

# Rocking Wrigley: The Chicago Cubs’ Off-Field Struggle to Compete for Ticket Sales with its Rooftop Neighbors

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## I. INTRODUCTION

For the entire history of Wrigley Field, landlords of these buildings, their tenants and guests have enjoyed watching major league baseball games from these unique vantage points . . . . It would . . . be absurd to claim that persons lawfully on the property of the buildings near Wrigley Field must avert their eyes in order to avoid “misappropriating” these games.<sup>1</sup>

In 2000, the Chicago National League Ball Club (“Cubs” or “Club”), owned by the Tribune Company,<sup>2</sup> sought to enlarge its playing facility, Wrigley Field.<sup>3</sup> The proposal called for an estimated expansion of approximately 2,000 seats to a ballpark that currently accommodates 39,059 people.<sup>4</sup> The residents of Wrigleyville, the area surrounding Wrigley Field, have vehemently rejected such plans to augment the ballpark’s seating capacity, stating that such additions would ultimately increase “parking problems, traffic, litter, noise, crime, public urination, and other nuisances” in the vicinity.<sup>5</sup>

1. Fran Spielman, *Wrigley Neighbors Fire Back at Cubs*, CHI. SUN-TIMES, Jan. 7, 2003, at 7.

2. Casey Bukro, *Rooftops Called Wrigley Charm*, CHI. TRIB., Jan. 8, 2003, § 2, at 3.

3. Associated Press, *‘The Free Ride is Over’: Cubs Sue Owners of Rooftop Bars Overlooking Wrigley* (Dec. 17, 2002), available at [http://sportsillustrated.cnn.com/baseball/news/2002/12/16/wrigley\\_lawsuit\\_ap/](http://sportsillustrated.cnn.com/baseball/news/2002/12/16/wrigley_lawsuit_ap/). “Plaintiff owns and operates Wrigley Field, the second oldest major league ballpark in the United States, and the Chicago Cubs baseball team, a charter member of the National League.” Complaint for Injunction, Damages and Other Relief, *Chicago Nat’l League Ball Club, Inc. v. Sky Box on Waveland, L.L.C.*, No. 02C 9105, at 5 (N.D. Ill. Dec. 17, 2003).

4. Alexia Elejalde-Ruiz, *Take Me Out to the Historic Landmark: Cubs Play Hardball About Wrigley Field*, BOSTON GLOBE, Jan. 19, 2003, at A14. The proposal also called for the addition of “12 more night games to [the Cubs’] current prescribed limit of 18.” *Id.* The team is seeking 30 night games. It should also be noted that Wrigley Field has the “smallest [seating] capacity in the National League,” which is the league in which the Cubs play. *Id.*

5. *Id.*

In attempting to expand the ballpark, the Tribune Company began planning and bargaining with Wrigley Field's neighbors. However, the team owners were unable to negotiate any deal.<sup>6</sup> During these discussions, several rooftop businesses overlooking Wrigley Field backed the neighbors' cause.<sup>7</sup> The rooftop operators, who have created profitable enterprises by selling tickets to fans (wishing to view games at Wrigley from their rooftops),<sup>8</sup> worried that their extraordinary views of the team's playing field would be obstructed by the proposed venue expansion.<sup>9</sup>

The Cubs frustration with this unraveling situation reached its zenith on December 16, 2002, when the Club filed a lawsuit against the owners of several of these rooftop businesses.<sup>10</sup> The Cubs argue that the rooftop operators violate copyright laws and "directly compete" with the team for ticket sales.<sup>11</sup> Moreover, the Cubs aver that the rooftop business owners have been "piggybacking" on team marketing in direct violation of the Lanham Act, have misappropriated the team's property, and have been unjustly enriched.<sup>12</sup>

The outcome of this case will seriously affect several areas of the law. The suit raises federal questions concerning the Copyright and Lanham Acts. It also raises state questions concerning contracts, land use controls, and misappropriation. While resolving these claims is important, this Note focuses on several other questions that directly impact communications law. For example, it is yet to be resolved whether the Cubs are suggesting that the rooftop owners are infringing the Cubs' copyright by publicly displaying *telecasts* of the team's games, or if they are alleging that the rooftop owners (and their ticket-buying customers) are precluded from even *watching* the Cubs' games from these nearby locations. If the court determines that the rooftop owners are conducting legitimate business practices, there remains the possibility that the owners will contract with broadcasting entities and enter into lucrative telecasting deals (e.g.,

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6. *Id.*

7. *Id.*

8. *Cubs Sue Rooftop Owners*, INDIANAPOLIS STAR, Dec. 17, 2002, at D2.

9. The City of Chicago has seemingly sided with the Wrigleyville residents and the rooftop owners. The City moved to grant Wrigley Field historic landmark status, thereby essentially guarding "against any alterations that could detract from the historical significance of the 89-year-old ballpark." Elejalde-Ruiz, *supra* note 4. Furthermore, even Chicago's Mayor, Richard Daley, supported the nonexpansion movement after a March, 2002, referendum revealed that eighty percent of the Wrigleyville neighbors demanded community protections before any stadium expansion plans were to be approved.

10. Complaint for Injunction, Damages and Other Relief, Chicago Nat'l League Ball Club, Inc. v. Sky Box on Waveland, L.L.C., No. 02C 9105, at 5 (N.D. Ill. Dec. 16, 2003) [hereinafter Cubs Complaint].

11. *Id.* at 8.

