CHAPTER NINETEEN -- INTELLECTUAL PROPERTY AND SPORTS

I. INTRODUCTION

This Chapter focuses on one of the most quickly developing area of legal analysis of professional sports -- issues of intellectual property. For those classes in which the Torts and Sports chapter (Chapter 18) has just been completed, this chapter offers a transition from libel and defamation and related aspects of a sports personality's "right of privacy" to the individual's ownership of a "right of publicity." For those classes that will not cover Torts and Sports and those that are proceeding out-of-order, this chapter presents the issue in a manner that should be self-contained and should not suffer in any way because Chapter 18 has been bypassed.

The business of sports has always been primarily a business of intangible assets (e.g., the license to enter the ballpark to view a game, the contract right to a player's services, the "franchise" or membership right in an association that entitles the owner of a team to be part of a league, and the right to broadcast a sports exhibition or game). However, little has been written about that phenomenon. In recent years the lawyers and businessmen have focused a great deal more attention on the limits and character of those intangible rights, as well as ways to protect intangible rights. Advances in technology, from television to cable to satellite to the internet, all increase the attention being focused on sports and the intangible rights associated with them.

In general, the law of intellectual property is no different for sports than for other businesses, especially businesses in the entertainment industries. Entertainment industry celebrities and athletes face similar issues concerning the misappropriation of their names and likenesses and claims that their performances have been misappropriated. However, there are issues that are different for sports, and this chapter focuses primarily on those issues. What are the ownership rights of athletes, team owners, and other event producers?

In a perfect world, this chapter would be preceded by "primer chapters" about rights of privacy and publicity, copyright law, trademark law, and the common law of misappropriation. [We have not even attempted to cover patent law issues, which primarily arise for the equipment businesses, such as golf equipment manufacturers.] However, this chapter is intended as a mere survey of these subject matters, and few sports law courses will be able to take enough time (and to require students to do enough reading) to study these subjects in depth. The goal of this chapter is to focus sufficient coverage on the issues and cases that bear directly on the business of sports, in order that the instructor or student who masters the cases covered in these chapters should be well on his or her way to knowing much more than the above average (or even the well above average) sports law practitioner. The instructor or student will certainly not be prepared to hang out a shingle as an intellectual property expert, but they should have a working knowledge of the general subject matter and the most important sports law cases in these areas.
II. ANALYSIS OF THE CASES


Primary Reason for Inclusion: This case addresses the issue of under what circumstances an athlete is entitled to restrict commercial use of his or her identity, including statistical information about the athlete's career.

Points to Emphasize: This case (like virtually all others addressing similar facts) gives broad protection to information about athletes. Draw attention to the case at issue -- (1) none of the athletes were identified on the box, so it was not the identity of the individual golfers that was used to attract the person reading the box and considering a purchase. The purchaser of the game had to buy it (or hear about its contents from a previous purchaser) to know what golfers were featured in the game, and (2) the data is merely publicly available, factually accurate information about each of the twenty-three golfers.

The case draws a line between "dissemination of news or articles or biographies" and other "commercial project[s]." This can be fertile ground for a discussion about hypotheticals -- e.g., (1) a newspaper that runs a "fantasy baseball" game, in which the subscribers select a team of players and the players' statistics yield winners and losers or (2) a golf encyclopedia that includes statistics about all of the top professional golfers who ever lived, with a fold-out game board and instructions for how to play a game using the statistics in the book. See also N&Q 5.

The case includes the judge's ruminations that "[p]erhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference . . ." Does the theory depend on the idea that the product interferes with the athlete's own effort to exploit his identity commercially? The court seems to say it does not, but suggests the reason may be to preserve the option for the athlete in the future:

They may not all desire to capitalize upon their names in the commercial field, beyond or apart from that in which they have reached their known excellence. However, because they presently do not should not be justification for others to do so because of the void. They may desire to do it later.

A hypothetical to consider would be a reclusive ex-athlete who has sworn that he will never support a commercial endeavor involving his statistics for religious reasons. Does he have a right of no-publicity?

