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The Thrill of Victory, and the Agony of the Tweet: Online Social Media, the Non-Copyrightability of Events, and How to Avoid a Looming Crisis by Changing Norms

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TABLE OF CONTENTS

I. INTRODUCTION ........................................... 446

II. BACKGROUND ............................................. 448
   A. 2009 SEC MEDIA POLICY AND RESPONSES ................. 448
   B. ABOUT ONLINE SOCIAL MEDIA ............................... 451
      1. Forms of Online Social Media ............................... 451
      2. Issues Surrounding Online Social Media ................. 452
   C. SOCIAL MEDIA POLICIES IN OTHER SPORTS LEAGUES ....... 454
   D. INTELLECTUAL PROPERTY PROTECTIONS IN
      SPORTS GENERALLY ....................................... 456
         1. Copyright Protections ................................ 456
         2. Commercial Misappropriation ......................... 457
         3. Right of Publicity .................................... 459

III. ANALYSIS ................................................. 461
   A. LOGISTICAL PROBLEMS WITH POLICY ENFORCEMENT ......... 461
   B. LEGAL PROBLEMS WITH POLICY ENFORCEMENT ............... 463
      1. Personal Messages ................................... 463
      2. Scores and Updates .................................. 466
      3. Commercial Uses ..................................... 466
      4. Substitutes for Coverage .............................. 468
   C. COMBATING INFRINGEMENT BY CHANGING NORMS ............. 472

IV. CONCLUSION .............................................. 476

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I. INTRODUCTION

Every Saturday during the fall, tens of thousands of students, alumni, and fans pour into the football stadiums of the member schools of the Southeastern Conference (SEC). In their desire to capture and share the enthusiasm of the moment, those fans take pictures and short videos of themselves and the game action, and send text and other messages intended to regale others with tales of the excitement. Fans then end up uploading much of this content to the internet in order to better preserve the memories of that day and share them with friends and fellow fans. In the summer of 2009, the SEC circulated a draft of a media policy that, on its face, would have made all such activity by ticketed fans at SEC sporting events a violation of the ticket policy and subjected those fans to the threat of legal action. Though the policy was subsequently amended to include less draconian language regarding fan behavior at games, the policy as adopted still contains considerable restrictions on fan behavior. The purpose of this Note is two-fold: first, to suggest that such a policy, either in its initial or its subsequently adopted form, would face insuperable practical and legal obstacles to its enforcement; second, to suggest that, given the unenforceability of such a policy, in order to protect their intellectual property interests in their events going forward, sports leagues such as the SEC must adopt a policy based on norms that see fans as partners in protecting the league’s interests, rather than adversaries, in order to protect their intellectual property interests in their events. Only by instituting such a change in how it approaches the protection of its intellectual property interests can a league such as the SEC hope to protect those interests in its games and thus avoid the sort of crisis that the illegal file-sharing revolution created for the music industry.

The situation that led to this policy has been made possible by the rapid and recent advance of two forms of technology: mobile communications and online social networking. Mobile communications technology, whether in the form of a cell phone or a multi-function device such as an iPhone or Blackberry, has evolved to give the user of such technology the ability to take pictures and video, and share those images in real time, either with other mobile communications technology users or with those connected to the internet. Online social media...
technologies, such as Facebook.com (Facebook), Twitter.com (Twitter), and YouTube.com (YouTube), provide users with the opportunity to establish a network of other users with whom they can easily share content. As these technologies have increasingly intersected, it has become possible for individuals to, in real time, create content and share information and images directly from their mobile communications devices to the network of other users with whom they are connected via the online social media sites.

At first blush, the issues raised by these new mobile technologies may appear to be nothing more than a redo of the illegal file-sharing challenge with which the recording industry has struggled. However, the issues raised by these new mobile technologies stand to become an even greater challenge to existing conceptions of intellectual property law. In addition to having in common all of the practical enforcement problems of the illegal file-sharing challenge, the use of these new mobile technologies introduces a legal issue not found in the entertainment industry’s struggle. Put simply, whatever the difficulties faced by the entertainment industry in dealing with illegal file-sharing, at least the product they were attempting to protect fell within the ambit of copyright law. This Note will demonstrate that here the product that leagues such as the SEC will increasingly have to struggle to protect, the game itself, as opposed to its broadcast, is not covered within our traditional notions of intellectual property law.

There is, however, another respect in which the situation facing the SEC is disanalogous from that faced by the music industry during the last two decades: this time, organizations such as the SEC see the threat coming and have the opportunity to act before technology threatens their very business model. Leagues such as the SEC have a window of opportunity to formulate policy to respond to this challenge that those in the music business did not have. While it is easy to dismiss the threat posed by such technologies, as that threat has yet to make itself apparent, it would not be advisable to do so. Broadcast revenues are the engine that drives collegiate and professional sports, and these technologies, by facilitating the creation of unauthorized alternate broadcasts, have the potential to threaten the sports business model in much the same way that file-sharing has threatened the traditional music industry model.

Part I of this Note contains an examination of the SEC’s media policy and its implications. It begins with a consideration of the relevant language in the policy...
itself, and continues with a review of the response that the initial version received and how this led to the adoption of a much revised policy. Part II examines the growth and development of the online social media technologies that led to the inclusion of the new policy language regarding fan usage of the contents of the game, and considers the implications that the ever-evolving nature of these technologies has for the development of future policies aimed at dealing with these technologies. Part III reviews the state of the case and statutory law dealing with the intellectual property protections teams and leagues may assert over both the broadcasts of games, and over the contents of the games themselves. Part IV examines the practical and legal obstacles a league such as the SEC would face in attempting to enforce a policy, either like the one it initially circulated or the one it subsequently adopted, against the sort of online social media use the policy seems designed to stop. This part focuses particular attention on the challenges posed by the fact that events such as sports games are not afforded protection under federal copyright law. Lastly, having seen the difficulties presented by attempts at control through a top-down, enforcement-oriented mindset, Part V suggests that the adoption of a policy based on the notion of reciprocity as developed in Mark Schultz's *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law* is more likely to prove an effective long-term strategy for the protection of the intellectual property interests of teams and leagues.

II. BACKGROUND

A. 2009 SEC MEDIA POLICY AND RESPONSES

In the late summer of 2009, the Southeastern Conference (SEC) circulated a draft of its proposed new media policy to its member institutions. Portions of this policy were seemingly aimed at dealing with the burgeoning use of online social media by ticketed fans of the teams of SEC member institutions. The version of the media policy initially circulated to SEC member universities provided that ticketed fans would not be allowed to “produce or disseminate (or

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6 Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651; see infra Part III.C.

7 See Kruse, supra note 1.

8 For the purposes of this paper, online social media refers to any web-based communications technology that allows for the uploading and distribution of user-generated content. Examples include blogs, video sites such as YouTube, and social networking sites such as Facebook and Twitter. Many of these sites now allow content to be uploaded via remote wireless devices, as well as directly to a website.

9 See Kruse, supra note 1 (describing the SEC policy and the initial response to it).
aid in producing or disseminating) any material or information about the [sporting] Event, including, but not limited to, any account, description, picture, video, audio, reproduction or other information concerning the Event. The policy also contained significant restrictions on media members covering SEC sporting events, including limiting use of game highlight clips by news stations to the seventy-two hour period after the conclusion of the game, preventing media members from posting video or audio clips to the internet, and disallowing media members from providing real-time descriptions of the game (also known as “live-blogging”). The restrictions were seen by the SEC as a way of helping to protect the interests created by an agreement they had entered into with XOS Technologies as part of a new SEC digital sports network. The restrictions on coverage were also not limited to the games; they would have extended to practices and press conferences occurring before and after the games.