12. *Id.* at 10-12.

providing broadcasters with magnificent rooftop views of Wrigley Field in exchange for handsome monetary returns).

Even though the outcome of this case is uncertain, several important questions have emerged. If sports events cannot be copyrighted, can a sports team or other entity that publicly performs these events require that nonpaying passers-by or fans of the performance direct their attention elsewhere in order to avoid copyright infringement or unjust enrichment? Further, can broadcast networks, filming from neighboring rooftops, televise the performance without paying royalties or licensing fees to those creating the event? To answer these questions, significant issues relating to ownership of information and broadcasting rights must be addressed.

Although this case raises considerable Lanham Act and misappropriation claims, this Note focuses on the copyright and unjust enrichment claims involved in the Chicago Cubs case. Additionally, because of the potentially immense precedential value of this case, this Note is broadly tailored to illustrate the far-reaching effects that this case may have on other sports entities and entertainment venues hosting public performances. Clearly, this case raises several vital questions, and—assuming that it goes to trial and that a judgment is rendered—its result could significantly impact the sports and entertainment world, the legal community, and the current landscape of communications law.<sup>13</sup>

Part II of this Note focuses on the creation of a property right in sports information while specifically addressing the actions of the Federal Communications Commission (“FCC”) and the judiciary in enabling such a right. Further, mention is made of the significance of the Copyright Act in establishing this property right in sports information. The remainder of this Note discusses specific arguments relating to unjust enrichment (Part III), the balance of sports property rights and land use rights (Part IV), and the availability of copyright infringement claims for sporting or other entertainment events (Part V).

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13. “U.S. District Judge James Holderman set Feb. 23, 2004, as the trial date for a lawsuit pitting the Chicago Cubs against rooftop bleachers surrounding Wrigley Field. But Holderman urged the two sides to reach a settlement before then.” *Cubs, Rooftop Owners Get 1 Year to Settle Feud*, CHI. TRIB., Feb. 12, 2003, sec. Metro, at 3.

## II. FCC AND JUDICIAL RECOGNITION OF SPORTS INFORMATION

### A. *FCC Leniency*

The situation in which the Cubs and the rooftop owners find themselves is nothing new. As early as the 1920s, Major League Baseball (“MLB”) entered into broadcasting contracts authorizing radio stations to air World Series games.<sup>14</sup> In 1934, A.E. Newton, who operated his own radio station in his basement, wanted to broadcast the World Series without having to pay broadcasting royalties to any of the interested sports organizations.<sup>15</sup> Newton gave his listeners “running accounts” of the 1934 World Series games. He listened to *authorized* radio broadcasts and simply relayed his version of the games’ play-by-play action.<sup>16</sup>

Because of these actions, Newton faced opposition when he attempted to renew his broadcasting license.<sup>17</sup> The FCC originally thought that Newton’s actions violated the Communications Act of 1934.<sup>18</sup> However, after investigating Newton, the FCC determined that, although it did not particularly agree with his actions,<sup>19</sup> Newton had not violated the Communications Act.<sup>20</sup> The FCC emphasized that since Newton had confined his sports broadcasting career to the 1934 World Series, his license would be renewed.<sup>21</sup>

### B. *Judicial Favoritism of Sports Property Protection*

Newton’s travails with the FCC initiated debate concerning ownership of information and the property rights associated with sporting events. Sports broadcasting issues were routinely brought to the FCC’s attention; however, the state and federal courts, not the FCC, were

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14. Robert Alan Garrett & Philip R. Hochberg, *Sports Broadcasting and the Law*, 59 IND. L.J. 155, 157 (1984).

15. *Id.* See In the matter of A.E. Newton, *Statement of Facts and Grounds for Decision*, 2 F.C.C. 281, 284 (1936) [hereinafter Newton]; see also Nat’l Baseball Hall of Fame, World Series Programs, at [http://www.baseballhalloffame.org/exhibits/online\\_exhibits/ws\\_programs/images/1934\\_tigers\\_game\\_7.htm](http://www.baseballhalloffame.org/exhibits/online_exhibits/ws_programs/images/1934_tigers_game_7.htm) (last visited Nov. 16, 2003). The interested organizations included Major League Baseball, the St. Louis Cardinals, and the Detroit Tigers.

16. Garrett & Hochberg, *supra* note 14, at 157.

17. *Id.*

18. This section of the Act prohibited “rebroadcasting [an event], without consent, from another station’s programming.” *Id.* See generally Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. § 325(a) (2000)).

19. Garrett & Hochberg, *supra* note 14, at 157. See generally Newton, *supra* note 15.

20. Newton, *supra* note 15, at 284.

21. *Id.* at 285.

ultimately thrust into the middle of these controversies.<sup>22</sup> Owners of sports organizations thought that judicial forums were much more favorable than the FCC had been, and thus pursued judicial review of these types of cases.<sup>23</sup> Amateur broadcasters “who sought to follow in Newton’s footsteps” proclaimed that the “running accounts” of the sporting events were merely “news in the public domain” and argued that any person had the right to disseminate such news.<sup>24</sup> However, the sports organization owners and the courts took a different view.<sup>25</sup>

In *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, a radio station broadcast Pittsburgh Pirates’ baseball games without the permission of the Pirates organization,<sup>26</sup> which had already licensed its radio rights to NBC.<sup>27</sup> The Pirates sued to enjoin the unauthorized KQV broadcasts. They sought a preliminary injunction, which the court eventually granted. In enjoining KQV Broadcasting from covering the Pirates’ games, the court held that the Pirates organization, “by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom [sic], had a property right in such news, and the right to control the use thereof for a reasonable time following the games.”<sup>28</sup> The court further held that KQV had

misappropriated the property rights of the Pirates in the “news, reports, descriptions or accounts” of the Pirates’ games; that such misappropriation resulted in KQV’s “unjust enrichment” to the detriment of the Pirates; and that KQV’s actions constituted “unfair competition,” a “fraud on the public” and a violation of unspecified provisions of the Communications Act.<sup>29</sup>

This case clearly helped to establish the right in sports information property.