Consider the game producer who does not want to track down all of those ex-athletes. Could he produce a PGA Tour game with the statistics of top former PGA Tour players? How about a Major League Baseball game, with statistical information about top former major leaguers? The answer to these questions turns on what rights the tour or the league
secured from their athletes by virtue of the express or implied contracts that existed between the athletes/players and the league/tour. See also N&Q 4, below.

Notes and Questions: N&Q 1 forces the student to focus on what claim was asserted. The case says the plaintiffs contended the defendants' use of their names and career statistics was "an invasion of their privacy and an unfair exploitation and commercialization of their names and reputations." Strictly speaking, it appears to have been a tort case for invasion of privacy. However, there are elements of different theories suggested by the court's analysis -- unjust enrichment, misappropriation, and so on.

N&Q 2 addresses the fact that although generally based on a "right of publicity" theory, the idea is one of a protected intellectual property interest, like a copyright or a trademark or a patent -- such that it can be sold, assigned or licensed, on an exclusive or non-exclusive basis, and the assignee or licensee can file claims against alleged infringers.

N&Q 3 and 4 explore the policy issues presented by the fact that athletes' decisions to refuse to license their identities or to assign too high a price for such a license may prevent the development and production of worthwhile products. It also mentions the role of players associations in "group licensing" -- granting a licensee the right to utilize the identities of all of its members in a group setting, such as trading cards, computer or board games, and other licensed products.

N&Q 5 discusses the issue of right of publicity after death, which is a question that varies from state to state, based on interpretation of common law or statutes specifically enacted to create a post-death right for the celebrity's estate.


Primary Reason for Inclusion: This case presents a case on the line between news use and commercial exploitation and is one of the few cases resolved against the athlete.

Points to Emphasize: The magazine went about as far as a magazine can go in utilizing Joe Namath's identity to sell magazines. It did not just say "read about Joe Namath in Sports Illustrated." It promoted the magazine as "How to Get Close to Joe Namath." Could readers have been misled into believing that Joe Namath had endorsed Sports Illustrated or had been paid by Sports Illustrated for the use of his name?

The courts says the following:

There is nothing degrading, derogatory or untruthful about the copy.

Couldn't the same have been said about the contents of the game in Palmer? Namath had not suggested it was defamatory. Somehow the newspaper or magazine can extend its right to
publish news information about public figures to be a right to use the public's interest in athletes and celebrities to promote the sale of the newspaper or magazine.

**Notes and Questions:** N&Q 1 & 2 ask how far the envelope of promoting the paper can be pushed. What about shirts depicting cover pages of *Sports Illustrated*? Does it matter if the t-shirts were sold and generated a profit as opposed to being given away for free as part of an effort to increase the subscription base?

N&Q 3 and 4 provide information about how professional sports leagues and tours purport to secure specific rights of publicity from their athletes. Those agreements are based on contract law principles, and the questions are intended to consider issues of implied contract, contracts of adhesion, and similar issues.

**Case:** *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979)

**Primary Reason for Inclusion:** This case provides a more comprehensive analysis of the history of the concept of a right of publicity as it explores a different issue about the scope of the protection -- does it extend to an athlete's nickname? It also discusses protection of a nickname under the law that protects trade names.

**Points to Emphasize:** The court discusses the public policy implications and attempts to craft a cause of action consistent with public policy. However, that yields different conclusions -- for example, the court is concerned about whether something is in fact been taken from the athlete. Therefore, the court discusses the fact that Hirsch had taken steps to enhance and protect his public image and its value for promotional purposes and the fact that Hirsch had been paid in the past for the use of his name.

The decision also discusses trademark law and its similarity to and relationship to common law protection of an athlete's right of publicity. This provides a transition into the next portion of the chapter -- where trademark and copyright law are discussed as the means by which other intangible assets are protected.

The decision does not hold that Hirsch should prevail -- merely that he is entitled to have the issue submitted to a jury, which will have to assess whether the name of the product -- Crazylegs -- refers to Hirsch and is likely to confuse the public into believing that Hirsch sponsored the product.

