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Streaming Is the Name of the Game: Why Sports Leagues Should Adapt to Consumers and Follow Ad Dollars Towards Live Streaming

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Comments

STREAMING IS THE NAME OF THE GAME: WHY SPORTS LEAGUES SHOULD ADAPT TO CONSUMERS AND FOLLOW AD DOLLARS TOWARDS LIVE STREAMING

I. Combating Consumers Within Streaming Platforms: An Introduction to Sports Broadcasting and Live Streaming

Live streaming is changing the way sporting events are broadcasted, advertised, and viewed by consumers.[1] The popularity of live streaming stems from the growth of the internet and the emergence of Google, YouTube, and Facebook as the most trafficked websites.[2] These websites are part of peoples' daily lives and pro-

1. *See generally* Josh Mathews, *Sports Broadcasting Blackouts: A Harbinger of Change in Rapidly Evolving Media Landscape*, 18 Hous. Bus. & Tax L.J. 202 (2018) (addressing evolving media landscape within scope of sports); *see also* Juan Pablo Manterola, *Online Streaming Is the Future of Sports Broadcasting: It's Not 'If' You'll Cut Cable, but 'When'*, Forbes (Apr. 14, 2017, 9:00 AM), https://www.forbes.com/sites/forbesagencycouncil/2017/04/14/online-streaming-is-the-future-of-sports-broadcasting-its-not-if-youll-cut-cable-but-when/#5675d5533bbc [https://perma.cc/2RUV-8939] (noting decline in cable company subscriptions and suggesting sports broadcasting needs to be more like movies: go directly to consumers); Derek Thompson, *TV's Ad Apocalypse is Getting Closer*, The Atlantic (Aug. 10, 2017), https://www.theatlantic.com/business/archive/2017/ 08/tvs-ad-apocalypse-is-coming/536394/ [https://perma.cc/2X7C-V2EW] (questioning where *forty billion dollars a year* of advertising would go in ad-free streaming service) (emphasis added); *cf.* Sara Fischer, *TV Advertising Projections Reduced Due to Increased Cord-Cutting*, Axios (Sept. 13, 2017), https://www.axios.com/tv-advertising-projections-reduced-due-to-increased-cord-cutting-1513305461-b103f7af-1019-4437-88d8-3d15caf2a8dc.html [https://perma.cc/59XP-XRPN] (reporting decrease of one billion dollars for TV advertising due to cord-cutting). For further discussion on how live streaming is changing the way sports are broadcasted, see *infra* notes 16–52 and accompanying text.

2. *See* Andrew Marantz, *Reddit and the Struggle to Detoxify the Internet*, The New Yorker (Mar. 19, 2018), https://www.newyorker.com/magazine/2018/03/19/reddit-and-the-struggle-to-detoxify-the-internet [https://perma.cc/5MGE-UQQK] (listing Reddit, one commonly used source for pirating and streaming content, as website with fourth most traffic); *see also* Jeff Desjardins, *These Are the Top 100 Websites of the Internet, According to Web Traffic*, Bus. Insider (Mar. 7, 2017, 8:08 PM), https://www.businessinsider.com/top-100-websites-web-traffic-2017-3 [https://perma.cc/LW5N-5TLV] (identifying Google, YouTube, and Facebook as top three most trafficked websites, followed by Amazon as fourth, Reddit as seventh, and Yahoo and Twitter, other websites providing streaming content, as fifth and ninth, respectively); *cf.* Jerri Collins, *The Top 10 Most Popular Sites of 2018*, Lifewire, https://www.lifewire.com/most-popular-sites-3483140 [https://perma.cc/LW5N-5TLV] (last updated Jan. 2, 2019) (identifying Google, YouTube, and Facebook as

vide access to live stream content such as sporting events, television shows, daily news, and friends' activities.[3] As a result, streaming services are now vital to consumers.[4] Consider the seventieth Primetime Emmy Awards, which aired in September 2018, as an example.[5] The Primetime Emmy Awards ironically drew its smallest viewership audience in the last decade, even though more shows were awarded from streaming services like Netflix, Amazon, and Hulu than ever before.[6]

The rise of streaming services and the use of streaming technology by social media websites like Facebook and Twitter have altered the methods advertisers use to reach consumers and the way consumers choose content to watch.[7] Live streaming technology

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top three most trafficked websites, but Yahoo as eighth and Amazon as tenth most visited websites).

