The Not-So-Friendly Confines:
Where Tradition Meets Greed

By: Eric Meyers
"Take me out to the ball game,
   Take me out with the crowd.
Buy me some peanuts and cracker jack,
   I don't care if I never get back,
Let me root, root, root for the home team,
   If they don't win it's a shame.
For it's one, two, three strikes, you're out,
   At the old ball game."\(^1\)

Baseball is an American tradition, the “National Pastime.” The game itself is filled with traditions, such as the singing of “Take Me Out to the Ballgame.” After the home team records the first three outs in the seventh inning, the crowd rises and sings the song that dates back over 100 years.\(^2\) Chicago Cubs broadcasting legend, Harry Carey, who is credited was the first announcer to sing the song over the loudspeakers, once said, “I would always sing it because I think it’s the only song I knew the words to!”\(^3\) “Take Me Out to the Ballgame” is a staple of the game of baseball, a game filled with rich tradition.

Wrigley Field is also an American tradition. Home of the Chicago Cubs, the second oldest ballpark in the country is a treasure to behold. Nestled in the heart of the North Side of Chicago, fans and tourists alike visit the ballpark located at the intersection of Waveland and Sheffield. Most fans go to a ballgame for the experience: the sound of the crack of the bat; the smell of the food; the taste of peanuts or Cracker Jack; and the feel of tradition. From the ivy on the walls, to the signature singing of “Take Me Out to the Ballgame,” Wrigley Field screams

\(^1\) Jack Norworth, *Take Me Out to the Ballgame*, York Music Company, 1908 (song lyrics).
\(^3\) *Id.*
tradition. The neighboring rooftops, which are visible from the inside the stadium, are also an important part of the Wrigley Field tradition. The same rooftops that helped create the Wrigley Field ambience are at the center of a not-so-friendly dispute over the “Friendly Confines.”

Baseball, like most sports in America today, has transformed from a game of history and tradition to a business of money and greed. The greed of the Chicago Cubs should not be a determinative factor in shaping the law regarding rooftop spectatorship. The issues surrounding the Cubs’ Rooftop controversy have a direct impact on sports fans across the country. Baseball began as a boy’s game and is now on the brink of corporate destruction.

Scope

Part I of this paper provides background on the legal dispute between the Chicago Cubs and the Rooftop Owners. Part II addresses the applicable federal law. Part III analyzes the legal issues involved in the controversy. Part IV provides possible defenses with respect to the issues in the Cubs’ complaint.

I. Background

A. The Complaint

At the crux of their complaint, the Chicago Cubs alleged that the Rooftops operate without license from the Cubs, in direct competition with the Cubs.4 The Cubs sought relief on the basis of four legal theories:

(1) Violation of the Copyright Act;5
(2) Violation of the Lanham Act;6
(3) Misappropriation;

---

4 See Plaintiff’s Third Amended Complaint at ¶ 2, Chicago Nat’l League Ball Club, Inc. v. Sky Box on Waveland, L.L.C., No. 02 C 9105 (N.D. Ill. filed Oct. 27, 2003).
6 15 U.S.C. § 1125(a)
As pleaded in the complaint, the Cubs sought:

- compensatory damages; statutory damages for the year 2003 pursuant to 17 U.S.C. § 504(c);
- disgorgement to the Cubs of the Rooftop Owners’ profits;
- treble damages pursuant to 15 U.S.C. § 1117(a);
- a permanent injunction barring the Rooftop Owners from:
  - (a) selling, or in any way offering for value, admissions to view live baseball games played at Wrigley Field without license from the Cubs;
  - (b) infringing the Cubs’ copyrights; and
  - (c) engaging in any commercial advertising, promotion or marketing likely to cause confusion, mistake or deception concerning the Rooftop Owners’ connection or affiliation with the Cubs or the Cubs’ sponsorship or approval of the Rooftop Owners’ business;
- an award granting the Cubs costs and reasonable attorneys’ fees.\(^8\)

**B. Case History**

Wrigley Field was erected in 1914.\(^9\) Since the day Wrigley opened its gates in April 1914, spectators have watched baseball games from the neighboring buildings.\(^10\) Several events lead the Cubs to file a lawsuit against the Rooftop Owners 88 years after the ballpark’s opening. In the 1980s, the neighborhoods surrounding Wrigley Field began to gentrify.\(^11\) Along with the aforementioned gentrification of Wrigleyville came an increased demand for Chicago Cubs

---

7. Id. (Counts I, II, III, IV).
8. Id. (Relief sought).
9. Defendant’s Answer at 3, Chicago Nat’l League Ball Club, Inc. v. Skybox on Waveland (No. 02 C 9105).
baseball, specifically games played at Wrigley Field.\textsuperscript{12} Around the same time that the Cubs started selling out their home games at Wrigley Field, some astute Rooftop Owners began charging admission for the exceptional view.\textsuperscript{13}