The new SEC media policy generated an immediate critical response. Gannett and the Associated Press, two of the largest print media outlets covering the SEC, directed their newspapers and correspondents to refuse to sign the new credential policy, a decision that had the potential to seriously affect both national and local print coverage of the SEC. Those opposed to the policy argued not only that it was an intolerable imposition on their professional activities, but also that the policy represented a possibly unconstitutional infringement on their rights as journalists. However, the response to the SEC media policy was not universally negative. The Dean of the University of Florida’s College of Journalism and Communications, John Wright, praised the decision as a “smart and prudent thing to do to protect the rights to their product” and a good way of handling the situation “in an evolving media landscape.”

Charles Bloom, the SEC’s Associate Commissioner for Media Relations, conceded that the combination of a possible boycott of national and local print

10 Id.
12 Id.
13 Id.
15 See id. (noting that the editor of the Tennessean, a paper featuring local coverage of Tennessee and Vanderbilt believes the newspaper would likely advance a prior restraint argument if forced to challenge new restrictions).
coverage of SEC games and the public relations effect that the new policy was having on the conference and its member institutions led to the revision of the initial policy. The SEC's own Twitter page acknowledged the fan unrest, posting to its site: "To our Twitter fans, we have heard you. We're working on clarifications to our policy and should have something done soon." While the new policy relaxes many of the restrictions on media members, the restrictions relating to online use of in-game video footage and live-blogging remain in place. Several media organizations who do not feel that the revisions go far enough have sent the SEC a "joint letter of protest."

The new policy provides, in relation to ticketed customers, that

[n]o [ticket] Bearer may produce or disseminate in any form a "real-time" description or transmission of the Event (i) for commercial or business use, or (ii) in any manner that constitutes, or is intended to provide or is promoted or marketed as, a substitute for radio, television or video coverage of such Event. Personal messages and updates of scores or other brief descriptions of the competition throughout the Event are acceptable. If the SEC deems that a Bearer is producing a commercial or real-time description of the Event, the SEC reserves the right to pursue all available remedies against the Bearer.

Absent the prior written permission of the Southeastern Conference, game action videos of the Event may not be taken by Bearer. Photos of the Event may be taken by Bearer and distributed solely for personal use (and such photographs shall not be licensed, used, or sold commercially, or used for any commercial or business purpose).

Bloom acknowledged that the new policy was not intended to restrict fans from posting images to personal websites or social media sites such as Facebook, but
was instead aimed only at in-game footage and any commercial use of the images that fans otherwise may use. \(^2\) Bloom also commented on the fact that the original policy language as it related to fans was an outgrowth of attempting to apply standard media policy language to a world of new media. \(^2\)

B. ABOUT ONLINE SOCIAL MEDIA

1. Forms of Online Social Media. In this context, “online social media” describes a narrower range of usages than that phrase might be used to describe. Similar terminology has been used to describe websites such as Ebay.com and Amazon.com, where users participate in interactive online marketplaces by providing, *inter alia*, feedback on sellers and buyers transacting business on the site, and reviews of products available for sale there. \(^2\) As the policy language forbidding the “production or dissemination . . . [of] any material or information about the Event, including, but not limited to, any account, description, picture, video, audio, reproduction or other information concerning the Event” \(^2\) demonstrates, the forms of online social media with which the SEC’s initial media policy were seemingly concerned, and thus which are of relevance here, are of a different character and are comprised of two broad categories. \(^2\)

First, there are websites, such as Facebook and Twitter, which allow users to upload short blurbs to the site in the form of “status updates,” which may then be read by other users of the site. Twitter, founded in 2006, \(^2\) gives users a space limited to 140 characters—letters, numbers, and punctuation—to answer the question, “What’s happening?” \(^2\) These 140 character messages, called “Tweets,” can be uploaded to the Twitter site from the internet, a mobile phone text message, or an internet instant message. \(^2\) Facebook, founded in 2004, \(^2\) provides


\(^2\) See Twitter.com, supra note 20 (recaptitulating the explanations of SEC officials, including Bloom, for the change in policy language).


\(^2\) Initial SEC Ticket Policy, supra note 11.


\(^2\) Id.

for a broader range of user-generated content, such as education, employment, and personal relationship information, as well as more photo and video options, on a user's profile than does Twitter. However, Facebook shares Twitter's "status update" feature and also enables users to upload status updates via a variety of mobile technologies, such as text messaging, as well as directly to the user's website profile.

The second category of online social media websites towards which the SEC policy was directed are those, such as YouTube.com (YouTube) and Twitpic.com (TwitPic), which allow the user to upload videos and photographs to the site for viewing by other users. YouTube was founded in 2005, and was purchased by internet giant Google in 2006. YouTube enables users to upload videos both by means of the YouTube website, and by uploading them via a mobile device such as a cell phone. Other users can then view the uploaded videos across a variety of platforms, whether on the YouTube site, remotely accessed via mobile devices, or as embedded on another website or blog. Twitpic allows users to share photographs via the Twitter application, and also allows users a variety of means by which they can both upload and view content. In addition to its status update feature, Facebook allows users the ability to upload photos and videos, both directly to the website and via a variety of mobile devices, which are then able to be viewed by other users.

2. Issues Surrounding Online Social Media. The SEC and similar organizations face a number of challenges presented by the technology embodied in these sites. First, the ability of users to generate content anywhere and upload that content via increasingly sophisticated mobile phone and internet access technology, such as iPhones and Blackberrys, has created a situation in which it is nearly impossible

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33 Initial SEC Ticket Policy, supra note 11 (providing that ticket bearers may “make no use of any . . . picture, photograph, [or] video,” and may not “place or distribute video or audio highlights on or through the Internet or any other new media distribution platform”).
37 See YouTube Mobile, supra note 35.
to control the flow of information at events. Each of these sites contains extensive policy provisions evincing an intent that all content on the sites comply with relevant laws governing use and privacy.\textsuperscript{41} However, the sheer volume of content contained on, and traffic generated by, these sites ensures that use in violation or legally protectable rights is all but inevitable.\textsuperscript{42} Lastly, the fact that these sites have become so popular so quickly—the second, fourth, and twelfth most popular websites in the world are only five, four, and three years old, respectively\textsuperscript{43}—creates a tremendous dilemma: attempting to anticipate development and usage of new technologies, while ensuring a policy addressing new technology use is still relevant a year after it is written.

It is this last aspect of the challenges presented by online social networks, the unpredictability of their development and use, that perhaps most distinguishes these challenges as ones demanding of new solutions. Discussing the related technology of text messaging,\textsuperscript{44} writer and cultural commentator Chuck Klosterman describes the invention of text messaging as being a “solution to a desire I never even knew I had, and [something that] came into existence long before anyone was demanding it.”\textsuperscript{45} Klosterman further notes that “[i]t would be imprecise to claim that texting has changed the way I communicate, because it didn’t replace any existing method of communication in my life.”\textsuperscript{46} What Klosterman’s comments reveal is that the development of these sorts of modern communications technologies, such as text messaging or tweeting, is often difficult to predict because those technologies often have no pre-existing analogue in the lives of their users, and represent responses to problems, which people were not generally aware needed a solution.\textsuperscript{47} Charles Bloom, the SEC’s Associate Commissioner for Media Relations, acknowledged that the rapid and


\textsuperscript{43} See supra text accompanying notes 28, 31, 34.


\textsuperscript{46} Id.

\textsuperscript{47} Id.
unpredictable development of new media technologies and their increasing sophistication necessitated a broader policy so that the SEC might be protected against new developments that might arise in the next few years. Due to the continuing evolution of the relevant technologies and the response their policy changes generated, the SEC has committed to reviewing its policy annually.

As unpredictable as the development of new methods of communication can be, the uses to which these technologies can be put are perhaps more surprising still. Perhaps the most dramatic example of this is the role that Twitter played in sustaining the protests by the Iranian people against their government's alleged fraud in the conduct of the 2009 Iranian presidential election. Despite the fact that it began merely as a way for friends to keep in touch with one's friends, Twitter quickly became the preferred method for Iranian dissidents to circumvent the Iranian government's attempts to stifle the flow of information, both about the protests against the government and the government's response to those protests. In fact, Twitter became so essential to the efforts of the Iranian dissidents that the U.S. State Department prevailed upon Twitter to delay a scheduled maintenance for the website so as to ensure that the dissidents would be able to access the site. Given that it could be updated via text message instead of only through the internet itself, Twitter was of particular value to the Iranian dissidents because it was much more difficult for the government to block postings to the site than it would have been for a more traditional internet-only application that could have been cut off just by restricting access to the site within Iran.

