WHO OWNS THE VIEW?
CHICAGO CUBS V. ROOFTOP OWNERS,
OR *CHICAGO NATIONAL LEAGUE BALL CLUB, INC. V. SKY BOX ON WAVELAND, L.L.C.*

By Charles Shifley and Patrick Shifley*

"The free ride is over," said Andy MacPhail, Chicago Cubs president and CEO. "The rooftop owners take in as much as $10 million a year by selling seats to view our games. We do not believe the rooftop operators are entitled to profit from our names, our players, trademarks, copyrighted telecasts and images without our consent."[1]

"The Rooftop Skybox is an unparalleled facility with entertaining space on two levels. The rooftop itself is an open-air space offering an unobstructed view of Wrigley Field where you will view the game from a double-decker structure featuring extra-wide stadium seats. In addition, the rooftop contains a bar and grill with a generous food service area and an outdoor deck with café-style seating for dining and conversation. The third floor contains two climate controlled rooms: the front room has floor-to-ceiling windows overlooking the park and seating for two dozen people; the backroom is a theater with three televisions, a sports ticker and auditorium seating."[2]

"We can accommodate groups up to 160 people, but there is NO MINIMUM number of people required in order to book a date. Prices below are for an ALL INCLUSIVE package, all food and drinks are included in that price."[3]
Estimated revenues of Ivy League Baseball Club, one of 13 rooftop businesses similar to Sky Box on Waveland, $1.38 million dollars per year at maximum attendance.[4]

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1 Ronald Roenigk, *Cubs, Bar Owners Back to Battling in Courts as Landmark Status Moves Forward: 'Lawyers win! Lawyers win!'*, INSIDE PUBLICATIONS (Chicago), Dec. 18-24, 2002, *available at* http://www.insideonline.com/site/epage/8393_162.htm.

2 *See* http://www.skyboxonwaveland.com/rooftop.htm (last visited May 5, 2003). This quote is from an advertisement on the website of Skybox on Waveland, L.L.C., one of the 'rooftop operators' whose buildings' tops overlook Wrigley Field in Chicago, providing unobstructed views of the baseball games played there.

3 *See* http://www.ivyleaguebaseballclub.com/pages/941082/index.htm (last visited May 5, 2003) (advertisement on website of the Ivy League Baseball Club (Annex Club, L.L.C.)). Given the number of games, an estimated maximum seating of 160 people, and a quoted price range for 2003 between $95 and $195, projected revenues of the Ivy League Baseball Club (one of thirteen rooftop businesses similar to Skybox on Waveland, L.L.C.) can be calculated to approximately $1.38 million dollars per year at maximum attendance.

4 *See* http://www.ivyleaguebaseballclub.com/pages/941082/index.htm.

As of this writing, on September 28, 2003, the Chicago Cubs have clinched first place in the NL Central, their pitching is excellent, their hitting is picking up, and this could be the year. As in new Manager Dusty Baker's mantra ("I didn't come here to lose"), the Cubs could win it all. All is right with the world.

But not so in the legal relations between the Chicago Cubs baseball team and the rooftop businesses adjacent to their Wrigley Field home. In *Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C.*,[5] the Chicago Cubs recently sued eleven rooftop businesses in a four-count complaint for copyright infringement, unfair competition (trademark infringement), misappropriation and unjust enrichment.[6] According to the Cubs' complaint and to Andy MacPhail, President and CEO, as quoted above, the Chicago Cubs have a property right in the performance of the Major League baseball games played at Wrigley Field, and the rooftop owners infringe the Cubs' copyrights by rebroadcasting the Cubs' telecasts.[7]

According to the rooftop owners' answer to the complaint, the Cubs' allegations are made solely to harass the owners and pressure the community and the City of Chicago to permit the Cubs to fundamentally alter Wrigley Field and the character of the Wrigleyville neighborhood.[8] Still, as represented by the information quoted above, from the advertisements of rooftop operators Skybox on Waveland and Ivy League Baseball

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5 No. 02 C 9105 (N.D. Ill. filed Dec. 17, 2002).

6 *See* Plaintiff's Amended Complaint at ¶ 4-15, *Chicago Nat'l League Ball Club, Inc. v. Sky Box on Waveland, L.L.C.*, No. 02 C 9105 (N.D. Ill. filed Dec. 17, 2002) (Counts I, II, III, IV).

7 *Id.* at ¶ 36, 44.

8 *See* Defendants' Answer at ¶ 1, *Chicago Nat'l League* (No. 02 C 9105).

