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forum state.

In conclusion, the court granted King's motion to dismiss the trademark infringement case for lack of personal jurisdiction. The court held that King did not direct any

infringing activity toward New York. In addition, King did not make "a discernible effort" to market his club in New York. Finally, the court held that even if personal jurisdiction was proper

under New York's long arm statute, it would violate the Due Process Clause because King did not purposefully establish minimum contacts with New York. •

## ***NBA games not "original works of authorship" — no protection under federal Copyright Act***

*by Thomas O'Connor*

In *NBA v. Motorola, Inc.*, 105 F.3d 841 (2nd Cir. 1997), the United States Court of Appeals for the Second Circuit held that the transmission of scores and other information by way of a hand-held pager during National Basketball Association ("NBA") games does not constitute a misappropriation of "hot news," because athletic events are not original works of authorship and, thus, are not copyrightable.

### **Motorola developed "real time" NBA score pager**

Motorola developed a hand-held pager which displays scores and other information from NBA games while the games are being played. Motorola receives the information from Sports Team Analysis and Tracking Systems ("STATS"), a company that monitors NBA games and gathers information. STATS employs reporters who watch the games on television or listen to them on the radio and subsequently enter the scores into personal computers. The information is relayed to a host computer which compiles and analyzes the data and sends it to a common carrier. The common carrier then sends the information, via satellite, to local FM radio networks which, in turn, emit a signal received by the Motorola pager. A lag of two to three minutes exists between the actual game and the display of information on the pager. The NBA maintained that the games and television broadcasts were "original works of authorship" and, therefore, were protected by the federal

Copyright Act ("the Act") and state misappropriation law.

### **Scores reproduced from copyrighted broadcast not infringement**

In 1976, Congress amended the Copyright Act to provide copyright protection to broadcasts of live events, including sports. However, the issue in this case was not a rebroadcast of the game, but a reporting of scores and statistics from the broadcast. The scores and statistics are facts which any person attending an NBA may obtain. Facts are not copyrightable. Only expressions of originality may be copyrightable. Accordingly, the court held that STATS did not infringe on the copyrighted broadcasts.

### **Court differentiates between athletic events and the broadcasts of those events**

While broadcasts of live basketball games involve skill and production, such that an unauthorized reproduction of the game would violate copyright laws, actual games and the correlative information and scores are not copyrightable. The court held that basketball games do not constitute "original works of authorship" under 17 U.S.C. § 102(a), as athletic events are not among or analogous to any of the eight categories of protected "works" in the Act. The court noted that any "scripting" of the events in a game is suggestive and general, and

the games' results can be unanticipated.

Although sparse case law is available on the matter, the existing case law indicates that games are not copyrightable. Additionally, Congress did not extend copyright protection to the underlying game when it amended the Copyright Act. This supports the holding that athletic games are not copyrightable. Moreover, individual skills and ingenuity cannot be copyrighted without reducing competition. The court observed that "a claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try it." For example, the inventor of the T-formation in football could not copyright his invention. Any originality in athletic games must remain in the public domain in order to continue to attract audiences to the games.

### **Misappropriation claim preempted by federal copyright law**

The court ruled that federal copyright law preempted the NBA misappropriation claim. State claims that fall within the "general scope" or the "subject matter" of the Copyright Act are preempted by the Act. "Legal or equitable rights equivalent" to the rights protected by federal copyright law under 17 U.S.C. § 106 are within the ambit of the Copyright Act. 17 U.S.C. § 301. Further, in a claim where the subject matter receives protection by Sections 102 and 103 of the Copyright Act falls within the Copyright Act. 17 U.S.C. § 106.

### **No separate cause of action for underlying games.**

The court determined that both the underlying game and the broadcast were within the subject matter of the Copyright Act. The district court, in holding for the NBA, developed a partial preemption doctrine which distinguished between the underlying games and the broadcasts of those games. The district court held that the misappropriation claim was not preempted because the underlying games were not within the subject matter of the Copyright Act. However, the court of appeals noted that it is illogical to declare that a copyrightable work is preempted, but that the underlying subject is not. The Copyright Act is not meant to be read to distinguish between a work and its subject matter.