3. *See* Scott Kleinberg, *Live Streaming: The Next Big Thing in Social Media*, CHI. TRIB. (Apr. 1, 2015), http://www.chicagotribune.com/lifestyles/ct-so-social-live streaming-meerkat-periscope-20150401-column.html [https://perma.cc/QUK6-NFZE?type=image] (looking specifically at Twitter for example and defining live streaming as broadcasting in real time); *see also* Karl Kaufman, *Will Facebook Become the Preferred Way for Fans to Watch Sports?*, FORBES (June 15, 2018, 12:50 PM), https://www.forbes.com/sites/karlkaufman/2018/06/15/will-facebook-become-the-preferred-way-for-fans-to-watch-sports/#9eb833a2746f [https://perma.cc/8ZNN-NMVJ] (reporting how "live videos on Facebook generate six times more discussion than recorded videos") (internal quotation marks omitted).

4. *See generally* Mathews, *supra* note 1 (addressing consumer reliance on streaming for sports); Sara Fischer, *The Battle for the Future of TV*, AXIOS (Oct. 11, 2018), https://www.axios.com/digital-video-wars-heat-up-4ccda248-c8c8-4d2c-9acf-ebef67607870.html [https://perma.cc/V9FX-W9UZ] ("The race to own the future of TV is intensifying, with mobile and streaming video companies looking to build or expand video services that will launch by next year.").

5. *See* Liane Starr, *Netflix and HBO Set the Pace at 70th Primetime Emmys Telecast, with Amazon and FX Close Behind*, TELEVISION ACAD. (Sept. 17, 2018), https://www.emmys.com/news/awards-news/70th-emmy-winners [https://perma.cc/A84L-WLRM] (reporting on results of Emmy Awards from September 2018).

6. *See* Stephen Battaglio, *Emmy Awards' TV Audience Hits New Low with 10.2 Million Viewers*, L.A. TIMES (Sept. 18, 2018, 3:10 PM), http://www.latimes.com/business/hollywood/la-fi-ct-emmy-ratings-20180918-story.html [https://perma.cc/U73B-5937] ("The Emmy Awards telecast is not the only trophy show to see smaller audiences, as a *growing number of viewers prefer to watch clips of the programs online* rather than sit through a three-hour telecast with commercials.") (emphasis added).

7. *See* Fischer, *supra* note 4 (examining expansion of streaming video companies, such as Netflix and Amazon which have each totaled more than one hundred million subscribers, and noting no TV networks are "looking to own the future of television"); *see also* Ben Popper, *The Great Unbundling: Cable TV as We Know It is Dying*, THE VERGE (Apr. 22, 2015, 10:34 AM), https://www.theverge.com/2015/4/22/8466845/cable-tv-unbundling-verizon-espn-apple [https://perma.cc/BMS2-MW2Y] (indicating main goal of broadcasting is advertisements); Thompson, *supra* note 1 (suggesting consumers prefer streaming to cable, as "each ad-free streaming product is yet another reason to dump the ad-rich cable bundle"). *See generally* Kaufman, *supra* note 3 (discussing Facebook's use of streaming for personal purposes and sports); *see also* Cori Faklaris et al., *Legal and Ethical Implications of Mobile*

has had a particularly strong impact on professional sports leagues.[8] Within the last several years, live streaming technology has led to a difficult decision for sports leagues to confront.[9] Leagues must determine whether to keep sporting coverage in-house and provide easy access for consumers to stream content and watch events, or keep the coverage on major broadcasting networks like they have traditionally done.[10]

