

Sports Leagues' New Social Media Policies: Enforcement under Copyright Law and State Law

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INTRODUCTION

In 2009, the National Hockey League (“NHL”), National Football League (“NFL”) and National Basketball Association (“NBA”) became the first major North American sports leagues to announce social media restrictions.¹ The major sports leagues have similar social media policies, the broadest of which extends longstanding copyright infringement warnings to social media websites like Facebook and Twitter.² The more narrow social media restrictions limit only play-by-play uploading by players, personnel and coaches, while the broader restrictions purport to prohibit real-time uploading of play-by-play game approximations by all Internet users.³ The NFL, which has always barred play-by-play descriptions of games in progress, extended that ban to social media platforms, requesting that social media play-by-play game accounts be time delayed and limited in amount, in order to protect the game coverage of accredited licensees.⁴ The leagues’ request that social media platforms not host game time play-by-play approximations raises questions regarding sports leagues’ enforcement of their intellectual property rights. Given that billions of social media users around the globe are able to upload from virtually any public sporting event or broadcast using mobile devices, the sports leagues’ social media policies face issues of enforceability. Contract and property law supply the legal framework for leagues’ authority to control the uploading capabilities of sports arena attendees.⁵ Employment law forms the legal

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1. See Steve Keating, *North American Pro Sports Leagues in a Twitter Over Tweeting*, REUTERS, Oct. 1, 2009, available at <http://www.reuters.com/article/idUSTRE5905BZ20091001>.

2. See *id.*

3. Staci D. Kramer, *New NFL Policy Limits Social Media Use on Game Day*, PAIDCONTENT.ORG (Aug. 31, 2009, 5:50 PM), <http://paidcontent.org/article/419-new-nfl-policy-limits-social-media-use-on-game-day/>; see also Associated Press, *League Announces Policy on Social Media Before and After Games*, NAT’L FOOTBALL LEAGUE (2009), <http://www.nfl.com/news/story?id=09000d5d8124976d&template=without-video-with-comments&confirm=true>.

4. Kramer, *supra* note 3; see also Associated Press, *supra* note 3.

5. The leagues could restrict arena spectators’ mobile uploading through a contract written on the back of their purchased tickets or by posting signs that warn of infringing uploads. See 2 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 6:45 (Danny R. Veilleux et al. eds., 4th ed. 2007) (stating that a contract is enforceable to the ticket holder where “its terms and the circumstances surrounding its issue and acceptance, would reasonably communicate . . . that his or her rights are being affected by a contract” and where “sign or placard was actually read or was so conspicuous that it ought to have been read”).

backbone of the leagues' uploading restrictions covering players, coaches, officials and league personnel.⁶ Yet, by purporting to extend traditional copyright law to social media sites, and by stating that play-by-play approximations might infringe accredited rights holders, the new restrictions potentially reach millions of independent users. As the sports leagues may face challenges as to whether social media restrictions are legal and enforceable, the leagues might look to copyright law through theories of secondary liability and the Digital Millennium Copyright Act (DMCA).⁷ Alternatively, the leagues can look to state law, with claims tailored to navigate around the so-called "hot news" preemption doctrine.⁸

This Note proceeds in three parts. Part I traces the explosion of social media outlets today and the threat that the Internet poses to the leagues' licensed networks and copyrighted products. Part II describes the relevant legal background and case precedent that guides sports organizations' intellectual property rights in the Internet age. Part III applies the relevant legal framework to the sports leagues' social media policies, arguing that copyright law could protect sports leagues' prohibition of play-by-play uploading of game progress, where the uploading is based on copyright protected broadcasts. Given the difficulty of enforcing such copyright protection against individual users, this Note examines secondary liability and suggestions for enforcement through the notice and takedown provisions of the DMCA. Finally, Part IV concludes with an alternative exploration of how the leagues might use the noncopyright "hot news" doctrine to protect their rights in the digital age.

I. SPORTS LEAGUES' POLICIES AS A RESPONSE TO THE THREAT OF SOCIAL MEDIA

A. SPORTS LEAGUES RELEASE SOCIAL MEDIA POLICIES

The NFL led the charge in announcing a social media policy in late August 2009; now nearly all the major North American sports leagues, including the NHL and NBA, have established restrictions on social media site usage.⁹ The *Social Media Bible*, the leading social media reference book for businesses, defines social media as "activities, practices, and behaviors among communities of people who

6. See Douglas J. Wood, *5 Steps to Manage Social Media Risks*, L. TECH. NEWS (Jan. 15, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202438328710>.

7. The leagues may face "challenges" stemming from litigation to academic attacks. In terms of litigation, consider the 2007 Computer & Communications Industry Association's ("CCIA") requested injunction against sports leagues' alleged "manifestly false" copyright warnings, which the Federal Trade Commission ("FTC") refused to grant and argued that risks of over-breadth should not bar copyright warnings. See Scott L. Walker & Matthew Savare, *Foul Use?: FTC Declines to Take Action Against Allegedly Overbroad and Misleading Copyright Warnings*, 25 ENT. & SPORTS L., no. 4, 2008 at 1, 28; see also Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 [hereinafter DMCA] (codified as amended in scattered sections of 17 U.S.C.).

8. See *Int'l News Serv. v. Associated Press*, 248 U.S. 214 (1918).

9. See Keating, *supra* note 1.

gather online to share information, knowledge, and opinions using conversational media,” which has been defined by another writer as “audio in a live chat room, text in a Twitter tweet, pictures . . . or video”¹⁰ This definition encompasses the leading social media sites Facebook and Twitter. All the leagues have slightly different policies, but this analysis will focus on the foundational NFL policy, which is the most detailed. According to the NFL restrictions, players, coaches and operational personnel can post to these social media platforms up to ninety minutes before kickoff and following post-game media interviews; referees are prohibited at all times from using social media.¹¹ NFL policy also states that the guidelines are consistent with longstanding prohibitions against game play-by-play descriptions and that website hosts should therefore prohibit real-time, detailed play-by-play game approximations posted by any user to the extent that these approximations could substitute for the league’s licensed networks’ copyrighted broadcasts.¹² The social media policies include both narrow restrictions imposed on league players and personnel and broad restrictions imposed on sites that host such game progression uploads.

The narrow social media directives for players, coaches, football operations and officiating personnel is akin to other private organizations’ employment policies, for example, a corporate policy of monitoring employees to make sure communications are consistent with company policy.¹³ The NFL actually recommends that clubs allow limited tweeting and blogging during public practices.¹⁴ Like any organization worried about confidentiality, the clubs are concerned with unchecked employee uploads posing a potential competitive disadvantage; “coaches worry reckless tweets may provide inspirational bulletin board material for opposing teams.”¹⁵

In addition to concerns with internal employee policing, the leagues’ social media policies address the threat that the massive explosion in social media

10. LON SAFKO & DAVID K. BRAKE, *THE SOCIAL MEDIA BIBLE* 6 (2009); Wood, *supra* note 6. The authors of *The Social Media Bible* consulted with leading social media experts from companies and consulting firms, as well as *New York Times* bestselling authors nationwide, to assemble a content-rich social media bible. See *The Experts*, SOC. MEDIA BIBLE, <http://www.thesocialmediabible.com/the-experts/> (last visited Jan. 30, 2011).

11. Associated Press, *supra* note 3.

12. *Id.*; see also Kramer, *supra* note 3.

13. This analysis will not delve into the employment and contract law considerations within such a social media policy. Generally, courts have “granted employers broad discretion in disciplining employees where the employer can show that the off-duty [or on-duty] conduct has damaged the business, hurt the employer’s interests, or is otherwise inconsistent with the employer’s business needs.” William C. Martucci et al., *Social Networking: A Workplace Policy*, LAW.COM (Jan. 22, 2010), <http://www.law.com/jsp/PubArticle.jsp?id=1202439369681>. In addition, the employee will have no privacy claims where social media update material can be accessed by a large number of individuals. *Id.* Lastly, for purposes of blogging and social networking, the applicability of the NLRA will hinge on whether the activity was concerted. *Id.*

14. Associated Press, *Teams Struggle with Policies on Twitter Usage as Site’s Popularity Grows*, NAT’L FOOTBALL LEAGUE (2009), <http://www.nfl.com/trainingcamp/story?id=09000d5d811aff8e&template=without-video-with-comments&confirm=true>.

15. Keating, *supra* note 1.

platforms poses to traditional broadcasting rights and licenses. The NFL, NBA and NHL restrict players and coaches from Internet updating until after licensed media interviews are over.¹⁶ The fact that such restrictions revolve around and are determined by the timing of *licensed* broadcast media illustrates how the leagues' primary concern is with protecting their *licensed* networks as rights holders.

The leagues' policy interest in protecting their licensed networks also justifies prohibiting certain game-related social media use as applied to all Internet users contributing play-by-play uploads. The broadest of these restrictions prohibits social media sites from hosting play-by-play descriptions that approximate and potentially even substitute for licensed broadcasts.¹⁷ The NFL policy prohibits detailed play-by-play descriptions or real-time accounts of games that are uploaded or posted to social media platforms by any user.¹⁸ The league thus attempts to extend its traditional copyright infringement warning, which is announced at the beginning of every broadcasted game, to the Internet: "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited."¹⁹ The NFL statement cited on social media use reads:

Longstanding policies *prohibiting play-by-play descriptions of NFL games in progress apply fully to Twitter and other social media platforms*. Internet sites may not post *detailed information that approximates play-by-play during a game*. While a game is in progress, any forms of accounts of the game must be sufficiently time-delayed and limited in amount (e.g., score updates with detail given only in quarterly game updates) so that the accredited organization's game coverage cannot be used as a *substitute for, or otherwise approximate, authorized play-by-play accounts*.²⁰

The policy explicitly applies traditional prohibitions against unaccredited substitutes for copyrighted licensed broadcasts to social media websites. If Internet sites like Facebook and Twitter host game accounts, they must be time-delayed and limited to factual updates so as not to usurp accredited organizations' broadcast rights.

Additionally, the NFL policy is a floor, allowing individual clubs the discretion to impose stricter social-media restrictions.²¹ At the beginning of the 2009 season, numerous club teams also imposed restrictions on workout and practice

16. *Id.*

17. Kramer, *supra* note 3 (claiming that the application of copyright disclaimers to social media is "so that the accredited organization's game coverage cannot be used as a substitute for, or otherwise approximate, authorized play-by-play accounts"); *see also* Associated Press, *supra* note 3 ("[T]he league, which has always barred play-by-play descriptions of games in progress, also extended that ban to social media platforms.").

18. Kramer, *supra* note 3 ("The policy also lays out social media use rules for media applying 'longstanding policies prohibiting play-by-play descriptions of NFL games in progress' to Twitter and the like . . .").

19. See any telecast of an NFL game for a copyright disclaimer that airs either before the start of the second half or after the first commercial break of the second half.