Club themselves, the rooftop owners can hardly argue that they do not receive millions in revenues by selling views of the Cubs' games in Wrigley Field .[9]

The principal question between these legal combatants is clear: "Who owns the view?" The Cubs claim a property right in the view but the rooftop owners claim the right to watch Cubs games from the rooftops. A companion question is "what rebroadcasts of telecasts are proper without licenses?" The Cubs claim rights in their telecasts but the rooftop owners assert that at least two rooftop owners have no televisions, and at least two more each have only one, a legal number.[10] The case of the Cubs versus the rooftop owners may or may not ever answer the principal questions of the case, because the presiding judge, Judge James F. Holderman of the Northern District of Illinois, has instructed the parties to meet with a magistrate judge to negotiate a settlement, and has meanwhile denied an early defense motion for summary judgment, without prejudice.[11] Nevertheless, the background law to this interesting local suit is fascinating. The circumstances surrounding the Cubs' lawsuit and its timing are also revealing.

Fundamentally, United States law has long recognized that barring limited exceptions, "the view," whether of mountains, buildings, people, or public performances,

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[9] *See, e.g., infra* note 3 (calculating that the Ivy League Baseball Club could earn up to $1.38 million dollars per year at maximum attendance).

[10] *See* Defendants' Motion for Summary Judgment at ¶ 6, *Chicago Nat'l League* (No. 02 C 9105). The motion was denied without prejudice, apparently as premature. Minute Order of 6/10/03, *Chicago Nat'l League* (No. 02 C 9105).

[11] Court's Referral Order of 3/13/03, *Chicago Nat'l League* (No. 02 C 9105) (order referring the parties to U.S. Magistrate Judge Sidney Schenkier regarding settlement); Court's minute order of June 10, 2003 (denying motion). The parties will have a year to try to negotiate a settlement as Judge Holderman has set February 23, 2004 as the trial date for the lawsuit. Court's Scheduling Order of 2/11/03, *Chicago Nat'l League* (No. 02 C 9105) (case scheduling order).

is in the public domain.[12] The view of Wrigley Field with the Cubs playing concerns both buildings and public performances. Before 1990, protection for the three-dimensional design of a building under United States copyright law was long "at best uncertain, and at worst nonexistent."[13] While the Architectural Copyright Protection Act of 1990[14] protected new architectural works,[15] that act specifically limited the copyrights in such works to give freedom to those who used views of the buildings from public places.[16] United States copyright law has never protected any work unless fixed in a tangible medium in accordance with the United States Constitution.[17] Moreover, Section 106 of the Copyright Act of 1976[18] provided five exclusive rights to copyright owners[19] (now expanded to six, with the sixth specific to sound recordings).[20] These five rights (exclusive reproduction, preparation of derivate works, distribution of copies or phonorecords, public performance, and public display) do not include a right to exclusive

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12 The First Amendment protects depictions of views as matters of free speech. *See, e.g., ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003) (Tiger Woods unable to prevent the sale of prints o f a painting including his image).

13 JAY DRATLER, JR., 1 INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY, § 5.02[4] (1991 & Supp. 2003).

14 Architectural Works Copyright Protection Act [Title VII of Judicial Improvements Act of 1990], Pub.L. No. 101-650, §§ 701-706, 104 Stat. 5089, 5133-5134 (1990) (codified as amended at 17 U.S.C. §§ 101, 102, 106, 120, 301).

15 A renovated Wrigley Field might qualify.

16 DRATLER, *supra* note 11, at § 5.02[4].

17 MELVILLE B. NIMMER & DAVID NIMMER, **1** NIMMER ON COPYRIGHT, § 2.03[B] (2000 & Supp. 2003) [hereinafter "NIMMER ON COPYRIGHT"].

18 Copyright Act of 1976, Pub. L. No. 94-553, § 106, 90 Stat. 2541, 2546 (1976) (codified as amended at 17 U.S.C. § 106).

19 2 NIMMER ON COPYRIGHT, *supra* note 15, at § 8.02[A] n.6.1, § 8.21[A].

20 *Id.*

public viewing.[21] At the same time, no known right protects against public viewing. Neither the right of privacy, nor the right of publicity is known to protect against public viewing. Unfair competition does not protect against public viewing. Misappropriation and unjust enrichment are also not known to protect against public viewing. As the rooftop owners allege in their Answer, it would be odd to claim that neighbors of Wrigley Field should avert their eyes on game days to avoid misappropriating views of Cubs' games.[22] Wrigley Field has been in existence since 1914, and its outfield was apparently designed to allow views to and from the local rooftops.[23]

Nimmer, a leading authority on copyright law, states that the Seventh Circuit Court of Appeals has decided that baseball games are copyrightable themselves, citing *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*.[24] This conclusion is based on one footnote in the court's opinion, however, which states only that baseball players' performances are not uncopyrightable for lack of artistic merit.[25] Regardless, one does not reproduce, prepare derivate works of, distribute copies of, publicly perform, or publicly display the players' performances by viewing them, or selling the opportunity to view the public display of the players' performances.