This Comment argues leagues should decide to stream their content, because if they do, there is no shortage of potential buyers for the streaming rights.[11] Facebook and Twitter are two examples of eager buyers acting as non-traditional broadcast companies jumping at the opportunity to stream sporting events.[12] Over the last several years, Facebook first agreed to stream one Major League Baseball ("MLB") game per week for one season, and then agreed to exclusively stream twenty-five games the following season.[13] Twit-

Live-Streaming Video Apps, ASS'N FOR COMPUTING MACHINERY DIG. LIBRARY, In Proc. of the 18th Int'l Conf. on Human-Computer Interaction with Mobile Devices and Services Adjunct (2016), https://doi.org/10.1145/2957265.2961845 [https://perma.cc/E7XY-GPNT] (describing live streaming video's surge in society and Facebook's live technology platform). "A Cisco White Paper estimates that by 2017, video will account for 30% of all internet traffic and *70% of mobile traffic*." *Id.* (emphasis added) (implying surge of mobile traffic to increased consumer use of streaming).

8. *See, e.g.*, *At the Gate and Beyond*, PWC SPORTS OUTLOOK, at 10–13 (Oct. 2018), *available at* www.pwc.com/us/sports [https://perma.cc/PKL3-R7RB] (hereinafter "PWC SPORTS OUTLOOK") (predicting streaming rise will continue in professional sports); *see also* Kaufman, *supra* note 3 (reporting on streaming deals between internet service providers and sports leagues).

9. *See* Manterola, *supra* note 1 (discussing challenges presented to sports leagues by rise of streaming).

10. *See id.* (suggesting individual sports teams could "bypass traditional broadcasting" but it is unclear whether major sports leagues' see streaming "as a profitable alternative to cable or paid streaming TV").

11. See Lara O'Reilly, *Streaming Sports Service DAZN Aims to Introduce Ad Model Without All the Repetition*, WALL ST. J. (Nov. 23, 2018, 9:29 PM), https://www.wsj.com/articles/streaming-sports-service-dazn-aims-to-introduce-ad-model-without-all-the-repetition-1542998439 [https://perma.cc/36VR-MTNY] ("Live sports continue to deliver large audiences to TV networks otherwise suffering steady ratings erosion. They also give viewers a heavy dose of what's called 'ad frequency.'"); Elizabeth Winkler, *The Real Streaming Race Starts . . . Now*, WALL ST. J. (Feb. 1, 2019, 5:30 AM), https://www.wsj.com/articles/let-the-streaming-wars-begin-11549017001?ns=prod/accounts-wsj [https://perma.cc/NRN4-CFPL] ("People already have multiple streaming subscriptions. Eventually it may be the norm to pay for a bundle of platforms.").

12. *See, e.g.*, Manterola, *supra* note 1 (reporting on Facebook's interest in live streaming); Kaufman, *supra* note 3 (comparing Facebook's and Twitter's streaming ambitions).

13. *See* Kaufman, *supra* note 3 ("Facebook overhauled its platform to encourage more interactive and engaging content, and *video* is at the forefront of that change.") (emphasis added).

ter paid the National Football League ("NFL") ten million dollars for the rights to air Thursday Night Football games in 2016, and Amazon later purchased those rights for fifty million dollars.[14] Amazon also bought the rights to live stream twenty English Premier League soccer games for 2019, and in 2018 YouTube bought the rights to air Major League Soccer games for Los Angeles' new team.[15]

Even though some leagues have signed contracts to provide streaming services, those same leagues, and others, are hesitant to embrace streaming because of the threat of potential infringement of their intellectual property rights.[16] Sports broadcasters are also wary of live streaming because they fear live streaming websites and apps "will cannibalize viewers."[17] Sports leagues are cautious because they derive most of their revenue from ticket sales and the sale of broadcasting rights.[18] Broadcasting live sporting events is a huge revenue opportunity for sports leagues and broadcasters.[19]

14. *See id.* (noting content is available to paying Amazon Prime members and for free through Amazon's Twitch service).

