

Mobile Technologies, Social Media, Event Digital Publishing and the Challenge to Copyright in the U.S.

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Abstract: *The convergence of mobile technologies and social media has spawned new challenges in copyright law. Users are able to capture events that they observe, including organized games, and publish them in real-time online to small and wide audiences. Current copyright law protects events that have been simultaneously fixed in a “tangible medium of expression,” but does not offer similar protection to live events that have not been recorded. This article explores this dilemma and concludes that while there are several approaches that plaintiffs might consider in litigating against event digital publishers, none is completely satisfactory and such events remain free for all, from a copyright perspective.*

Keywords: *Event digital publishing, social media, copyright, mobile technologies*

It is probably an understatement to say that mobile technologies are becoming ubiquitous. Even if they do not own one, most people, for example, know about the iPhone, the Blackberry, and Android-driven devices, among others.

The technological ability of these devices to capture and publish data and events is rapidly increasing, leading to what Hutchins (2009) as “digital plenitude.” The evolving online social networks such as Facebook, Twitter, Twitpic, and YouTube are complementing this ability. Social networking means sharing this data and events, often in real time, within (and sometimes out of) a social network. The list of social networks keeps growing, just as participants of these networks keep increasing (Sheppard, 2010). In March 2012, for example, Facebook reported an average of 526 million daily active users and more than 125 billion friends connections (Facebook, 2012).

Data and events being captured may include videos and commentary of ongoing physical games. Apart from it being problem for event organizers and sports leagues because it impacts their market for broadcasting and publishing, it also poses a challenge to current copyright laws.

Current US copyright law protects events if they have been reduced to a tangible form, if, for example, they have been or are simultaneously transmitted and recorded (17 USC 101). Section 101 states that a “work consisting of sounds, images, or both, that are being transmitted, is “fixed”... if a fixation of the work is being made simultaneously with its transmission.” Likewise, the court in *Baltimore Orioles v. Major League Baseball* provided copyright protection for televised broadcasts (*Baltimore Orioles v. Major League Baseball Players Ass’n.*, 805 F.2d 663 (7th Cir. 1986). Thus, intercepting a broadcast of a game (which by definition is fixed) and then retransmitting it via social networks would be an infringement of copyright on such broadcasts. A court even issued an injunction against a website that linked to the webcasts of a sports company (*Live Nation Motor Sports v. Davis*, 2007 WL 79311 (N.D. Tex., 2007).

However, non-recorded games are not protected. In *NBA v. Motorola, Inc.* (105 F.3d 841 (2d. Cir. 1997), NBA sought to stop Motorola from using information gathered from NBA broadcasts to disseminate progress information to SportsTrax pager subscribers. The court ruled that basketball games do not fall within the scope of Copyright Acts’ “original works of authorship,” which include literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works (17 USC 102(a)). Not only are the games themselves not protected, according to the court, neither is statistical nor score information about them, because these would constitute uncopyrightable facts (Hull, 2011). The court in *NBA*, however, acknowledged the “hot news exception” to misappropriation claims, but ruled it did not apply to Motorola’s actions in this case. The court acknowledged that there was a hot news misappropriation exception 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 (105 F.3d 841, at 845).

Live-blogging, capturing and digitally publishing video of real-time games over social media might meet one or more of the “hot news” exceptions: (i) the team owners pay a high premium for players and facilities; (ii) the game is time-sensitive in often is not broadcast in local markets until after the event; (iii) digital publishing of the event free-rides on the team-owners’ efforts; and (iv) the digital publication might be in direct competition with the licensed broadcasts. It is doubtful, though, that such digital publishing could reduce the incentive of team owners to have teams and to stage games.

Teams may have an exclusive right to publish, broadcast games played within their parks (*Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 494 (W.D. Pa. 1938)). The Pittsburgh Athletic case involved a broadcaster who telecast a baseball game play by play from outside a stadium. But even where such exclusivity is granted to a broadcaster, social networkers have the ability to erode it by their ability to generate and upload content from anywhere. Such exclusive agreements, however, have nothing to do with copyrightability.

The problem is magnified by the fact that it is difficult to police users of social networking devices, and not for lack of trying. For example, the US National Basketball Association has tried to police players and coaches by prohibiting them from using Twitter, cell phones and other communication devices from 45 minutes before a game to the end of the game. For example, on September 30, 2009 it issued the following news release (National Basketball Association, 2009):

NEW YORK (AP) -- The NBA is instituting a policy regarding Twitter and other social media sites, banning players from using them during games.

