. For example, a baseball gamecast could provide information about the speed of batted balls or outfielder throws, something the television viewer or radio listener may not receive.[9]

During the MLB playoffs, gamecasts on MLB's website drew 750,000 users a day.[10] Such data provides strong evidence that the average sports enthusiast views gamecasts as a viable alternative to TV or radio broadcasts, or at least preferable to waiting for results and highlights on ESPN's SportsCenter. It is easy to see why sports associations such as MLB are interested in protecting gamecasts. So why have MLB and other leagues not fought more aggressively for this protection? One answer is the Second Circuit's decision in *National Basketball Association v. Motorola, Inc.*[11]

II. The Law: *NBA v. Motorola*

A. Background

The controversy between the National Basketball Association ("NBA") and Motorola in *NBA v. Motorola* arose out of circumstances similar to MLB's current attempt to protect rights to gamecasts. Motorola manufactured the SportsTrax paging

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[8] *Id.*

[9] Michael Hiestand, *MLB takes hardball stance on Web sites' use of its data*, USAToday.com (Oct. 23, 2003), *at* http://usatoday.com/sports/columnist/hiestand/2003-10-23-hiestand_x.htm (on file with the North Carolina Journal of Law & Technology).

[10] *Id.*

[11] NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

device and began marketing it in January 1996.[12] The pager displayed information about NBA games that were in progress, including team names, score, possessions, number of fouls, quarter, and how much time was left in the quarter.[13] The information was updated every two to three minutes, with a lag time of two or three minutes between the actual events and the corresponding display of information.[14]

The Sports Team Analysis and Tracking Systems company ("STATS") worked in conjunction with Motorola to produce the pagers. STATS provided the statistical information about the games in progress[15] by watching the games on TV or listening to them on the radio.[16] That information was then relayed over a network until it reached the individual pagers.[17] STATS also maintained its own website that provided even more information and more frequent updates than the pager.[18] The Second Circuit regarded the legal issues surrounding the pager and website as identical and indicated that its ruling applied with equal force to both.[19]

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[12] *Id.* at 843.
[13] *Id.* at 844.
[14] *Id.*
[15] *Id.* at 843.
[16] *Id.* at 844.
[17] [STATS] 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.

Id.
[18] *Id.*
[19] *Id.*

B. The Court's Analysis

On appeal,[20] the Second Circuit discussed copyright law with respect to sporting events and reexamined the NBA's state law "hot-news" misappropriation claim in detail.[21] The court began its analysis by reviewing the applicability of copyright law to sporting events and broadcasts of sporting events. Next, the court began a copyright preemption analysis, considering the NBA's "hot-news" misappropriation claim. Finally, the court analyzed the elements of the "hot-news" claim that survived preemption.

1. Copyright Law

With respect to copyright law, the court examined the NBA's ability to copyright its games.[22] The court concluded that the basketball games did not meet the subject matter requirements for federal copyright protection because the games were not "original works of authorship" as required by the Copyright Act.[23] The court distinguished the extensive preparation required to produce sporting events from the protectable underlying script of a play or movie.[24] The court also recognized practical problems with allowing copyright in a sporting event, such as impairing fair competition[25] and questions of copyright ownership.[26]

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[20] The NBA filed several claims against Motorola, all of which were dismissed by the district court except the state law misappropriation claim. NBA v. Sports Team Analysis & Tracking Sys. Inc., 939 F. Supp. 1071 (S.D.N.Y. 1996). The district court found Motorola liable for misappropriation and entered a permanent injunction. *Id.* at 1075.

[21] *Motorola*, 105 F.3d at 846–54.

[22] *Id.* at 846.

[23] 17 U.S.C. § 102(a) (2003); *Motorola*, 105 F.3d at 846.

[24] *Motorola*, 105 F.3d at 846.

[25] 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

The Second Circuit also addressed the NBA's claim for copyright protection of the broadcast itself. The court recognized that these broadcasts were expressly copyrightable under the Copyright Act.[27] The court, however, did not find that Motorola infringed on the NBA's copyright due to the fact that the pager only reproduced facts from broadcasts and not the expression of the broadcasts.[28] The court described the protectable expression of a broadcast as the product resulting from the work of television cameramen and directors.[29]

2. Misappropriation

Once the court established that Motorola was not infringing the NBA's copyright, the court considered the state law "hot-news" misappropriation claim. "Hot-news" claims are based on *International News Service v. Associated Press* ("*INS*").[30] In *INS*, one wire news service company copied factual news stories from another wire news service.[31] The Supreme Court found that the offending news service committed common law misappropriation

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> 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.