15. *See* Ivana Kottasova, *Soccer Binge! Amazon Will Show 20 Premier League Matches in UK*, CNN (June 7, 2018, 8:27 AM), https://money.cnn.com/2018/06/07/media/amazon-premier-league-rights/index.html [https://perma.cc/69YB-MYME] (reporting Amazon's deal); *see also* Kaufman, *supra*, note 3 (discussing YouTube's deal and pointing out YouTube is owned by Google). To clarify, YouTube is a subsidiary of Alphabet Inc., and Alphabet Inc. was created by Google "bl[owing] up its entire corporate structure to form a new parent company." Avery Hartmans & Greg Sandoval, *The Company Formerly Known as Google is Far Bigger than Most People Realize*, BUS. INSIDER (July 11, 2018, 5:13 PM), https://www.businessinsider.com/alphabet-google-company-list-2017-4 [https://perma.cc/DG2K-RYMX] (noting corporate restructuring was in 2015 and meant to ease its business operations, including its ownership of YouTube, which was acquired in 2006, and is number one video sharing website and number two most visited website). For further discussion of YouTube, including the fact that it is the second most visited website after Google, see *supra* note 2 and accompanying text.

16. *See* Marc Edelman, *From Meerkat to Periscope*, 39 COLUM. J.L. & ARTS 469, 472 (2016) (citing Christian Red, *New Sports Fight: Video Streaming*, N.Y. DAILY NEWS, at 47 (May 5, 2015)) (expressing fear of sports leagues). *See generally* Faklaris et al., *supra* note 7 (stating, in general, live streaming poses threat due to "numerous legal and ethical concerns around privacy and information sharing, publicity and intellectual property").

17. *See* Edelman, *supra* note 16, at 472 (citing Don Kaplan & Christian Red, *Big $ucker Punch By Video Apps*, N.Y. DAILY NEWS, at 17 (May 5, 2015)) (providing quote from TV Media Insights Editor-in-Chief Marc Berman in regards to streaming apps).

18. *See* Faklaris et al., *supra* note 7 ("The increasing accessibility of video and live streaming capability for individuals, as opposed to broadcast and cable television networks, has long posed a threat to these revenue streams."); *see, e.g.*, PwC SPORTS OUTLOOK, *supra* note 8, at 3–4 (highlighting media rights, gate revenues, and sponsorship).

19. *See* PwC SPORTS OUTLOOK, *supra* note 8, at 12 (discussing focus on streaming as source to rely on for broadcasting).

This is evident in the fact that the cost of viewing broadcasted sporting events comprises approximately fifteen percent of a standard cable bill.[20] The value of broadcasting rights also presents a legal challenge for sports leagues and broadcasters.[21] Sports leagues and broadcasters are "prime candidates for a legal battle over their intellectual property rights and broadcast copyrights" against those who rebroadcast content without permission, because leagues and broadcasters want to ensure continued success of their businesses.[22] For example, the television network NBC paid billions of dollars for the rights to broadcast the 2014 Olympics.[23] NBC expressed concern it would suffer if websites and apps were able to stream events from the Olympics without NBC's consent.[24]

Against this backdrop, it is evident that live streaming technologies are changing the way consumers watch sporting events.[25] Live streaming has arguably been around since the 1990s, but it was too difficult for most consumers to use until recently.[26] It is easy for today's consumers to enjoy live streams because smart phones are more sophisticated and provide access to improved data networks with faster computing abilities.[27] As a result of these technological

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20. *See* Mathews, *supra* note 1, at 203 (noting sports broadcast is "dominant revenue stream" for leagues and percent of cable bill).

21. *See* PwC SPORTS OUTLOOK, *supra* note 8, at 13 (suggesting increased competition across all "devices, channels and apps" could result in "significant rights fee increase").

22. Bryan Altman, *Periscope, Meerkat Threaten Multi-Billion Dollar Sports Broadcast Copyrights*, CBS LOCAL SPORTS (Apr. 2, 2015, 4:30 PM), http://newyork.cbslocal.com/2015/04/02/periscope-meerkat-threaten-multi-billion-dollar-sports-broadcastcopyrights/ [https://perma.cc/5V58-VK43] (discussing sport broadcasters opposing live streaming's technological development).