20. Kramer, *supra* note 3 (emphasis added).

21. Associated Press, *supra* note 14.

attendees.²² As discussed above, these more restrictive club level policies actually run contrary to the NFL's recommendation that limited Internet use should be allowed during publicly accessible practices. In justifying the restriction, many of the clubs and coaches look to their historical right to ban the use of cell phones, computers, PDAs and other electronic equipment on the sidelines.²³ Although instances of enforcement and penalties have been scarce, the clubs have been successful in enforcing their policy through player fines, benching and monitoring their sidelines.²⁴

Most other North American sports leagues have followed closely behind the NFL in establishing their own social media policies.²⁵ In September 2009, the NBA announced its social media guidelines, which prohibit social media website use during games for players, coaches and other team personnel involved in the game, until after the post-game locker room media time.²⁶ Those not participating in the particular game, such as spectators, front office employees or owners watching from the stands, are not prohibited from posting to social media platforms during games.²⁷ Like the NFL, the NBA seems focused on protecting its licensed broadcast right holders by limiting social media use only until after obligations to traditional media outlets are fulfilled.²⁸ Again focusing on licensed networks' rights, most recently, in October 2009, the NHL announced that it was finalizing social media recommendations prohibiting players, coaches, trainers and all game-related personnel from engaging in such activity close to "media access periods."²⁹ The NHL director of social media marketing commented, "I looked at what the NBA was doing and what the NFL was doing and used those as a basis for my own recommendations."³⁰ For all three leagues, the underlying concern was to safeguard the rights of their accredited broadcast licensees.

22. The Miami Dolphins have the strictest policy, which prohibits fans and media at training camp practices from tweeting, blogging or texting. The New England Patriots, Buffalo Bills, Indianapolis Colts, New Orleans Saints and the Detroit Lions also imposed further social media usage restrictions. Associated Press, *supra* note 14.

23. *Id.* (discussing how, as an employer, the leagues can control such uploading activities, and how, with contracts on the backs of tickets, the leagues can control what devices spectators bring into the arena.)

24. Current enforcement by the clubs and possibilities of enforcement will be addressed with more specificity *infra*, see note 58.

25. Keating, *supra* note 1. At the time of this writing, Major League Baseball ("MLB") has no specific guidelines but pointed to a longstanding policy regarding communicational devices that prohibits their use thirty minutes before the start of a game. *Id.*

26. Marc Stein, *NBA Social Media Guidelines Out*, ESPN (Sept. 30, 2009), <http://sports.espn.go.com/nba/news/story?id=4520907>.

27. *Id.*

28. *Id.*

29. Keating, *supra* note 1.

30. *Id.*

B. CONTEMPORARY SOCIAL MEDIA AND THE POTENTIAL THREAT TO THE SPORTS INDUSTRY

Although social media sites are only a few years old, nineteen percent of Internet users today use such sites to share updates about themselves or view updates about others.³¹ Leading national studies indicate that “it is clear that a ‘social segment’ of Internet users is flocking to both social network sites and status update services” and that this segment of Internet users promises to grow exponentially in the coming years.³² Comparable to the reach of television and radio, one Twitter user can have more than 86,000 followers.³³ In September 2010, Twitter reported 175 million registered users and 95 million tweets per day.³⁴ The most successful social media network, Facebook, boasts more than 500 million active users with a majority logging on to the social media platform each day.³⁵ Most relevant for this analysis, more than 30 billion pieces of content (web links, news stories, blog posts, notes, videos) are shared each week by users; more than 200 million users access Facebook through their mobile devices.³⁶ Facebook recently topped Google as the most visited U.S. website, indicating a shift in how Americans search for content on the web.³⁷ To provide some perspective, 147 million viewers tuned in during the 2009 Super Bowl, the third most watched television program in history, while Facebook has at least 250 million viewers on any given day.³⁸

Sometimes clips from copyrighted broadcasts are uploaded to such websites.³⁹

31. Susannah Fox, Kathryn Zickuhr & Aaron Smith, *Twitter and Status Updating Fall 2009*, PEW INTERNET (Oct. 21, 2009), <http://pewinternet.org/Reports/2009/17-Twitter-and-Status-Updating-Fall-2009.aspx>. This October report marked an eight percent increase from just April 2009. *Id.* The Pew Internet and American Life Project is the most recent project of the Pew Research Center exploring the impact of the Internet on contemporary society and aims to be an authoritative source on the evolution of the Internet through surveys that examine how Americans use the Internet. *See About Us*, PEW INTERNET, <http://pewinternet.org/About-Us/Project-History.aspx> (last visited Mar. 3, 2011).

32. *Id.*; *see also* Amanda Lenhart, *Adults and Social Network Websites*, PEW INTERNET (Jan. 14, 2009), <http://pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx> (noting that with a quadrupled share since four years ago, now almost forty percent of contemporary adult Internet users have a profile on an online social network site).

33. Adam Singer, *49 Amazing Social Media, Web 2.0 and Internet Stats*, FUTURE BUZZ (Jan. 12, 2009), <http://thefuturebuzz.com/2009/01/12/social-media-web-20-Internet-numbers-stats/>.

34. *About Us*, TWITTER, <http://twitter.com/about> (last visited Mar. 1, 2011).

35. Facebook Press Room, *Statistics*, FACEBOOK (last visited Jan. 26, 2011), <http://www.facebook.com/press/info.php?statistics>.

36. *Id.* The growth of Facebook mobile is an important endeavor for the social media platform as there are more than 200 mobile operators in sixty countries working to deploy and promote Facebook mobile products. *Id.*

37. Julianne Pepitone, *Facebook Traffic Tops Google for the Week*, CNN MONEY (Mar. 16, 2010), http://money.cnn.com/2010/03/16/technology/facebook_most_visited/index.htm?hpt=T2.

38. David B. Wilkerson, *Super Bowl XLIII Draws Average 95.4 Million Viewers*, MARKETWATCH (Feb. 3, 2009, 10:35 AM), <http://www.marketwatch.com/story/super-bowl-xl-iii-draws-average-954>.

39. Jason J. Lunardi, Note, *Guerilla Video: Potential Copyright Liability for Websites that Index Links to Unauthorized Streaming Content*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1077, 1083

Given the potential reach of these sites to billions of users, combined with the real-time capabilities of uploading photos, descriptions and videos, it is easy to appreciate the leagues' concerns with infringement of their intellectual property rights and licenses under the 1976 Copyright Act.⁴⁰ With millions participating every minute of the day, all over the world, online peer sharing has been described by one legal analyst as "an epidemic" that "raise[s] a myriad of risks," including risks to intellectual property.⁴¹ Confronted with the reality of social media's massive hosting capabilities, all three leagues share a justified, underlying concern for their traditional network licensees. The leagues focus their policies on prohibiting social media in temporal proximity to licensed interviews, and the NFL in particular has extended its warnings *only* where such sites host uploads that could substitute for the licensed networks' broadcasts.⁴² The sports leagues thus join the larger entertainment industry in attempting to protect traditional intellectual property rights in the Internet age, where "at least 50 million citizens have been seduced into copyright infringement—a civil wrong—by its ease and convenience using current technology."⁴³

The emergence of online peer sharing, coupled with growing global interest in professional sports, means that potential broadcast revenue generated by television contracts is likely to be undercut and devalued.⁴⁴ Research on online sports piracy suggests a "global paradigm of online piracy of live sports telecasts is emerging with worrisome growth characteristics."⁴⁵ Real-time transmissions of live telecast signals have been used to pirate programming from networks including ESPN, FOX, NBA TV, NBC, NFL Network and a number of regional sports networks.⁴⁶ "Evidence indicates that in 2007, [peer-to-peer services] were used to pirate thousands of hours of live sports telecasts."⁴⁷ The potential harm to sports leagues' revenues is just now beginning to be understood.⁴⁸

Much academic discussion has centered upon the argument that these sports

(2009) (discussing the piracy of entire television shows and movies online).

40. Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2006).

41. Wood, *supra* note 6.

42. Kramer, *supra* note 3 ("[O]ne of the league's official tweeters (@NFLprguy), told paidContent the rules are meant to keep the focus on the game and preserve the rights of credentialed media.").

43. Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 264 (2007) (quoting JAY DRATLER, *CYBERLAW: INTELLECTUAL PROPERTY LAW IN THE DIGITAL MILLENNIUM* § 601[2] (2006)); *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197 (C.D. Cal. 2007) (holding distributor of peer-to-peer file sharing computer networking software liable for inducement of copyright infringement via the Internet and other digital pathways).

44. Chia-heng Seetoo, Note, *Can Peer-to-Peer Internet Broadcast Technology Give Fans Another Chance? Peer-to-Peer Streaming Technology and Its Impact*, U. ILL. J.L. TECH. & POL'Y 369, 370 (2007).

45. Mellis, *supra* note 43, at 259.

46. *Id.* at 261.

47. *Id.*

48. *Id.* at 260; *see also* Gary R. Roberts, *The Scope of the Exclusive Right to Control Dissemination of Real-Time Sports Event Information*, 15 STAN. L. & POL'Y REV. 167, 168 (2004).

leagues do not need the extra protection of the copyright law regime in order to have the incentive to continue to produce athletic performances.⁴⁹ These arguments ignore the reality that “*over two-thirds* of the total revenues of the NFL and over half of the revenues of the [NBA] and [MLB]” come from television, and these revenues hinge on the sports entities’ exclusive control over the broadcasters’ rights to televise games.⁵⁰ Unlike other forms of entertainment with weaker viewer demand for live broadcasts, sports fans care not only about the final results but also about the *progression of a game*. Professional sports are “uniquely vulnerable” to streaming, peer-to-peer file sharing or play-by-play update technology because sports fans are “far less interested in watching yesterday’s games of which the results are already known.”⁵¹ Sports leagues’ performance products have time-sensitive value on the day that they are broadcast to the public. Because the core of sports entertainment is the real-time progression of the game, “if a network is paying millions or hundreds of millions of dollars for rights, the network sales force needs to sell advertisers on the fact that the only place that the product is available is on their network.”⁵²

If the game progression, real-time accounts and descriptions are available on the Internet, this availability will reduce the number of viewers, or at the very least, will “change the viewing experience with respect to how advertisers determine value.”⁵³ As noted above, *two-thirds* of sports leagues’ revenue hinges on such exclusivity guarantees in order to pay median player salaries of up to \$1.325 million.⁵⁴ The social media user who circumvents the television market and makes a game’s play-by-play progress directly available to the public on the Internet could “significantly affect[] the NFL broadcast’s immediate value.”⁵⁵ Since regular season football telecasts and game performances are major productions where the

49. Michael E. Plantinga, Note, *An Amended Doctrine that Will Silence the NFL: The Demise of the Existing Fair Use Doctrine as it Relates to Uses of Digital Sports Entertainment Media*, 14 J. TECH. L. & POL’Y 51, 74 (2009) (“The NFL cannot claim any type of meaningful future harm because despite people’s posting NFL clips on the Internet for a number of years, this activity has not even slightly disturbed the NFL’s unwavering multi-billion dollar annual revenue.”); see also Timothy W. Havlir, *Is Fantasy Baseball Free Speech? Refining the Balance Between the Right of Publicity and the First Amendment*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 229, 241 (2008) (given the “high salaries of professional athletes, the competitive nature of sports, and an independent desire for fame, immensely large revenues from other sources, it seems doubtful that publicity rights encourage athletes to compete at a higher level”); Matthew J. Mitten, *A Triple Play for the Public Domain: Delaware Lottery to Motorola to C.B.C.*, 11 CHAP. L. REV. 569, 574 (2008) (arguing that the creation of collateral Internet products does not “discourag[e] the production of ‘officially licensed or authorized’ products by sports leagues”).

50. Roberts, *supra* note 48, at 167 (emphasis added).

51. Seetoo, *supra* note 44, at 376.

52. Robert Hacker & Vered Yakovee, *Legal Aspects of Big Sports Events Management Part IV: Broadcasting*, 25 ENT. & SPORTS L., no. 3, 2007 at 1, 35.

53. *Id.*

54. *USA Today Salaries Database*, USA TODAY, <http://content.usatoday.com/sports/football/nfl/salaries/mediansalaries.aspx?year=2009> (last visited Jan. 31, 2011) (listing median salaries of NFL players in 2009 by team).