C. SOCIAL MEDIA POLICIES IN OTHER SPORTS LEAGUES

The SEC's 2009 media policy has hardly been the only attempt made by a sports league to deal with the issues presented by online social media. The National Football League (NFL) prohibits the use of Twitter and other forms of online social media by players, coaches, and other football operations personnel.

48 See Belson & Arango, supra note 22 (attempting to explicate the SEC's motivation for the new policy).
51 See About Twitter, supra note 28 (describing the motivation behind Twitter's creation).
52 See Grossman, supra note 50.
54 Id.
from ninety minutes before kickoff until after the league’s mandatory post-game interview period. There does not seem to be anything that would prevent the NFL from expanding the application of its policy to cover fan use of online social media, but the policy as promulgated seems particularly targeted at employees of the teams themselves. The National Basketball Association (NBA) has recently adopted a policy that in many respects resembles the NFL’s policy, banning use of Twitter and similar social media sites by coaches, players, and other personnel during the period from forty-five minutes prior to tipoff until they have completed their post-game responsibilities, such as press conferences. The U.S. Open tournament, conducted every year by the Professional Golfers’ Association of America (PGA), prohibits spectators from even carrying any cell phones, PDAs, or cameras onto the tournament grounds. Such a restriction obviously makes it impossible for ticketed fans to update online social media sites from the tournament.

While the approaches these leagues have taken to the challenge of online social media bear some obvious resemblances to the approach taken by the SEC, the SEC approach differs in at least two important respects. First, the SEC policy singles out ticketed fans in a way different from the policies of the other leagues. The NFL and NBA policies are directed at coaches, players, and other personnel, while the PGA U.S. Open policy is directed at fans, volunteers, and event staff alike. Second, the SEC policy seeks to target fan use of online social media directly, by providing language in its media policy that attempts specifically to address the issue of the use by ticketed fans of the contents of the game for the production and dissemination of depictions or images of that game. By contrast,


56 See *Patrick Avery, NFL Twitter Policy All About Money*, ITBUSINESSEDGE.COM, Sept. 2, 2009, http://www.itbusinesedge.com/cm/community/kn/blog/nfl-twitter-policy-all-about-money/?cs=35468 (advising fans to be careful not to run afoul of the NFL’s Twitter policy, though acknowledging there may be little the league can do under its current policy).


59 See Initial SEC Ticket Policy, supra note 11; see also Final SEC Ticket Policy, supra note 19 (providing in both policies, that the media use restrictions apply to “Bearers” of “Tickets”).

60 See supra text accompanying notes 55, 57.

61 See supra text accompanying note 58.

62 See Initial SEC Ticket Policy, supra note 11 (providing that ticket bearers may not “place or distribute video or audio highlights of any Event on or through the Internet or any other new media distribution platform”); Final SEC Ticket Policy, supra note 19 (providing that ticket bearers may not “produce or disseminate in any form a ‘real-time’ description or transmission of the event,”
the PGA policy does not contain language that attempts to restrict what sort of content ticketed fans at events can produce, but instead addresses fan use of online social media indirectly, by banning the means by which fans would update online social media sites. 63 Thus, the SEC media policy can be seen as something of a departure from other attempts sports leagues have made dealing with these issues.

D. INTELLECTUAL PROPERTY PROTECTIONS IN SPORTS GENERALLY

1. Copyright Protections. While some of the challenges presented by the interaction of sports and online social media are new, attempts by sports leagues to regulate the flow of information regarding their sporting events are not. Copyright protections are well-established and readily enforced for the broadcasts of sporting events. 64 The Federal Copyright Act provides protection for works "consisting of sounds, images, or both, that are being transmitted . . . if a fixation of the work is being made simultaneously with its transmission." 65 The court in Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n found that televised broadcasts of sporting events were afforded copyright protection. 66 Further, the federal copyright protection preempts the state law right of publicity claims of the players. 67 In a case from the early days of sports broadcasting, a federal district court held that member teams of the National League, one of the two leagues that make up Major League Baseball, had an exclusive right to the "disseminating or publishing or selling, or licensing the right to disseminate, news, reports, descriptions, or accounts" of the baseball games played within their parks during the games. 68 Additionally, the court there held it immaterial to a consideration of the team’s unfair competition claim that the infringing broadcaster obtained no revenue directly from the broadcast, as the broadcast of the games helped generate advertising revenue for the station. 69

subject to certain conditions).

63 See USGA Spectator Guide, supra note 58 (prohibiting fan use of cell phones, PDAs, and cameras, but not including language referencing content).

64 See, e.g., Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663 (7th Cir. 1986) (holding that telecasts of baseball games are copyrightable works and that baseball clubs hold copyright in those works).


66 Baltimore Orioles, Inc., 805 F.2d at 670.

67 Id. at 674.


69 Id. at 493.
2. Commercial Misappropriation. The law does not extend the same degree of copyright protection for the content of the events as it does for the broadcast and dissemination of the events. Copyright protection exists only for "original works of authorship" 70 and not for any idea, concept, or discovery. 71 Two cases from the last fifteen years are useful in establishing whether, and to what extent, such protection may be afforded to the contents of a sporting event, as distinct from the broadcast of that event. 72 National Basketball Ass'n v. Motorola was an appeal by Motorola and its partner, Sports Team Analysis and Tracking Systems (STATS), from a permanent injunction granted by a federal district court. 73 The NBA sought injunctive relief because Motorola and STATS had developed SportsTrax, a hand-held pager that enabled subscribers to receive real-time updates about the scores and statistics of NBA games. 74 The NBA brought suit under a number of theories, including copyright infringement and commercial misappropriation. 75 The district court found that Motorola and STATS had "misappropriated the essence of NBA's most valuable property—the excitement of an NBA game in progress." 76

On appeal, the Second Circuit Court of Appeals reversed the district court's grant of permanent injunctive relief. 77 The court agreed with the district court that the basketball games themselves, as distinct from the broadcast of said games, did not fall within the protection of the Copyright Act. 78 Under the Copyright Act, protection is afforded to "original works of authorship," a designation which includes literary works, musical works, dramatic works, visual art, architectural works, choreography, sound recordings, and motion pictures. 79 The court of appeals held, as had the district court below, that while the broadcasts of the games constituted "original works of authorship" for purposes of Copyright Act protection, the games themselves did not. 80

71 Id. § 102(b).
72 Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (holding that professional basketball games do not fall within the scope of the "original works at authorship" requirement of the Copyright Act); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007) (holding that fantasy sports game provider's rights to use players' statistics superceded players' right to publicity).
73 Motorola, 105 F.3d at 843.
74 Id.
75 Id. at 844.
77 Motorola, 105 F.3d at 855.
78 Id. at 846.
80 Motorola, 105 F.3d at 845–46.
The court of appeals parted company with the district court, however, on the issue of whether the NBA's misappropriation claim under New York law was preempted under the federal law as embodied in the Copyright Act. The district court had held both that Motorola and STATS had engaged in unlawful misappropriation under New York law, and that the New York state law misappropriation claim was not preempted by the Copyright Act as it applied to the games themselves, though it was preempted as it applied to the broadcasts. The court of appeals reversed the preemption judgment regarding the contents of the games themselves, holding that, despite the difference between the games themselves and the broadcasts, the two should be treated the same for the purposes of evaluating whether a misappropriation claim would be preempted by the Copyright Act. Ultimately, the court of appeals held that NBA games themselves, and information about them, such as scores and statistics, were not protectable, either under federal copyright law or under state commercial misappropriation law.