23. *See* Edelman, *supra* note 16, at 472 (citing Kaplan & Red, *supra* note 17) (reviewing potential issues from streaming).

24. *See id.* (cautioning forward looking ideas of live streaming abilities with existing contracts in place).

25. *See generally id.* (discussing how evolving media landscape is forcing sports industry to examine how best to broadcast events)*; see also* Edelman, *supra* note 16, at 470–72 (discussing intellectual property rights of live streaming sporting events).

26. *See* Kleinberg, *supra* note 3 (noting ability to record on smartphones and livestream via apps and internet service providers).

27. *See* Jeff Ward-Bailey, *Live-Streaming Apps: Periscope Rises to Challenge Meerkat*, CHRISTIAN SCI. MONITOR, (Mar. 26, 2015), http://www.csmonitor.com/Technology/2015/0326/Livestreaming-apps-Periscope-rises-to-challenge-Meerkat [https://perma.cc/QVT7-WWD4] (noting rise in popularity and powerful smartphones); *see also* Ed Baig, *Periscope Streams Challenge Meerkat*, USA TODAY (Mar. 26, 2015, 5:10 PM), https://www.usatoday.com/story/tech/columnist/baig/2015/03/26/twitter-periscope-poses-livestreaming-challenge-to-meerkat/70469808/ [https://perma.cc/937X-YW94] ("Only now with faster and more robust networks, powerful smartphones in the hands of many, and, of course, the presence of social networks, [live streaming] is finally gaining meaningful traction.").

advancements, a larger audience is interested in live streaming content, specifically sporting events.[28] This increased ease of access presents a lucrative opportunity for the sports industry; it could satisfy consumer demand by offering live streams of games.[29] However, the industry is wary of live streaming and has expressed concern because the value of broadcasted events is "inherent to their timeliness."[30] The timeliness has to do with the fact that a live sporting event is only important when live, otherwise consumers are only interested in the result or outcome of the event as opposed to watching it in real time.[31] Although a live stream is as timely as a live broadcast, leagues' concerns focus on preventing illegal streaming.[32] If an event is illegally streamed or broadcasted, the result of the event will already be known, the illegal streamer will already have benefited from watching, and the leagues will have suffered from fewer viewers.[33] This Comment argues leagues should not be wary, because they can use copyright law to fight parties who live stream content without permission.[34]

Copyright law protects the leagues' interests because unauthorized live streaming infringes and impairs the marketability and profitability of the broadcasted coverage.[35] Leagues already use copyright law to protect their rights in the traditional broadcasting

28. *See* Baig, *supra* note 27 (noting "meaningful traction" resulting in larger audiences). Consumers have also become more accustomed to watching videos on small screens and different types of platforms. *See* Tali Arbel, *Boxing Match Pops up on Phones as TV Habits Change*, HONOLULU STAR-ADVERTISER (May 5, 2015) (describing transition from televisions to handheld devices).

29. *See* PwC SPORTS OUTLOOK, *supra* note 8, at 9–10 (suggesting social media presents "24/7/365 opportunity to connect" and allows people to control content consumed).

30. *See* Samuel Gibbs et. al., *What Do Periscope and Meerkat Mean for Broadcasting Copyright?*, THE GUARDIAN (May 11, 2015, 6:06 AM), http://www.theguardian.com/technology/2015/may/11/periscope-meerkat-broadcast-copyright-premier-league [https://perma.cc/VK9L-X7ZK] (noting several professional sports leagues have voiced caution against live streaming apps).

31. *See id.* (discussing importance of timeliness of games to securing viewers); *c.f.* with *infra* notes 113–116 and accompanying text (examining results and accounts of sporting events).

32. For further discussion of an example regarding live streaming and live broadcasting an event, see *infra* notes 207–218 and accompanying text.

33. *See e.g.*, Edelman, *supra* note 16, at 475 (noting loss to leagues).

34. *See id.*, at 475 n.31 (citing to Compl. at ¶ 38, Showtime Networks, Inc. v. John Doe (No. 2:15-CV-03147), 2015 WL 1910767 (C.D. Cal. Apr. 28, 2015)) (discussing case involving unlicensed live streaming of boxing match between Floyd Mayweather, Jr. and Manny Pacquiao).