55. Plantinga, *supra* note 49, at 74.

cost of putting on a single game performance can be between \$150,000 and \$250,000, any decrease in broadcast revenue affects incentives to produce the sport performance.⁵⁶ Given that the onslaught of social media is so recent, the quantitative impact of such hosts remains to be seen. However, the statistics concerning online piracy of live sports telecasts through peer-to-peer streaming and unicast technologies are worrisome.⁵⁷ Additionally, continuous social media updates, real-time play-by-play accounts, uploaded videos and photos pose a similar threat. Finally, as addressed below, the leagues have also developed competing social media products. The NFL, NBA and NHL all have their own Facebook and Twitter accounts and products. Unaccredited social media Internet uploaders would be in direct competition with social media products offered by the leagues.

C. INTELLECTUAL PROPERTY LAW AS SOLUTION

Although the league policies outlined are justifiable responses to the threats posed by unauthorized Internet infringement of league products, enforcement on the Internet is problematic. This Section suggests ways in which the leagues may nevertheless look to intellectual property law as a remedy.

One criticism of the NFL's social media policy is the feasibility of enforcement. Different legal and remedial contexts apply to the extension of guidelines to all game descriptions on social media outlets as compared to the extension of guidelines to league personnel. NFL clubs have already taken successful corrective measures in policing their teams.⁵⁸ In August 2010, the NFL fined Chad Ochocinco \$25,000 for breaking the NFL's game-day Twitter policy by posting tweets just an hour before kickoff and again an hour into the game (after taking a particularly tough hit).⁵⁹ Yet, the social media policies as applied to outside spectators and fans seem to be unrealistic, leading one commentator to

56. David Biderman, *Football Games Have 11 Minutes of Action*, FOX SPORTS ON MSN (Jan. 22, 2010), <http://msn.foxsports.com/nfl/story/football-games-have-11-minutes-of-action-011810>.

57. Unicast refers to "one-to-one distribution of a media stream from a central server to an end user's computer" and streaming over peer-to-peer "involves a media stream being passed through the Internet among network participants." Mellis, *supra* note 43, at 260. "In both cases, the technologies enable real-time transmissions of live telecast signals on a worldwide basis." *Id.*; see also *Definition of Peer-to-Peer Networks*, PC MAG. ENCYCLOPEDIA, http://www.pcmag.com/encyclopedia_term/0,2542,t=peer-to-peer+network&i=49056,00.asp (last visited Feb. 1, 2011).

58. Associated Press, *Jets Coach Ryan Benched WR Clowney After Tweets*, NAT'L FOOTBALL LEAGUE (2009), <http://www.nfl.com/news/story?id=09000d5d813002f9&template=with-video-with-comments&confirm=true> (providing that the New York Jets coach Rex Ryan benched wide receiver David Clowney who tweeted complaints about playing time); Associated Press, *supra* note 14 (showing that the Chargers recently fined cornerback Antonio Cromartie \$2,500 for using Twitter to give information about training camp.); Stein, *supra* note 26 (stating that as of this writing, the NBA's only Twitter-related fine has punished Dallas Mavericks owner Mark Cuban when he was docked \$25,000 for complaining about referees' refusal to call a foul).

59. Ebenezer Samuel, *Chad Ochocinco Apologizes to NFL Commissioner for In-Game Tweet, Suggests Different Punishment*, N.Y. DAILY NEWS (Aug. 25, 2010), http://www.nydailynews.com/sports/football/2010/08/25/2010-08-25_ochocinco_tweets_another_apology_for_tweeting.html.

pessimistically “wish the league office the best of luck in keeping Joe Schmoe in Kokomo from trying to become the Twitter and/or USTREAM version of Al Michaels.”⁶⁰ However, the daunting task of enforcement hasn’t stopped the Miami Dolphins from attempting to police thousands of spectators at its practices. A spokesperson for the team commented: “I would acknowledge that enforcing the restrictions can be difficult. We’re not looking over everybody’s shoulder, but we do have a concern about information flow.”⁶¹ Although the Dolphins claim success in policing their practice spectators, it seems impossible for the league to police all Facebook and Twitter uploads for play-by-play descriptions, photo or video uploads.

Given such difficulties, the sports industry may consider turning to copyright litigation and adopting a legal strategy similar to that used by the Motion Picture Association of America (“MPAA”). As the MPAA’s now former general counsel proclaimed: “[Y]ou can’t sue everybody. Often lawsuits are intended to establish a principle, and in a lot of cases people are law-abiding. They will follow the decisions of the courts.”⁶² As with the movie industry, sports leagues would benefit from a judicially established principle that more clearly supports their claims regarding illegally uploaded play-by-play descriptions.

If social media uploads can be shown to infringe the leagues’ copyright broadcast rights, as discussed in Part III, *infra*, social media sites could be secondarily liable, which would implicate the unique availability of the DMCA, 17 U.S.C. § 512(c).⁶³ The DMCA gives Internet service providers and “hosting” services a safe harbor from secondary liability for copyright infringement where such sites, like Facebook and Twitter, are hosting content at the direction of third-party users.⁶⁴ The safe harbor provision of the DMCA is available to website hosts if the website can demonstrate that it 1) had neither actual nor constructive knowledge that the system contained infringing material or 2) received no financial benefit directly attributable to the infringement where it has the right and ability to control and 3) responded expeditiously to remove or disable access to the infringing material.⁶⁵ In order to be shielded from secondary liability, website hosts thus must adopt and implement (and inform account holders of the service provider’s system or network of) a policy that terminates account holders of the service provider’s system who are repeat infringers; and the website must accommodate and not interfere with standard technical measures.⁶⁶ The DMCA

60. Gregg Rosenthal, *NFL Adopts Game Day Social Media Policy*, NBC SPORTS (Aug. 31, 2009, 4:08 PM), <http://profootballtalk.nbcsports.com/2009/08/31/nfl-adopts-game-day-social-media-policy/>.

61. Associated Press, *supra* note 14.

62. David Hechler, *Piracy on Fast Forward*, LAW.COM (Sept. 7, 2007), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1189069353022> (referring to MPAA success in the seminal *Grokster* litigation).

63. 17 U.S.C. § 512(c) (2006).

64. Karl Oakes, *Copyrights and Intellectual Property* § 103, in 18 CORPUS JURIS SECUNDUM (2010).

65. 17 U.S.C. § 512(c).

66. Oakes, *supra* note 64, § 103 (citing 17 U.S.C. § 512(i)).

limits social media hosting sites' liability where such sites take infringing material down, authorizes the issuance of subpoenas to identify infringers and authorizes injunctive relief.⁶⁷ Thus, sports leagues could operate through the DMCA in order to invoke such "notice and takedown" provisions and force website hosts like Facebook and Twitter to remove those few unauthorized accounts that continually approximate play-by-play game progression and infringe on copyrighted broadcasts. In fact, the leagues have already invoked the DMCA by sending takedown notices to YouTube for video posts that they believe infringe their broadcasts.⁶⁸ Part III of this Note will analyze whether the leagues have sufficient copyright infringement claims to invoke this DMCA takedown enforcement power against those sites that host real-time play-by-play descriptions of sports games.

The preceding backdrop has outlined the details of the leagues' social media policies as a response to social media sites' potential threat to sports leagues' licensed networks and their copyrighted broadcast material. The next Section examines how both copyright and state law have been employed by the sports industry in protecting its broadcast rights.

II. PAST COPYRIGHT AND STATE LAW PROTECTION OF SPORTS LEAGUE PRODUCTS

In pursuing federal copyright remedies, sports leagues must confront serious barriers to the claim that social media uploads are infringing. This Part will demonstrate that: 1) there is a current understanding, though questionable, that there can be no infringement where the defendant's Internet product originates in the unprotected game facts or the sports performance itself; 2) in order to be infringing, the defendant's product must be expressive and descriptive enough to "copy" a league's copyrighted material and must actually take from the expressive elements of the copyrighted sports broadcast; and lastly, 3) web sites must arguably be secondarily liable for users' infringement in order to require that these sites invoke the DMCA notice and takedown provisions.

If, on the other hand, the leagues choose to pursue state law claims to protect accredited broadcast holders, the claims could be based on some form of state property law or, more narrowly, qualify under the "hot news" doctrine in order for such state law claims to survive federal copyright preemption.⁶⁹

Although sports leagues are able to control the radio and television exploitation of their product, the leagues have only just started to explore how to contend against the Internet exploitation of their performances; thus, any of the foregoing copyright law and state law remedies tailored to this problem will be necessarily novel.

67. *Id.* (citing 17 U.S.C. §§ 512(g), (h), (j)).

68. Plantinga, *supra* note 49, at 53.

69. *See Int'l News Serv. v. Associated Press*, 248 U.S. 214 (1918) (discussing "hot news" doctrine).

A. NO COPYRIGHT IN THE UNDERLYING ATHLETIC PERFORMANCE OR STATISTICS

The first hurdle facing the sports industry is the “general understanding” that there is no copyright ownership in the underlying athletic performance. In the only case where a league has asserted a copyright in an athletic performance, the Second Circuit flippantly dismissed all copyright claims on summary judgment and the ruling was not appealed.⁷⁰ This rule relies on the omission from the Copyright Act of 1976 of any category of protected work that encompasses sports performances.⁷¹ Academics contend that any claim of copyright infringement in the underlying games must fail because athletic events are not copyrightable.⁷² As will be discussed, this Note leaves open the possibility that with the benefit of deeper case law analysis, professional sports performances could be copyrightable in the future.⁷³

Statistics, raw data lists and fantasy league information about an athletic performance qualify as “facts” of the performance, where facts are not copyrightable.⁷⁴ In lawsuits over the use of statistics on the Internet, both players and the leagues have been precluded from claiming that Internet producers violated any copyright.⁷⁵ For example, in *C.B.C. Distribution & Marketing*, a federal district court in Missouri held that a certain collection of statistics did not constitute a copyrightable compilation because the MLB branch responsible for the statistics did not engage in any unique assemblage of baseball data; the statistics lacked the requisite creativity.⁷⁶ The court held that public domain lists of major league baseball players and their statistics lacked the originality requirement for copyright

70. Roberts, *supra* note 48, at 168–69 (citing *Nat'l Basketball Ass'n v. Motorola, Inc.*, 939 F. Supp. 1071, 1088 (S.D.N.Y. 1996) (*Motorola I*), *rev'd on other grounds*, 105 F.3d 841 (2d Cir. 1997)); *see also* *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (*Motorola II*). However, this lonely Second Circuit case cited no cases to substantiate its dismissal of copyrights in the live game performances and relied only on a “general understanding,” which leaves open the possibility that professional sports performances could be copyrightable in the future. *Id.* at 846–47 (emphasis added).

71. *See* 17 U.S.C. §102 (2006) (enumerating the categories of works protected by copyright).

72. 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.09[F] (2010). Similarly, in another case regarding whether a sports-like exercise was copyrightable, a defendant invested in a series of twenty-six yoga exercises called asanas. The court ruled that indeed, yoga exercises did not meet the requisite creativity. WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* § 20:2 (2d ed. Supp. 2010) (citing *Open Source Yoga Unity v. Choudhury*, 74 U.S.P.Q.2d 1434 (N.D. Cal. 2005)).

73. As will be discussed, *infra* note 90, in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 669 n.7 (7th Cir. 1986), the MLB argued for copyright in the game performance spectacle by correctly asserting “only a modicum of creativity is required for a work to be copyrightable.” Further case law may agree with this contention.