The court in Motorola does acknowledge a surviving exception to its holding that state law commercial misappropriation claims are preempted by the Copyright Act in certain cases of "hot news" misappropriation. Hot news misappropriation cases are those reminiscent of one of the earliest cases dealing with this set of issues, International News Service v. Associated Press. That case involved two competing news services, International News Service (INS) and the Associated Press (AP), and attempts by INS to pirate AP news stories by copying AP news content, sometimes re-writing it, and distributing it to INS's customers. Deciding the case not on the basis of whether there was a copyrightable interest in the news, but instead on an unfair competition theory, the Supreme Court found that AP possessed a form of property interest in the news, resulting in part from the labor the AP had invested in collecting the news, and in part from the fact that such news had commercial value and thus should be conceived of as a species of property, which could be and had been misappropriated. The Motorola court, in finding that Motorola's use of NBA game information was not subject to the hot news exception, specified the contours of the surviving hot news misappropriation exception:

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81 Id. at 848.
82 Id.
83 Id. at 848–49.
84 Id. at 841.
85 Id. at 845.
86 248 U.S. 215 (1918).
87 Id. at 231–32.
88 Id. at 234–35.
89 Id. at 239–40.
(i) a plaintiff generates or gathers information at a cost; (ii) the
information is time-sensitive; (iii) a defendant's use of the
information constitutes free-riding on the plaintiff's efforts; (iv) the
defendant is in direct competition with a product or service offered
by the plaintiffs; and (v) the ability of other parties to free-ride on
the efforts of the plaintiff or others would so reduce the incentive
to produce the product or service that its existence or quality would
be substantially threatened. 90

3. Right of Publicity. Sports leagues have also attempted to protect themselves
against what they see as improper use of the contents of their games by suing
under a right of publicity theory, alleging violation of the right of publicity of the
players involved. 91 While there is substantial disagreement over the extent to
which right of publicity protections may be extended to college athletes, it is useful
to consider how this litigation strategy has fared when it has been pursued by
professional sports leagues. 92

In C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media,
L.P., a producer of fantasy sports games, C.B.C., provided fantasy sports games
across a number of platforms, including telephone, email, and the internet, for
which participants would pay fees to play and additional fees to engage in certain
transactions, such as trading players. 93 C.B.C. also provided in-depth, up-to-date
statistical information regarding MLB players' performances to enable fantasy
baseball players to better select players for their fantasy rosters. 94 C.B.C. had
provided these services pursuant to a series of licensing agreements with the Major
League Baseball Players' Association (MLB Players' Association) from
1995–2004. 95 In 2005, the MLB Players' Association agreed to grant a license for
MLB Advanced Media to gain the rights to "exploitation via all interactive media,"
which included the use of player performance statistics for the sort of fantasy
baseball games C.B.C. had been providing. 96 Though MLB Advanced Media did

90 National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
91 C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818
(8th Cir. 2007) (affirming grant of summary judgment to fantasy sports game provider to use
professional baseball players' statistical information).
92 See, e.g., Katie Thomas, College Stars See Themselves in Video Games, and Pause to Sue, N.Y. TIMES,
July 4, 2009, at A1 (explaining the genesis of a class action lawsuit by former NCAA athletes against
video game producer).
93 C.B.C. Distrib. & Mktg., Inc., 505 F.3d at 820–21.
2d 1077, 1080 (E.D. Mo. 2006) (detailing the information C.B.C. made available through the game
in the district court decision).
95 Id.
96 Id. at 1081.
offer C.B.C. a license to promote MLB Advanced Media's fantasy games for a percentage of the revenue raised by those games, it was clear that MLB Advanced Media viewed the new licensing agreement as precluding C.B.C. from promoting C.B.C.'s existing fantasy baseball games. Thus, C.B.C. filed a complaint seeking a declaratory judgment on the issue of MLB Advanced Media's purported exclusive ownership of performance statistics and their concomitant ability to prevent other fantasy sports game providers from being able to provide such information to the public.

In granting the injunctive relief sought, the district court held that MLB Advanced Media failed to prove that C.B.C. had violated the players' state law right of publicity and that, even if C.B.C. had violated the players' rights of publicity, First Amendment protections would preempt the state law right of publicity claims. The Eighth Circuit affirmed the district court's grant of injunctive relief. However, the court of appeals held that the district court had ruled incorrectly regarding whether C.B.C.'s use of the MLB players' names and performance statistics had been sufficient to constitute a violation of the right of publicity under Missouri state law, as C.B.C. had both used the players' names as symbols for their identities and had intended to obtain commercial advantage. Nevertheless, the court of appeals affirmed the ruling of the district court on the grounds that the First Amendment protections afforded C.B.C.'s fantasy sports games trumped the state law right of publicity claim. The court of appeals found that the facts of the case both indicated that the information C.B.C. relied on for its fantasy baseball games was already available in the public domain, and "barely, if at all, implicate[d] the interests that states typically intend to vindicate by providing rights of publicity to individuals," whether those interests are economic or non-economic. The court also held that C.B.C.'s use of the information related to the MLB players was protected expressive speech, especially in light of the conclusion in Gionfriddo v. Major League Baseball, which stated that "recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection."

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97 Id.
98 Id. at 1081–82.
99 Id. at 1091–1107.
100 C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 820 (8th Cir. 2007).
101 Id. at 822–23.
102 Id. at 824.
103 Id. at 823–24.
104 Id. (citing Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 411 (2001)).
III. Analysis

The SEC modified its initial 2009 media policy at least in part due to the critical response from fans of the league, and media members and associations who would be involved in coverage of the league. The policy that eventually was adopted moderated many aspects of the initial policy, as it affected both media members and ticketed fans. However, the question must be asked: if the SEC had chosen to stick to the policy it initially promulgated, could the SEC have enforced that policy? After all, if the initial policy was abandoned because it was unpopular—not because it was unworkable or unable to withstand challenge in court—a similar policy could be adopted by another league as sports leagues continue working to find ways to deal with these evolving issues. This question has at least three dimensions: (1) would meaningful enforcement of such a policy even be possible, (2) assuming so, would the SEC succeed against legal challenges to the policy, and (3) if the policy falls to legal challenges, what else could be done to alleviate the problem?

A. LOGISTICAL PROBLEMS WITH POLICY ENFORCEMENT

Analysis of the question of meaningful enforcement of the SEC’s initial policy begins with a consideration of the number of fans who would have potentially been affected by such a policy. The SEC leads all other collegiate conferences, and has done so for more than two decades, in both total and average attendance at football games. The SEC also ranks second in the nation in college basketball attendance with over 11,000 fans per game and has led the nation in college baseball attendance for more than a decade, with more than 4,000 fans per game attending in 2009. While it is of course impossible to know how many of these fans are also users of social media sites, with hundreds of thousands of fans

105 See supra Part II.A.
106 See text accompanying notes 21–23.
107 For the purposes of this Note, the discussion of policy enforcement will be confined to enforcement against fans. The enforceability of the policy against the press raises issues beyond the scope of this Note.
108 See Initial SEC Ticket Policy, supra note 11.
attending games every year, and hundreds of millions of social media users there must be considerable overlap.

Even setting aside the question of the efficacy of legal responses by copyright holders, simply finding the content the SEC would claim to be infringing presents considerable potential for enforcement difficulty. The difficulties the SEC would have faced in enforcing its initial policy would likely depend in large measure on what social media sites were being used to host the purportedly banned content. For a site such as YouTube, finding potentially infringing content is comparatively easy. YouTube’s search capability would allow those searching for potentially infringing content to input search criteria such as the name of a university or player to determine whether any videos matching that description can be found on the site. While videos could be misleadingly tagged in an attempt to evade detection, this misleading tagging would also reduce the potential for worrisome distribution, as the same obstacle would present itself to users simply searching to catch a video from the game.