**Notes and Questions:** N&Q 1 asks whether the test should be the intent of the seller of the product or whether consumers share the sellers' belief and are likely to be confused. If the sellers believe that the public will associate the product with the athlete because the nickname is used, but the public misses the association, there was an intent to misappropriate the athlete's right of publicity, but nothing was really lost because the athlete's effort to promote himself was not diluted. One might take the position that if you intended to misappropriate the athlete's right of publicity and the plaintiff can prove it, he should not be required to conduct consumer surveys to
prove the effort was successful. Even if most consumers were not misled, if any were, that may be enough.

N&Q 2 and 3 identify cases that have considered whether drawings and other depictions that are recognizable as artists' renditions of an athlete or a celebrity infringe upon the right of publicity. As with nicknames, if the effort is to identify a particular person, that person must be consulted.


Primary Reason for Inclusion: Provides an introduction to basic concepts of trademark law and suits for infringement of rights protected by trademark law.

Points to Emphasize: The facts and the testimony of the defendants clearly established that the intent of the infringers was to sell merchandise to consumers who would associate "New Jersey Giants" with the "New York Giants" football team, and they had engaged in the same conduct to cause "New York Cosmos" fans to purchase "New Jersey Cosmos" merchandise. The court expressly found that the defendants' efforts were only about making money, and the challenged conduct did not involve an effort to convince the team, which is located in New Jersey, and plays its home games in East Rutherford (the Meadowlands), New Jersey, to change its name. Therefore, the judge concluded that this case did not raise concerns about using trademark law to infringe upon freedom of speech.

The court discusses some of the concerns of trademark law -- for example, the defendants' merchandise competes with the merchandise sold by legitimate licensees of the team via NFL Properties and, thereby, hurts the plaintiffs' sales. In addition, the defendants' merchandise is of extremely inferior quality, and it might cause the consumer of that merchandise to have a bad impression of the NFL and all of its properly licensed merchandise.

Despite the clear evidence of intent, plaintiffs had to produce evidence of actual consumer confusion, which they did -- the form of a consumer survey conducted in accordance with accepted principles of survey research, showing evidence of confusion.

The court rejects the argument that the licensed merchandise promotes the watching of NFL games. The importance is that one of the plaintiffs' arguments is that the infringement in selling the merchandise infringed the plaintiffs' "service marks," as well as their trademarks. If the infringement interfered with the plaintiffs' sale of tickets to football games and interfered with the NFL's efforts to cause viewers to watch television broadcasts of NFL games, it would have constituted service mark infringement as well as trademark infringement.

The trademark infringement yields several independent causes of action -- violation of the federal Lanham Act, state law unfair competition, tortious misappropriation of the plaintiffs' goodwill and reputation, and tortious interference with business relationships.
Notes and Questions: N&Q 1 discusses a much more difficult question -- situations where businesses in a city from whence a team has relocated use the departed team's name (e.g., the Baltimore Colts and the Brooklyn Dodgers). In one reported decision, a Canadian Football League team was prevented from calling itself the Baltimore Colts or the Baltimore CFL Colts, to identify a football team, and Major League Baseball tried to prevent a restaurant in New York City from calling itself the Brooklyn Dodger Sports Bar and Restaurant. Could fans in Baltimore really have believed the Baltimore CFL Colts were affiliated with the NFL team that had left Baltimore more than ten years earlier? Would New York residents believe the sports bar was associated with a Los Angeles baseball team? If the latter were true, would it have adversely affected Major League Baseball? If consumers had bad experiences at the sports bar, is it likely that such experiences would have hurt the business of Major League Baseball? What about Major League Baseball's business of licensing restaurants? Should it matter if Major League Baseball has or has not, in fact, licensed any sports bars to date?

Other cases -- involving major professional sports league teams adopting names previously used by much lesser teams in the same, similar, or different sports -- are discussed in 2-4. Is it perhaps more difficult to show consumer confusion when you operate such a lesser, less widely known team that consumers may not know you exist, and are therefore less likely to be confused? Is that fair? What if the same percentage of people who have ever heard of your team are confused, even though those people are a small percentage of the overall population?

Is there a need for injunctions to prevent the use of the same or similar names? N&Q 5 chronicles the great many teams in different sports and the great number of universities that share the same names. Can those facts be used to help an alleged infringer defend an infringement suit?