The Cubs’ attendance figures averaged 89\% capacity for the 2002 Major League Baseball season, which was fourth best of the thirty teams in the league.\textsuperscript{14} These figures only account for fans that actually come to the ballpark and walk through the turnstiles, thus it is entirely plausible that the Cubs regularly sold out home games during the 2002 baseball season.\textsuperscript{15} Much to the dismay of Chicago mayor, Richard M. Daley, and neighborhood residents, particularly the Rooftop Owners and tenants, the Cubs searched for ways to expand the seating capacity of Wrigley Field.\textsuperscript{16} Neighborhood residents, along with the City of Chicago, rallied in opposition to the Cubs’ desire to alter historic Wrigley Field by creating a proposal that would declare the ballpark a landmark.\textsuperscript{17} By unanimous vote, a Chicago city council committee recommended landmark status for certain features of Wrigley Field.\textsuperscript{18} Because the local landmark designation

\textsuperscript{12} Id. (“[As a result of] … WGN and the late announcer Harry Caray popping up on cable networks all over the country … the Cubs became associated with a good time, no matter what the score. Now a visit to Wrigley Field is as de rigueur for Chicago visitors as Broadway in New York, a movie studio tour in Los Angeles …”).


\textsuperscript{14} Id. (citing ESPN as a source for the data).

\textsuperscript{15} Id.


\textsuperscript{17} Id.

\textsuperscript{18} Carrie Muskat, \textit{Council Approves Landmark Status: Features of Wrigley Field Included In Proposal}, Jan. 27, 2004, http://chicago.cubs.mlb.com/news/article.jsp?ymd=20040127&content_id=631178&vkey=news _chc&fext=.jsp&c_id=chc (the committee endorsed a proposal to grant landmark status to Wrigley Field’s four exterior walls and roofs, the marquee sign at the corner of Clark and Addison streets, the center field scoreboard, the grandstands and bleachers, and the brick wall and ivy surrounding the playing field).
placed restrictions on the Cubs’ ability to expand the stadium and build additional seating.\textsuperscript{19} Cubs ownership vehemently opposed to the City’s proposal.\textsuperscript{20}

The Chicago Cubs filed its initial Complaint against the Rooftop Owners on December 17, 2002.\textsuperscript{21} The Rooftop Owners filed Motions for Summary Judgment on June 6, 2003. The court denied the motion without prejudice; the Judge set a trial date for one year from the date and encouraged both parties to engage in serious settlement negotiations.\textsuperscript{22}

The Cubs reached a settlement agreement with all thirteen Rooftops by April 2004.\textsuperscript{23} The settlement was not entered by the Federal District Court for the Northern District of Illinois as a judgment or decree.\textsuperscript{24} The agreement required the Rooftop Owners to pay the Cubs seventeen percent of their gross revenue for a period of twenty years.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Jane Lee, USA TODAY, \textit{Historic Sports Sites Rarely Take Landmark Status}, July 26, 2007, \url{http://www.usatoday.com/sports/2007-07-25-history-sportsites_N.htm} (Major League Baseball ballparks are not found on the list of National Historic Landmarks because of the owners’ desires to make changes to the existing structures. The Chicago Cubs' Wrigley Field, the Boston Red Sox's Fenway Park and the Chicago White Sox's old Comiskey Park were among sports-related landmarks designated by the Interior Department for consideration in 1987; however, each owner cited concerns that National Historic Landmark status would restrict future modifications).
\item \textsuperscript{21} Complaint for Injunction, Damages and Other Relief, Chicago Nat’l League Ball Club, Inc. v. Skybox On Waveland, No. 02 C 9105 (N.D. Ill. filed Dec. 17, 2002), 2002 WL 32682094.
\item \textsuperscript{22} Minute Order of 6/10/03, Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C. (No. 02 C 9105).
\item \textsuperscript{23} Minute Order of 4/08/04, Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C. (No. 02 C 9105).
\item \textsuperscript{24} Settlement was reached out of court and the Cubs entered into a private agreement with the Rooftops. The court docket simply notes that settlement had been reached, but the docket does not contain any official order or decree announcing the terms of the settlement.
\end{itemize}
II. Overview of Applicable Federal Law

A. The Lanham Act

The Cubs alleged the Rooftops practiced advertising methods that were in violation of Section 43(a) of the Lanham Act, which reads as follows:

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.26

B. The Copyright Act

The Copyright Act of 1976 provides exclusive rights for the copyright owner to do or to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.27

III. The Legal Issues

The Cubs Rooftops litigation presented very important and interesting sports and intellectual property law issues that the courts have yet to fully address. First, the trademark infringement issue is fairly straightforward. The more complex issues, however, involved the role of the Copyright Act. Courts have not addressed many issues involving the view of the actual sporting event with respect to the Copyright Act. Additionally, this case presented a new context for the function of the Copyright Act’s preemption of state claims.