By contrast, sports leagues such as the SEC would likely face considerably greater difficulty in locating potentially infringing content on social media websites such as Facebook or Twitter. Facebook provides users with the option of making the content they post to their page available to anyone, or restricting access to viewing their page and its contents to those with whom they are “friends” on the site. Also, unlike YouTube, Facebook users can only search for other users, and not specifically for the content they have posted on their pages. Similarly, Twitter provides users with the option of making their accounts public, in which case anyone, including non-users, can follow their “Tweets,” or private, in which case only those approved by the user to view their page and follow their updates are able to do so.

Thus, the logistical problems with enforcement of a policy that purports to limit all usage of online social media sites by ticketed fans become clear. Given the ease with which online social media sites can be updated via cell phones or other mobile devices, it is difficult, if not impossible, to keep ticketed customers from posting content by any means short of keeping such mobile devices away

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112 See supra note 42 and accompanying text.
from the event altogether, as golf's U.S. Open does.\textsuperscript{117} And with a potentially large overlap between ticketed SEC customers and users of online social media sites, it is likely that there would be hundreds, if not thousands, of violations every year of a policy such as that initially put forward by the SEC. Given that many of those violations could be made on privacy-protected Facebook and Twitter profiles, it seems almost certain that large numbers of violations of a "no online social media usage by ticketed fans" policy would be tremendously difficult to detect in any sort of systematic way by those seeking to enforce the policy. Also, given the continually evolving nature of both the design of online social media sites and their usage, it seems likely that, if the exigencies of technology dictated a situation in which enforcement mechanisms were frequently employed against users of sites possessing certain characteristics\textsuperscript{118} and were infrequently or never deployed against other types of sites, development and usage would evolve in a direction calculated to avoid detection of potential copyright violations.

B. LEGAL PROBLEMS WITH POLICY ENFORCEMENT

Assuming for the time being that the practical issues with enforcement of a policy like the one put forward by the SEC are not insuperable, there remains the question of whether the SEC or a similarly situated league would be successful in attempts at enforcement through the legal system. While it might seem obvious that fan usage that was commercial in nature or intended as an alternative to sanctioned broadcasting would be an infringement of legally protectable interests, the question is complicated by the fact that in the scenario the SEC policy envisions, fans are producing content gathered from the game itself, not from the broadcast of that game. While federal law provides copyright protection for the broadcasts of live events, no such protection is extended to the contents of the event itself.\textsuperscript{119} Thus, federal intellectual property protections will be unavailing for those seeking to protect the contents of a sporting event itself from use by fans, leaving such parties with recourse only to state law intellectual property protections.\textsuperscript{120}

\textsuperscript{117} See USGA Spectator Guide, \textit{supra} note 58 (detailing USGA policy on mobile communications devices at golf tournaments). While a policy like the USGA's certainly could be adopted by the SEC, given the differing mores that prevail at USGA golf events and college football games, such a policy would likely be wildly unpopular and difficult to enforce.

\textsuperscript{118} For example, keyword, topic-based searching for content, such as is found on sites such as YouTube and Twitter.

\textsuperscript{119} See \textit{supra} Part II.D.1.

\textsuperscript{120} It is worth noting that there is a dearth of federal case law on these issues, especially at the Supreme Court level. Thus, the legal principles enunciated in these few cases could hardly be said to be set in stone. However, the cases cited in this Part and in Part II.D, \textit{supra}, represent the current
It is worth clarifying that, for the purposes of this Note, the legal enforcement mechanisms with which we are concerned are those providing for protection against the infringement of rights in intellectual property interests. Obviously, a ticket to a sporting event represents an agreement between the league and the buyer, and violation of the policies that form part of the ticket agreement may give rise to a cause of action for breach of that agreement. However, a consideration of such issues is beyond the scope of this Note. It is worth noting, though, that the same issues presented by the SEC sporting events could arise in the context of an event such as the Macy’s Thanksgiving Day parade, where there would be no tickets and thus no ticketing agreement, but a fan-generated alternate broadcast could still significantly affect critical broadcasting revenues. While in the SEC test-case that is the focus of this Note, some sort of breach of license remedy may be available, the scope of the issues is potentially much broader, extending to many types of events in which no ticket is sold, but to which broadcast revenues are critically important.

Unfortunately, much state law is preempted by the federal Copyright Act.\textsuperscript{121} Not preempted by the federal Copyright Act are those works which have “subject matter that does not come within the subject matter of copyright.”\textsuperscript{122} This might seem to include the contents of a live event as distinct from its broadcast, but at least one circuit court was loath to draw a distinction between the contents of a game and the broadcast of the game for the purpose of avoiding preemption.\textsuperscript{123} In so concluding, the court also found that players’ right of publicity claims were preempted by the federal copyright protections afforded to the teams employing those players pursuant to the copyrighted status of the broadcasts of those teams’ games.\textsuperscript{124} This would seemingly forestall a potentially useful avenue for securing protections for games themselves outside the scope of copyright law.\textsuperscript{125} Thus, in evaluating whether teams or leagues have avenues for legal enforcement against fan use of the contents of games, we must see whether those potential uses fall within the scope of protections afforded by exemptions carved out in existing case law.

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\textsuperscript{121} See supra note 66 and accompanying text.
\textsuperscript{123} Baltimore Orioles Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 675 (7th Cir. 1986).
\textsuperscript{124} See supra note 66 and accompanying text.
\textsuperscript{125} But see David E. Shipley, Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976, 20 ARIZ. ST. L.J. 369 (1988) (arguing against the court's preemption analysis of right of publicity claims on grounds that the game and the broadcast are separable, and games do not fall within the subject matter of copyright).
THE AGONY OF THE TWEET

Before considering specific contexts in which behavior by ticketed fans might lead to attempts at legal enforcement by sports leagues, it is worth noting as an initial matter that no list of such potentially infringing conduct can purport to be in any way exhaustive. As previously noted, the unpredictability that characterizes the development and developing usage of online social media technologies makes it impossible to say in advance what combinations of technology and usage will be problematic.

To take one example, could an individual ticket bearer, or more likely a group of ticket bearers, attempt to create a “real-time” video depiction of the event that they intended as an alternative to broadcast coverage? The SEC is clearly concerned with the possibility, as there is policy language that aims at protecting against such usage even in their revised and ultimately adopted version. But would it even be technologically feasible to create such content and upload it in real-time? Would anyone watch such coverage, even if it were possible to create the content and upload it in real time to the internet? Assuming anyone actually watched this content, would the numbers of those watching be sufficient to represent any kind of threat to the broadcast interests that leagues such as the SEC are obviously so keen to protect? Answers to these and other questions do not immediately suggest themselves, even though this is a usage that one could easily foresee. For those usages one could not reasonably foresee, the implications become even murkier.

1. Personal Messages. The first group of usages to be considered are those which would almost certainly constitute the most prevalent, but are also the most innocuous: those messages by ticket bearing fans at an event that are of a personal nature and uploaded to online social networking sites such as Facebook or Twitter. The initial policy put forward by the SEC would possibly have swept even these messages within its ambit, as the policy prohibited “production or dissemination [of] any account [or] description... concerning the Event.” Thus, by the plain language of the policy, a Tweet such as, “At the game! So excited!” if made by a ticketed fan inside the stadium and uploaded to Twitter via a cell phone or other mobile device, might have been in violation of the policy. Despite this, it is difficult to see how such messages, even if made from inside a

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126 See Final SEC Ticket Policy, supra note 19.
127 Given the ready, and very often free, accessibility of network coverage of such events, it is not immediately obvious why anyone would prefer such an alternative. This is especially true in light of the fact that network coverage has certain built-in advantages. The gap in quality created by some of these advantages, such as higher quality video, may be closed by the advance of technology. Other advantages, such as the fact that network cameras have ready access to unobstructed sight-lines that a camera furtively carried by a fan in the stands does not, are likely to remain areas where network coverage is superior.
128 See Initial SEC Ticket Policy, supra note 11.
stadium during a game, infringe upon intellectual property interests protectable by a league such as the SEC.\(^\text{129}\) Perhaps realizing that this made the original policy language unenforceably overbroad, the SEC included language in its revised and subsequently adopted policy exempting such communications and stating that “[p]ersonal messages . . . are acceptable.”\(^\text{130}\)

2. *Scores and Updates.* Also exempt under the new SEC ticket policy and deemed “acceptable” conduct by ticket bearers are “updates of scores or other brief descriptions of the competition [posted] throughout the Event.”\(^\text{131}\) While such conduct is not deemed to be a violation of the policy as it now stands, it would have been a clear violation of the original policy. It is worth considering whether the posting of such scores and descriptions as updates via Facebook or Twitter, or other similar usage, would have been held to be a violation of the SEC’s copyright.