N&Q 6 discusses the fact that a consumer survey may identify confusion among people who have no interest in the business or products of either the alleged infringer or the plaintiff, but no confusion among anyone with an interest in the businesses at issue in the case. The Boston Marathon case, discussed below, suggests that indifferent consumers' views may be disregarded when assessing the likelihood of consumer confusion. N&Q 6 goes on to suggest that the NFL's concern may not have been one of confusion, but rather that the Baltimore CFL Colts might prove to be a rallying point for former fans of the NFL Colts, who might turn their loyalty toward the new professional team, thereby limiting the ability of the NFL to transfer that loyalty to a future NFL expansion (or relocated) team in Baltimore or to continue to sell old Baltimore Colts memorabilia in Baltimore. The issue is, "what interests are we trying to protect?" Is it a concern for consumer confusion or are we protecting some intangible asset that we believe belongs to the team or league? This is a theme that carries through the rest of the cases in this Chapter.

N&Q 7 suggests that only consumers who will be targeted by the alleged infringer should matter -- Baltimore area residents who might buy Baltimore CFL Colts merchandise matter -- not fans in Indiana who may or may not support the Indianapolis Colts, but who are
unlikely to ever have the opportunity to purchase CFL Colts merchandise, the sale of which is likely to be limited to the team's immediate drawing area.


**Primary Reason for Inclusion:** Decision addresses teams' "ownership" of the city in which they play their home games as the name or "trademark" of the team, and the extent to which a professional sports league can regulate the use that is made of the results of league games.

**Points to Emphasize:** This decision is merely a single decision of one United States District Court, issued over twenty years ago, dealing with the specific facts before the court. However, ever since this decision was issued, professional sports leagues and other businesses have operated under the assumption that it is permissible, with a disclaimer, to refer to professional sports league teams, for commercial purposes, by reference to the city in which the teams play their home games (or the geographic identifier the teams use -- e.g., New York for the Jets and Giants, who play their home games in East Rutherford, New Jersey). As a result, advertisers may play an athlete to participate in an advertisement and refer to the fact that the athlete plays for St. Louis or Boston, without perceiving a need to secure a license from the league or team for which the athlete plays.

The issue, once again, is what belongs to a team or a league. If it is clear that the reference is to the performance of the Minnesota Vikings football team, but we believe consumers will not be confused into believing that the Vikings authorized the use or that the commercial venture has an association with the Vikings, is there nevertheless an intangible property interest the Vikings own and can protect through the courts?

Put differently -- it is the question the court asks -- do defendants' efforts to capitalize on the popularity of NFL football constitute misappropriation of assets or rights belonging to the plaintiffs? It is clear that an effort to capitalize on the popularity of NFL football is permissible, as long as the defendants do not misappropriate something that belongs exclusively to the NFL and its member teams. This may be a good time to introduce the concept of improper misappropriation based on the common law that was introduced by the Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918). This Supreme Court precedent will be the primary focus of the Second Circuit's decision in the Motorola case in 1997, which is the last featured case in this Chapter.

In connection with the legal question of misappropriation, this might be a good time for a discussion of the business concept of "ambush marketing." That concept is introduced in the text at pages 941-943.

One point for discussion might be whether the students believe the fact that the defendant was a state government entity that was generating profits for state governmental purposes influenced the court's decision.
Another point for discussion might be the question of whether disclaimers cure everything. The court in this case required a "clear and conspicuous statement that Scoreboard is not associated with or authorized by the National Football League." Can profiteers infringe upon professional sports league marks and logos and simply include a disclaimer that the products are not associated in any way with the NFL or its member teams? The answer is, of course, that they cannot. It is only when there is no use made of the protected marks or logos, as in this case when only unprotectable city names are used. In addition, if it were necessary to use the league's registered marks in an incidental manner to identify a service being performed or an offer being provided by the alleged infringers (e.g., in a publication that offers information and analysis of each team in a league and its players), that may be permitted, as long as done in a manner that does not create "an impression in the mind of the relevant segment of the public that a connection exists between the services offered and the holder of the registered mark when no such connection exists."

Notes and Questions: N&Q 1 focuses on the question of the sufficiency of a disclaimer in another sports-related context, a tee-shirt that described the Boston Marathon.