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22. Garrett & Hochberg, *supra* note 14, at 158.

23. *Id.* See *Pittsburgh Athletic Co. v. KQV Brdcast. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); see also *Nat’l Exhibition Co. v. Fass*, 133 N.Y.S.2d 379 (N.Y. Gen. Term 1954) (preliminary injunction), *aff’d*, 136 N.Y.S.2d 358 (N.Y. App. Div. 1954) (without opinion), 143 N.Y.S.2d 767 (N.Y. Gen. Term 1955) (final judgment) [hereinafter Fass]; *Zacchini v. Scripps-Howard Brdcast. Co.*, 433 U.S. 562 (1977).

24. Garrett & Hochberg, *supra* note 14, at 157-58.

25. *Id.*

26. *Pittsburgh Athletic Co.*, 24 F. Supp. 490. See Robert L. Saltzman, *Television News Access to Exclusively Owned Sporting Events: A Comparative Study*, 7 SPORTS LAW. J. 1, at 4 (2000). See generally Garrett & Hochberg, *supra* note 14, at 158.

27. Garrett & Hochberg, *supra* note 14, at 158.

28. *Id.* at 158 (citing S. REP. NO. 387, 83rd Cong., 1st Sess. 11 (1953)).

29. Garrett & Hochberg, *supra* note 14, at 158. See also Fass, *supra* note 23.

*C. Fortification of Sports Property Rights Through Enactment of the Copyright Act*

In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>30</sup> the Supreme Court recognized exclusive property rights to the “Human Cannonball.”<sup>31</sup> The Court held that an Ohio television station, which had secretly taped his performance and subsequently broadcast it during a newscast, had misappropriated his property right.<sup>32</sup> *Zacchini* established that sports organizers have a property right in the accounts and descriptions of their events.<sup>33</sup> However, the holdings of *Pittsburgh Athletic Co.* and *Zacchini*, were “based on a claim of misappropriation of property rights, a claim granted under state common law, which is preempted to the extent that federal copyright law shall govern.”<sup>34</sup>

In the 1970s, such federal law was established at the request of professional sports leagues.<sup>35</sup> Congress gave credence to the concept of sports property rights through the establishment of the Copyright Act of 1976,<sup>36</sup> which benefited sports organizations by providing copyright protection to live sports broadcasts, thereby vesting the owners of these telecasts with the exclusive right to publicly perform them.<sup>37</sup> Nonetheless, since the Act’s promulgation, several challenges have been asserted concerning the ownership of (and property rights in) sports information. In any event, the creation of the Copyright Act “added a new dimension to the sports property right concept established in *KQV* and *Zacchini* by protecting the sports clubs’ property right in the accounts and descriptions of a *televised* sporting event, while at the same time preempting any state misappropriation claim.”<sup>38</sup> However, these property rights potentially conflict with other rights, such as the contract and real property rights afforded to those who are fortuitously, and thereby lawfully, enriched. The conflict between the Cubs and the rooftop owners is a classic example of this conflict.

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30. 433 U.S. 562 (1977).

31. *Id.* at 563.

32. *Id.* at 565-66. *See* Garrett & Hochberg, *supra* note 14, at 158; *see also* Saltzman, *supra* note 26, at 4.

33. 433 U.S. at 578 (establishing that “entertainment, as well as news, enjoys First Amendment protection).

34. Saltzman, *supra* note 26, at 4-5.

35. Garrett & Hochberg, *supra* note 14, at 161.

36. *Id.*

37. *Id.*

38. Saltzman, *supra* note 26, at 5 (emphasis added).

### III. THE CHICAGO CUBS' COMPLAINT

#### A. *Have the Rooftop Owners Been Unjustly Enriched?*

The Cubs assert property rights in the performance of games at Wrigley Field because the team spends millions of dollars annually to produce their home games.<sup>39</sup> The Cubs are infuriated because, while the rooftop owners reap enormous financial rewards,<sup>40</sup> they do not pay any of the costs incurred in "fielding" a baseball team. Furthermore, the Cubs adamantly argue that they have been damaged because they have not been paid any licensing fees in exchange for granting the rooftop operators rights to sell tickets to fans wanting to watch the Cubs games.<sup>41</sup>

The Cubs believe that the rooftop operators have violated the Copyright Act and have been unjustly enriched by publicly selling performances of Cubs' baseball games that are played at Wrigley Field.<sup>42</sup> Also, the Cubs argue that the rooftop operators directly compete with the Cubs by funneling revenues away from live Cubs games. The Cubs claim that these activities have deprived them of millions of dollars in revenue,<sup>43</sup> and they suggest that the rooftop operators have been unjustly enriched<sup>44</sup> because their businesses are profitable solely due to the efforts and expenditures of the Cubs organization.<sup>45</sup>

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39. Cubs Complaint, *supra* note 10, at 11.