Id.

[26] *Id.* ("[T]he 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.'") (citing 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.09[F] at 2-170.1 (1996)).

[27] *Id.* at 847. The Copyright Act provides that "[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 (2003).

[28] *Motorola*, 105 F.3d at 847 ("'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.'") (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991)).

[29] *Motorola*, 105 F.3d at 847.

[30] 248 U.S. 215 (1918).

[31] *Id.* at 231.

because the copied information was time-sensitive and the copier did not have to bear any expense in gathering the news stories.[32] According to the *Motorola* court, the elements of a "hot-news" claim are

> 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.[33]

To resolve the "hot-news" claim, the court went through a copyright preemption analysis. A state law claim is preempted when the state law seeks to protect rights equivalent to those already protected by copyright law and when the work the state law applies to falls under the subject matter of copyright law.[34] A preemption analysis thus has two distinct requirements: the general scope requirement and the subject matter requirement.[35] The general scope requirement mandates that a state law claim seek to vindicate rights equivalent to the exclusive rights already

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[32] *Id.* at 242.

[33] *Motorola*, 105 F.3d at 845.

[34] 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.

17 U.S.C. § 301 (2003).

[35] *See* Harper & Row, Publishers v. Nation Enter., 723 F.2d 195, 199–200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

protected by copyright law.[36] If the state law claim offers substantively different protection than the protection under copyright law, then the state law claim is said to have an extra element, and the general scope requirement is not met.[37] The subject matter requirement mandates that the work is a type of work that can be protected under the Copyright Act.[38] If not, there is no preemption.

In its preemption analysis, the court held 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."[39] However, with respect to the general scope requirement of preemption, the court concluded that the "hot-news" misappropriation claim narrowly avoided preemption because it met the extra element test.[40] The court rejected case law applying misappropriation broadly, reasoning that the broad application was indiscernible from copyright infringement claims.[41] The extra elements of the surviving "hot-news" claim were found to be "(i) the time-sensitive value of factual information, (ii) the free-

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[36] *Id.* at 200.

[37] The extra element test is "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." 1 NIMMER & NIMMER, *supra* note 26, § 1.01[B] at 1-15 (1996).

[38] *Harper & Row*, 723 F.2d at 200.

[39] *Motorola*, 105 F.3d at 848.

> 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 . . . . 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.

Id. at 848–49.

[40] *Id.* at 852. "[C]ertain forms of commercial misappropriation otherwise within the general scope requirement will survive preemption if an 'extra-element' test is met." *Id.* at 850.

[41] *Id.* at 851.

riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff."[42]

III. Gamecasts Under *Motorola*

The issues raised by MLB's assertion of legal rights in gamecasts undoubtedly share some similarities to the claims in the *Motorola* case. But would an application of the law, as announced in the *Motorola* case, have the same result for gamecasts as for pagers? Gamecasts are sufficiently distinguishable from the SportsTrax pagers that the outcome should be different.

A. Copyright Infringement

The first step in the copyright infringement analysis is the same regardless of what type of game is being played. That is, any claim of copyright infringement in the *underlying games* must fail because athletic events are not copyrightable.[43] Plainly, baseball games are no more copyrightable than basketball games.[44]

The next step in the analysis is a consideration of whether or not a claim for copyright infringement can stand for *game broadcasts*. The broadcast of an athletic event such as a baseball game is copyrightable since "[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."[45] Congress added this language to the Copyright Act to expressly protect sports broadcasts: "The 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

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[42] *Id.* at 853.

[43] 1 NIMMER & NIMMER, *supra* note 26, § 2.09[F] at 2-170.1.

[44] *See Motorola*, 105 F.3d at 847 (attributing lack of caselaw on whether organized events themselves are copyrightable to a general understanding that those kinds of events, including athletic events, are uncopyrightable).