A. The Rooftop Owners’ Usage of The Cubs Brand

A number of Rooftop Owners presumably used the name, image, and likeness of the Chicago Cubs to advertise for their establishments. A defendant is liable under the Lanham Act when the “defendant's actions are ‘likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association’ of the defendant's goods or services with those of the plaintiff.”28 This issue does not offer much by way of analysis. The outcome of this claim would be based on whether each individual Rooftop advertised in a way that would cause public confusion as to whether the Chicago Cubs owned, operated, or were in any way affiliated with

27 17 U.S.C. § 106
the rooftops. The likely answer to this question is that some did. This also may be a large reason why the Rooftops agreed to the settlement rather than litigating the issues. For analytical purposes, the paper assumes that at least some of the Rooftop Owners violated the Lanham Act.

B. **Are Baseball Games Copyrightable?**

The Copyright Act does not provide an exclusive right to owners of sporting events.\(^{29}\) A sports event or a parade cannot, in and of itself and irrespective of other factors, be the subject of a copyright.\(^{30}\) In order for a work to be copyrightable, the work must exist in a “fixed” medium, such as a film or a photograph, which contains the record of the event.\(^{31}\) Therefore, there are no copyrights in events, but only in the reduction of such events to a tangible medium of expression.\(^{32}\) For example, the promotion and production of a Christmas parade is not a “work of authorship” entitled to copyright protection.\(^{33}\) “If a live broadcast is not based upon a work of authorship, as in the case of a sporting event, a parade, etc., then no statutory copyright infringement would result from its reproduction.”\(^{34}\) This conclusion is supported by Section 102(b) of the Copyright Act, which states: “In no case does copyright protection for an original

---

\(^{29}\) 17 U.S.C. § 102(a) (“Copyright protection subsists … in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship inside the following categories:
(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomime and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.”)

\(^{30}\) JOHN W. HAZARD, JR., 1 COPYRIGHT LAW IN BUSINESS AND PRACTICE § 2:55 (rev. ed.).

\(^{31}\) *Id.*


\(^{33}\) WGN, 622 F.Supp. at 1503.

\(^{34}\) *Id.* (quoting MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.03[B][2] note 33 (2000 & Supp. 2003)).
work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

A baseball game can best be described as an unscripted procedure or process that spans over a course of nine innings.

Even if the sporting event itself is not copyrightable, a live telecast may be entitled to copyright protection if it is fixed in a tangible medium of expression. Section 101 of the Copyright Act provides that a “work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.” Furthermore, the legislative history explicitly addresses the copyrightability of live telecasts of public events, suggesting that although live sports broadcasts are reaching the public in unfixed form, they are simultaneously being recorded. The live broadcast of the sporting event, with simultaneous fixation, is a work of authorship of the cameraman and protected under the Copyright Act.

---

37 Notes of Committee on the Judiciary, House Report No. 94-1476, Title 17, UNITED STATES CODE ANNOTATED (West Pub. 1977) p. 14. (The bill seeks to resolve, through the definition of “fixation” in Section 101 ..., the status of live broadcasts-sports, news coverage, live performances of music, etc.-that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and director are doing constitutes “authorship.” The further question to be considered is whether there has been a fixation. ... If the program content is transmitted live to the public while being recorded at the same time, ... the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast).
38 17 U.S.C § 101.
At least one case, however, suggests that a sporting event itself may be copyrightable. The Seventh Circuit in *Baltimore Orioles, Inc. v. Major League Baseball Players Association* suggests that baseball games are copyrightable themselves. However, Judge Eschbach made the assertion in a footnote within the court’s opinion. The court disagreed with the players’ argument that their performance on the field was not copyrightable because it lacked sufficient artistic merit. The footnote concludes with the proposition that even if the performance itself is not sufficiently creative, the cameramen and director contribute creativity to the telecasts. “The work that is the subject of copyright is not merely the Players’ performances, but rather the *telecast* of the Players’ performances. The creative contribution of the cameramen and director alone suffices for the telecasts to be copyrightable.”

*Baltimore Orioles* provides little to clarification as to whether the actual game itself is copyrightable. In fact, the court’s assertion in footnote 7 has been the subject of harsh criticism by copyright commentators. Professor Nimmer offers four problems with what he characterizes as the erroneous conclusion of the Seventh Circuit. In reaching its conclusion, the court did not cite to any authority dealing with athletic events, did not reference baseball as an existing form of expression in the Copyright Act, and failed to appreciate a distinction

---

40 *Id.* at 668-69; *see also* MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.09[F] (2000 & Supp. 2003).
41 *Id.* at note 7.
42 *Id.* (“Only a modicum of creativity is required for a work to be copyrightable”).
43 *Id.*
44 *Id.*
46 *Id.*
between “works of authorship” and works of great commercial value. Additionally, Professor Nimmer expresses much doubt as to the creativity of baseball player performances. Nevertheless, this issue may be inapplicable for the Rooftop Owners as they do not reproduce, prepare derivate works of, distribute copies of, publicly perform, or publicly display the players’ performances when they view the games, or sell the opportunity to view the public display of the players’ performances to others.