35. *See id.* (discussing *Showtime Networks* and how event lost value when others infringed on event's copyrights).

of sporting events.[36] For example, an event ticket often includes warnings with restrictive language on the back, and broadcasts often include similar statements about restrictions on rebroadcasting the content without the consent of the particular league.[37] A licensed broadcaster's biggest concern is that an unlicensed party will rebroadcast a sporting event involving "live coverage of a one-time live sporting event whose outcome is unknown."[38]

This Comment argues that even though leagues fear streaming and seek to preserve their revenue, they should still embrace live streaming platforms.[39] If leagues live stream their sporting events, they can engage with a rapidly developing audience through both social media and simply by providing easy access to content, similar to what many other television networks have done.[40] Historically, sports broadcasters provided content of any "noteworthy" event, and sports leagues focused on "produc[ing] sports."[41] But this model has changed.[42] For example, the NFL organizes its operations and media together in order to produce coverage of its own content.[43] The NFL is able to do this by implementing its intellec-

36. For further discussion of leagues' uses of copyright law, see *infra* notes 37–32, 106–142 and accompanying text.

37. *See, e.g.*, Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938) (noting language prohibiting ticket holders from sharing information during games themselves); *see also* Edelman, *supra* note 16, at 491 (citing Red, *supra* note 16) (discussing language from NFL prohibiting retransmission).

38. Edelman, *supra* note 16, at 476 n.34 (quoting Compl. at ¶ 38, *supra* note 34).

39. *See* Faklaris et al., *supra* note 7 (noting sports leagues have power under laws and financial motivation to block live streaming, but also have incentive to embrace change to cater towards consumers).

40. *See* Sara Fischer, *ESPN+ is up to a Million Paid Subscribers*, AXIOS (Sept. 20, 2018), https://www.axios.com/espn-subscribers-one-million-streaming-network-f518c532-1f38-42ff-904c-8eb990db962a.html [https://perma.cc/6NMM-HHS9] (examining success of ESPN's new "direct-to-consumer streaming service called ESPN+," suggesting future success for Disney, parent company of ESPN, which plans to launch streaming platforms in 2019); *see also* Fischer, *supra* note 4 (reporting on keeping content in-house such as Disney and AT&T's plans to "launch new direct-to-consumer streaming service[s]"). Before the streaming frenzy existed, Disney "[f]ocus[ed] on making great content and then sell[ing] it to distribution companies, like Comcast and DirecTV. This worked brilliantly when practically the entire country subscribed to the same television product." Thompson, *supra* note 1 (discussing traditional cable bundles' success, but also that current streaming content without advertisements gives consumers reason to abandon traditional cable bundles, leading Disney to remove its content from Netflix).

41. *See* Eric E. Johnson, *The NFL, Intellectual Property, and the Conquest of Sports Media*, 86 N.D. L. REV. 759, 760 (2010) (examining how leagues "traditionally" operated).

42. *See id.* at 760–61 ("It was up to others—the sports media—to produce coverage on anything noteworthy that came out of the [sporting event].").

43. *See id.* (pointing towards NFL as leading example of distributing information which other leagues are likely to follow as "the blueprint"). The NFL is a

tual property rights and keeping the content for itself to distribute.[44] Some entertainment companies, like Disney and Netflix, keep their content "in-house" to maintain control over the content, and sports leagues are questioning whether they should take the same approach.[45]

After establishing a strong fan base, Netflix was able create its own content and maintain distribution control.[46] Other networks are following suit and have begun to maintain ownership of their content, providing access through their own in-house platforms.[47] In response to the increase in the markets' use of streaming, other networks, websites, and apps, such as Facebook, Amazon, Twitter, and Yahoo, have joined the streaming revolution with an eye towards live streaming sporting events.[48] Ultimately, this is further proof of the demand for live streams of sporting events and the

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prime example as it models itself as the "world's leading sports business, media and entertainment company." *Id.* (quoting NFL's 2011 internship and entry level programs information). Further, the NFL "controls America's favorite sport with a business model that is the envy of all other professional sports leagues." *Id.* (citation omitted) (internal quotation marks omitted) (suggesting NFL's view of itself goes further than outsiders' opinions).