[45] 17 U.S.C. § 101 (2003).

unfixed form but that are simultaneously being recorded."[46] Athletic broadcasts, therefore, meet the fixation requirement of the Copyright Act.[47]

1. Facts/Expression

Although the broadcast in the *Motorola* case was copyrightable, the court did not find infringement on the part of Motorola or STATS. "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."[48] MLB and other sports organizations and associations that seek to protect their rights in gamecasts may be able to make a distinction from the *Motorola* case at this juncture. Gamecasts do reproduce the expression or description of the game that constitutes the broadcast. They often include a running commentary to go along with information about the score, players, and game situation. An example of such commentary may be "Julius Hodge drives to the basket and scores" if the sport were North Carolina State basketball or "forty-fourth minute: Beckham's shot saved by O. Kahn" if the sport were European Champions League Soccer. The ability of gamecasts to convey such expressive statements justifies a different result from the *Motorola* case, where the pagers were limited to transmitting basic factual information.

The court in *Motorola* was obviously thinking about television broadcasts when it considered the infringement issue. The court accorded great weight to Congress's example of the protection offered to a televised football game[49] and it agreed with

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[46] H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

[47] 17 U.S.C. § 102(a) (2003) ("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.").

[48] *Motorola*, 105 F.3d at 847.

[49] When a football game is being covered by four television

the district court that the originality of the broadcast came from the work of those involved with the broadcast such as the director or cameraman.[50] Conceptually, a gamecast is much closer to a radio broadcast than to a television broadcast. The running commentary in a gamecast often reads as though a radio announcer were narrating the action. Presumably, if the authorship for a television broadcast comes from the activities of the cameramen and the director to produce images, the authorship of a radio broadcast comes from the announcers' verbal descriptions of the actions of the players, coaches, referees, and fans. If a sports association could find some nexus between the copyrighted radio broadcasters' descriptions of the game and the commentary on the gamecast, then a claim could be made for copyright infringement.[51]

This argument ultimately runs into the gray area of the fact-expression dichotomy.[52] This is where the NBA failed to make out its infringement claim. The Court in *Motorola* "agree[d] with the district court that the 'defendants 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.'"[53] While a gamecast does transmit factual information, it certainly does so with more expression than the pagers in *Motorola.* Compared to a television broadcast, the level of expression in a gamecast might not seem significant, but that may not be the case

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> 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."

H.R. REP. NO. 94-1476, at 52.

[50] *Motorola*, 105 F.3d at 847.

[51] *See* Marc S. Williams, *Copyright Preemption: Real-Time Dissemination of Sports Scores and Information*, 71 S. CAL. L. REV. 445, 463–64 (1998).

[52] "'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.'" Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 (1991) (quoting Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539 (1985)).

[53] *Motorola*, 105 F.3d at 847 (quoting NBA v. Sports Team Analysis & Tracking Sys. Inc., 939 F. Supp. 1071, 1094 (S.D.N.Y. 1996)).

when comparing a gamecast to a radio broadcast. It is unclear exactly when a gamecast would cross the line from merely reproducing facts to reproducing the protected expression of a radio broadcast. However, a court considering a gamecast case would be better served to use radio as a benchmark for determining infringement rather than television.

2. Derivative Works

One argument not attempted in *Motorola*, but potentially successful in a gamecast case, is that the gamecast is an unauthorized derivative work of the copyrighted broadcast. The Copyright Act expressly recognizes the right of copyright holders to prepare derivative works.[54] The creator of the gamecast who is watching a game on television or listening to it on the radio could be alleged to be transforming or recasting the broadcast into the running commentary and other information that appears in the gamecast.[55] If the gamecast were "substantially similar" to the copyrighted broadcast, a court could find copyright infringement.[56] Of course the proponent of such an argument would also have to

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[54] 17 U.S.C. § 106(2) (2003); H.R. REP. NO. 94-1476, at 62.

> To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 [section 101 of this title] refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2) [clause (2) of this section], the infringing work must incorporate a portion of the copyrighted work in some form.

H.R. REP. NO. 94-1476, at 62.

[55] *See* Paul M. Enright, *"SportsTrax: They Love This Game!" A Comment on the NBA v. Motorola*, 7 SETON HALL J. SPORTS L. 449, 462 (1997) ("If Motorola received from Stats a running account of the broadcaster's play-by-play, and then displayed these words on the pager it would be infringing. Actions of this sort would involve deriving a work out of the broadcaster's original expression.").