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21 *See* 17 U.S.C. § 106; *see generally* 2 NIMMER ON COPYRIGHT, *supra* note 15, at §§ 8.01-8.24.

22 Defendant's Answer at 3, *Chicago Nat'l League* (No. 02 C 9105).

23 *Id.*

24 805 F.2d 663 (7th Cir. 1986), *cert. denied,* 480 U.S. 941 (1987), *cited in* 1 NIMMER ON COPYRIGHT, *supra* note 15, at § 2.09[F] n.66-85.

25 *Baltimore Orioles*, 805 F.2d at 669 n.7. "The Players argue that their performances are not copyrightable works because they lack sufficient artistic merit. We disagree. Only a modicum of creativity is required for a work to be copyrightable. … Contrary to the Players' contentions, aesthetic merit is not necessary for copyrightability. … Courts thus should not gainsay the copyrightability of a work possessing great commercial value simply because the work's aesthetic or educational value is not readily apparent to a person trained in the law. That the Players' performances possess great commercial value indicates that the works embody the modicum of creativity required for copyrightability."

Nimmer further suggests that the Seventh Circuit's conclusion was erroneous because its analysis exhibited four "problems."[26] These problems are no citation to authority dealing with athletic events, no reference to baseball as an existing form of expression in the Copyright Act, doubt as to the creativity of baseball player performances, and failure to appreciate a distinction between "works of authorship" and works of great commercial value.[27] Nimmer also invokes a parade of horribles against the decision.[28]

National Basketball Ass'n [NBA] v. Motorola, Inc.[29] determined that NBA games are not within the subject matter of copyright. According to that court, "[s]ports events are not 'authored' in any common sense of the word. . . . We believe the [historical] lack of caselaw is attributable to a general understanding that athletic events were, and are, uncopyrightable. . . . [T]he district court correctly held that appellants [who were selling pagers updated every two to three minutes with NBA game information during games] were not infringing a copyright in the NBA games."[30]

In sum, the Chicago Cubs will have a difficult time arguing for copyright in their games. Indeed, the Cubs' Complaint does not even claim copyright in the games. Instead, it apparently claims copyright only in the telecasts.[31]

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26 *See* 1 NIMMER ON COPYRIGHT, *supra* note 15, at § 2.09[F] n.69.1-77.1 and accompanying text.

27 *Id*.

28 *See id*. at §2.09[F] n.77.2-85 and accompanying text.

29 105 F.3d 841 (2d. Cir. 1997); *see generally* 1 NIMMER ON COPYRIGHT, *supra* note 15, at § 2.09[F].

30 *Nat'l Basketball Ass'n*, 105 F.3d at 846-47.

31 Plaintiff's Complaint at ¶ 30, *Chicago Nat'l League* (No. 02 C 9105) [Count I].

But do the Cubs have state law claims to the view? Arguably, yes – and arguably, no. A strong case can be made that their claims do not survive copyright pre-emption.[32] As a preliminary matter, copyright law pre-emption does not extend to state protection of works not yet fixed in a tangible medium of expression.[33] This exception to pre-emption, therefore, is expressly written into the copyright statute. "Unfixed works" are protectible under state law.[34] The Cubs' games are in a sense unfixed works. Yet in *National Basketball Ass'n,* the court held that because NBA games were reduced to tangible form by broadcasts, the misappropriation claim of that case, under state law, was pre-empted.[35] The court cited as its precedent the Seventh Circuit's *Baltimore Orioles* decision, which also held that, where games were fixed by broadcasting, players' right of publicity claims were pre-empted.[36] The court, quoting the *Baltimore Orioles* decision, stated "'there is no distinction between the performance and the recording of the performance for purposes of pre-emption . . . .'"[37]

Although the Seventh Circuit distinguished non-broadcasted games and unrecorded telecasts, the Cubs' games are both telecast and recorded. The Cubs assert theories of misappropriation and unjust enrichment in support of their claims to their

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[32] Pre-emption is the first argument of the defendants' (denied without prejudice) summary judgment motion. See fn. 9.

[33] 17 U.S.C. § 301(b) (1); RUDOLF CALLMANN, 2 THE LAW OF UNFAIR COMPETITION, TRADEMARKS, & MONOPOLIES 38, § 15.08 (4th ed. 1981 & Supp. 2003) ("the only thing that [is] clearly not preempted").