The precedent most relevant to a consideration of this issue is *National Basketball Ass’n v. Motorola, Inc.*,\(^\text{132}\) which held that Motorola’s distribution, via a mobile device, of scores and statistics of NBA games did not constitute a violation of the NBA’s rights under the Copyright Act or under a state law commercial misappropriation claim.\(^\text{133}\) It seems likely that a court would rule similarly when considering the issue of whether a user of online social media had infringed upon a sports league’s intellectual property interests, however conceived, by posting from a game in progress content such as a score, statistics, or an update on an in-game occurrence, like an injury. In fact, it seems even more likely in this case as, if the wholly commercial use of such information by Motorola is not an infringement of the league’s interests, presumably *a fortiori*, the wholly non-commercial use of such information by a user of Facebook or Twitter would not be held to be an infringement. Such non-commercial use would be even more obviously not in “direct competition with a product or service offered by [the sports league]” or “free-rid[ing] [sufficient to] reduce the incentive to produce the product or service [such] that its existence or quality would be substantially threatened.”\(^\text{134}\)

3. *Commercial Uses.* It is somewhat more difficult to determine the potential legal status of those usages of online social media that are still proscribed by the policy that was eventually adopted by the SEC. These usages fall into the broad

\(^{\text{129}}\) Another challenge presented by the language of such a policy would come in distinguishing such a Tweet from a text message to one recipient. How broad would be the scope of “any account [or] description”?\(^\text{130}\)

\(^{\text{130}}\) See Final SEC Ticket Policy, supra note 19.

\(^{\text{131}}\) Id.

\(^{\text{132}}\) 105 F.3d 841 (2d Cir. 1997).

\(^{\text{133}}\) See supra notes 77–83 and accompanying text.

\(^{\text{134}}\) Motorola, 105 F.3d at 845.
categories of "commercial use" and use that "constitutes, or is intended to provide or is promoted or marketed as, a substitute for . . . coverage." While these restrictions certainly seem more reasonable than those imposed on fans under the initial policy, they nevertheless represent considerable restrictions on potential fan use of content gathered at SEC sporting events and broadcast via online social media.

Given the holding in Motorola, it would seem as though fan use of the contents of a game, even where that use was commercial, would not constitute an infringement of a sports league's interests. After all, if the widespread commercial use of such information by Motorola, via its SportsTrax pager system, was not considered to be sufficient to constitute an infringement of the NBA's interests, then it is difficult to imagine that any fan usage would rise to the level of an infringement.

However, as the test enunciated in that case calls for a fact specific inquiry into whether usage is sufficient to constitute commercial misappropriation, the implications of such fan use are not clear. Any such usage is almost certain to qualify under the first three elements of the five-part test as (1) the information will be produced at a cost to the league; (2) the usage of the information will often be time-sensitive; and (3) the fan's usage would represent "free riding" on the efforts and costs of the league in producing the information. However, the question of whether the final two elements of the test would be met by any commercial fan usage is not clear under the Motorola decision. Those elements are: (4) The use must put the user in competition with the product or service offered by the league; and (5) The use must be sufficient to threaten the quality or existence of the league's product or service by reducing their incentive to produce it. The court in that case gives little to no guidance as to the extent of usage sufficient to meet the final two elements of the test the court lays out, merely, and without elaboration, concluding that the SportsTrax system employed by Motorola did not constitute such a usage.

Absent any explicit guidance, we can only speculate regarding what sort of usage would be sufficient to fit within the hot news exception that the Motorola court leaves intact for commercial misappropriation. For the first of the two remaining elements, it is not terribly difficult to imagine the sort of usage that could directly compete with the products or services offered by the league. Given the expansion of the coverage offered by sports leagues from traditional bastions...
such as TV and radio into websites and digital networks, almost any commercial usage of game content by a fan could potentially be an infringement on an area in which the sports league has already established some form of content. As regards the last prong of the test, however, it is not clear what usage, if any, would be sufficient to meet the test. After all, given that sports leagues like the SEC earn millions of dollars every year from their events, it is difficult to imagine that any fan usage, no matter how directly it conflicted with a usage by the league or how lucrative it was to the fan, could be sufficient to “reduce the incentive to produce the product or service [such] that its existence or quality would be substantially threatened.” Whether these uncertainties indicate an inadequacy with regards to the test set forth in *Motorola* is left to the judgment of the reader.

4. **Substitutes for Coverage.** The use that does leap immediately to mind as one that represents a potentially grave threat to the economic model upon which modern sports is built is use that “constitutes, or is intended to provide or is promoted or marketed as, a substitute for . . . coverage.” College sports teams and conferences generate revenue in a number of ways, including ticket sales, merchandising, corporate sponsorships, contributions from ‘boosters,’ and guaranteed payouts from postseason events such as the Bowl Championship Series (BCS) in football and the NCAA tournament in basketball. One of the largest sources of revenue, though, is that derived from the broadcasting contracts that teams and conferences negotiate with networks looking to carry broadcasts of their games on radio or, most importantly, television. The percentage of total SEC conference revenue generated by television broadcasting rights has increased further following the Conference’s signing of new broadcast contracts with ESPN and CBS. Also, while in some ways money from postseason contests like the BCS and the NCAA basketball tournament represents a source of revenue separate from television broadcasting rights, the money paid out to universities resulting from participation in those events is itself in large measure generated by television rights.

Given the language of the media policy ultimately adopted by the SEC, it is clear that fan use, which might come to threaten the revenue generated for the Conference by broadcast rights, is a concern that needs addressing. Regardless of

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140 Id.
141 See Final SEC Ticket Policy, supra note 19.
143 Id.
145 See Sims, supra note 142 (examining the various revenue streams used by the SEC).
whether current technology exists to make possible the sort of alternate, fan-generated broadcast that so concerns the SEC, it seems likely that such a scenario will come to pass sooner rather than later given the increasing miniaturization of video equipment, the increasing availability and decreasing cost of such equipment, and the ever-increasing ability of individuals to upload content to the internet remotely. One does not have to search the internet for very long to come up with sites providing advice on how to set up “webcasts” of remotely generated content from games. ¹⁴⁶ While these sites often assume that use will be authorized and content will be generated with traditional technologies, there is no reason such a model could not be extended to presumptively illicit use by fans armed with hand-held mobile devices capable of producing video content that can be uploaded in real-time to the internet. Assuming that such use was attempted and that the SEC sought to enforce its policy by challenging that use as an infringement of its interests, we are left with the question of whether such a challenge would succeed in court.