The Second Circuit also addressed the issue of whether sporting events in and of themselves are copyrightable. The court concluded that the Copyright Act was not applicable to the actual performance on the court (or in this case field) that is the subject of the telecasts. When analyzing the applicability of the categories listed in § 102, the court stated: “although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.” Furthermore, the court emphasized that “[s]ports events are not ‘authored’ in any common sense of the word.”

In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship’ under 17 U.S.C. § 102(a). Section 102(a) lists eight categories of ‘works of authorship” covered by the act, including such categories as ‘literary works,’ ‘musical works,’ and ‘dramatic works.’ The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.

47 Id.
48 Id.
49 See NBA v. Motorola, Inc., 105 F.3d 841 (2nd Cir. 1997).
50 Id. at 846.
51 Id.
52 Id.
According to the Second Circuit, although teams put forth a considerable amount of preparation for a game, “[s]ports events are not ‘authored’ in any common sense of the word.” The court distinguished preparing for a game from preparing for a play, movie, or television program, reasoning that athletic events are competitive and have no underlying script. Furthermore, in order to attract fans, the limited “authorship” of a sporting event must be open.

For many of these reasons, *Nimmer on Copyright* concludes that the “[f]ar more reasonable” position is that athletic events are not copyrightable. [1] M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.09[F] at 2-170.1 (1996). *Nimmer* notes that, among other problems, the number of joint copyright owners would arguably include the league, the teams, the athletes, umpires, stadium workers and even fans, who all contribute to the “work.”

---

53 *Id.*

54 *Id.*

(Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences, the most notable recent event being in a championship baseball game in which interference with a fly ball caused an umpire to signal erroneously a home run).

55 *Id.*

(If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering. Even where athletic preparation most resembles authorship-figure skating, gymnastics, and, some would uncharitably say, professional wrestling-a performer who conceives and executes a particularly graceful and difficult-or, in the case of wrestling, seemingly painful-acrobatic feat cannot copyright it without impairing the underlying competition in the future. A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try).

56 *Id.*
The court further acknowledged that caselaw is scarce on the issue of whether organized events are themselves copyrightable, but nevertheless concluded that the limited authority indicated that they are not. 57

We believe that the lack of caselaw is attributable to a general understanding that athletic events were, and are, uncopyrightable. Indeed, prior to 1976, there was even doubt that broadcasts describing or depicting such events, which have a far stronger case for copyrightability than the events themselves, were entitled to copyright protection. Indeed, as described in the next subsection of this opinion, Congress found it necessary to extend such protection to recorded broadcasts of live events. The fact that Congress did not extend such protection to the events themselves confirms our view that the district court correctly held that appellants were not infringing a copyright in the NBA games.” 58

The Rooftop Owners do not reproduce, prepare derivate works of, distribute copies of, publicly perform, or publicly display the Cubs’ performances by viewing them, or selling the opportunity to view the public display of the Cubs’ performances. 59

If the court had ruled on whether the Chicago Cubs were entitled to Copyright protection in the actual games, we may have finally had an answer on this unresolved issue. However, it remains unlikely that the Cubs could succeed in a Copyright claim for the performance on the field. Actually, the Cubs implicitly acknowledged this in their complaint, as they broadly plead that the Rooftop Owners were violating the Cubs’ Copyright in operating their businesses

57 Id. at 846-47 (citing Production Contractors, Inc. v. WGN Continental Broadcasting Co., 622 F.Supp. 1500 (N.D.Ill.1985) (Christmas parade is not a work of authorship entitled to copyright protection)).

58 Id. at 847.

without a license from the Cubs; however, the Cubs focused their Copyright claims on the issue of rebroadcasting on television monitors on the premises of the rooftop establishments. Some Rooftop Owners may have been in violation of Copyright laws with respect to the number and size of televisions located on their premises.