[34] *See* 1 NIMMER ON COPYRIGHT*, supra* note 15, at § 2.02 p.2-21.

[35] *Nat'l Basketball Ass'n*, 105 F.3d at 846-47.

[36] *Id.* at 848-50 (citing Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 675-76 (7th Cir. 1986)).

[37] *Id.* at 849 (quoting *Baltimore Orioles*, 805. F.2d at 675).

view.[38] It is difficult to differentiate these claims from the claims in *National Basketball Ass'n*[39] and *Baltimore Orioles.*[40]

Locating cases that clearly support the Cubs' state law claims on similar facts is also difficult. The "hot news" case of *International News Service v. Associated Press*.[41] is sometimes understood to support the potential for misappropriation claims where there is free-riding. The case held that tortuous free-riding was occurring where the International News Service ("INS") was copying "hot news" from the Associated Press ("AP") into INS news bulletins that were being sold in competition with the AP. The Cubs complaint is not the equal of a "hot news" claim because it is not a claim that the rooftop owners are copying facts collected by the Cubs.[42] In *National Basketball Ass'n,* the court rejected a "hot news" claim because the defendant was not free-riding on an NBA product for the same reason: they were not free-riding on such collected facts as box-scores, summaries of statistics, or real-time, NBA-collected facts. Similarly, watching Cubs games from rooftops lacks any free-riding on such products.

Turning to the rooftop clubs' use of televisions for displaying the Cubs' telecasts, the rooftop owners face a different situation. The telecasts are copyrighted. The clubs apparently have no licenses.

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38 Plaintiff's Complaint at ¶3, *Chicago Nat'l League* (No. 02 C 9105) [Counts III and IV].

39 105 F.3d 841.

40 805 F.2d 663.

41 248 U.S. 215 (1918).

42 According to Defendants' Motion for Summary Judgment at 18-19, see fn. 9, the Cubs have expressly disclaimed that their case is a "hot news" case.

A provision of the copyright law,[43] sometimes called the "dentist's office exception" to copyright infringement, authorizes television uses in commercial settings. This provision authorizes any and every commercial establishment to have one home-type television circa 1976—a "receiving apparatus"—on the premises for the enjoyment of customers, as long as there is no charge for viewing the television.[44] However, this exception appears to be exceeded by at least some of the rooftop owners. While the rooftop owners do charge admission, the charge is not for viewing the television -- but some of them apparently do have multiple televisions of large sizes.[45] The "dentist's office exception" does not justify more than one television per establishment or televisions of overly large size; the exception is limited to single units as used in the home.[46] The rooftop owners may need to scale back the number of televisions per establishment, or scale back the sizes of the televisions, or separate incorporate their various rooms with televisions, to fit within the "dentist's office exception" and avoid copyright infringement.[47]

Finally, why have the Cubs sued now? According to Cubs publicity representatives, the Cubs engaged rooftop owners in fourteen bargaining sessions, and

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[43] 17 U.S.C. § 110(5).

[44] *Id.*; Broadcast Music Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 21 USPQ2d 1181 (7th Cir. 1991).

[45] *See infra* note 2 ("three televisions" are advertised by a rooftop operator in the quote at the top of this article, quoted at http://www.skyboxonwaveland.com/rooftop.htm (last visited May 5, 2003)).

[46] Broadcast Music, 949 F.2d at 1489.

[47] The owners could also license their displays of the Cubs television broadcasts, for public viewing, through DirecTV, at a cost of only hundreds or a few thousand dollars. As seen at http://www.directv.com/buy/pdf/public_pkgs_and_rates.pdf , DirecTV has commercial licenses for public viewing readily available for essentially all American professional sports leagues, including Major League Baseball, and including the Chicago Cubs.

that in the last session the rooftop owners were retrenching.[48] Surrounding circumstances tell a more complex story. The Cubs sued the rooftop owners two days after the City of Chicago blocked the Cubs' plans to expand Wrigley Field's bleachers by lifting a freeze on considering landmark status for the ballpark.[49] Wrigley Field has no permanent structure blocking rooftop views, and the Cubs surely could not construct one after the ballpark received landmark status. Landmark status is to preserve the architectural and historic features of the park; the "open interrupted sweep of grandstand and bleachers" is considered part of those features.[50]

The Cubs' recent aggressive efforts to increase revenues are also illuminating. The Cubs have sought more night games.[51] In 2002, the Cubs started their own ticket brokerage, Wrigley Field Premium Ticket Services, to compete with other ticket brokerage agencies.[52] The Cubs also sought to add 2,000 more seats to the bleachers.[53] The Cubs are reported to have wanted to sell more advertising in the park.[54] Further, the

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48 Roenigk, *supra* note 1 (the article quotes Andy Macphail, Chicago Cubs president and CEO).