Analyzing this issue is complicated by the fact that the extant analyses of the rights protected or protectable in the context of broadcasting a sporting event assume the traditional broadcast model to be the only model. This is certainly reasonable, as the technology did not exist to enable fans to create and distribute this sort of broadcast-like content until very recently. The actual broadcasts themselves of sporting events are protectable under copyright law, ¹⁴⁷ and individual NCAA schools are permitted to negotiate broadcasting rights for their sporting events, ¹⁴⁸ but this hardly answers the question of whether the schools, or professional sports teams for that matter, have an enforceable right to control who broadcasts their sporting events. The copyright protections extended to broadcasts of the games are not particularly relevant, as we are not speaking about possible misuse of the content of a broadcast, but instead about whether a fan may attempt to create something aimed at providing a substitute for the broadcasts themselves. As we have seen, the contents of the game itself, as distinguished from the broadcast, are not subject to copyright protections and may be put to uses not specifically authorized by the league, team, or conference. ¹⁴⁹

The idea that a team, league, or conference might not have the ability, in certain circumstances, to enforce its right to determine who may broadcast its

¹⁴⁶ “Webcasting” is the use of internet technologies such as streaming media to “broadcast” audio or video content. See Ustream, Ustream Help Center, http://helpcenter.ustream.tv/ (providing instructions on how to create and webcast content).
¹⁴⁷ See supra Part II.D.1.
¹⁴⁸ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984) (holding that NCAA plan for televising college football games violated the Sherman Act and thus individual member schools must be allowed to bargain for themselves).
¹⁴⁹ See supra Part III.B.2 (discussing the Motorola case).
events seems intuitively implausible. After all, if ESPN and CBS pay the SEC $200 million per year to broadcast their sporting events, it is not as though NBC and ABC could just show up and start filming and broadcasting SEC sporting events. But that is due at least in part to the fact that the team would not even let those other broadcast networks into the building. By contrast, the ticket-buying fan whose attempt at providing an alternate broadcast will already be in the stadium, and legitimately so. And while teams may be able to stop people from bringing bulky camera equipment into the stadium, it seems less likely that they will prevent every one of their ticketed customers from bringing in their cell phone or mobile device. And it is those small, portable, multi-functional devices that stand ready to undermine the existing broadcast hegemony.

While the contents of sporting events themselves, as distinct from the broadcasts of those events, are not protectable under copyright, it is generally understood that teams have a quasi-property interest in their games. Thus, teams can grant an exclusive license to broadcast their games to certain entities, and sue other entities, who broadcast their games without authorization, for unfair competition. However, it is not clear that all fan broadcasts that might act as a substitute for authorized broadcasts would fall within the scope of this rule. While the court in Pittsburgh Athletic Co. v. KQV Broadcasting Co. found unfair competition, it did so only because it found that the defendant broadcaster made money indirectly from its broadcasts through an increase in advertising revenues. One can easily imagine fan broadcasts being set up on websites and earning no revenue from advertisers or otherwise. After all, in contrast to traditional broadcasting technologies, the technologies involved in creating and uploading content and hosting it on a website are inexpensive enough that no revenue is needed. In this circumstance, it seems unlikely that a team or league would succeed in a suit under an unfair competition theory, even though the website-based broadcast might very well siphon viewers from the more traditional, authorized broadcast medium.

As these examples demonstrate, it is unlikely that the contents of events, as distinguished from the broadcasts of those events, can be protected within the

150 *But see* USGA Spectator Guide, supra note 58 (explaining the USGA policy prohibiting fans from bringing cell phones, PDAs, and cameras into sporting events).
151 *See supra* note 68 and accompanying text (discussing the ownership rights held by teams in the games they put on).
152 *See, e.g.*, Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938) (holding that the owner of a baseball team has a property right in the news of the team’s games “by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom”).
153 *Id.*
154 *Id.* at 493.
contours of existing intellectual property law. For this reason, the evolution of technology that will allow fans to create and distribute such content may become an even larger challenge for intellectual property law in the next decade than internet file-sharing was in the last decade. As much as American copyright law has struggled to adapt in the face of the digital challenge, those interested in preventing file-sharing could at least fall back on the fact that the underlying works themselves—music, movies, software—were subject to copyright protection. This comfort will not be available to those struggling to contend with broadcasts of live events created and distributed by fans. In order to protect rights holders against the effects of the evolution of mobile technology, the definition of copyrightable subject matter may need to be significantly changed.

Unfortunately, there is no easy or obvious solution as to how such a change in our laws might be accomplished. The Constitution provides Congress with the authority to “promote the Progress of Science and useful Arts,” 155 but that power is limited by the “original works of authorship” and “fixation” requirements found in the Copyright Act. 156 As we have seen, there is no support in extant caselaw for the notion that the contents of live events themselves fall within these statutory and constitutional categories. And this is not without reason. Once one begins to countenance extending protections to events of this sort, it becomes apparent that an imposing line-drawing problem arises. Presumably we do not wish to extend copyright protection to pickup basketball games, little league baseball games, or high school football games, but it is not clear what principled difference there is between these events and the college and professional games to which we might wish to extend copyright protection.

In addition, there are considerable conceptual obstacles to conceiving of live events, such as sporting events, as falling within the scope of copyrightable subject matter. The game itself is neither fixed nor reproducible. Unlike other events such as plays or live musical performances that are subject to copyright protection, a sporting event is not based on a script, but is “spontaneous and unpredictable.” 157 Additionally, those participating in the games are thought of as more analogous to the subjects of a work of authorship than as authors themselves. 158 Consequently, it is difficult to see how one might reasonably fit sporting events within the conceptual ambit of copyright, even if one wanted to do so.

155 U.S. CONST. art. I, § 8, cl. 8.
157 Shipley, supra note 125, at 385 (describing how sports events differ from other live events for copyright purposes). See also 1 MEVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.09(F] (2008) (describing why sporting events are not within the subject matter of copyright).
158 Shipley, supra note 125, at 385–87.
C. COMBATING INFRINGEMENT BY CHANGING NORMS

Teams, leagues, and conferences will face insuperable practical and legal difficulties in their attempts to enforce protection of their intellectual property interests against ticketed fan users of internet social media. Yet we are left with the question of what, if any, strategy might allow them to more effectively protect their interests. One suggestion for how to resolve this dilemma comes from another area of intellectual property law in which intellectual property rights holders have faced considerable practical and legal difficulty in enforcement of their rights. With the advent of internet file-sharing, it has become common for individuals to ignore the copyright protections afforded to musical works and wide-spread illegal downloading and copying of music has become the norm. Further exacerbating the situation, continually evolving technologies for downloading and copying music have made it difficult for those seeking to enforce their copyright protections to identify those engaged in these activities and respond effectively. Internet file-sharing and the effect it has had on the way people consume music has largely undermined the traditional model of the music business.

Mark Schultz’s Fear and Norms and Rock & Roll suggests that an answer to this problem in the music business can be found in the practices of jambands and their fans. Unlike many of today’s music fans, jamband fans by and large respect the copyright protected status of the works of their favorite artists, even going so far as to report infringements of these protections by other fans to the groups’ lawyers. This fact is attributed in part to the bands’ attempts to make their fans feel that they are part of a community in whose success they as fans have an investment.

The copyright protection strategy pursued by jambands is contrasted with what Schultz calls the “fear strategy.” While some degree of enforcement is a seemingly necessary precondition of establishing the seriousness and efficacy of the law, the limitations of such a strategy are apparent, especially in this area of the law. For large numbers of people, eschewing illegal file-sharing in favor of compliance with copyright law is essentially a matter of choice, as only a

\[159\] Traditionally thought of as improvisational rock bands, such as The Grateful Dead, Phish, and moe., today the label "jambands" encompasses bands from a variety of genres. Schultz, supra note 6, at 653.

\[160\] Id. at 655.

\[161\] Id. at 653.

\[162\] The idea that the best way to alter behavior in such a way as to ensure compliance with law is to deter lawbreaking behavior by making the threat of sanction sufficiently credible, usually by aggressive pursuit and prosecution of those engaged in the proscribed action. Id. at 655.

\[163\] Id.
comparatively small number of the millions of those engaged in illegal file-sharing have been prosecuted.\textsuperscript{164} This suggests that ensuring that people respect the copyright protected status of works and conform their behavior accordingly is primarily a function of getting people to view such behavior as what they \textit{ought} to do in a normative sense, not just what they \textit{ought} to do to avoid the penalties associated with doing otherwise. Though Schultz acknowledges that "changing social norms is, in reality, a very complex challenge," and that "[t]here likely is no universal or easy way to establish a social norm," he offers jambands and the community of fans that have grown up in support of them as an example of how instilling such norms in consumers can have real and substantial effects on their willingness to comply with copyright protections.\textsuperscript{165}