C. Copyright Preemption

If the courts determine that baseball games in and of themselves are not the subject of the Copyright Act, the next issue would become whether the Chicago Cubs’ state law claims survive copyright pre-emption. In their motion for summary judgment, the Rooftop Owners argued that the Copyright Act pre-empts the Cubs’ claims for misappropriation and unjust enrichment.60

Congress provided for the preemption of copyright interrelated state law claims when it amended the Copyright Act in 1976.61 Under section 301:

(a) ... all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 10662 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 10263 and 10364, whether created before or after that date and

60 See Defendants’ Motion for Summary Judgment at ¶ 6, Chicago Nat’l League Ball Club, Inc. v. Skybox On Waveland (No. 02 C 9105).
61 17 U.S.C. § 301; NBA v. Motorola, Inc., 105 F.3d 841, 848 (2nd Cir. 1997).
64 17 U.S.C. § 103. The section § reads:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.
whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

Thus, the subject matter requirement is met when the work of authorship being copied or misappropriated “fall[s] within the ambit of copyright protection.” Certain forms of commercial misappropriation that otherwise falls within the scope of copyright protection will survive preemption if an “extra-element” test is met. Courts generally agree that some forms of commercial misappropriation, specifically claims involving “hot news,” survive preemption.  

---

67 Id. (analyzing the extent to which a “hot-news” misappropriation claim based on International News Service, 248 U.S. 215 (1918) involves extra elements and is not the equivalent of exclusive rights under federal copyright law).
68 See id. (citing Financial Information, Inc. v. Moody’s Investors Service, Inc., 808 F.2d 204, 208 (2d Cir. 1986), cert. denied, 484 U.S. 820 (1987)). The court explained that this conclusion is based on the legislative history of the 1976 amendments to the Copyright Act. The House Report stated: “Misappropriation” is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as “misappropriation” is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section...
The elements to survive preemption for a narrow “hot news” misappropriation claim are: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.69

Judge Easterbrook noted that “[o]ne function of § 301(a) is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain, which it can accomplish only if “subject matter of copyright” includes all works of a type covered by sections 102 and 103, even if federal law does not afford protection to them.”70 Furthermore, as noted above, Congress found it necessary to explicitly extend the copyright protection to the recorded broadcast of live events.71 The explicit protection afforded to recorded broadcasts of live events, analyzed in conjunction with Judge Easterbrook’s interpretation of the function of Section 301, suggests a Congressional intent to displace any legal protection, including those under state law.

The Cubs do claim that the Rooftops misappropriated facts constituting “hot” news.72 The inquiry is relevant, however, because if the Copyright preemption applies, the Cubs may

---

106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting “hot” news, whether in the traditional mold of International News Service v. Associated Press, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business, or financial data bases. H.R. No. 94-1476 at 132, reprinted in 1976 U.S.C.C.A.N. at 5748 (footnote omitted).

69 Id. at 853. (explaining that International News Service, 248 U.S. 215 (1918) “is not about ethics; it is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit seeking entrepreneurs.”)

70 ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996) (citation omitted).

71 NBA, 105 F.3d at 847.

72 Additionally, even if the “hot news” exception did apply to the Wrigley Field Rooftop controversy, the Cubs would likely not meet the required elements of the International News test because the organization would be unable to show that the Rooftops’ existence would cause the Cubs and television companies to stop producing and broadcasting Major League Baseball
have a limited basis for recovery. Copyright law pre-emption does not extend to works not yet “fixed” in a tangible medium of expression, which are subject to state law protections. Therefore, state law protects “unfixed” works.

If Chicago Cubs baseball games are “unfixed” works, the courts will need to determine whether the state claims for unjust enrichment and misappropriation are pre-empted by copyright law. In NBA v. Motorola, the court held that the state law claim for misappropriation was pre-empted. Citing Baltimore Orioles, the court determined that the broadcasts reduced the games to a tangible medium. The court concluded that no distinction exists “between the performance and the recording of the performance for purposes of pre-emption…”. Therefore, if a court determines that the Cubs do not have a claim for Copyright infringement because baseball games are not of themselves copyrightable, and further, that the copyright pre-emption applies to bar state law claims, the Cubs may have no legal remedy outside of trademark infringement.

For analytical purposes, this paper assumes that the Cubs cannot claim copyright protection for their baseball games. The paper further assumes that the copyright pre-emption does not apply to bar state law claims for unjust enrichment and misappropriation. The Cubs then, may have legitimate state law claims.

D. State Law Claims

---

73 17 U.S.C. § 301(b)(1).
74 See 1 NIMMER ON COPYRIGHT, supra note 45, at § 2.02 p.2-21.
75 NBA, 105 F.3d at 846-47.
76 Id. at 848-50 (citing Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 675-76 (7th Cir. 1986) (where games are fixed by broadcasting, players’ right of publicity claims are pre-empted)).
77 Id. at 849 (quoting Baltimore Orioles, 805. F.2d at 675).
In order to assess the likelihood of success for the Chicago Cubs’ claims for unjust enrichment and misappropriation, it is necessary first to examine the history of sports property rights.78