[56] *See* Horgan v. Macmillan, Inc., 789 F.2d 157, 162 (2d Cir. 1986) (discussing the substantial similarity test).

clear the fact-expression dichotomy hurdle that the Second Circuit emphasized in *Motorola* by showing that the substantially similar material was protectable expression.

Under a copyright infringement analysis, it is possible that a sports association could distinguish a claim involving the use of gamecasts from the *Motorola* case. It is not as clear that gamecasts are merely reproducing facts like the pagers in *Motorola* because gamecasts are producing actual descriptions of games, as opposed to simply scores and statistics. Also, the Second Circuit failed to consider adequately radio broadcasts as the standard for measuring infringement. Additionally, an unlicensed gamecast may be an unauthorized derivative work.

B. Misappropriation

Much like the issue of copyright infringement, the resolution of the issue of "hot-news" misappropriation in a case involving gamecasts may differ somewhat from the court's findings in *Motorola*.[57] This can be illustrated by considering the elements of a "hot-news" claim if the work in question was a gamecast. The elements would be the time-sensitive nature of factual information conveyed by gamecasts, free-riding by another gamecaster, and the threat to the existence of the gamecast product provided by a sports league.

According to the *Motorola* court, the one surviving element under a "hot-news" claim is the time-sensitive value of the factual information. In *Motorola*, the court concluded that the information was time-sensitive even though the delivery of information was not

[57] This Comment does not address the strengths and weaknesses of the preemption analysis by the *Motorola* court. Other commentators have addressed this issue. *See generally* Neal H. Kaplan, *NBA v. Motorola: A Legislative Proposal Favoring the Nature of Property, The Survival of Sports Leagues, and the Public Interest*, 23 HASTINGS COMM. & ENT. L.J. 29 (2000) (attacking the Court's analysis as unnecessarily limited); Louis Klein, *National Basketball Association v. Motorola, Inc.: Future Prospects for Protecting Real-Time* Information, 64 BROOK. L. REV. 585 (1998) (arguing that the court narrowed the "hot-news" exception to the point that it is unusable); Note, *Nothing But Internet*, 110 HARV. L. REV. 1143 (1997) (agreeing with the court's preemption analysis).

precisely contemporaneous.[58] Sports fans understandably want to know information about games of interest as soon as possible. Gamecasts deliver this information more quickly than did the pagers in *Motorola*, so there can be no doubt that under the *Motorola* analysis, information transmitted via gamecast is time-sensitive.

The next step is to distinguish the different informational products associated with a sporting event. "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."[59] Of these products, the *Motorola* court considered the generation of information by playing games and the live transmissions of those games to be the primary products of the NBA.[60]

With respect to these primary products, the *Motorola* court found that the NBA could not show any competitive effect from the SportsTrax pagers.[61] The court based this conclusion on the fact that "there is no evidence that anyone regards SportsTrax or the AOL site as a substitute for attending NBA games or watching them on television."[62] Presumably, if a sports association such as MLB could show some evidence that a gamecast is such a substitute, it could show the requisite competitive effect. It would be difficult to argue that a gamecast is a substitute for actually attending a game, but it is not beyond belief that a gamecast could be a substitute for watching a game on television or, especially, listening on the radio. Evidence of such a substitution could come in the form of surveys of sports fans or simply from collecting data about the number of fans tuning in to gamecasts. Surely if licensing revenues of copyrighted broadcasts suffered because of gamecasts, then competitive effect could be shown.[63]

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[58] *Motorola*, 105 F.3d at 853.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 853–54.
[63] *See* Williams, *supra* note 51, at 463 ("[T]he NBA licenses sports-ticker information on a scale which gives limited information to ESPN and CNN. The

When considering whether a gamecast is a substitute for attending games or watching broadcasts of games, a court would need to consider the special case of gamecast viewers who live too far away to either attend games for a certain team or pick up television or radio broadcasts for that team. Today, most of the major sports leagues have agreements with cable companies to carry games from other viewing areas, such as NBA League Pass. Of course, the cable customer must pay an additional fee for this service. Gamecasts create an alternative for those fans who want to keep up with their favorite teams from afar without paying extra for such cable services.[64] If enough fans chose gamecasts over paying for special cable television packages, then sports leagues may suffer some detrimental effects.