74. *See* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–51 (1991) (finding that while expression of an idea or fact is copyrightable, the idea or the raw facts themselves are not copyrightable).

75. *CBS Interactive, Inc. v. Nat'l Football League Players Ass'n*, 259 F.R.D. 398 (D. Minn. 2009); *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006), *aff'd*, 505 F.3d 818 (8th Cir. 2007).

76. *C.B.C. Distrib. & Mktg.*, 443 F.Supp.2d at 1101–03.

protection.⁷⁷ More recently, in *CBS Interactive, Inc. v. National Football League Players Ass'n*, a federal district court in Minnesota held that the operator of a fantasy football website did not violate any rights of the league by using professional football players' names and statistics.⁷⁸ The court there ruled that an online fantasy sports company did *not* need to get a license from the NFL Players Association to use old sports performance statistics, player reviews, injury updates and other information regarding the players and their respective NFL teams.⁷⁹

B. STRONG COPYRIGHT OWNERSHIP IN BROADCASTS

Although the leagues currently have no copyright ownership in underlying athletic performances and factual statistics, sports broadcasts are covered works of authorship under the Copyright Act of 1976, which demands that work be creative (i.e., an original work of authorship) and fixed (for more than transitory duration).⁸⁰ Specifically, pursuant to 17 U.S.C. § 102, “copyright protection subsists, in accordance with this title, in original works of authorship *fixed in any tangible medium of expression.*”⁸¹ According to 17 U.S.C. § 101, the work is “fixed” if there has been an authorized embodiment in a copy or phonorecord and if that embodiment “is sufficiently permanent or stable” to permit the work “to be perceived, reproduced, or otherwise communicated for a period of *more than transitory duration.*”⁸² Since broadcasts are considered sufficiently creative original works of authorship fixed for more than a transitory duration, the Copyright Act gives sports leagues the exclusive control and rights over their broadcasts, including the right to perform publicly, adapt and reproduce them.⁸³

Congress stated in the House Report leading up to the enactment of the 1976 Copyright Act:

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.’⁸⁴

Furthermore, the broadcast lasts for more than a trivial duration and is fixed if it is being simultaneously recorded. Moreover, Congress added explicit language to the Copyright Act to protect sports broadcasts, expressing the intention that the definition of “fixation” in § 101 include “live broadcasts—sports, news coverage,

77. *Id.*

78. *CBS Interactive*, 259 F.R.D. at 417–19.

79. *Id.*

80. 17 U.S.C. § 102 (2006).

81. *Id.* § 102(a) (emphasis added).

82. *Id.* § 101 (emphasis added).

83. *Id.* § 106(1), (2), (4) (providing copyright owner with exclusive right to reproduce the work, make derivative works and to public perform the work).

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

live performances of music, etc.”⁸⁵ Accordingly, sports leagues have continually been granted injunctions to stop the infringement of sports programming. In *National Football League v. Rondor, Inc.*, the league and its teams enjoined owners of bars and restaurants from showing locally “blacked-out” games by receiving the game signal from a distant antenna.⁸⁶ Similarly, the Eighth Circuit in *National Football League v. McBee & Bruno’s, Inc.*, also maintained that a simultaneously recorded live broadcast of a football game is protected under the Copyright Act.⁸⁷ The Seventh Circuit in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n* repeatedly explained that sports performances can qualify as copyrightable subject matter because the types of shots, instant replays and frame selection supply the creativity required for copyright.⁸⁸ Although the Second Circuit later disagreed, the *Baltimore Orioles* court asserted that player performances themselves could be copyrightable.⁸⁹ It stated: “[Major League Baseball Players Association] argue[s] that their performances are not copyrightable works because they lack sufficient artistic merit. We disagree. Only a modicum of creativity is required for a work to be copyrightable.”⁹⁰ Although beyond the scope of this Note, Judge Winter’s reasoning in the authoritative Second Circuit case denying copyright protection seems to apply more to a backyard pick-up game rather than a professional sports performance and, in the future, strong copyright protection extended to broadcasts could be extended to entire professional sports performances.⁹¹

C. INTERNET INFRINGEMENT OF SPORTS INDUSTRY COPYRIGHTS

Although no cases have been filed concerning Internet uploads of game details, recent district court cases have addressed the sports industry’s copyright protections when infringed on the Internet. In *Twentieth Century Fox Film Corp. v. iCraveTV*, a district court ordering a preliminary injunction ruled that unauthorized

85. *Id.*

86. *Nat’l Football League v. Rondor, Inc.*, 840 F. Supp. 1160 (N.D. Ohio 1993).

87. *Nat’l Football League v. McBee & Bruno’s, Inc.*, 792 F.2d 726 (8th Cir. 1986).

88. *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668 (7th Cir. 1986); *see also* *Phila. Eagles Football Club, Inc. v. City of Phila.*, 823 A.2d 108, 122, (Pa. 2003) (reestablishing that a live telecast simultaneously recorded with transmission is copyrightable).

89. *Balt. Orioles, Inc.*, 805 F.2d at 669.

90. *Id.* at 669 n.7. Citing both case law and secondary sources, the court asserted:

Contrary to the Players’ contentions, aesthetic merit is not necessary for copyrightability Players’ performances possess the modest creativity required for copyrightability. As Justice Holmes once declared, “if . . . [certain works] command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value. . . . That the Players’ performances possess great commercial value indicates that the works embody the modicum of creativity required for copyrightability.

Id.

91. *Motorola II*, 105 F.3d 841 (2d Cir. 1997) (where Judge Winter argues that sports are too unintentional, such reasoning does not seem to apply to sports spectacles where painstaking preparation makes the entire performance—the cheerleaders, sideline, accompanying radio, game announcers, big screen videos and performance as a whole—seem more analogous to other sports performances).

sports programming streaming, which gave Internet users the ability to watch the NBA and NFL's real-time broadcasts online, violated the sports leagues' copyrights.⁹² The court ruled that the sports leagues' rights under 17 U.S.C. § 106(4) to perform their works publicly—and to license or authorize others to do so—were infringed by unauthorized streaming of the live sports telecasts.⁹³ The court found irreparable harm because the accredited rights holders “lost the control with which Congress vested them of the copyrighted materials [and] have lost the ability to offer particular outlets exclusively.”⁹⁴ This decision was reinforced by *National Football League v. PrimeTime 24 Joint Venture*, where the Second Circuit affirmed the injunction of a satellite carrier that made unauthorized transmissions of football broadcasts to subscribers in Canada.⁹⁵ The court confronted new infringing technologies at different stages in the digital process and noted Congressional language that “[e]ach and every method by which [] images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’ and if the transmission reaches the public in [any] form, the case comes within the scope of [§ 106(4) or (5)].”⁹⁶

Finally, in *Live Nation Motor Sports, Inc. v. Davis*, a district court granted summary judgment to a sports company that “webcasted” (i.e., broadcasted via the Internet) live motor sports against a website that linked to the webcasts.⁹⁷ The court ruled that the sports company had copyright ownership in the live broadcasts (either via television, radio or Internet webcasts), all of which constituted original audiovisual material copyrightable under the Copyright Act.⁹⁸ The court analogized copyright protection for Internet webcasts to live television broadcasts, and instead of engaging in a technological analysis of how the link constituted a “copy,” the court seemed most attentive to equitable arguments including the sports company's diminished economic ability to market itself as the exclusive source of motocross Internet broadcasts.⁹⁹ The court was concerned with how the infringing website's link to real-time streaming allowed users to bypass the LiveNation

92. *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ. A. 00-120 & No. Civ. A. 00-121, 2000 WL 255989, at *1 (W.D. Pa. Feb. 8, 2000).

93. *Id.* at *7.

94. *Id.* at *8.

95. *Nat'l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000).

96. *Id.* at 12 (quoting H.R. REP. NO. 94-1476 (1976)) (alterations in original).

97. *Live Nation Motor Sports, Inc. v. Davis*, No. 3:06-CV-276-L, 2007 WL 79311, at *5 (N.D. Tex. Jan. 9, 2007).

98. *Id.* at *3.

99. *Id.* at *2–4; *see also* *Live Nation Motor Sports, Inc. v. Davis*, No. 3:06-CV-276-L, 2006 WL 3616983, at *1 (N.D. Tex. Dec. 12, 2006) (granting preliminary injunction). Contrast this less technological approach with the Ninth Circuit, which took a much more technical approach in ruling that search engine inline links to images were not “copies” that infringed copyrighted photographs. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 717 (9th Cir. 2007). It must be noted that in *Perfect 10*, the Ninth Circuit ruled that Google could only be held secondarily liable for search engine hyperlinks to infringing full-size Perfect 10 images if it had knowledge that the specific infringing images were available through its system and could have taken simple measures to prevent the damage to the plaintiff. *Id.* at 729.

homepage, resulting in economic substitution of the plaintiff's product.¹⁰⁰ Thus, the court focused on equitable arguments to protect the leagues investment-backed expectations in the control of their product.¹⁰¹

Although Circuit-level courts have yet to encounter sports companies' copyright claims in this Internet context, at the district level there seems to be agreement that unauthorized website streaming—or links to streaming, sports broadcasts or webcasts—constitutes copyright infringement. On a policy level, the courts' willingness to protect sports leagues against new technologies at every stage of the digital process, to extend copyright ownership to "webcasts" and to enjoin even a link to streaming broadcasts, all signal judicial support for the application of traditional copyright remedies to other Internet activities, including the uploading of play-by-play game approximations. The recognition of sports leagues' lost control, lost ability to offer particular outlets, loss of customer good will and loss of reputational control suggests that the judicial system heeds equitable justifications and is aware of how the Internet uniquely threatens the leagues with economic market substitution.¹⁰²

However, while the above cases are useful for analogizing to potentially infringing descriptive uploads, the streaming and linking at issue in those cases directly involved the entire sports broadcast and not merely descriptions or approximations of the broadcast. Thus although an analysis of the case law demonstrates that sports leagues enjoy strong copyright protection for their broadcasts (even in this Internet age), case law addressing purported Internet infringement of less than an entire streamed or hyperlinked broadcast is a different matter. Nevertheless, the leagues might look to the following line of cases to address more specifically whether game updates, rather than an entire broadcast stream, infringe on leagues' copyrighted material.

D. THE *MOTOROLA* CASE, STATE LAW CLAIMS AND GAME PROGRESSION UPLOADS

1. *Motorola* and Copyright Infringement

In the only case addressing sports leagues' copyright and state law rights over game updates, the league was ultimately unsuccessful in proving copyright infringement or state law misappropriation.¹⁰³ This case provides guidance for the leagues if they hope to make any successful copyright or state law claims; in

100. *Live Nation Motor Sports, Inc.*, 2006 WL 3616983 at *8–9.

101. "The NFL puts great effort into obtaining advertisers for promotional spots during its broadcasts' commercial breaks" and by circumventing the television market, a user that makes a clip directly available to the public on the Internet "has significantly affected the NFL broadcast's immediate value." Plantinga, *supra* note 49, at 74.

102. *See Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ. A. 00-120 & No. Civ. A. 00-121, 2000 WL 255989, at *8 (W.D. Pa. Feb. 8, 2000).

103. *Motorola II*, 105 F.3d 841 (2d Cir. 1997).

particular, the leagues may be able to distinguish social media uploads from the activities in this precedential case in order to enforce their social media claims.