Schultz attributes the prevalence of adherence to copyright norms within the jamband community to bonds of reciprocity and community formed between not only the fans and the bands, but amongst the fans themselves.\textsuperscript{166} The bonds of reciprocity are formed in the first instance by the willingness of jambands to allow their fans to record the bands’ concert performances, and then to copy and distribute the recordings of those performances in a way that is not remunerative for the band.\textsuperscript{167} While the bands do assert the copyright protected status of their commercial releases and forbid copying and distribution of these recordings, these protections are viewed as legitimate by their fans in large measure because of the generosity that the bands display in allowing so much of their music to be released to fans free of charge.\textsuperscript{168} Perceiving that the generosity demonstrated by jambands in allowing for fan taping and distribution of their live performances depends to some extent on the willingness of fans to purchase their commercial releases, a framework of fan-enforced norms has sprung up, aimed at eradicating fan violations of the bands’ copyright protections.\textsuperscript{169}

Jambands also work to establish a sense of community both between themselves and their fans and also within the fan community itself. Jambands are able to create the perception that their fans are important to them through extensive communications between band management and fans, by being mindful of the fan experience, setting up travel packages, and in pricing and distributing tickets.\textsuperscript{170} Fans respond to these efforts with loyalty and passion, often traveling considerable distances to see shows, with some fans following bands from show

\bibitem{164} Id. at 663 ("The RIAA has sued about ten thousand file sharers, while reports estimate millions use illegal file-sharing services monthly.").
\bibitem{165} Id. at 667–68.
\bibitem{166} Id. at 675–76.
\bibitem{167} Id. at 676–77.
\bibitem{168} Id. at 680–82.
\bibitem{169} Id. at 688.
\bibitem{170} Id. at 689.
to show on their tours. Additionally, bands and fans view the copying and distribution of the bands' live performances as an opportunity to help reinforce the bonds of community. The feelings of loyalty and community thus created help to support compliance with copyright protections, as fans are able to police their own with an efficacy the bands would struggle to replicate without fan assistance.

Schultz suggests that broader application of the principles underlying the success of jambands in enforcing copyright protections could help solve the internet file-sharing problem for the music industry, but it seems likely that the lessons learned from the experience of jambands could have more far-reaching application. As we have seen, the music industry is hardly the only arena in which modern communications technologies have made it possible for non-compliance with intellectual property laws to be not only an option for large numbers of people, but an option presenting little to no downside. Given the wide-spread distribution and use of these technologies, it seems unlikely that a strategy that focuses on punishment and deterrence will be effective in combating infringement of intellectual property interests. However, strategies calculated to make compliance with asserted intellectual property restrictions seem the normatively proper thing to do, and, perhaps more importantly, to incentivize consumers to themselves participate actively in the protection of those interests against infringement, seem more likely to succeed as the technological landscape continues to evolve.

While evolving communications technologies have conspired to make internet file-sharing the bête noire of twenty-first century intellectual property law, there are certainly reasons to believe that a similar confluence of evolving technologies and changing norms could force college athletics to confront a similar set of issues about how to manage their intellectual property interests. As we have seen, technologies already exist that would enable college sports fans to create and disseminate possibly infringing content in such a way that evading detection would be quite easy. This development critically harms the potential for developing a serious deterrent threat and makes compliance with schools' asserted intellectual property restrictions largely a matter of choice for very large numbers of people. Further complicating this picture for schools and leagues is the perception that the financial model embraced by the schools and leagues is fundamentally unfair. Between university endowments, substantial contributions from boosters, gate receipts, and lucrative broadcasting contracts, university sports programs,
especially big-time programs such as SEC football, are flush with income.\textsuperscript{174} Of course, the individuals most responsible for this financial success, the players, are largely precluded from sharing the windfall reaped by their efforts. While there are no doubt very good arguments in favor of not paying collegiate athletes for playing, the fact that so much revenue is generated by players who do not share in it no doubt contributes to a perception that schools and leagues are operating unfairly. As Schultz has shown in the context of the music industry, such a perception can have disastrous consequences for the willingness of individuals to comply with asserted intellectual property restrictions.\textsuperscript{175}

Despite the potential that exists for leagues such as the SEC and their member schools to encounter problems not dissimilar from those faced by the music industry over the last two decades, there are reasons to think that a league such as the SEC might be able to incorporate some of the lessons of the jamband community in creating an intellectual property policy. Most importantly, SEC sports fans are a rabidly passionate bunch who often have ties to their favorite university through attendance, family, or regional affiliation. Developing loyalty in one’s fan-base is one of the most important elements of developing the perception of reciprocity essential to replicating the success that jambands have had in protecting their intellectual property interests,\textsuperscript{176} and loyalty is something SEC fans have in spades.

Given all of this, one is still left with the question of what ought the SEC to do. The simple answers all seem to involve attempting to replicate certain aspects of the jamband model, only in this context: share more content with fans; focus on further developing relationships with fans; and attempt to increase the perception of the fairness of their enterprise. However, as Schultz points out, the inculcation of social norms is rarely, if ever, a simple and straightforward process. Whatever the similarities, the differences between the SEC’s situation and that of jambands will necessitate that any attempt to create a new normative culture in SEC fans will have to be a largely organic one, taking account of the realities of the situation. Nevertheless, creating in those fans a sense of investment in the success of their teams and their Conference, and thus helping to create a scheme of largely bottom-up protection of intellectual property interests, is likely to be a more successful way of dealing with a constantly evolving social media landscape.

\textsuperscript{174} See supra note 142 and accompanying text.
\textsuperscript{175} See Schultz, supra note 6, at 713 (discussing the perception that the music industry is run unfairly and the consequences of that perception).
\textsuperscript{176} Id. at 719–20.
IV. CONCLUSION

Given the considerable practical and legal obstacles that would arise in any attempt to enforce a policy of the sort either initially promulgated or eventually adopted by the SEC, it seems clear that such a policy would be all but unenforceable. Such a policy assumes that teams and leagues can both effectively police the unauthorized creation of content based on their live events, and that they have a legally protectable interest in those events. Neither of those assumptions reflects the reality these organizations face. The uses to which new technologies are put are just too diffuse and rapidly evolving to be effectively policed by an organization such as the SEC. And while such a league has a recognized intellectual property interest in the broadcasts of its events, that interest does not extend to the events themselves, which are thought to fall outside the contours of existing copyright law.

Assuming a change in our laws to bring live events such as sports games within the ambit of federal copyright law is not possible, it is difficult to see how such a policy could be made enforceable. Such a change is likely not forthcoming, though, as it is widely assumed that live events cannot be brought within the subject matter of federal copyright law, given that live events do not share the relevant characteristics of other “original works of authorship.” While other, *sui generis* types of intellectual property protection may be created via statute, it is not at all clear what form they would take or how successful they would be in standing up to judicial scrutiny. Even assuming a federal protection scheme could be created, it is possible that a top-down, enforcement-minded view of protecting one’s intellectual property interests is simply not compatible with a world in which continually evolving information-sharing technologies have conspired to help create a culture in which adherence to certain kinds of laws is viewed as purely optional. As the example of jamband fans shows, in order to have effective copyright protections in the world as it is now, it may be necessary to create a sense of investment in those consuming one’s product so that they become partners and not adversaries in the process of helping to police potential misuse.

The SEC is in an advantageous position, though, because they are in a position to act, and not just react, before the technological wave crests. The development of illegal file-sharing and its effect on the music industry was not a problem many saw coming, and so the music industry was stuck playing catch-up, trying to react to developments they had not considered. By contrast, the language of the policy adopted by the SEC shows that the league is aware of the potential threat these technologies pose. Thankfully for the SEC, the development and use of the social media technologies have yet to rise to the level the SEC obviously fears they will. However, it is clear that the SEC and other similarly situated leagues must act promptly, for the pace at which these new technologies are developed and utilized
continues to accelerate. Online social media technologies are incredibly powerful and they are not going away. By getting ahead of the problem and finding a way through the changing of norms to turn its consumers into allies instead of adversaries, the SEC can exchange a future in which online social media is a grave threat for one in which it is a tremendous asset.