40. *Id.* at 12.

41. *Id.*

42. Cubs Complaint, *supra* note 10, at 12.

43. *Id.*

The Cubs provide a variety of seats from which to view open-air games at Wrigley Field, including bleachers, box seats, lower and upper grandstand seats and skyboxes. The Cubs sell seats to individuals, to companies and other groups and have food and drink available for sale on individual and group bases at many locations at Wrigley Field. The Cubs enhance the experience of live games at Wrigley Field by showing telecasts of the games at many points inside the ballpark.

*Id.* at 5.

On game days, [the rooftop operators] charge for admission to their rooftop and private party facilities, with the per person charge reaching as much as \$150 or more. Some Defendants are charging up to \$300 per person for games during the 2003 season. Fans cannot gain access to Defendants' rooftop and private party facilities unless the charge has been paid. In return for payment of the entry charge, Defendants provide their patrons with the ability to view Cubs games in person as they are played at Wrigley Field and to partake in food and drink and also provide unauthorized performances of the Cubs' copyrighted telecasts, for the entertainment of patrons and to enhance their profits.

*Id.* at 6.

44. *Id.* at 12.

45. *Id.* at 12.

### B. *Balancing Sports Property and Land Use Rights*

The Cubs' sports property rights must be weighed against the rooftop owners' real property rights. Since 1998, the rooftop businesses have operated under City of Chicago licenses that *expressly permit* them to operate as sites for watching Cubs home games.<sup>46</sup> Moreover, the rooftop business owners argue that the Cubs "forfeited their right to compensation by 'acquiescing' to [the rooftop businesses'] for-profit operations for more than 20 years," and by not raising any objections while the rooftop business owners spent millions of dollars to secure the city licenses permitting their continued operation.<sup>47</sup> Furthermore, the rooftop business owners, like many followers of A.E. Newton, argue that the "games are, by their very nature, open air public performances," and they suggest that "no one has ever questioned the right of people on the rooftops to watch the games."<sup>48</sup>

### C. *Copyright in Relation to Sports Property*

At the heart of the Club's complaint is a call for the court to declare the rooftop operators in violation of the Copyright Act. The Club believes that by operating such business without a license from the Cubs, the rooftop operators have unfairly infringed the team's copyrights. The Cubs claim that other than the rooftop operators and their patrons, "essentially everyone who watches Cubs games in person . . . and every entity that transmits from Wrigley Field live visual and/or oral depictions of [Cubs] games (from telecasters to radio broadcasters to Internet gamecasters) does so pursuant to license from the Cubs, their opponent or Major League Baseball."<sup>49</sup>

The United States Constitution provides that Congress shall have power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>50</sup> It is this "Copyright Clause" that gives Congress the authority to enact copyright legislation.<sup>51</sup> In 1976, Congress used its authority under this clause to promulgate the Copyright Act.<sup>52</sup> This Act provides that, "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression."<sup>53</sup>

46. Bukro, *supra* note 2 (emphasis added).

47. Spielman, *supra* note 1.

48. Bukro, *supra* note 2.

49. Cubs Complaint, *supra* note 10, at 2.

50. U.S. CONST., art. I, § 8, cl. 8.

51. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.02 (2003).

52. Copyright Act, 17 U.S.C. § 102 (2000).

53. *Id.* Works of authorship include the following categories:  
(1) literary works;

Despite the Cubs' claim, the "fixation" requirement may bar the team from asserting any rights precluding the rooftop businesses from having to pay the Cubs royalties.

#### IV. UNJUST ENRICHMENT

The Cubs complaint alleges that the rooftop owners have been unjustly enriched.<sup>54</sup> The Club claims that their neighbors should not be allowed to profit from the Cubs' cost of sporting a team.<sup>55</sup> The Club argues that by taking the Cubs' property and using it as the essential part of their multi-million dollar rooftop businesses, defendants obtain a "windfall" and are unjustly enriched.<sup>56</sup>

Clearly, *Newton*, *Pittsburgh Athletic Co.*, and *Zacchini* establish that the Cubs have property rights in their games. However, the question remains as to the extent of these rights. The Cubs allege that the rooftop owners "operate extremely profitable businesses because they take the Cubs' property and divert the Cubs' revenues to themselves without paying any of the costs required to, among other things, field a team and operate a ballpark in order to participate in Major League Baseball."<sup>57</sup> Intuitively, an entity that provides a service should not want its "sweat of the brow" to benefit anyone but itself, but the law is not so definitive.

##### A. *The Restatement Position*

The Restatement of Restitution states: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."<sup>58</sup> Restitution is a longstanding remedy under contract law<sup>59</sup> and is necessary to make the damaged party whole. However, the parties must be in privity of contract before a seemingly benefited party can be required to pay any compensation to the other.<sup>60</sup> "A person is not required

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- (2) musical works, including any accompanying words;
  - (3) dramatic works, including any accompanying music;
  - (4) pantomimes and choreographic works;
  - (5) pictorial, graphic, and sculptural works;
  - (6) motion pictures and other audiovisual works;
  - (7) sound recordings; and
  - (8) architectural works.