In *National Basketball Ass'n v. Motorola, Inc.*, the only case addressing potential copyright infringement in real-time sports updates, the NBA sought to enjoin Motorola from gathering information about game progress from NBA broadcasts and disseminating that information to SportsTrax pager subscribers and a corresponding website.¹⁰⁴ The data gathered from the broadcasts included team names, score, possessions, fouls per quarter and how much time was left in the quarter.¹⁰⁵ When Motorola failed to come to terms with the NBA on a license, the company decided to have unauthorized statisticians gather game information from televised broadcasts of each NBA game and retransmit game data through their Motorola pagers themselves.¹⁰⁶ At the trial court level, the United States District Court for the Southern District of New York dismissed all of the NBA's *copyright claims* and ruled that since the underlying sports game and corresponding facts were not copyrightable, the pagers were not infringing any NBA copyrights.¹⁰⁷ The Second Circuit affirmed the district court dismissal of the copyright claims, reiterating that the Copyright Act does not list athletic events as protectable subject matter and that, "although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories."¹⁰⁸ The court conceded that "case law is scarce on the issue of whether organized events themselves are copyrightable" and this lack of case law was "attributable to a *general understanding* that athletic events were, and are, uncopyrightable."¹⁰⁹ The Second Circuit agreed with the lower court, asserting that because the pagers "reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast," the pagers did not infringe on any copyrighted material.¹¹⁰ Thus, as will be discussed below, the leagues would need to distinguish social media uploads from these pager updates.

104. *Id.*

105. *Id.* at 844.

106. *Id.*

107. Nat'l Basketball Ass'n v. Sports Team Analysis & Tracking Sys. (*Motorola I*), 939 F. Supp. 1071, 1088, 1094 (S.D.N.Y. 1996), *rev'd on other grounds*, *Motorola II*, 105 F.3d 841.

108. *Motorola II*, 105 F.3d at 846.

109. *Id.* at 846–47 (emphasis added). It seems that the court has been more concerned with policy considerations like the difficulty of attributing ownership and the need for athletes to build upon each other's plays in concluding that athletic events are not copyrightable. Query why only this one Second Circuit case, which based its copyright denial on "general understanding," has been deemed a definitive authority for the proposition that sports have no copyright protection. For example, the *Baltimore Orioles* case discussed *supra* disagreed. *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986).

110. *Motorola II*, 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)).

2. *Motorola*, Hot News and State Law Claims

Although the copyright claims were all dismissed, the Southern District of New York did rule in favor of the NBA's state commercial misappropriation claims, classifying the SportsTrax as "hot news," a property right distinct enough from copyright to survive federal preemption.¹¹¹ The "hot news" state law misappropriation claim derives from *International News Service v. Associated Press (INS)*, where the U.S. Supreme Court held that, because the value of news depends upon the *promptness of its transmission*, a news service could be restrained from stealing news bulletins that had been issued by a competing news service.¹¹² The crux of the hot news misappropriation claim was the injustice of a defendant-competitor who misappropriated a product for its own profit, to the disadvantage of the plaintiff, the party who bore all of the costs of production. Applying this misappropriation claim, the *Motorola* district court held that "through the SportsTrax product . . . defendants disseminated to the NBA fans game information on a real-time basis. In so doing, they have misappropriated the essence of NBA's most valuable property—the excitement of an NBA game in progress."¹¹³ The lower court thus ruled that the real-time unauthorized retransmittal of a sports game progression gives rise to a state "hot news" misappropriation claim that is not preempted under the general scope of the Copyright Act.¹¹⁴

Yet, the Second Circuit reversed this state law misappropriation holding on the grounds that the transmissions were not "hot news" and thus that the federal Copyright Act did preempt the NBA state law claims.¹¹⁵ The federal copyright statute preempts any state law claim that addresses rights equivalent to the Copyright Act's statutory rights (i.e., the right to reproduce, to prepare derivative works, to distribute, to perform or to display), in works that fall within the statutory subject matter (i.e., original works of authorship fixed in any tangible medium of expression).¹¹⁶ "All legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . and come within the subject matter of copyright . . . are governed *exclusively* by the 'Copyrights' title of

111. *Motorola I*, 939 F. Supp. at 1098 ("NBA's claim of misappropriation of its rights in the NBA games fails to satisfy the subject matter test of 17 U.S.C. § 301, and, therefore, is not preempted.").

112. *Int'l News Service v. Associated Press*, 248 U.S. 215, 239–40, 245–46 (1918). The Court held the defendant liable where it took material that had been acquired by the plaintiff:

as the result of organization and the expenditure of labor, skill, and money, and which is salable by [plaintiff] for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to . . . competitors of [plaintiff] is appropriating to itself the harvest of those who have sown.

Id.

113. *Motorola I*, 939 F. Supp. at 1075.

114. *Id.* at 1098, 1107.

115. *Motorola II*, 105 F.3d at 853–54.

116. Oakes, *supra* note 64, § 5.

the United States Code.”¹¹⁷ Conversely, in order to survive federal preemption, a state law claim 1) cannot seek to protect one of the rights under the general scope of 17 U.S.C. § 106 and 2) cannot be based upon a work protected by the subject matter of 17 U.S.C. §§ 102 and 103.¹¹⁸

The Second Circuit agreed with the Southern District of New York that the “subject matter” of the SportsTrax was within the types of works protected by §§ 102 and 103—i.e., the copyrightable broadcasts were the source of the Internet updates.¹¹⁹ However, unlike the lower court, the Second Circuit held that the NBA’s claimed rights were preempted because they were *not* “hot news” and thus fell within the “general scope” of exclusive rights under §106.¹²⁰ As discussed above, the “hot news” doctrine protects the product of a plaintiff’s expenditure of labor, skill and money, in order to protect the incentive to create such a product.¹²¹ While admitting that the “hot news” element of time sensitivity was present, the court found that the NBA did not show “any damage to any of its products based on free-riding.”¹²² The case was therefore “obviously not the situation . . . *INS* was intended to prevent: the potential lack of any such product or service because of the anticipation of free-riding.”¹²³ Foremost in the court’s denial of the “hot news” claim was that the NBA’s “primary and secondary products”—the production of their game performance and the production of their television broadcasts—would

117. *Id.* (citing 17 U.S.C. § 301(a)) (emphasis added).

118. 17 U.S.C. §§ 102, 103, 106 (2006).

119. *Motorola II*, 105 F.3d at 848–49 (citing cases where subject matter not within a copyrightable category was nonetheless preempted by 17 U.S.C. § 301, as in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 674–75 (7th Cir. 1986), where baseball players’ state law right of publicity was not infringed when their names and images were used in MLB game telecasts because the right of publicity was preempted by § 301 as soon as the games were broadcasted or televised and thus became a “subject matter” of 17 U.S.C. §§ 102 and 103).

120. *Id.* at 847, 854. According to the Second Circuit in *Motorola*, a “hot-news” claim can be invoked where: 1) a plaintiff generates or gathers information at a cost; 2) the information is time sensitive; 3) a defendant’s use of the information constitutes free-riding on the plaintiff’s efforts; 4) the defendant is in direct competition with a product or service offered by the plaintiffs and 5) 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. *Id.* at 853. The court held that although the real-time factual information provided by the SportsTrax pager is time sensitive, the defendants paid the costs of its collection transmission and did not free-ride off NBA. *Id.* at 854. Further, the Second Circuit ruled that the NBA real-time information did not need “hot news” protection because there was no competition with the NBA’s “primary” or “secondary market.” *Id.* at 853. The primary market was the events themselves, the secondary the broadcasts and telecasts and the third market was the dissemination of real-time scores. *Id.* The court argued that the NBA would still produce games and broadcasts (primary and secondary products), regardless of whether statisticians disseminated already publicly available material. *Id.* at 854. Furthermore, the fact that the NBA might have plans for a similar pager called Gamestats in the future was not sufficient to qualify for a hot news claim. *Id.* Notably, however, the court did find that collecting facts from an NBA Gamestats pager to retransmit them to SportsTrax pagers would constitute free-riding, might cause Gamestats to be unprofitable and would deter the NBA’s transmission of current information to pagers or similar devices. *Id.* at 854 n.9.

121. *See Int’l News Serv. v. Associated Press*, 248 U.S. 214 (1918).

122. *Motorola II*, 105 F.3d at 854.

123. *Id.*

not be devalued, and the incentive to produce performances and broadcasts would not be diminished by the pager threat.¹²⁴ The NBA did not establish the free-riding, direct competition and reduced incentive for production sufficient to qualify for a “hot news” claim.¹²⁵

Although the NBA was unable to establish copyright or misappropriation claims on its particular facts at the appellate level, *Motorola* does not represent the end of the analysis with respect to sports leagues’ state law claims. Echoing the lower *Motorola* court’s grant of the NBA’s misappropriation state law claim, which ruled that the pagers were exploiting the “essence” of the NBA product by hijacking game progression, a few older cases used property law claims to prevent unauthorized sports updates. In one case, a radio station was prohibited from placing spectators outside a stadium to relay play-by-play news to a radio station for unauthorized broadcast.¹²⁶ The court ruled: “it is perfectly clear that the exclusive right to broadcast play-by-play descriptions of the games played by the ‘Pirates’ at their home field rests in the plaintiffs.”¹²⁷ The unauthorized relaying of game progression regards a “property right of the plaintiffs with which defendant is interfering when it radio broadcasts the play-by-play description of the ball games obtained by the observers.”¹²⁸ The court noted the expense and enormous economic resources it takes to put on the performance and that the spectator’s unauthorized play-by-play accounts infringed on the sports company’s “legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies.”¹²⁹ Similarly, a Florida district court ruled that the PGA had the rights under state property law to control the real-time distribution of the PGA’s Real-Time Scoring System (“RTSS”).¹³⁰ The court found:

[The PGA was] justified in its restrictions because (1) Morris free-rides on the PGA 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.¹³¹

Notably, these cases rely on state property and misappropriation claims rather than copyright claims. In *PGA*, the court found that the property right to restrict access to the real-time scores was *not* grounded in copyright law and that the

124. *Id.*

125. *Id.* at 850–54.

126. *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 494 (W.D. Pa. 1938); *see also* Tyler McCormick Love, Note, *Throwing The Flag On Copyright Warnings: How Professional Sports Organizations Systematically Overstate Copyright Protection*, 15 J. INTELL. PROP. L. 369, 377 (2008).

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

128. *Id.*

129. *Id.*

130. *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1282–83 (M.D. Fla. 2002). The PGA tracked golfers’ scores through RTSS to an onsite media center and later posted on the Tour website. *Id.* The PGA invested in a creative information gathering RTSS product and Morris Communications tried to publicize the RTSS material for profit before the PGA. *Id.*

131. *Id.*

“instant case deals with facts that are *not subject* to copyright protection.”¹³² The Eleventh Circuit affirmed the PGA’s rights while qualifying “that this case is not about copyright law.”¹³³ Arguably, these courts, aware of the *Motorola* precedent, went out of their way to disavow any connection to copyright law in order to avoid preemption and to arrive at equitable results.

These cases rely on state law property and misappropriation rights justified by economic investment in a sports product; thus, in order to survive preemption, a league likely must assert an equivalent proprietary investment in a product in order to succeed in such state property law claims.¹³⁴

III. POSSIBLE SPORTS LEAGUE COPYRIGHT CLAIMS

The extension of traditional copyright infringement claims to Internet updates implicates unsettled areas of the law, where case law is largely limited to district courts. The 2007 *Live Nation* decision notes: “litigation over copyright protections for live Internet webcasts has not made its way into . . . *any other circuit court opinions that this court could find.*”¹³⁵ In *Motorola*, the court regretted that “case law is scarce on the issue of whether organized events themselves are copyrightable and indicated that there is “a *general understanding* that athletic events were, and are, uncopyrightable.”¹³⁶ Confronting such a dearth of case law, the Second Circuit resorted to a “general understanding” rather than any particular decision at the heart of its ruling.