The other informational product is the collection and retransmission of strictly factual material. In *Motorola*, this was the pager market. In a gamecast case, it would be the gamecast market. The *Motorola* court determined that there was a lack of free-riding by SportsTrax with respect to the pagers.[65] The court emphasized that the free-riding element necessitated production of a "directly competitive product for less money because it has lower

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NBA is likely to lose profits in these markets because fewer people will tune into ESPN or CNN during or after the games if they have on-line services or pagers through SportsTrax or AOL. This will affect ratings, and therefore, the NBA will lose money in its licensing fees.").

[64] It is reasonably foreseeable that as a result of the services offered by SportsTrax and in particular AOL, an NBA fan will forego his option to purchase a satellite dish in order to watch his favorite out of town teams. Many people who purchase satellite dishes for their television do so for the main purpose of obtaining access to out-of-town sporting events. Satellite dishes are extremely expensive for the average fan, and in order to have access to every NBA game, a satellite dish owner must pay an additional $149 per year to subscribe to the requisite "League Pass." For current and potential satellite dish owners, the opportunity to keep track of their favorite out-of-town teams and players for the substantially cheaper cost of logging onto AOL or purchasing a SportsTrax pager is a viable and likely option.

Id. at 465.

[65] *Motorola*, 105 F.3d at 853.

costs."[66] The court concluded that Motorola and STATS did enough collection and assimilation of data so that they were not free-riding.[67] It is difficult to distinguish a gamecast in this regard. It seems a gamecaster would be able to show lack of free-riding so long as it was using its own effort to collect factual information about the games. It did not seem to matter to the court in *Motorola* that the NBA would soon have a product, which delivered much of the same information as the SportsTrax pager.[68] The court seemed willing to let the market decide who would enjoy the greater spoils in the sports pager marketplace, so long as each pager company incurred its own costs of production.[69] The court in *Motorola* opined that the NBA's product potentially had a competitive edge in the pager market because of cost-sharing as well as a temporal advantage.[70] Therefore, the court concluded the NBA's claim was distinguishable from the claim in the *INS* case,[71] "where the free-riding created the danger of no wire service being viable."[72] A similar obstacle could arise if MLB or another sports association brought an action to protect its interest in gamecasts. There is plenty of evidence of competitive effect in the gamecast industry, such as gamecasters adding new statistics and features.[73] Under the *Motorola* analysis, this would favor a finding of no free-riding.

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[66] *Id.* at 854.

[67] 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.

Id.

[68] *Id.* at 853.

[69] *Id.* at 854.

[70] *Id.* at 854 n.9.

[71] Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

[72] *Motorola*, 105 F.3d at 854, n.9.

[73] McClusky, *supra* note 4.

A misappropriation claim involving gamecasts would not suffer the same fate as the NBA's claim in *Motorola*, provided enough evidence could be gathered showing that gamecasts are a substitute for the athletic events or broadcasts. Undoubtedly, the information transmitted via gamecast satisfies the time-sensitive requirement, but it would be more difficult to show free-riding under the *Motorola* analysis. The key to the success or failure of a misappropriation claim would be the ability of gamecasts to substitute for games or broadcasts. If sufficient factual information were put forth, a sports association could show substitution under a hot-news claim and possibly not suffer the same fate as the NBA.

IV. Solution: The Copyright Act

A more reliable way to assure sports associations some degree of protection for their gamecasts is to add language to the Copyright Act addressing the need for such protection. Were Congress to add an explicit provision protecting gamecasts, MLB, the NBA, the National Football League and others could exercise proprietary rights over gamecasts in much the same way that they manage radio and television rights. Of course, there still would be a question of where to draw the line between protected expression and facts, which cannot be protected, but this could be addressed by adopting a commonsense approach such as the "box-score method."

A. Modifying the Copyright Act

As the *Motorola* court stated, the NBA could protect its broadcasts because Congress specifically granted protection for

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> MLB is continuing to add new features to its gamecasts. For the 2004 season, it will add a "ball tracker" that will chart the speed, location and trajectory of each pitch in the game. These numbers will be crunched, and a new statistic, a "Nasty Factor," will describe how hard a pitcher is to hit. Also, the speed of ground balls will be measured, to give some idea of how hard a play is to make.