*Id.*

54. Cubs Complaint, *supra* note 10, at 12.

55. *Id.*

56. *Id.*

57. *Id.*

58. RESTATEMENT OF RESTITUTION §1 (1936) [hereinafter RESTATEMENT].

59. *Id.*

60. For an explanation of privity, see *infra* Part IV.B.

to deal with another unless he so desires and, ordinarily, a person should not be required to become an obligor unless he so desires.”<sup>61</sup> Furthermore, a person who “officiously confers a benefit upon another is not entitled to restitution therefor[e],”<sup>62</sup> and “a person who has conferred a benefit . . . by way of giving another services or by adding to the value of his land . . . should not be permitted to require the other to pay therefor[e].”<sup>63</sup>

The rooftop owners should not be required to pay the Cubs anything. A person on his or her own property should not be required to pay restitution to a neighbor simply because that neighbor decided to publicly display an entertaining event. The law should not require people, standing on their own property to avert their eyes or plug their ears, in an attempt to ensure that they will not be unjustly enriched. Such a requirement would undermine the fundamental aspects of contract and property law. The rooftop owners’ fortune (or misfortune) is that their neighbor happens to be the Chicago Cubs. These owners should not be forced to compensate the team just because they happen to have adjoining properties.

### B. *Sole Element of Proximity*

Privity is the “connection or relationship between two parties, each having a legally recognized interest in the same subject matter.”<sup>64</sup> “The doctrine of privity means that a person cannot acquire rights or be subject to liabilities *arising under* a contract to which he is not a party.”<sup>65</sup> The sole element of proximity (i.e., the fact that Wrigley Field and the rooftop operations are closely situated) should not compel a finding that the parties are in privity of contract. By erecting a roofless ballpark, the Cubs officiously bestowed a benefit onto their rooftop neighbors. The Cubs were established in 1876<sup>66</sup> and for ninety years have played their home games at Wrigley Field.<sup>67</sup> Team owners cannot now cry foul and claim that their rooftop neighbors are being unjustly enriched. Surely, the rooftop owners would not be able to sell tickets absent the Cubs’ games at Wrigley Field. Further, even though the Chicago skyline is magnificent, rooftop operators

61. RESTATEMENT, *supra* note 58, §2.

62. *Id.*

63. *Id.*

64. BLACK’S LAW DICTIONARY 1217 (7th ed. 1999).

65. *Id.* at 1218 (quoting G.H. TREITEL, THE LAW OF CONTRACT 558 (8th ed. 1991)).

66. Historical Analysis of the Cubs, at [http://chicago.cubs.mlb.com/NASApp/mlb/chc/history/chc\\_history\\_timeline.jsp](http://chicago.cubs.mlb.com/NASApp/mlb/chc/history/chc_history_timeline.jsp) (last visited Nov. 16, 2003). The team was established as the Chicago White Stockings but renamed the “Cubs” in 1902. *See also* Chicago Cubs Timeline—1900s, at [http://chicago.cubs.mlb.com/NASApp/mlb/chc/history/chc\\_history\\_timeline\\_1900s.jsp](http://chicago.cubs.mlb.com/NASApp/mlb/chc/history/chc_history_timeline_1900s.jsp) (last visited Nov. 16, 2003).

67. Cubs Historical Account of Wrigley Field, at [http://chicago.cubs.mlb.com/NASApp/mlb/chc/ballpark/chc\\_ballpark\\_history.jsp](http://chicago.cubs.mlb.com/NASApp/mlb/chc/ballpark/chc_ballpark_history.jsp) (last visited Nov. 16, 2003).

would certainly not be as successful in selling admission tickets to their roofs without the Cubs' presence.<sup>68</sup> Nonetheless, the rooftop owners should not be forced to pay restitution just because the rooftops happen to have astonishing views of Wrigley Field. If the owners of the Cubs and owners of other outdoor roofless sports and entertainment venues believe that by displaying their product they have enormously profited their neighbors, to their own financial detriment, they should consider investing in screens, roofs, or domes that would conceal their facilities from their neighbors' views. In terms of economics, that would solve the problem of unjust enrichment.

## V. LAND USE RIGHTS

### A. *Deppert v. Detroit Base-Ball Club*

The Cubs' current squabble with their rooftop neighbors is strikingly similar to what the Detroit Base-Ball Club encountered nearly a hundred and twenty years ago. In 1886, John Deppert erected viewing stands on his barn, charging visitors a fee to watch baseball games played in the Detroit Base-Ball Club's park, which adjoined Deppert's land.<sup>69</sup> Deppert also sold refreshments to his barn-top patrons. As in the current Cubs' case, Deppert sought approval by the city's board of building inspectors to declare his facility safe and secure.<sup>70</sup>

The Detroit Base-Ball Club asked the court to enjoin Deppert from making such use of his buildings and premises.<sup>71</sup> The court determined that Deppert was legally entitled to use his premises for the purpose of amusement and also as a means of collecting revenue from the sale of refreshments.<sup>72</sup> The court specifically held that, "[c]ourts cannot limit the extent, up or down, to which a man may enjoy his property; and if he goes higher than his neighbor, so long as he does not interfere with the rights of others, or injure his neighbor, he subjects himself to no liability."<sup>73</sup>

The rooftop operations near Wrigley Field are selling food and drinks to patrons—just as the court in *Deppert* held that a property owner is legally entitled to do. Also as in *Deppert*, the rooftop owners overlooking Wrigley Field have obtained city permits entitling them to use their

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68. "Unlike bars and restaurants, Defendants' rooftop businesses operate only in conjunction with Cubs' home games. At all other times, they stand idle." Cubs Complaint, *supra* note 10, at 6.

69. Detroit Base-Ball Club v. Deppert, 27 N.W. 856 (Mich. 1886).

70. *Id.* at 857.