44. *See id.* (discussing how NFL keeps "not only traditional broadcasting game coverage" for itself, but also "all elements used by journalists to report on sports," such as audio and video coverage, and in game updates).

45. *See* Sara Fischer, *AT&T to Launch a Netflix Competitor Late 2019*, AXIOS (Oct. 10, 2018), https://www.axios.com/att-launch-new-streaming-service-in-late-2019-06574ea7-5ed6-4b38-9323-f7cf9ea7bd34.html [https://perma.cc/R8KW-LQJ2] (explaining new plans for "direct to consumer" streaming); *see also* Fischer, *supra* note 4 (stating "Netflix and Amazon currently lead the pack," but pointing out AT&T and Disney's plans to provide streaming content in near future); Karl Bode, *The Rise of Netflix Competitors Has Pushed Consumers Back Toward Piracy*, MOTHERBOARD (Oct. 2, 2018, 2:21 PM), https://motherboard.vice.com/en_us/article/d3q45v/bittorrent-usage-increases-netflix-streaming-sites?utm_source=reddit.com [https://perma.cc/JP8M-RFBY] (discussing Disney's decision to remove its content from Netflix and begin its own streaming service). "Studies have shown that nearly every major broadcaster will have launched their own streaming service by 2022. And these companies are increasingly choosing to *keep their own content as in-house* exclusives in order to drive subscriptions." *Id.* (emphasis added) (suggesting moving content in-house makes sense to drive up subscribers when content is better and exclusive). For further discussion of sports leagues' decision on streaming content, see *infra* notes 187–285.

46. *See* Fischer, *supra* note 4 (examining Netflix's subscription video service). For further discussion of Netflix, see *supra* notes 7–10, 40, and 45 and accompanying text.

47. *See, e.g.*, Fischer, *supra* note 40 (reporting on Disney's interest in controlling its platform, including its subsidiary ESPN+). For further discussion of other similar streaming platforms, see *supra* notes 7–10, 40, and 45 and accompanying text.

48. For further discussion of these non-traditional broadcasting companies' opportunities, see *supra* notes 13–15, *infra* notes 199–201, 240–243 and accompanying text.

wide audience sports leagues could reach if they allowed these sites to stream their content.[49]

Prior to discussing how live streaming is changing the consumption of sporting events, it is necessary to discuss the history of sports broadcasting and how leagues have handled broadcasting issues in the past.[50] This Comment addresses the history to predict how leagues will likely react to current live streaming disputes and how leagues *should* react to such disputes.[51] The history of sports broadcasting shows how coverage of sporting events has developed to where it is now and conclusively suggests the direction it may continue to move towards—a direction focusing on the consumers and easy access to content.[52] Section II of this Comment provides background on the development of live streaming.[53] Section II also examines major intellectual property legislation through the Sports Broadcasting Act and copyright law.[54] Section III of this Comment analyzes the most significant trends in live streaming, including how consumers are protected under specific policies.[55] Section III also looks at boxing which has embraced streaming to air content as well as lessons from the sport's past issues.[56] Ultimately, Section IV of this Comment argues that leagues should embrace live streaming because it helps them engage directly with consumers via internet providers, mobile devices, apps, and easy access to content.[57]

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49. *See* PwC SPORTS OUTLOOK, *supra* note 8, at 12 (reporting next generation of consumer demands focuses on "tech giants").

50. For further discussion of the development of sports broadcasting, see *infra* notes 58–105 and accompanying text.

51. For further discussion of changes in coverage of sporting events and the development of sports broadcasting, see *supra* notes 10–45 and *infra* notes 58–155 and accompanying text.

52. For further discussion of sports broadcasting development, see *infra* notes 58–79 and accompanying text.

53. For further discussion of the background of streaming, see *infra* notes 58–79 and accompanying text.

54. For further discussion of sports broadcasting law and other legislation protecting such content, see *infra* notes 80–157 and accompanying text.