Id.

such broadcasts in the 1976 Copyright Act.[74] This was accomplished by altering the definition of "fixation" to include "a work consisting of sounds, images, or both, that are being transmitted . . . if a fixation of the work is being made simultaneously with its transmission."[75] It would not be difficult to alter the definition of fixation similarly so that it also encompasses gamecasts, at least to the extent that gamecasts have running commentary and perhaps certain graphics.[76]

If gamecasts were recognized as copyrightable material, then other websites offering gamecasts would be in danger of infringing on the respective sports associations' intellectual property. For example, suppose MLB produced gamecasts that included running commentary, graphics, and statistical information about the game. A competing gamecast may also offer commentary, graphics, and statistics, and even though its commentary and graphics are not identical to that of MLB, the competitor may still be an infringer if a court could find substantial similarity.

There is reason to believe that Congress would be amenable to updating the Copyright Act so that it explicitly includes gamecasts. In its report accompanying the Act, Congress showed a willingness to protect the broadcast of sporting events and an intent to adapt copyright law to emerging technologies.[77] Congress stated that "[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."[78] Furthermore, Congress's report recognized that "[a]uthors are continually finding new ways of expressing

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[74] *Motorola*, 105 F.3d at 847 ("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.'").

[75] 17 U.S.C. § 101 (2003).

[76] For instance, the definition could read "a work consisting of sounds, images, text, or graphics that are being transmitted . . . ."

[77] H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

[78] *Id.*

themselves, but it is impossible to foresee the forms that these new expressive methods will take."[79] There was no intent in the Act to "freeze the scope of copyrightable subject matter at the present stage of communications technology."[80] From this language, it is apparent that Congress realized that broadcasts and new technologies deserved protection under copyright law. Therefore, Congress should be willing to protect gamecasts, since gamecasts are simply broadcasts driven by new technologies.

B. The Box-Score Method

As previously mentioned, even if Congress explicitly added language protecting gamecasts, the question of where to draw the line between fact and expression in gamecasts would still remain. This article proposes a "running box-score method." Under this method, a gamecaster who presents real-time information available to one reading a box score (as it would appear in the newspaper, for example) would be conveying only factual information. In contrast, a gamecaster providing more details than those one would normally find in a box-score would be infringing on the copyrightable gamecast.

A good illustration of this point can be found in the following example. A typical basketball box-score has player names and individual player statistics, such as field goal attempts, field goals made, rebounds, assists, fouls, turnovers, etc. The box-score also includes team totals of all of these statistical categories. Under the box-score method, all of these statistics could be kept current and transmitted in real time. That is to say, the box-score would look exactly the same as the one that appears in the newspaper the next day, the difference being that the gamecast is updated as the game progresses. In this manner, continuous factual information can be provided about ongoing games without the play by play commentary that constitutes the expression of a copyrightable gamecast.

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[79] *Id.*
[80] *Id.*

This approach would strike a fair balance between the need for sports associations to enjoy the full benefit of their activities and availability of factual information. This method recognizes that gamecasts are another means of exhibiting sporting events, similar in many ways to radio and television broadcasts.[81] There is no dispute that sports leagues have control over radio and television rights. There is equally no dispute that facts from the underlying games may be reproduced in box-scores. Modifying the Copyright Act to include protection for gamecasts would afford consistent broadcast rights to sports associations while allowing real-time dissemination of factual material.

V. Conclusion

Gamecasting is becoming more and more popular as a means to keep up with sporting events. As is the case with many technological advancements, gamecasting technology has become widespread before all of the legal issues surrounding gamecasting have been resolved. It remains to be seen whether the judiciary as a whole will adopt the analysis put forth in *Motorola*. If not, then a claim by a sports association that an unlicensed gamecaster is misappropriating information may be successful. Even if the *Motorola* analysis is used, a sports association still has a good chance of succeeding either on copyright infringement or under the hot-news misappropriation claim.

Rather than leaving the legality of gamecasts unresolved, Congress should make the necessary changes to the Copyright Act so that a gamecast would be expressly protected like other broadcasts. The box-score method would be a sufficiently clear demarcation of the line between fact and expression. The result would be that sports leagues could protect online exhibitions of games in the form of gamecasts, while sports fans are still allowed free access to real-time factual information. Thus, the law student will still be able to go to the library, comfortable with the fact that

[81] Some may argue that gamecasts are superior to these other broadcasts in some respects.

he or she can glance up at the computer from time to time and keep up with games in progress.