Despite such a paucity of appellate court rulings, the foregoing discussion of the case law to date demonstrates certain principles: 1) currently, there can likely be no copyright infringement where the uploads originate in unprotected statistics or the performance itself rather than a copyrighted broadcast; 2) in order to make a copyright infringement claim, “play-by-play” uploads, as distinct from pager updates, must be expressive and descriptive enough to be seen as “copying” the protected broadcasts and, even assuming that uploads could be distinguishable “copies” of broadcasts, the uploads must actually take from the expressive copyrightable elements of the broadcast; and lastly, 3) in order to make a “hot news” or other state-law claim and avoid federal copyright preemption, the leagues must point to the misappropriation of their products, or free-riding by a direct competitor, that actually threatens the leagues’ continued production of sports performances and broadcasting.

132. *Id.* at 1281 (emphasis added).

133. *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1292 (11th Cir. 2004).

134. *But see Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 494 (ruling for the sports league in their state law claims based *only* on investment in the game performance itself).

135. *Live Nation Motor Sports, Inc. v. Davis*, Civ. A. No. 3:06-CV-276-L, 2007 WL 79311, at *3 (N.D. Tex. Jan. 9, 2007) (emphasis added).

136. *Motorola II*, 105 F.3d 841, 846–47 (2d Cir. 1997) (emphasis added).

A. COPYRIGHT INFRINGEMENT BASED ON COPYING

Erik Manassy is the author of *Jets Twit* and a self-proclaimed diehard Jets fan.¹³⁷ Known as “E” and “@e_man” on Twitter, Mr. Manassy was one of the earliest adopters of the tool in 2006, as user number 11,000.¹³⁸ Now with followers numbering well over the millions, “@e_man” tweets nearly every thirty seconds, tracking and commenting on certain plays and players.¹³⁹ During just one preseason Jets game, in the span of a mere two minutes e_man tweeted:

Great run by Chauncey Washington, lost the ball but it was ruled down [thirteen minutes ago]. . . . Clowney on the en-around and 12 yard pickup. He looked fast [twelve minutes ago]. . . . Woodhead with the run for 1 yard [eleven minutes ago]. . . . Jenkins didn't sound convincing talking about the depth of the D[efense] [ten minutes ago]. . . . Both Chauncey Washington and Danny Woodhead have outperformed McKnight, who has 3 fumbles, this preseason . . . Woodhead just made a nice tackle on special teams . . . Jim Ihedigbo with another CRUSHING HIT!¹⁴⁰

Would the league have any viable copyright infringement claims against e_man? As discussed in Part II, *supra*, the leagues can claim infringement where uploads originate from copyrighted material. The first determinative copyright question will be whether uploads are based upon protected elements of the broadcasts, infringing on the sports leagues reproduction rights under 17 U.S.C. § 106.¹⁴¹

The second step in the inquiry into infringement of the sports leagues' reproduction right is to determine whether “play-by-play” uploads are expressive and descriptive enough to qualify as “copies” of the broadcast. Even if the users are taking the material from copyrighted broadcasts, and if, as in *Motorola*, the uploads consist of limited factual information—team names, scores, possessions, fouls per quarter and time—such limited factual uploads would likely constitute facts and not “copies” of the broadcast.¹⁴² Like the facts transmitted to the pagers, most user “tweets” and status updates may include only short sentences, phrases or scores from fans—reproductions of facts, not the protected elements of the broadcasts.¹⁴³ For example, an upload could consist of only “3_0 jets . . . favre is

137. Erik Manassy, *Jets Twit*, TWITTER, <http://jetstwit.com/> (last visited Mar. 1, 2011).

138. Erik Manassy, *follow @e_man*, TWITTER, http://twitter.com/e_man/lists/jetsplayers (last visited Mar. 1, 2011).

139. Erik Manassy, *follow @e_man: New England Patriots vs. New Jersey Jets Game*, TWITTER (Sept. 19, 2010), http://twitter.com/e_man/lists/jetsplayers.

140. *Id.*

141. Note that this analysis focuses on copyright infringement based on *copying*. Other theories of direct copyright infringement that the leagues could make include violations of their public performance rights, and public display rights. Yet, recent case law suggests that clicking links might not implicate performance rights. See *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (finding that because there was no volitional act by Google when users click on a cached link, the act did not constitute direct copyright infringement).

142. *Motorola I*, 939 F. Supp. 1071, 1089 (S.D.N.Y. 1996) (“Facts are not protectible because they lack originality.”).

143. *Motorola II*, 105 F.3d 841, 846–47 (2d Cir. 1997) (ruling that sparse facts from broadcasts do not reproduce the expressive elements of the broadcasts).

about to tee off on the jets!”¹⁴⁴ This factual upload does not “copy” the protected expressive material. As the lower court in *Motorola* instructed, “copying” requires, among other criteria, a “substantial similarity of protectible [sic] material in the two works.”¹⁴⁵ Thus, copyright infringement claims regarding social media uploads that consist of pure factual updates would likely be dismissed because such uploads reproduce only facts and are not “substantially similar” to copyrighted broadcasts.

The issue is unlikely to arise with respect to such updates, as the leagues’ social media policies do not even purport to regulate limited and purely factual updates. The NFL release *specifically focuses* on play-by-play accounts that *reach the level of game approximation*, referring only to Internet material that is so strikingly similar to copyrighted broadcasts that it could substitute for the broadcast.¹⁴⁶ The NFL clearly recognizes the limits to which their prohibition extends by explicitly noting that their social media policies do *not apply* to “score updates” or “quarterly game updates.”¹⁴⁷ The leagues *do not attempt to reach* those social media uploads that are “limited in amount.”¹⁴⁸ The league is *only* concerned with play-by-play approximations that are so similar to broadcasts that they could “substitute” for accredited league broadcast coverage.¹⁴⁹

Attempting to distinguish statistical “score updates” uploads from play-by-play uploads that copy accredited broadcasts involves drawing a very fine line. Internet uploads might lie indeterminately between copying factual statistical information and copying radio or television broadcasts. Judicial line drawing will often prove necessary in order to distinguish those copies that cross the line from pure factual reproduction to infringement of copyrightable elements.¹⁵⁰

Here, unlike the pager displays that were found not to copy “the expression or description of the game that constitutes the broadcast,” new social media sites have much greater audiovisual capabilities that could enable them to “copy” broadcast sources.¹⁵¹ The technologically primitive pagers were limited to score, time and stats per player, and thus could not approximate “the many decisions that must be made during the broadcast of a . . . game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection” that “similarly supply the creativity required for the copyrightability of the telecasts,” which social

144. Lincoln Hawks, *Lincoln_Hawks on Twitter*, TWITTER (Oct. 11, 2010, 7:10 PM), http://twitter.com/Lincoln_Hawks.

145. *Motorola I*, 939 F. Supp. at 1093 (citation omitted).

146. Kramer, *supra* note 3; *see also* Associated Press, *supra* note 3 (“The league . . . has always barred play-by-play descriptions of games in progress . . .”).

147. Kramer, *supra* note 3.

148. *Id.*

149. *Id.* (“[G]ame coverage cannot be used as a substitute for, or otherwise approximate, authorized play-by-play accounts.” (internal quotations omitted)); *see also* Associated Press, *supra* note 3 (“barr[ing] play-by-play descriptions”).

150. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (“Here as elsewhere in the copyright law there are lines that must be drawn even though reasonable men may differ where [sic].”).

151. *Motorola II*, 105 F.3d 841, 847 (2d Cir. 1997).

media sites have the technological capabilities to copy.¹⁵²

With continuous audiovisual capabilities, Facebook and Twitter can convey at least as much expression as a radio broadcast. Social media sites' real-time uploads could reproduce game progression broadcasts using detailed descriptions, audio clips, photos, video clips and a running commentary of the game progression and plays. Although Twitter technically has a 140-word limit per upload, plug-ins allow the user to expand and upload continuously beyond one single post.¹⁵³ "Twit-Pics" also enable more audiovisual capabilities than a pager, which is restricted to linguistic rather than visual expression. Facebook allows a thousand words per post and two different "News Feeds"—summary views of the most interesting activity that has happened and a real-time view that shows you what is happening right now.¹⁵⁴ Mark Zuckerberg describes the News Feed "as a timeline—or a stream. As people share more, the timeline gets filled in more and more with what is happening with everything you're connected to. The pace of updates accelerates. This creates a continuous stream of information."¹⁵⁵ The uploading capabilities include descriptive status updates, videos, photos, audio or "anything else they want."¹⁵⁶ Thus, real-time mobile uploads to social networking sites could cross the line from merely reproducing facts to reproducing the expressive broadcast sources.¹⁵⁷ If Internet uploaders are transcribing nearly exactly what a television or radio broadcaster is communicating, the uploads could well be found to constitute a "copy" of the broadcast source material.

Assuming that uploads "copy" an accredited broadcast source, and that these uploads are more than mere collections of facts, in order to determine whether the copies are infringing, courts will also look at unprotected versus protected elements in order to determine whether improper appropriation of the copyrightable material has occurred.¹⁵⁸ To qualify as infringing, uploads should copy more than a "de minimis" amount of the source broadcast, which may be determined in relation to a quantitative or qualitative standard.¹⁵⁹ A court might find either quantitative or

152. *Motorola I*, 939 F. Supp. 1071, 1094 (S.D.N.Y. 1996) (quoting *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986)).

153. *Expand Twitter's 140 Word Limit and Tell the Complete Story*, WINANDMAC.COM (Mar. 23, 2008, 5:32 PM), <http://www.winandmac.com/tips/expand-twitter-140-word-limit-and-tell-the-complete-story/>.

154. Raylene Yung, *New Views for Your Home Page*, THE FACEBOOK BLOG (Oct. 23, 2009, 1:00 PM), <http://blog.facebook.com/blog.php?post=162536657130>.

155. Mark Zuckerberg, *Improving Your Ability to Share and Connect*, THE FACEBOOK BLOG (Mar. 4, 2009, 3:17 PM), <http://blog.facebook.com/blog.php?post=57822962130>.

156. *Id.*

157. See Clifford N. MacDonald, *Gamecasts and NBA v. Motorola: Do They Still Love this Game?*, 5 N.C. J.L. & TECH. 329, 339–40 (2004).

158. See *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 711–13 (S.D.N.Y. 1987) (copying the bird's eye view genre of an illustration would not be improper appropriation, but copying details like the block letters, lighting, windows and block print would be copyright infringement).

159. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997) ("The qualitative component concerns the copying of expression, rather than ideas, a distinction that often turns on the level of abstraction at which the works are compared. The quantitative component

qualitative “de minimis” taking of the copyrighted material if the uploads are describing the same replays, commentary, description of players, shot selection, video or audio clips, or are otherwise reproducing the creative decision making behind the broadcast. In order to infringe, the uploads must reproduce creative elements of what the cameramen and the director are doing, which constitutes “authorship” in the sports broadcast source material. The leagues have a strong infringement case where there is reproduction of specific details, sequences and structure that are not included in the uncopyrightable facts.¹⁶⁰

Yet, even if, as the preceding discussion has suggested, the leagues can make a claim that some uploads impermissibly copy broadcast source material, the difficulties of enforcement against individual uploaders seem difficult to overcome.¹⁶¹ After proving infringement by the user in the first place, the leagues would likely be better served by proving *secondary liability* of hosting sites and invoking the notice and takedown features of the DMCA, although the leagues themselves will bear the burden of identifying which continual users or accounts post play-by-play descriptions that approximate the game broadcasts.¹⁶²

B. SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT AND THE DMCA “SAFE HARBOR”

Given the difficulty of bringing actions against individual uploaders, the leagues might instead look to hosting sites like Facebook and Twitter, invoking copyright law’s application of the doctrine of secondary liability, which may be further divided into vicarious liability or contributory liability. Vicarious liability grew out of the theory of respondeat superior in tort law, and arises where the secondary party has 1) the right and ability to control and 2) a financial stake in the infringing activity.¹⁶³ Contributory liability requires 1) knowledge of the infringing acts and 2) any inducement or contribution to infringement, such as aiding or abetting.¹⁶⁴

generally concerns the amount of the copyrighted work that is copied, a consideration that is especially pertinent to exact copying.”) (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [A][2] (1997)).

160. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 397 (1940).

161. See *supra* note 62 and accompanying text.

162. See Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006).

163. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262–63 (9th Cir. 1996) (finding vicarious liability where the defendant operated a swap meet where vendors sold illegal copyright infringing copies of plaintiff’s music because the defendant had 1) the ability to control who sells at the swap meet and 2) the defendant made money from the vendors); see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (finding vicarious liability where defendant Napster’s program was being used by end users to illegally copy plaintiff’s music because “turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability” and the only means to escape vicarious liability is to police infringement).

164. See *Fonovisa*, 76 F.3d at 264 (finding contributory infringement because the defendant swap meet owners were told about the activity and they actively tried to provide an environment for counterfeit activity to thrive); see also *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913, 919 (2005) (finding that, where Grokster hosted a website that was capable of both lawful and unlawful uses, it was liable for acts of copyright infringement by third parties using the product because

However, any such claims of copyright infringement based on secondary liability would be countered by the invocation of the safe harbor provision in Title II of the DMCA, 17 U.S.C. § 512(c).¹⁶⁵ The provision exempts online service providers, defined in part by 17 U.S.C. § 512(k) as “a provider of online services or network access,” from what would otherwise qualify as secondary liability.¹⁶⁶ The DMCA specifically protects such Internet sites that passively host content, comply with certain statutory rules and cooperate when receiving qualifying takedown notices from copyright owners.¹⁶⁷ Given that Facebook and Twitter provide “online services” and host user-submitted description uploads, these sites would arguably be covered under § 512(c).¹⁶⁸ The DMCA provides that hosting websites:

[S]hall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)(i) *does not have actual knowledge* that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is *not aware of facts or circumstances* from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, *acts expeditiously to remove*, or disable access to, the material;

(B) *does not receive a financial benefit* directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) *upon notification* of claimed infringement as described in paragraph (3), *responds expeditiously to remove*, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹⁶⁹

In simple language, 17 U.S.C. § 512(c) requires “clean hands and empty heads”; a host will be protected by the DMCA if it does not have actual or apparent knowledge of infringing activity, or, if it does have knowledge, the site responds expeditiously to remove the material claimed to be infringing. To abide by the

it demonstrated clear expression and other affirmative steps that *fostered* infringement; mere knowledge of infringing potential or of actual infringing uses would not be enough to subject a distributor to liability); *Napster*, 239 F.3d at 1021 (holding that if a defendant learns of specific infringing material available on its Internet system and fails to purge it, the defendant knows of and contributes to direct infringement).

165. See *supra* notes 62–68 and accompanying text. The DMCA gives Internet service providers and “hosting” services a safe harbor from secondary liability for copyright infringement where such sites, like Facebook and Twitter, are hosting content at the direction of infringing third-party users. 17 U.S.C. § 512(c)(1–3).

166. 17 U.S.C. § 512(k).

167. See *id.* § 512(c)(1)–(3).

168. *Id.* § 512(c).

169. *Id.* § 512(c)(1) (emphasis added).

notice and takedown requirements, the hosting site must have a “designated agent” that receives the notifications and ensures that accounts are compliant.¹⁷⁰ The leagues would also need to comply with the DMCA’s required elements of notification.¹⁷¹ Upon notification of claimed infringement by the sports leagues, the social media sites would need to respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”¹⁷²

Under this scheme, the sports leagues would have the burden of identifying those accounts that cross the line from factual squibs, score updates and quarterly summaries to expressively approximated game broadcasts. However, given that § 512(c)(3)(A)(v) requires only a “statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,” the leagues might be able to implement the notice and takedown provisions without undue burden or risk.¹⁷³ Section 512(f) sets a high standard for finding copyright owners (here, the sports leagues), liable for damages to the hosting sites (Facebook and Twitter); such liability would attach only if the leagues were to “*knowingly, materially misrepresent[]*” that certain social media uploads are infringing.¹⁷⁴ Thus, it is cost-efficient for the leagues to send notice and takedown requests as a general strategy because the hosting sites can’t protest unless there is “knowing” misrepresentation of copyright infringement.¹⁷⁵ In *Rossi v. Motion Picture Ass’n of America Inc.*, the Ninth Circuit ruled that the DMCA requires subjective good faith; if a website or account creates the impression that infringing material might be available, and there is no evidence that the copyright holder knew otherwise, the court will find good faith.¹⁷⁶ The Supreme Court held that a “good faith belief” does *not* require a copyright holder to conduct a reasonable investigation to establish actual infringement prior to sending notice.¹⁷⁷ Thus, the leagues only need have a subjective good faith belief that certain website accounts are infringing their copyrighted broadcasts in order to satisfy the DMCA’s good faith requirement and

170. *Id.* § 512(c)(2).

171. *Id.* § 512(c)(3) (requiring 1) the signature of the person authorized to act for the copyright holder; 2) identification of the copyrighted work infringed, or if multiple works, a representative list of the works on that site; 3) identification of the infringing material and information sufficient to *permit service provider* to locate the material; 4) contact information of the copyright holder; 5) a statement that the copyright holder acted in good faith; and 6) a statement that the information is accurate).

172. *Id.* § 512(c)(1)(C).

173. *Id.* § 512(c)(3)(A)(v).

174. *Id.* § 512(f) (emphasis added).

175. See *Online Policy Grp. v. Diebold*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (suggesting that knowing misrepresentation means the party “actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations”).

176. *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000, 1004–05 (9th Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005).

177. *Id.* at 1004. (“Congress could have, but did not, expressly import a specific objective standard or reasonable investigation requirement into § 512(c)(3)(A)(v).”).

successfully invoke the notice and takedown provisions.

C. COPYRIGHT INFRINGEMENT BASED ON UNAUTHORIZED DERIVATIVE WORKS

In addition to copyright infringement based on copying (whether on theories of direct or secondary liability), the leagues could argue that news feeds and social media accounts are unauthorized derivative works of copyrighted broadcasts.¹⁷⁸ The owner of copyright has the exclusive right to “prepare derivative works based upon the copyrighted work.”¹⁷⁹ To be categorized as a derivative work that infringes on the exclusive right to adapt, a work needs to exhibit sufficient creativity to be a “new copyrightable work” on its own, while remaining substantially similar to the original work.¹⁸⁰ The derivative work must recast, adapt and transform the original.¹⁸¹ As discussed, social media uploads are capable of reproducing the copyrightable expressions of the broadcasts and may generate enough creativity and authorship to constitute “new copyrightable works” and be a derivative work. The NFL’s own social media uploads could be deemed sufficiently different from the traditional radio and television media to “recast” the accredited broadcasts.¹⁸²

In order to determine whether the “right to adapt” has been infringed, courts often look to whether the derivative work could substitute for the original author’s work in the economic market.¹⁸³ As has been noted throughout this analysis, the accredited broadcasts face very real threats of economic substitution, and the leagues’ own social media accounts directly compete with third-party uploads of sporting events. Acknowledging the role of economic substitution, the *PGA* court recognized digital RTSS as a type of derivative product, ruling that the Internet provided an opportunity to profit on a nearly identical principle as that applicable to television, radio and print media: “the PGA Tour has a right to sell or license its product, championship golf, and its derivative product, golf scores, on the Internet

178. See MacDonald, *supra* note 157, at 340.

179. 17 U.S.C. § 106(2).

180. *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998) (stating that the derivative work must also substantially incorporate material from the preexisting work that is protected by copyright); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir.1976) (holding that a derivative based upon reproduction of work of art must “contain some substantial, not merely trivial, originality” (internal citations omitted)). Thus, a derivative work must both have its own independent creativity and take substantially from the preexisting work.

181. Oakes, *supra* note 64, § 14 (citing 17 U.S.C. § 101). “Various matters have been held copyrightable as derivative works, such as a dubbed or subtitled foreign film, a particular production of a play, a three-dimensional figure derived from a drawing, and a reworking of a translation.” *Id.* (citations omitted). It seems that an Internet stream of creative material could be a derivative work.

182. See *Muñoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309, 314 (D. Alaska 1993) (granting a preliminary injunction because mounting copyrighted notecards on ceramic tiles sufficiently “recast” the cards and was an infringing derivative work), *aff’d*, 38 F.3d 1218 (9th Cir. 1994).

183. See, e.g., *L. Batlin & Son, Inc.*, 536 F.2d 486 (denying copyright protection for the derivative plastic version of the bank because it was just trying to cheaply replace the market for the iron version).

in the same way the PGA Tour currently sells its rights to television broadcasting stations.”¹⁸⁴

Although the PGA case did not address copyright issues, the equitable argument that the sports company should have the right to make its own derivative products revolves around the same *economic policy rationale* that is presented in copyright derivative infringement claims. Although this derivative works argument is not explicitly found within the leagues' current social media policies, infringement of the NFL's right to adapt its broadcast sources on the Internet seems a plausible claim against uploaders that make use of sports broadcasts.¹⁸⁵

IV. STATE LAW CLAIMS

As an alternative remedy to protect against the unlawful use of their broadcast material, the leagues could turn to state law misappropriation claims, on the *model of the “hot news”* right established in *INS*.¹⁸⁶ As discussed in Section II.D *supra*, to be successful in these claims the leagues will need to distinguish social media uploads from the pager uploads in *Motorola*.¹⁸⁷

In *INS*, the “hot news” right was a right against defendant's unauthorized interference with the operation of the plaintiff's business precisely at the time sensitive point where the profit was going to be reaped; the defendant was diverting a material portion of the profit away from those who had earned it, to the benefit of those who had not.¹⁸⁸ The defendant, who stole from the plaintiff's news bulletins, gained a special advantage in not being burdened with any of the expense of gathering the news.¹⁸⁹ Similarly here, the value of a broadcast of a game in progress “depends upon the promptness of transmission,” as in *INS*, and contemporaneous Internet accounts of the game could detract from the value of copyrighted broadcasts that the leagues have invested heavily in producing.¹⁹⁰ In *Motorola*, the court held that such *INS* “hot news” misappropriation claims surviving preemption under the Copyright Act are limited to cases where: 1) the plaintiff generates or *gathers information at a cost*; 2) that information is *time sensitive*; 3) the defendant's *use of information constitutes free riding* on plaintiff's

184. *Morris Comm'ns Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1282 (M.D. Fla. 2002). As will be discussed in the next section, the *Morris* case is relevant for the sports leagues' state law property claims.

185. In addition to the argument that the NFL could gain control over social media as derivative works, perhaps official league uploads could be deemed copyrightable “factual compilations.” See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.* 499 U.S. 340, 348 (1991) (stating that there could be copyright protection if “choices as to selection and arrangement . . . entail a minimal degree of creativity”). As repeatedly discussed, statistical lists do not involve the requisite creativity and originality, but the leagues' own social media uploads could be copyrightable where no users could use or reproduce the leagues' own Internet game approximations.