1. **Background of Sports Property Rights**

In 1938, the Federal District Court for the Western District of Pennsylvania was one of the first courts to acknowledge the existence of a sports property right in a baseball context. In *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,79 the Pittsburgh Pirates sued to enjoin KQV from broadcasting Pirates’ baseball games without permission from the Pirates organization.80 The Pirates had entered into a licensing agreement with NBC for the right to broadcast Pirate games on the radio.81 The defendant radio station, KQV, had employees strategically located outside Forbes Field, on property that KQV had leased, in such a way that enabled their employees to see over the exterior walls for the purpose of relaying play-by-play descriptions of the games.82 The court granted a preliminary injunction against defendant radio station KQV.83 The court held that the Pirates had a property right in the radio broadcasts and the right to control the use of the broadcasts.84 The court further held that KQV had misappropriated the property

---

80 *Id.* at 491. This case was decided before Congress amended the Copyright Act to include protection for the broadcast of a live event.
81 *Id.* at 492. (The Pirates entered into a contract with General Mills, granting General Mills exclusive broadcasting rights. General Mills then entered into a contract with NBC to broadcast play-by-play descriptions of the games over the radio).
82 *Id.* (The Pirates played their home baseball games at Forbes Field. Fans were admitted into the ballpark with a paid admission ticket that expressly forbid the ticket holder from giving out news of the game while it was in progress. Additionally, Forbes Field was enclosed by high fences and structures in order to prevent non-paying spectators from viewing the games).
83 *Id.* at 494.
84 *Id.* at 493-94.
rights of the Pirates in the news, reports, descriptions or accounts of Pirates’ games. The court determined that such misappropriation resulted in KQV being unjustly enriched at the cost of the Pirates, and further constituted unfair competition. Soon after Congress amended the Copyright Act in 1976, the Supreme Court of the United States decided Zacchini v. Scripps-Howard Broadcasting Co. In Zacchini, the plaintiff brought an action against a local news station for misappropriation of his professional property right after a reporter secretly taped his “Human Cannonball” act; the news station subsequently broadcast the performance. The Court determined that the news station had misappropriated the plaintiff’s right. “An entertainer … usually has no objection to the widespread publication of his act as long as the gets the commercial benefit of such publication. Indeed, in the present case [Zacchini] did not seek to enjoin the broadcast of his act; he simply sought compensation for the broadcast in the form of damages.” The Court reasoned that entertainers have a property right in the accounts and descriptions of their events. The Court decided this case strictly on state misappropriation of a

85 Id. at 494.
86 Id. at 492. (citing International News Service v. Associated Press, 248 U.S. 215 (1918)).
88 Id. at 563-564. (The trial court granted defendant’s motion for summary judgment. The Ohio Court of Appeals reversed. While the majority held that Zacchini’s complaint stated a cause of action for conversion and for infringement of a common-law copyright, the concurring judge based his decision on the ground that the complaint stated a cause of action for appropriation of Zacchini’s “right of publicity” in the film of his act. All three judges agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury. The Supreme Court of Ohio held that the television station had a right to report its newscasts unless intent of the television station was to misappropriate Zacchini’s right of publicity for a non-privileged private use or to injure Zacchini).
89 Id. at 575-76.
90 Id. at 573-74.
91 Id. at 578.
right of privacy and unjust enrichment claims, and did not address any issues of copyright pre-
emption.\footnote{See id. at 573-79.}

2. Unjust Enrichment

The Cubs also alleged the Rooftop Owners were unjustly enriched.\footnote{Cubs Complaint (Count IV), supra note 4 and accompanying text.} At maximum attendance, projected revenues for the Ivy League Baseball Club, one of the thirteen Rooftop defendants, total approximately $1.38 million per year.\footnote{Charles Shifley & Patrick Shifley, \textit{Who Owns the View - Chicago Cubs v. Rooftop Owners, Or Chicago National League Ball Club, Inc. v. Box on Waveland, L.L.C.}, 1 NW. J. TECH. & INTELL. PROP. 70, 73 (2003) (taking the number of games, an estimated maximum seating of 160 people, and a quoted price range for 2003 between $95 and $195).} The Cubs argued that this is a considerable amount of profits for a business that relies on the product the Cubs produce, yet contributes nothing to that production.\footnote{Cubs Complaint (Count IV), supra note 4 and accompanying text.}

IV. Defenses

Despite the fact that the games are public, open-air performances that can be viewed by neighbors without interference, the Cubs claimed that the Rooftop Owners are stealing property that rightfully belongs to the Cubs.\footnote{Defendants’ Motion for Summary Judgment, supra note 10.}

A. Land Use Rights

The Rooftop Owners should be entitled to use their land in any manner that they please, so long as they do not constitute a nuisance or invade the Cubs’ privacy. A landowner cannot be restrained from erecting a structure for the express purpose of overlooking the adjoining land.\footnote{1 AM.JUR.2d, \textit{Adjoining Landowners}, § 19, (citing Detroit Baseball Club v. Deppert, 27 N.W. 856 (Mich. 1886)).}