71. *Id.*

72. *Id.* at 858.

73. *Id.*

facilities for the purpose of selling tickets to view Cubs' games. The rooftop owners are simply putting their land to the use to which they are entitled. They have erected stands and other costly accommodations to entice patrons to pay admission to watch Cubs games. Until the Cubs erect an obstruction that would block the rooftop views, the team cannot legally prevent its neighbors from using their own land absent any interference or injury to the Cubs' property. The Cubs would argue that they are, in fact, being injured by the rooftop owners. However, such allegations of harm must be determined by a court.

Furthermore, none of the rooftop owners are encumbered by any covenants (disavowing property rights) in the Cubs' favor. If the Cubs wanted to, they could have conducted negotiations with their rooftop neighbors and bargained to acquire any such rights. In any event, the facts of these two cases could not be more analogous, and it is clear that the *Deppert* court, if faced with the Cubs case, would have ruled in favor of the rooftop businesses.

#### *B. Right to Observe and Record Events on Adjoining Land*

A New Jersey court provided the same land use reasoning as *Deppert* to determine the extent to which a landowner may observe the actions of his or her neighbors. In *N.O.C., Inc. v. Schaefer*<sup>74</sup>, the plaintiffs, Noble Oil Company, operated a fuel waste oil facility on their property.<sup>75</sup> In its complaint, N.O.C. argued that the defendant, whose property was adjoining N.O.C.'s property "climbed a ladder propped against a tree near [N.O.C.'s] property line so that she could observe [N.O.C.'s] activities. . . . She has used binoculars, a camera and occasionally a telescope to observe [those activities]."<sup>76</sup> The defendant believed that N.O.C. had "constructed a fence, a platform and underground tanks which violate[d] the local zoning ordinance[s]. She [was] also concerned about oil spills on the property which might seep through the ground and invade her lands."<sup>77</sup> Upon reporting her concerns to the township committee at a public meeting, the defendant was advised by her town's mayor that, "she had no proof to support her claims."<sup>78</sup> The defendant sought to acquire such proof by observing and recording N.O.C.'s activities.<sup>79</sup> The court, referring to *Deppert*, held that "[a] landowner cannot be restrained from erecting a

74. 484 A.2d 729 (N.J. Super. Ct. Law Div. 1984).

75. *Id.* Admittedly, this case was brought as an invasion of privacy complaint. The Cubs do not make any such allegations against the rooftop owners.

76. *Id.* at 730.

77. *Id.*

78. *Id.*

79. *Id.*

structure for the express purpose of overlooking the adjoining land, although the reason for the erection of such structure is to observe exhibitions on such adjoining premises.”<sup>80</sup>

Under *N.O.C.* and *Deppert*, the rooftop owners around Wrigley Field are not only entitled to observe and charge others to view Cubs’ games, but they may also record the activities at Wrigley Field. Taken together, *Deppert*, *N.O.C.*, and the Cubs’ current suit coalesce into a significant body of potential precedent, proposing that a property owner whose land is adjacent to another’s may take overt steps in erecting stands and charging admission to watch the activities on the contiguous property. . . . Moreover, he and his patrons may record and photograph those activities with impunity. Barring any copyright violation, such a right could hypothetically permit the rooftop operators not only to charge fans to view the games from the rooftops, but also to charge telecasters to set up cameras, microphones, and other devices for the sole purpose of recording the games. By virtue of owning the land adjacent to the Cubs, the rooftop owners are afforded this right.

## VI. COPYRIGHT INFRINGEMENT CLAIMS

### A. *Fundamentals of the Copyright Act*

One must seriously consider the mandates of the Copyright Act whenever original works of authorship are to be copied or recorded. The Act sets forth three conditions for making a work copyrightable: (1) a work must be *fixed* in a tangible form; (2) the work must be an *original* work of authorship; and (3) it must come within the *subject matter* of copyright.<sup>81</sup> Cubs’ games played at Wrigley Field do not satisfy any of these conditions of copyright creation. The Copyright Act suggests that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy is . . . sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>82</sup> Under this standard, Cubs’ games are not fixed until recorded onto videotape or some other tangible form of expression. Therefore, the games, as observed live from the rooftops adjacent to Wrigley Field, are not protected by the Copyright Act.

The Copyright Act further lists eight categories of “works of authorship.”<sup>83</sup> Included among these categories are literary works, musical

80. *Id.* at 734 (citations omitted).

81. *See* 17 U.S.C. § 102(a) (2000).

82. *Id.* § 101.

83. Copyright Act, 17 U.S.C. § 102(a) (2000).

works, dramatic works, and, notably, audiovisual works.<sup>84</sup> Audiovisual works (consisting of a series of related images, “intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any”)<sup>85</sup> are considered fixed or embodied in a tangible medium. Courts have held that telecasts are considered audiovisual works, and thus are copyrightable.<sup>86</sup> As illustrated above, Cubs’ games are not “fixed” until they are recorded. As such, they cannot qualify as “audiovisual works” or under any of the other seven listed categories of works of authorship.

Moreover, Section 102 of the Copyright Act, which delineates the subject matter of copyright, has not been interpreted to implicitly or explicitly include athletic events.<sup>87</sup> Unrecorded performances are not “fixed” in a tangible form and thus are not deemed copyrightable.<sup>88</sup> A sporting event, although it may be televised, falls within this category of unrecorded and unfixed material.