49 Dan Bollerman, *Cubs Sue Owners of Rooftop Clubs Near Wrigley Field for Damages*, BLOOMBERG NEWS, Dec. 18, 2002, *available at* LEXIS, News Library, Bloomberg File.

50 Salvatore Deluca, *Wrigley Field Forever,* Preservation Online, May 9, 2003, available at http://www.nationaltrust.org/magazine/archives/arch_story/050903.htm.

51 Fran Spielman, *Cubs Angling to Buy Rooftop Buildings*, CHI. SUN-TIMES, Oct. 2, 2002, at 131, *available at* http://www.wrigleyexpansion.com/art29.html.

52 That has provoked its own lawsuit. Mickey Ciokajlo, *Cubs Facing Ticket Fraud Lawsuit, Brokerage Scalped Fans, Lawyers Say*, CHI. TRIB., Oct. 10, 2002, at N3, *available at* http://www.wrigleyexpansion.com/art32.html.

53 Spielman, *supra* note 44, at 131.

54 Andy Trenkle, *Cubs Announce Invasion of Cubs*, THE DAILY ILLINI (University of Illinois), Apr. 11, 2002, *available at* http://www.dailyillini.com/apr02/apr11/sports/stories/sports_column01.shtml.

Cubs are reported to have attempted to negotiate for the right of first refusal to buy the rooftop buildings when they are next sold.[55]

Recent events provide even more context. Professional baseball teams are not favored properties. In May, the Anaheim Angels were sold by Walt Disney Company.[56] The Los Angeles Dodgers are also soon to be sold.[57] According to the Wall Street Journal, Rupert Murdoch's News Corporation "put the Los Angeles Dodgers on the block" because the team is "no longer considered an important property for News Corporation."[58] Reportedly, the Dodgers were purchased by News Corporation in 1997 for $310 million "as part of a strategy to build up its Fox Sports West regional-cable sports channel."[59] Also reportedly, the team now loses about $40 million to $50 million annually. The *Journal* continues that "other media conglomerates also are no longer fans of team ownership. Walt Disney Company has decided to put the Anaheim Angels baseball team on the block and AOL Time Warner Inc.'s chief executive, Richard Parsons, has said the Atlanta Braves could be sold."[60]

The *Journal* maintains, "Sports teams were considered must-have properties during the 1990s by expansionist media companies seeking to control both programming content and distribution. Those reasons have diminished in ensuing years, as media

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55 Spielman, *supra* note 49, at 131.

56 *Glazer, News Corporation Have Deal In Place,* Reuters News Service July 29, 2003, available at http://sports.espn.go.com/mlb/story?id=1586935.

57 *Id.*

58 John Lippman, *Murdoch's News Corp. Places Los Angeles Dodgers Up for Sale*, WALL ST. J., Jan. 22, 2003, at B4.

59 *Id.*

60 *Id.*

consolidation has eliminated competition for sports-television rights in individual markets."[61]

Cubs management may have seen the handwriting. They can either become supremely profitable, or face a sale by The Tribune Company, with possible loss of management jobs.

In *Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C.,* the Cubs have equity on their side. That is, they are Chicago's beloved Cubs, in the business of selling seats to view their games, and they invest heavily in their team and facility. Million dollar businesses competing for some of their patrons contribute nothing to the game. But the Cubs are risking a defense judgment on the only important issue of the case: who owns the view? Rooftop owners reportedly would pay $14 for each patron, while the Cubs have wanted $19.[62] The rooftops reportedly seat 1000 people.[63] In the year 2003, there are to be eighty-two home games.[64] The gap between settlement positions is apparently $19 - $15 = $4 times 82 times 1000 = $328,000.[65] The Cubs might be well advised to play ball.

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[61] *Id.*; *see also Franchise Players*, CHI. TRIB., Feb. 10, 2003, at 18 (saying humorously that numerous professional sports teams are for sale).

[62] *See* Spielman, *supra* note 49.

[63] Washburn, *Cubs hurl federal suit at rooftop owners,* Chicago Tribune, December 17, 2002.

[64] For a rundown of the Chicago Cubs' 2003 game schedule, see http://chicago.cubs.mlb.com/NASApp/mlb/chc/schedule/chc_schedule_dbd_2003.jsp.

[65] Assuming consistent maximum attendance at the rooftops.