186. See *Int'l News Serv. v. Associated Press*, 248 U.S. 214 (1918).

187. *Motorola II*, 105 F.3d 841, 845 (2d Cir. 1997).

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

189. *Id.*

190. *Id.* at 230.

efforts; 4) the defendant is in *direct competition* with product or service offered by plaintiff; and 5) the ability of other parties to free ride on efforts of plaintiff and others would so *reduce the incentive to produce* the product or service that its existence or quality would be substantially threatened.¹⁹¹

Here, elements one and two are obviously met since the league plaintiffs gather the information at a cost—regular-season football telecasts are major productions that can cost between \$150,000 and \$250,000—and the sports information is extremely sensitive to timing, given that few fans are interested in viewing re-enactments of already known scores.¹⁹²

In order to assert that the infringing social media uploads fit within the “hot news” context, however, the leagues would need to prove more: specifically, the additional elements that were not present in *Motorola*—free riding by the defendant uploaders, direct competition and a threat to the very existence of the product or service provided by the plaintiff.¹⁹³

In terms of elements four and five—direct competition and a *reduced incentive* to produce their product—unlike *Motorola*, here the leagues have already established their own Facebook and Twitter products, which would be in *direct competition* with unauthorized social media Internet uploads. For instance, the Washington Redskins have a user profile on Facebook that provides the roster, depth chart, coaching, staff, schedule, team news, Gameday previews, Redskins TV, Redskins Radio, tickets, merchandising links and stadium info.¹⁹⁴ In addition, Redskins followers can follow commentary and updates, photos, videos and links.¹⁹⁵ The account also provides direct links to players’ Twitter accounts.¹⁹⁶ In addition, the Redskins account links to the Twitter accounts of ESPNRadio, ExtremeSkins, RedskinsGameday (which gives score updates during the game) and the Editorial Director of the Redskins Media Department.¹⁹⁷ Even the Miami Dolphins, the least “Twitter friendly” team, which does not even let public spectators bring in their PDAs to practices, has an official Facebook page,

191. *Motorola II*, 105 F.3d at 845. The Second Circuit held:

The . . . ‘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.

Id.

192. *Id.* at 853 (“The information transmitted to SportsTrax is not precisely contemporaneous, but it is nevertheless time-sensitive.”). For the costs of major sports production, see Biderman, *supra* note 56.

193. *Motorola II*, 105 F.3d at 853–54 (“[T]he NBA has failed to show any competitive effect whatsoever from SportsTrax on the first and second products and a lack of any free-riding . . .”).

194. *Washington Redskins Official Facebook Page*, FACEBOOK, <http://www.facebook.com/redskins?ref=ts> (last visited Feb. 1, 2010).

195. *Id.*

196. *Id.*

197. *Id.*

designated by the “official” stamp of approval.¹⁹⁸ Already, there are signs that the club and league accounts are competing with third-party accounts; the websites try to distinguish these “official” accounts from copycat accounts in their profiles.¹⁹⁹ The official Facebook accounts link to various commercial purchases like ticket sales, promotional contests, events, newsletters and merchandising.²⁰⁰ Facebook recently announced that users can purchase credits with PayPal, and can use those credits to purchase virtual goods with all applications that accept them.²⁰¹ The league accounts have thus created a source of income and an economic market on the Internet in direct competition with unauthorized accounts. Third-party social media accounts that directly compete with the leagues’ own social media accounts and broadcasts could reduce the incentive for the leagues to continue to market some of their own Internet products. The public may lose access to the clubs’ production of information on Facebook and Twitter because the leagues may decide not to invest in these products. Thus, in regards to the elements of direct competition and reduced incentive to produce, the leagues here arguably have stronger claims than those of the plaintiffs in *Motorola*.

Even if user accounts are in direct competition with the leagues’ own social media products, a counterargument against “hot news” claims may be brought asserting that the competitive element of the hot news analysis can only be satisfied by direct competition with copyright holders’ *primary or secondary products* (game performance or broadcast production).²⁰² Given that continuous uploads tracking the sports performance may not provide the same level of audiovisual entertainment as traditional media, such Internet technology may not be a substitute for television or radio broadcasts; consumers will always prefer televised games to lower technology Internet play-by-play accounts. However, as noted above, one could argue that the increasingly sophisticated, multimedia Internet play-by-play descriptions indeed threaten television and (even more seriously) radio broadcasts.²⁰³ Younger generations are increasingly comfortable with digital forms of entertainment in lieu of traditional broadcast mediums.²⁰⁴ Again, *two-thirds* of sports leagues’ revenue hinges on exclusivity; Internet users that circumvent the broadcast market and make game play-by-plays directly available to the public on

198. In regards to the stringent Dolphins’ policy, see Associated Press, *supra* note 14. For the official Miami Dolphins page, see *Miami Dolphins: Company*, FACEBOOK, <https://www.facebook.com/MiamiDolphins?ref=ts> (last visited Mar. 2, 2011).

199. See *Miami Dolphins: Company*, *supra* note 198 (noting the small facebook designation in the bottom corner of the profile picture).

200. *Washington Redskins Official Facebook Page*, FACEBOOK, <http://www.facebook.com/redskins?ref=ts> (last visited Feb. 1, 2010).

201. Deborah Liu, *Expanding Our Commitment to Facebook Credits*, FACEBOOK (Feb. 25, 2010, 2:30 PM), <http://developers.facebook.com/blog/post/364>.

202. See *Motorola II*, 105 F.3d 841, 853–54 (2d Cir. 1997).

203. See Lunardi, *supra* note 39, at 1083–84.

204. Jane Weaver, *Teens Tune out TV, Log on Instead*, TECH AND GADGETS: MSNBC.COM (2010), http://www.msnbc.msn.com/id/3078614/ns/technology_and_science-tech_and_gadgets/ (last visited Mar. 2, 2011).

the Internet could “significantly affect[] the NFL broadcast’s immediate value.”²⁰⁵ Decreases in broadcast revenue may threaten the production of performances that can cost between \$150,000 and \$250,000.²⁰⁶ The leagues could likely show the requisite competitive effect where their licensing revenues of copyrighted television or radio broadcasts suffered.²⁰⁷ Evidence already indicates that the Internet displaces the market for radio and television.²⁰⁸ Therefore, the leagues may well be able to navigate around the holding of *Motorola* in proving the elements of direct competition and reduced incentive to produce.

The most difficult “hot news” element to prove will be whether social media users free ride on any information-gathering product invested in or created by the leagues, or whether the users do all their own collection and assimilation for their uploads. Here, the case appears a closer one than in *Motorola*: while the statisticians in *Motorola* were clearly doing their own information-gathering, here the leagues expend resources to create Internet accounts with unique features that the leagues could argue are being appropriated by third-party social media accounts. If the third-party accounts could be shown to be free riding off of the official league accounts, the free riding element would be met here. As the court in *Motorola* admitted, if the SportsTrax pagers “were to collect facts from an enhanced Gamestats pager to retransmit them to SportsTrax pagers, that would constitute free-riding.”²⁰⁹ However, it will be difficult to prove such free riding off of official Internet accounts; moreover, as discussed repeatedly, users formulate their game-approximating uploads by gathering sports information on their own. Thus, although the leagues seem to have much better free riding arguments than in *Motorola*, it is unclear how the courts will rule.

Regardless of the leagues’ ultimate ability to argue this hot news claim, this Note has attempted to distinguish the potential league plaintiffs in the current social media context as presenting more convincing arguments on at least two of the three elements that the NBA lacked in *Motorola*. In addition, the leagues could look to other decisions supporting sports companies’ “legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies.”²¹⁰ These decisions repeatedly seem to rely on equitable arguments in

205. See Plantinga, *supra* note 49, at 51.

206. Biderman, *supra* note 56.

207. MacDonald, *supra* note 157, at 342.

208. Lunardi, *supra* note 39, at 1083–84.

209. *Motorola II*, 105 F.3d 841, 854 (2d Cir. 1997).

210. See *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 492 (W.D. Pa. 1938). At the administrative level as well, equitable considerations in favor of greater protection have trumped concerns of overbreadth. A late 2007 ruling by the Federal Trade Commission (“FTC”) suggests that these risks of potential overbreadth in the application of copyright law should not limit the leagues’ ability to issue copyright warnings. The FTC refused to grant the Computer & Communications Industry Association (“CCIA”) an injunction against sports leagues’ alleged “manifestly false” copyright warnings. See Walker & Savare, *supra* note 7, at 28. The CCIA argued that the copyright warning is “manifestly false” because the Copyright Act does not protect facts or ideas” and “makes no allowance for . . . the principle that facts are not copyrightable.” *Id.* at 29–30. However, the FTC staff declined to take any action, citing first the lack of a “sufficient basis to conclude that consumers would

recognizing a “property right of the plaintiffs with which defendant is interfering when it broadcasts the play-by-play description of the ball games obtained by the observers.”²¹¹

V. CONCLUSION

The onslaught of new Internet social media and peer sharing technologies threatens sports leagues' licensed broadcast rights. In response, the leagues have issued new social media policies to protect their investments in their creative products. To enforce their rights in these investments and products, this Note has argued that the leagues can either point to the copyright law regime or to state law misappropriation claims. If, as academics contend, sports performances are not copyrightable, under copyright law the leagues may argue that user uploads take from copyrighted broadcasts, that play-by-play uploads are expressive enough to “copy” broadcasts and that the uploads take from the copyrightable elements of the broadcast. Upon finding such primary infringing activity, in lieu of problematic actions against individual users, the leagues could attempt to hold the social media website hosts liable on theories of secondary liability. Although the websites would seek to avoid such liability under the DMCA, any such invocation would trigger notice and takedown provisions that would force the sites to take down identified infringing user accounts. Moreover, the leagues' remedies would not be limited to those associated with violations of the right to make “copies” of copyrightable works; the right to create derivative works may also be implicated in social media uploading of play-by-play accounts. Finally, as an alternative to copyright infringement, the leagues may bring state law claims that could arguably survive federal copyright preemption by navigating the requirements of *Motorola* and invoking additional, state law equitable precedent. Sports leagues new social media policies are a narrowly tailored response to the real economic threat that this Internet age poses to traditional broadcasts. Sports leagues should be able to enforce these policies, whether through copyright or state law, against the

view those brief warnings as complete statements of their rights with respect to the works,” and second, lack of a “sufficient basis to conclude that consumers would be likely to refrain from engaging in lawful activities as a consequence of reading those warnings.” *Id.* at 30; *see also id.* at 32, n.32 (citing Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, FTC, to Edward J. Black & Matthew Schruers, CCIA (Dec. 6, 2007), available at <http://www.ftc.gov/os/closings/staff/071206ccia.pdf>). Most importantly, for purposes of this social media upload analysis, the FTC staff claimed that the “safest course is always to get permission from the copyright owner before using copyrighted material.” *Id.* The FTC favored the leagues' warnings because they incentivized permission, highlighted penalties and encouraged a cautious approach.

211. *Pittsburgh Athletic*, 24 F. Supp. at 492; *see also Morris Commc'ns Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1281 (M.D. Fla. 2002) (recognizing a property right in the sports company's RTSS product based on an equitable valid business reason for restricting access up until the time that the scores are published; this suggests that leagues have property or contract rights to control “insider” uploads from spectators inside their stadiums because the only recipients of the disputed information at that moment are those whom the leagues have placed conditions on for their access to the performance); Roberts, *supra* note 48, at 187.

unauthorized Internet entertainment use of the leagues' copyrighted material and performance property.