The league sent a memo to teams on Wednesday telling them that cell phones and other communication devices can't be used from 45 minutes before game time until after players have finished their responsibilities after games. That includes halftime.

The rule applies to "coaches, players and other team basketball operations personnel." NBA spokesman Tim Frank confirmed the memo and its contents.

The memo does not specify penalties for violation of the rule, and says teams are free to create their own policies for practices and other team events.

The NBA has more than 1.4 million followers on Twitter, and many players are active on it (<http://www.nba.com/2009/news/09/30/nba.twitter.rules.ap/index.html>).

Similarly, the NFL prohibits use of online social media by coaches, players, and other personnel from 90 minutes before kick-off. Likewise, spectators to the Professional Golf Association US Open are prohibited from bringing cameras, PDA's, cell phones and the like to the games. PGA hopes that this removes the means to “live-blog” by capturing and publishing the game in real-time (Sheppard, 2010). Game leagues have also requested social media platforms to delay play-by-play game accounts, for the benefit of accredited licensees (Hull, 2011).

One of the major concerns with event digital publishing utilizing social media is the danger that the broadcasts could replace the actual product (for example, spectators might avoid going to the actual game), or could compete with broadcasting franchises, for which team owners have already been paid. Sheppard (2010) notes that this would threaten the sports business model as it is currently structured, similar to the threat posed by digital file sharing to the traditional music industry model.

An approach that event organizers may use to curtail the digital publishing of their events to online social networks may be to have the event participants sue under the right of publicity claim. Right of publicity is a state law claim originating out of common law that attempts to prohibit the use of images or other aspects of famous persons (mostly entertainers) for commercial advantage. California, for example, has a statute prohibiting such exploitation:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs (California Civil Code Section 3344(a)).

However, such claims are subject to a First Amendment challenge under the US Constitution. For example, the court in *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball* (*C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007) declared that “recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball’s website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection” (505 F.3d 818, at 823-824). Furthermore, in terms of copyright, not only are games not copyrighted because the moves are spontaneous and not fixed in a tangible medium, but even if they were fixed (as in a broadcast), the players would not be authors of the game. In any case, state law right of publicity claims would be pre-empted by federal copyright law (*Baltimore Orioles* at 674).

For ticketed events, aggrieved parties could have recourse by resorting to breach of contract claims, if the ticket prohibited real-time event digital publishing. However, there are many events that are not ticketed (such as parades), for which no such recourse would be available, and even ticketed events can be observed and recorded from adjacent property (Bitman, 2004). In any case, given the scope and size of the number of possible digital publishers on social media, there remains the very real problem of enforcement (Hull, 2011). Suits against social media platforms for hosting copyrighted material (such as intercepted broadcasts), for example, would run into the problem of the Digital Millennium Copyright Act (DMCA) safe harbour, which protects Internet service providers against infringement liability under certain circumstances, where the host is able to demonstrate that: there was no knowledge of the infringing activity, there was no direct financial benefit arising out of the infringement, where the host had the ability and control to control uploading activities, and where the host promptly removed infringing material upon request (17 USC 512(c)). While leagues may be able to have infringing material such as intercepted broadcasts taken down using the DMCA requests, they cannot use this to request the takedown of non-copyrighted material, such as user generated digital publishing of real-time events.

Finally, a plaintiff could seek relief on the basis of a trademark infringement claim. A trademark owner uses the mark to identify its goods and services, and to distinguish them from other similar goods and services. An infringing use of a trademark is where such use creates a likelihood of confusion among customers as to the origin of the goods. Major leagues are very protective of their trademarks, as they constitute one of their most valuable assets. When a user captures an event, he is also likely to capture much of the trademark of the event’s owner. The plaintiff could then argue that the user is creating confusion as to the origin of his digital publication.

A fact often overlooked is that those who digitally publish events have copyright protection in their publications, despite having done so without the event producers’ permission. It is clear that advances in mobile technologies, in making possible the instant capture and digital publishing of events through online social media, will continue to pose serious challenges to US copyright law, as well as copyright laws in other countries. An emerging suggestion (Solomon, 2011) is that the list of copyrightable subject matter be expanded to include sport events as an additional category of “works of authorship” enumerated in the Copyright Act, much like motion pictures. Solomon points to some similarities between sports events and motion pictures: scenes versus quarters; cast of characters versus players. A major difference, of course, is that while motion pictures are closely scripted and directed, sports events are one-time events that have only tentative scripts that can vary widely from the coaches’ initial attempts at directing.

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