### **Misappropriation of "hot-news" may survive preemption**

The court next reviewed the NBA's state misappropriation claim in the context of the "general scope" requirement of the Copyright Act. The court stated that a narrowly defined state law claim may survive preemption by federal law. A claim must contain elements other than those necessary for a copyright infringement claim. These include: (1) a cost associated with the collection or generation of information; (2) time sensitive value of the information; (3) "free-ride" use of the information; (4) direct competition between the information gatherer and the information user; and (5) a threat to the existence of the product or service provided as a result of the "free riding." The court held that the NBA claim did not meet these requirements.

Motorola did not engage in misappropriation of the NBA's property because the elements of (1) competition and (2) "free-riding" were missing. The NBA's primary business of producing and licensing copyrighted broadcasts of live basketball games was in no way threatened by the Motorola pager. In fact, Motorola indirectly advertises for the NBA by marketing the pagers for "those times when you cannot be at the arena, watch the game on TV, or listen to the radio . . ."

The court also explained that Motorola did not "free-ride" on the NBA by collecting information from broadcasts. Motorola used its own resources to collect facts and figures about the games and to transmit these facts and figures to the data processing centers and then to the pager. This element defeated any "free-riding" claim of the NBA; therefore, the NBA's claim did not survive preemption.

### **False advertising claim dismissed**

The NBA also contended that certain statements made by Motorola in a press release were a violation of the Lanham Act, 15 U.S.C. § 1125(a). The claim derived from a statement made by Motorola that its information was "direct from the press box and that the pager provide[d] updates from the arena." The NBA claimed Motorola falsely advertised because Motorola's reporters were not actually at the game. The district court determined that the advertising statements did not

materially mislead anyone and dismissed the claim. The court of appeals affirmed.

Athletic games are not original works of authorship and, therefore, are not protected under the Copyright Act. Furthermore, the Copyright Act preempted the NBA's misappropriation claim. To survive preemption, a claim must satisfy a five-prong test: (1) costs are

associated with the generation of information; (2) information is time sensitive; (3) defendant "free-rides" from plaintiff's effort; (4) direct competition exists between plaintiff and defendant; (5) "free-ride" reduces incentive to produce information. Accordingly, the NBA cause of action failed because state law did not apply and federal law did not allow it to proceed. • • •

## *E-mail stories detailing the rape and murder of a young woman do not constitute a "true threat"*

by Philip Tortorich

Intimidation, fear — these are common responses to threats disseminated on electronic mail. In order to protect individuals from badgering and torment, the United States Congress passed 18 U.S.C. § 875(c) ("§ 875(c)") prohibiting the transmission of any communication containing a threat. Although the First Amendment protects free speech, language containing a "true threat" is not protected, and, thus, is criminal under § 875(c). In *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997), *reh'g en banc denied* (Apr. 14, 1997), the United States Court of Appeals for the Sixth Circuit clarified the requisite elements of § 875(c) and defined what constitutes a "threat."

### **Internet used for sexual fantasies**

Between November 1994 and January 1995, the defendant, Abraham Jacob Alkhabaz, a.k.a. Jake Baker, ("Alkhabaz"), commu-

nicated via the Internet with Arthur Gonda ("Gonda"). The two communicated sexual stories and fantasies using electronic messages ("E-mail"). Alkhabaz used his computer in Michigan; Gonda was connected online in Ontario, Canada. The messages typically consisted of sexual descriptions involving violence against women and children. Alkhabaz was active on a Usenet news group, "alt.sex.stories," where he posted fictional stories concerning the "abduction, rape, torture, mutilation, and murder of women and young girls." Since these stories were posted on the Usenet, they could be accessed by anyone with a computer and modem.

In January, 1995, Alkhabaz posted a story concerning one of his classmates at the University of Michigan. This story gave the name of the classmate and portrayed her being tortured. The story detailed the multiple rape of this young woman, culminating in her murder

by igniting gasoline poured over her body. The E-mail messages also indicated a willingness to carry out the actions. On February 9, 1995, Alkhabaz was arrested and criminally charged with violating 18 U.S.C. § 875(c) by engaging in an interstate commerce communication involving a threat to kidnap or injure another person.

### **Government must satisfy three elements under § 875(c)**

Title 18, United States Code, Section 875(c) states: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 875(c). In the present case, the court concluded that the Government must meet three elements: (1) a transmission in interstate [or