### B. *NBA v. Motorola*

The above analysis was borne in 1998, when the Second Circuit considered whether sporting events in and of themselves are copyrightable.<sup>89</sup> The court specifically considered whether copyright law was applicable to the actual athletic performances underlying sports telecasts. The court answered this question with a resounding “no.”<sup>90</sup>

In the seminal case of *NBA v. Motorola*, the National Basketball Association brought suit against Motorola, the manufacturer of SportsTrax, a hand-held pager system that provided “real-time” sports scores and other information, alleging commercial misappropriation under New York state law.<sup>91</sup> The court made mention of a footnote in *Baltimore Orioles, Inc. v.*

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84. *Id.*

85. *Id.* § 101.

86. *See, e.g., Baltimore Orioles, Inc.*, 805 F.2d at 668.

87. *See NBA v. Motorola, Inc.*, 105 F.3d 841, 846 (2nd Cir. 1997) (“[A]lthough the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.”).

88. *Baltimore Orioles, Inc.*, 805 F.2d at 675. “Among the many such works that are not fixed in tangible form are . . . extemporaneous speech, ‘original works of authorship’ communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down.” *Id.* (citation omitted).

89. *NBA*, 105 F.3d at 846.

90. *Id.*

91. *Id.* Additionally, the NBA brought forth a number of other claims that were dismissed by the district court. Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L. & ARTS 317, 340-41 (2000).

*Major League Baseball Players Association*,<sup>92</sup> a Seventh Circuit opinion, which hinted at the copyrightability of baseball players' on-field performances.<sup>93</sup> However, the Second Circuit, holding that "professional basketball games are not 'original works of authorship' protected by copyright,"<sup>94</sup> rejected this footnote as dictum.<sup>95</sup> The court claimed that the "more reasonable" position is that athletic events are not copyrightable since "the number of joint copyright owners would include the league, the teams, the athletes, umpires, stadium workers and even fans, who all contribute to the 'work.'"<sup>96</sup> Therefore, the court concluded, that the Copyright Act was not intended to protect the authorship of these events.<sup>97</sup> The legislative history of the Copyright Act suggests that the Second Circuit's interpretation of the Act in *NBA v. Motorola* was correct.<sup>98</sup> "In testimony before Congress in hearings prior to the adoption of the 1976 Copyright Act, the Register of Copyrights expressed doubt that '[a] game itself, as a game, and activities of the participants, the players, are actually copyrightable.'"<sup>99</sup> Moreover, "[t]here is some indication that Congress considered the application of copyright to sporting events such as football games," and ultimately rejected the idea that sporting events were copyrightable.<sup>100</sup> Thus, it seems clear that if Congress wanted to afford athletic events copyright protection, it would have included them in Section 102 of the Act.<sup>101</sup> Additionally, the court in *NBA v. Motorola* rightly found that, "[u]nlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script."<sup>102</sup>

It is undisputed that the Cubs own the copyrights in the local telecasts of their games, including each home game played at Wrigley Field, and

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92. 805 F.2d 663 (7th Cir. 1986).

93. *NBA*, 105 F.3d at 846. "Players' performances possess the modest creativity required for copyrightability." However, the court went on to state that "even if the [p]layers' performances were not sufficiently creative, the [p]layers agree that the cameramen and director contribute creative labor to the telecasts." *Baltimore Orioles, Inc.*, 805 F.2d at 669 n.7.

94. Weber, *supra* note 91, at 341 (quoting Copyright Act, 17 U.S.C. § 102(a)).

95. *NBA*, 105 F.3d at 846-47. *But cf.* *Morris Communs. Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322 (M.D. Fla. 2000) (holding that plaintiff could not gather real-time scores without using defendant's real-time scoring system, and consequently, that plaintiff had not shown a substantial likelihood that it would prevail on the merits).

96. *NBA*, 105 F.3d at 846 (quoting NIMMER ON COPYRIGHT, *supra* note 51, § 2.09F).

97. *NBA*, 105 F.3d at 841.

98. Weber, *supra* note 91, at 341.

99. *Id.* (citation omitted).

100. *Id.* (footnote omitted).

101. *Id.*

102. *NBA*, 105 F.3d at 846.

carried on WGN-TV, WCIU-TV, CLTV and/or Fox Sports Net Chicago.<sup>103</sup> Therefore, the Cubs argue, the defendant rooftop owners have intentionally and willfully<sup>104</sup> infringed upon the Team's copyrights in the telecasts by giving unauthorized public performances of the games on defendants' premises for the entertainment of patrons and for the enhancement of the business and revenues of the rooftop owners.<sup>105</sup>

Assuming they have not assigned those rights to others, a sports club or other entertainment entity owns a copyright in the telecasts of its games or performances if they are simultaneously "fixed" in a tangible medium.<sup>106</sup> Also, since a broadcaster produces the telecasts of such games or performances and creates and artistically develops these telecasts, he is also afforded a copyright in the telecasts.<sup>107</sup> Nonetheless, the game, sport, or other publicly displayed performance, is nothing more than an accumulation of facts.<sup>108</sup> Neither the sport/entertainment organization nor the broadcaster has any rights to the underlying product in and of itself. The court in *NBA v. Motorola* reasoned that, "[t]he 'fact/expression dichotomy' is a bedrock principle of copyright law that 'limits severely the scope of protection in fact-based works.'" Clearly, no author may copyright facts or ideas. Rather, "[t]he copyright is limited to those aspects of the work—termed "expression"—that display the stamp of the author's originality."<sup>109</sup> In so finding, the court in *NBA v. Motorola* declared that, "Although the broadcasts are protected under copyright law, the district court correctly held that Motorola . . . did not infringe NBA's copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast."<sup>110</sup>

### C. Copyright in One Event Afforded to Several Entities

A Seventh Circuit ruling reinforces the idea that a parade, an event similar to a sporting event, is not afforded copyright protection. In *Production Contractors, Inc. v. WGN Continental Broadcasting Co.*,<sup>111</sup> a parade organizer brought suit against a television station, alleging violation

103. Cubs Complaint, *supra* note 10, at 6. It is also clear that the Cubs affix a copyright notice to each of their telecasts: "Copyright 2002 Chicago National League Ball Club, Inc." *Id.* at 10.