In 1886, the original “rooftop case” was decided by the Supreme Court of Michigan.\footnote{In 1886, the original “rooftop case” was decided by the Supreme Court of Michigan.} The defendant, John Deppert, constructed a viewing area on the roof of his barn to better view
the baseball games being played in Recreation Park, the home field of the Detroit Base Ball Club.99 The ballpark, which was adjacent to Deppert’s property, built a higher fence so as to block off the view from the outside.100 Deppert charged a fee for others to watch the game from his homemade bleachers and sold refreshments as well.101 The city’s board of building inspectors approved his arrangement as safe and secure.102 The Detroit Base Ball Club brought an action seeking to enjoin Deppert from using his barn in the manner alleged, as it was injurious to the ballclub.103

Similar to the Chicago Cubs’ complaint against the Rooftop Owners, the Detroit Base Ball Club alleged that the company relies largely upon revenue from admission to the ballpark to defray its operating costs of fielding the baseball team.104 The Detroit Base Ball Club also alleged its attempt to prevent non-paying spectators from watching the games by building higher screening and fencing around the ballpark.105 The court affirmed the lower court’s judgment for the defendant, Deppert.106 “It does not appear that the complainant enjoyed any exclusive franchises emanating from the legislature, or under any provision of the charter or bylaws of the city, or under any resolution or other action of the city counsel, in the use it made of the park, or that it had any right to control the use, in any manner, of the adjoining property.”107 The court also noted that the complaint does not “show that any persons visiting the refreshment stand of the plaintiff would have otherwise paid the admittance fee and entered the complainant's park, or

99 Id.
100 Id.
101 Id.
102 Id. at 857.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
that the defendant in any manner prevented them from so doing if they wished." 108 Furthermore, the court expressed difficulty in seeing how the Detroit Base Ball Club had been injured. 109 “Courts 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.” 110

“A landowner cannot be restrained from erecting a 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.” 111

B. Hypothetical Analysis

In the upper class town of Wealthywood, a prominent hotel chain owner, Dee Lux, plans to throw a graduation bash for his daughter. Mr. Lux hires a well-known band to perform at the party. Tents are assembled in the backyard with tables, but the stage is built just outside the covering of the tents. R.F. Topps, who lives next door to Mr. Lux, recently erected an elevated deck which extends over a portion of his back yard. The deck is now an addition to the balcony that connected to his bedroom. Building inspectors have approved R.F. Topps’ new deck, and his house remains in compliance with all building code regulations.

Upon learning of the graduation party, R.F. Topps decides to invite a few guests over to his house. Topps and his guests go outside onto the deck and lounge around on lawn chairs while enjoying some cold refreshments. From R.F. Topps’ deck, the group has an excellent view of the performance and clearly hears the music.

108 Id.
109 Id.
110 Id.
111 1 AM.JUR.2D, Adjoining Landowners, § 19, (citing Detroit Base-Ball Club v. Deppert, 27 N.W. 856 (Mich. 1886)).
Clearly, R.F. Topps has done nothing wrong in this scenario. Topps has a right to invite his friend over for refreshments and to view the performance in his neighbor’s yard. As the Rooftops acknowledged in their Answer to the Complaint, it would be strange indeed to require R.F. Topps force his guests to avert their eyes and cover their ears so as to not be unjustly enriched.

Adding to the hypothetical, assume R.F. Topps decided to throw a party of his own and charged people admission to view the band from his deck. Further, he went to the city to acquire a temporary liquor license, and paid for the liquor license. It would be prejudical and unfair to R.F. Topps if he were required to pay Dee Lux the money he made from his guests.

C. Equitable Estoppel, Acquiescence

The Cubs complaint may be slightly misleading. The Rooftop Owners insisted that the Cubs did not simply tolerate the rooftops for nearly 100 years, rather they exploited them for their own business objectives. In a letter to the City of Chicago dated October 19, 2000, the Cubs general counsel, Mark W. Hianik explained that:

[The Chicago Cubs] have peacefully coexisted with the property owners who have operated private baseball ‘clubs' on Sheffield and Waveland Avenues. [The Cubs] have done so... partly because of Wrigley Field's seating capacity limitations and partly because the rooftop fans add a certain charm and ambiance to the Wrigley experience.