N&Q 2 discusses one case that dealt with alleged ambush marketing in a common context. A corporation runs a promotion that features officially licensed sports merchandise, which the corporation purchases. Does the corporation have to pay the sports organization for the right to conduct such a promotion? In this case, the court concluded that consumers were misled into believing there was an association between the corporation and the sports organization or a license from the latter to the former.

N&Q 3 provides commentary about the consequences of the district court's decision. N&Q 4 describes the dormancy of state lotteries based on the outcome of sports league games and its re-emergence in the late 1980's. The NFL v. Governor of Delaware decision had noted the NFL's concern about fifty states having lotteries based on NFL games, but had not been impressed by that concern. This note describes the NBA's litigation against Oregon and N&Q 5 chronicles the leagues' legislative initiative when states finally started following Delaware's lead. The litigation was not as successful as the legislative efforts. The leagues' lobbying efforts resulted in federal legislation barring any additional states from following the lead of Delaware and Oregon.

Case: Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986)

Primary Reason for Inclusion: This case is included to introduce students to copyright law and the application of intellectual property protection to television broadcasts of sporting events. The case includes discussion of how the players' rights of publicity, discussed earlier in this Chapter, interface with the copyright in the broadcast.

Points to Emphasize: This lawsuit basically arose as part of the collective bargaining process. All of the Major League Baseball teams filed this litigation, seeking a declaratory judgment, in
response to the claim by the Major League Baseball players association that the players held property rights in the broadcast of the players' performances during major league baseball games. The clubs sought a definitive affirmance of their position on this issue, in order to remove any uncertainty about the position being asserted by the players and to avoid having to bargain about that issue.

The court concluded that the telecasts (not the games themselves) were copyrightable. The creativity necessary for a work to be copyrightable is supplied by the decisionmaking concerning how the game is filmed.

The court also concluded that participation in the broadcasts of games was within the scope of the players' employment. Therefore, the court held that the broadcasts constituted works made for hire and the employers (the teams) were presumed to own all rights in the broadcasts "in the absence of an agreement to the contrary."

The court then turned to the question of how the teams' copyright in the broadcasts interacts with the players' rights of publicity. The court held that the federal copyright law preempts the players' rights of publicity in their game-time performances as soon as they are broadcast and are thereby "fixed in tangible form."

Notes and Questions: N&Q 1 seeks to apply the reasoning of the Baltimore Orioles case to licensing by a professional sports league, to an unrelated corporation, of the right to use game footage in advertisements. The league is not permitted to license use that would cause the ordinary viewer to believe the licensee's product has been endorsed by players featured in the footage, without the players' consent. Other questions about permissible use must be answered with reference to copyright law, as modified (if at all) by the collective bargaining agreement between the players and the teams in the league, as explained in the Baltimore Orioles case.

N&Q 2 identifies the very difficult conflict of laws question presented by the fact that Major League Baseball's operations include two teams located in Canada. The issue was alluded to by the court at the end of its opinion.

N&Q 3-6 address issues of labor law suggested by the decision. The NLRB staff issued an advice memorandum that concluded that football players' rights of publicity for group licensing constitute mandatory subjects of bargaining (N&Q 4); therefore, if that position is sustained, that element of the Mackey labor exemption test from Chapter Nine would be satisfied in N&Q 5. N&Q 6 asks under what circumstances an individual employee can yield to his employer rights that he would otherwise retain under the terms of the collective bargaining agreement. Cross-references to the relevant portions of Chapters 14 and 15 are included in the note.

The Baltimore Orioles decision does not address whether the players' performances or the games, as separated from the recordings of those games, can be copyrighted. N&Q 7 poses that question and refers the students to the 1997 Motorola decision, the last
featured case in this Chapter, where the United States Court of Appeals for the Second Circuit held that sports events or performances are not "authored" and cannot be copyrighted.

**Case:**  **WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42 (1st Cir. 1991)**

**Primary Reason for Inclusion:** This case focuses on the question of what it is that a sports event producer owns -- what constitutes misappropriation or ambush marketing or impermissible free riding, and what constitutes an asset created by the event producer that can be used in various ways by anyone who chooses to do so?