104. *Id.*

105. *Id.*

106. See 17 U.S.C. § 102; see also Garrett & Hochberg, *supra* note 14, at 164.

107. See 17 U.S.C. § 102; see also Garrett & Hochberg, *supra* note 14, at 164.

108. *NBA*, 105 F.3d at 847; see also Weber, *supra* note 91, at 341-42.

109. *NBA*, 105 F.3d at 847 (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) (citation omitted)).

110. *Id.*

111. 622 F. Supp. 1500, 1502 (N.D. Ill. 1985).

of copyright law and common law claims under the Lanham Act. The plaintiff claimed that the defendant “intend[ed] to telecast the parade, using [his] own personnel and equipment, simultaneously” with the only station that had exclusive rights to broadcast the parade.<sup>112</sup> The court held that the parade contained “no original creative authorship” and rejected the plaintiff’s claims.<sup>113</sup> The court maintained that the telecast of the parade, like the telecast of a sporting event, was “a work of authorship fixed simultaneously with its transmission only for purposes of copyright protection from videotaping . . . or secondary transmissions . . . [and did] not extend to prevent another simultaneous live telecast by another television or radio station.”<sup>114</sup>

Since sports and other events like parades cannot be copyrighted, the rooftop owners can watch and even record the Cubs’ games. Clearly, baseball cannot be copyrighted; only the *recording* of the on-field action, not the action itself, can be copyrighted. Thus, the rooftop owners have a legitimate argument that if they film the Cubs’ games from their rooftop vantage points, they will essentially own a copyright in those recordings. Further, it is undoubtedly true that these rights would be of considerable value to the rooftop businesses.<sup>115</sup>

However, it is worth noting that broadcasters may be hesitant to contract with the rooftop owners or similar entities for fear of backlash from MLB, MLB teams, or other sports organizations like the National Basketball Association, National Football League, and the National Hockey League. Broadcasters may want several different camera angles, on-field microphones and access to coaches, players and other team personnel both on and off the playing surface. By contracting with operations like the rooftop businesses, established broadcasters may lose such access and, as a consequence, prominence. Nevertheless, less-sophisticated broadcasters may simply wish to have one vantage point and may relish the opportunity to contract with the rooftop owners for these copyright privileges.

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112. *Id.*

113. *Id.* at 1503 (citation omitted).

114. *Id.* at 1504 (citation omitted); *see also* WCVB-TV v. Boston Athletic Ass’n, 926 F.2d 42 (1st Cir. 1991) (finding that broadcasting Boston marathon without permission of Boston Athletic Association is not a Lanham Act violation and does not create an inference that broadcast is somehow official).

115. “Twenty-four sports channels, like ESPN and Fox Sports News, currently pay copyright owners for use of their highlights in other shows not geared to immediate coverage of current events. For example, ESPN pays a fee to Major League Baseball . . . for the rights to show extended highlights of baseball games during a half-hour program geared exclusively for baseball.” Saltzman, *supra* note 26, at 14-15.

## VII. CONCLUSION

Sports and entertainment are undoubtedly major industries in American culture and society. A key reason that sports and entertainment have become mainstays among consumers is constant saturation through broadcasts on television, radio, the Internet, and other media. Because of the high stakes and high dollar figures associated with sports and entertainment, owners of such entities fervently argue that they are afforded rights in all their creations and products. However, these arguments are untrue. When factors such as land use, contract, and property law are weighed against the ownership rights involved in the dissemination of sports information, the rights in sports property must lose, barring any copyright or other protections.

Since the beginning of the twentieth century, the FCC and the courts have explicitly created a possessory ownership of sports information. Furthermore, the Copyright Act has established clear guidelines delineating the extent to which a work of authorship, as well as sports property, can be duly protected. Clearly, the Copyright Act affords owners of originally fixed material copyright protection, but that which cannot be copyrighted cannot be protected. There is no question that unfixed works are not entitled to protection and that they do not fall within the scope of the Copyright Act. Excluding telecasts, sports and other entertaining acts are works that cannot be copyrighted because they are merely factual events. They are not afforded any protection unless “fixed in a tangible medium of expression.”<sup>116</sup>

Because these events lack legal protection, any person who decides to film or record such events may do so. Moreover, landowners who have visible access to adjacent properties (which publicly display entertaining events) may themselves record, film, broadcast, and distribute such recordings, or they may assign such rights to others (e.g., broadcast networks). Additionally, if they or their assignees do film the events, their recordings (or broadcasts) will result in copyright protection in their newly affixed creation, and the original creator of the performance is granted absolutely nothing.

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116. Copyright Act, 17 U.S.C. § 102(a) (2000).