In describing the effect of the rooftops and the rooftop spectators, Andy MacPhail, the Cubs president has stated that the rooftops and the rooftop spectators are “definitely part of the ambiance. It sort of screams that this is such a great place to be that people from the outside are

---

112 Defendants’ Answer to Plaintiff’s Third Amended Complaint, at Answer 1, Chicago Nat’l League Ball Club, Inc. v. Skybox on Waveland (No. 02 C 9105).
113 Id.
lining up to watch.”[114] The Cubs have marketed the rooftops and rooftop spectators as part of the unique character of Chicago Cubs’ baseball by displaying featured shots during WGN broadcasts.[115] Even Harry Caray referred to the rooftops and rooftop-spectators as an essential part of the unique experience of Cubs baseball, which is “one of the mystiques of Wrigley Field.”[116] The Cubs official website has encouraged fans to “come see why Wrigley Field is considered to be the Mecca of baseball…The ivy, the hand-operated scoreboard, the rooftops surrounding the ballpark…”[117]

On May 20, 1998, the City of Chicago enacted an ordinance setting forth certain rights and obligations of building owners and rooftop operators.[118] The ordinance required that the Rooftop Owners obtain a “Special Club-Wrigley Rooftop” license.[119] The license also required the buildings to be in compliance with commercial building and safety codes, as well as handicap accessibility and Americans with Disabilities Act requirements.[120] The Rooftop Owners spent millions of dollars to get the buildings up to code.[121] During the licensing process, the Cubs


[114] Id.
[115] Id.
[116] Id.
[117] Id.
[118] Id.
[119] Id.
[120] Id.
[121] Id.

This type of license is required to sell rooftop admission rights or sell food, beer or wine on rooftops in the Wrigley Field adjacent area described in Chapter 04-388-010. Wrigley Field Special Club licenses are only valid from March-November.

Inspections Required: Criminal History Review, Health-Food Protection, Fire, DOB-Special Inspection Program, Plumbing, Ventilation, Local Liquor Control Commission.

Fees: $1,000.00.

Renewal: Seasonal, March-November, for a 2-Year Term.

[120] Id.
[121] Id.
never raised any objection to the buildings’ license applications, their use as a venue for gatherings to watch baseball, or the licensing process.  

D. Laches

The Rooftops also have a defense in laches. “The doctrine of laches is derived from the maxim that those who sleep on their rights, lose them.” Laches apply to a trademark infringement case when the defendant shows: i) that the plaintiff had knowledge of defendant’s use of an already infringing mark, ii) the plaintiff inexcusably delayed in taking action with respect to the defendant’s misuse, and iii) the defendant would be prejudiced if plaintiff was allowed to proceed with the claim. With respect to the trademark infringement, the Rooftops would have to prove that the Cubs knew about their advertising for an unreasonable amount of time.

Applying the laches doctrine to the other claims, however, the Rooftops would have no problem showing that the Cubs knew of their existence and did nothing about it for an unreasonable amount of time. Nearly one hundred years must be unreasonable according to any court’s standards. Further, the Rooftops would certainly be prejudiced if the Cubs were to proceed with the claims. The Rooftops are licensed by an ordinance of the City of Chicago to charge admission to their buildings to watch the Cubs’ games. The Cubs did not object when the City adopted the ordinance nor when the Rooftops sought and obtained licenses. Additionally,

---

122 Id.
123 Chattanooga Manufacturing, Inc. v. Nike, Inc. 301 F.3d 789, 792 (7th Cir. 2002) (citing Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999)).
124 Id.; see also Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1040 (2d Cir.1980).
125 Id. at 792-93.
126 Id. at 703; see also 5 J. THOMAS & MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:1, at p. 31-8 (2001).
127 Defendants’ Answer, supra note 112.
the Rooftop Owners spent a lot of time and money remodeling their buildings and acquiring the licenses. A court would certainly determine that the delay was prejudicial to the Rooftops.

E. Landmark Status

Although the landmark status does not provide a legal argument of itself, the fact that the Cubs filed the lawsuit three days after the City of Chicago proposed a plan to make Wrigley Field a historic landmark speaks volumes to the driving force behind the dispute.\textsuperscript{128} The Cubs were obviously upset because the city and the neighborhood would not approve their plan to expand the stadium, and further because landmark status would place restrictions on expansion into the future. The Rooftops opposed the expansion because any type of renovation to Wrigley Field would obstruct the exceptional view. In their Answer to the Cubs Complaint, the Rooftops assert that the complaint was solely to harass the owners and pressure the community and the City of Chicago to allow the Cubs to expand Wrigley Field. Because the Cubs were regularly selling out games, they needed to expand in order to make more. But the Cubs could not expand with the new landmark designation. Therefore, the only option left for the Cubs was to sue the Rooftops because the Rooftops were making a lot of money thanks to the increased demand for Cubs baseball.

Conclusion

Even though the rooftops add to the ambience of Wrigley Field, the Cubs’ greed caused the organization to put money ahead of tradition. The parties resolved the dispute in a peaceful settlement, but with the economic downturn, the Rooftops have lost money. Perhaps the Rooftops may have been better off litigating the issues.

\textsuperscript{128} Defendants’ Answer, \textit{supra} note 112.