**Points to Emphasize:** This case presented a very interesting hypothetical situation concerning a professional sports event. For years, Channel 5 had broadcast the Boston Marathon live in the Boston area, without securing any license from the producer of the event, the Boston Athletic Association ("BAA"). In the late 1980's and early 1990's, the BAA believed it needed to generate additional revenue in order to offer increased prize money to attract top competitors. The New York Marathon and other marathons that offered much greater prize money were leaving Boston without a first class field of runners. One of the BAA's plans for generating increased revenue was to grant exclusive television broadcast rights to the event to one television station. Channel 5 participated in the competition for those broadcast rights, but made it clear that it intended to broadcast the marathon whether it received rights from the BAA, or not. Channel 5 did not secure the rights, and went ahead with its plan to broadcast live the marathon, from television cameras that showed the progress of the event, which is run on public streets. Channel 5 offered to "broadcast whatever disclaimers" the BAA would want, and to broadcast them at virtually whatever frequency the BAA might want (including every thirty seconds), to make it clear that the Channel 5 broadcast was not associated with the BAA and did not have "any special broadcasting status."

The court identifies an important distinction from other trademark cases -- there is no issue that consumers are being confused about whether they are watching the "real" Boston Marathon or a "knock-off," and many viewers may not have any idea (and may not care) whether they are watching an "officially sanctioned" broadcast or not.

The court then takes head-on the issue of what "free riding" or seeking to benefit commercially from public interest in someone else's product or business, is impermissible. Unless the BAA can identify a legally protected, intangible property interest that is being violated, they cannot cause the court to enjoin the alleged free riding.

**Notes and Questions:** The court discussed language from the Supreme Court's decision in *International News Service v. INS*, but at the end of the opinion states that it has not addressed issues of state law because those issues were not properly before the court. In fact, the INS case concerned the state common law concept of misappropriation. Therefore, it is not clear to what extent the court was rejecting the doctrine's applicability to this case. This issue is explored in N&Q 1 and 3.
Is the *Boston Marathon* case's significance limited to events run on public streets with respect to which the event producer cannot feasibly exclude competing broadcasters, in situations in which the event has historically been broadcast by television companies that have not been required to pay a fee? Does the court's reliance on the prior precedent involving a parade on public streets support that view? This issue is considered in N&Q 2.

N&Q 2 goes on to provide a history of cases about unauthorized radio broadcasts and play-by-play reporting. Those cases from the 1930's and 1950's generally supported sports event producers' right to prevent unauthorized broadcasts. The *Boston Marathon* decision and the next case, the 1997 *Motorola* decision, may have changed the legal landscape.

**Case:**  *National Basketball Ass'n v. Motorola*, 105 F.3d 841 (2d Cir. 1997)

**Primary Reason for Inclusion:** This is a landmark decision that addresses issues concerning what alleged "free riding" can be blocked by producers of sports events. The decision discusses the extent to which the federal copyright laws preempt a state law "hot news" misappropriation claim based on *INS v. AP* and the scope of that misappropriation doctrine.

**Points to Emphasize:** This is a landmark decision issued in 1997 that dramatically changed the legal landscape. The district court had ruled for the NBA and the United States Court of Appeals for the Second Circuit ruled against the NBA in a broad and sweeping manner. As of this writing, requests for rehearing *en banc* or review by the Supreme Court pursuant to a writ of certiorari had not been resolved. The decision has not yet been interpreted or applied by lower courts. Therefore, its meaning and importance is not yet clear.

Prior to the *Motorola* decision, based on the cases cited in N&Q 2 following the *Boston Marathon* decision, it was generally thought that the line of what was and was not permissible would be drawn by some demarcation of whether the information being provided was sufficiently immediate and detailed as to constitute "play-by-play" coverage or something close enough as to draw people away from television or radio broadcasts or other "official," "licensed," or "authorized" coverage of the event. It was thought that the more the coverage looked like very current (up to the minute) news coverage of the event, as opposed to an alternative broadcast of the event, the more likely it was that the court would permit it, out of a concern about inhibiting the value of internet coverage and the electronic news coverage of the future.

There were many narrow ways in which the court could have resolved this case and still reversed the decision of the district court. For example, the court could have held that the minimal information provided by the pager at issue did not constitute a sufficient infringement upon any property interest of the NBA. However, that was not the course chosen by Judge Winter and his three-judge panel.
The opinion holds that only a narrow "hot-news" misappropriation claim, and not the broad application made of that doctrine by New York courts, survived the enactment of the 1976 amendments to the federal copyright laws. The court then set-out a narrow, restrictive five-part test (see page 981 and 987-88) that must be satisfied for a plaintiff to assert a "hot news' INS-like claim."

Although peripheral to the decision, the court's analysis of whether a game is copyrightable is interesting and a worthwhile issue for class discussion. This question had never been addressed squarely by a court, although the commentary had taken the position that sports events were not copyrightable.

Then, the analysis of whether taking facts from broadcasts constituted an infringement of the broadcast is an important part of the court's decision. By confirming that it was not an infringement, the court is permitting the generation of a wide variety of news and/or entertainment products by persons who simply watch the broadcasts and generate a product that concerns the sporting events that are being shown on television. It is not permissible to utilize the commentary that accompanies the broadcast or any of the copyrightable expression of the games, but the factual detail about the game itself can be reproduce and retransmitted without infringing the copyright in the telecast. The remaining question is whether the use that is made of the information violates the "hot-news" misappropriation requirements that the court holds survived the enactment of the 1976 copyright amendments.

The New York cases had perceived that there was a broad prohibition on misappropriation of undefined property rights of commercial value. The Metropolitan Opera case, discussed by the court in Motorola, went so far as to state that such misappropriation was commercially immoral and offensive to ethical principles, and thereby justified a "broad and flexible" prohibition. The court rejects that analysis and narrowly circumscribes the permissible misappropriation claims.

Notes and Questions: The notes and questions that follow the Motorola decision are designed both to explore the implications of the decision and to integrate the issues of the Motorola decision with the learning of the other cases in this Chapter, concerning copyright law, rights of publicity, and other legal theories.

N&Q 1 describes a lawsuit that was settled prior to the Motorola litigation by the grant of a license by the NFL. The question that is presented in N&Q 1 and 2 is whether an internet site could provide play-by-play descriptions of professional sports league games while they are in progress. If the sports league does not provide that type of coverage, is the fourth prong of the Motorola test satisfied? If a sports league provides that coverage on its own internet site (see N&Q 5), could they ever prove that the efforts of a competitor would so reduce their incentive to produce that coverage that its existence or quality would be threatened? Is it the internet coverage that would have to be threatened or the coverage of the games in the broadcasts? Footnote 8 of the decision (page 988) suggests that the "primary product" -- the
games or the television broadcast of those games -- would have to be threatened. N&Q 7 explores what evidence the league would have to present to satisfy its burden on that point.

If an independent internet provider can provide the information, presumably there is no basis for prohibiting enhancement of the presentation with various graphical depictions. Might it be more fun for some to "watch" the World Series games "live," with the players replaced by cartoon characters moving around the field? See N&Q 2.

N&Q 3 asks how the players' right of publicity claims work into this analysis. Presumably their rights of publicity are not infringed by incidental references to them that are necessary to describe the action in the game. However, what if an internet site included integrated access to biographical and statistical information about the players that enhanced the product. For example, the viewer could click on prompts that would disclose the batter's lifetime and season batting average against the pitcher he is facing and in situations with runners on base and two outs. The mere integration of access to that information onto the screen where the play-by-play description of the game occurs would seem to be permissible.

With respect to the hypothetical of N&Q 4, as long as a disclaimer is included that eliminates consumer confusion and makes it clear that the internet site is not authorized by or associated with the NFL, the NFL v. Governor of Delaware case suggests that teams can be identified for any purpose by city names, and Motorola indicates that there is no misappropriation if the entire team name is used to identify factually who is playing, as long as the five-part test is not violated.

N&Q 6 and 7 pose one question not answered by Motorola -- could anyone watch NFL games on television and conduct a radio broadcast of the game -- on the internet or over the air (assuming no infringement on the copyright of the broadcast -- no use of the commentary)? How would that violate the five-part test outlined in Motorola? How much would the NFL have to prove? Would the facts described in N&Q 7 be sufficient? Are they facts the NFL must prove in order to prevail?

N&Q 8 asks the policy question -- what should the law be in this area?