55. For further discussion of trends in live streaming and consumers' protection, see *infra* notes 160–198 and accompanying text.

56. For further discussion of sports broadcasting trends, see *infra* notes 160–286 and accompanying text.

57. For further discussion of how leagues should react, see *infra* notes 287–300 and accompanying text.

II. BACKGROUND: EXPLAINING LEAGUES' HESITANCIES TO CHANGE THROUGH ANTITRUST LAWS, COPYRIGHT LIMITATIONS, AND INTELLECTUAL PROPERTY RIGHTS

To understand how streaming has developed in the sports industry, it is helpful to explore prior protective actions leagues have taken to control the availability of their content on different networks.[58] Sports coverage has existed throughout modern history.[59] Technological developments, including the introductions of the radio and television, have boosted consumer and advertiser interests in sports.[60] In the late twentieth century, technological innovations prompted changes in legislation and caselaw, pushing broadcasting towards its current form.[61] As a result of these technological advancements, broadcast networks are willing to pay increasing amounts to claim the exclusive rights to air sporting events, thereby boosting leagues' revenue.[62] For example, the NFL entered into agreements with CBS, Fox, NBC, and ESPN from 2014 to 2022 for nearly forty billion dollars.[63] The National Basketball Association ("NBA") agreed to contracts with ESPN and TNT from 2016 to

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58. *See generally* Edelman, *supra* note 16, at 470–77 (addressing history of live streaming technology); *see also* Mathews, *supra* note 1, at 203–209 (discussing history of sports broadcasting rights).

59. *See* Corey Nachman & Dashiell Bennett, *14 Innovations That Changed Sports Broadcasting Forever*, BUS. INSIDER (Apr. 17. 2011, 4:26 PM), https://www.businessinsider.com/evolution-how-we-watch-sports-2011-4 [https://perma.cc/6E38-Z7FW] (describing history of sports coverage beginning with widespread radio broadcasts in 1920s, baseball coming to television in 1939, and sports programming in color in 1955).

60. *See* Jeremy M. Evans, *We Have Come Full Circle: Where Sports Franchises Derive Their Revenue*, 33 ENT. & SPORTS LAW 12 (2017) (discussing broadcasting revenue for sports and noting television was invented in 1920s but larger television contracts began in 2000s). For further discussion of advertisers' interests, see *supra* note 7 and accompanying text.

61. For further discussion of historical advancement in technology and sports broadcasting, see *supra* notes 58–60 and accompanying text.

62. *See* Evans, *supra* note 60, at 12–13 (reviewing revenue sources from broadcasting deals).

63. *See* Nitin Bhandari, *Top 10 Largest Sports League TV Contracts Ever*, THE RICHEST (Nov. 23, 2013), https://www.therichest.com/sports/the-largest-sports-league-tv-contracts-ever/ [https://perma.cc/A2CY-XJPV] (noting for 2014, Fox's NFL contract worth $1.1 billion per year, CBS's NFL contract worth $1 billion per year, and NBC's NFL contract worth $950 million per year); *cf. Top 10 Biggest TV Rights Deals in Sports*, TOTAL SPORTEK (Jan. 19, 2017), https://www.totalsportek.com/money/biggest-tv-deals-sports/ [https://perma.cc/M732-6DY9] (depicting total worth of NFL's broadcasting deals as $39.6 billion). Notably, the NFL's largest contract appears to be ESPN's deal to air Monday Night Football, which is worth $1.9 billion per year. *See* Bhandari, *supra* note 63 (pointing out largest sports broadcasting contract).

2025 for twenty-four billion dollars.[64] The MLB signed a deal with Fox, TBS, and ESPN from 2014 to 2022 for just over twelve billion dollars.[65] The revenue from these contracts is split among the franchises in each league.[66] These contracts also depict the larger deals within the respective sports leagues, which do not include the many regional and local television station contracts that also broadcast games.[67] The revenue generated from broadcasting deals is expected to increase as "internet television outlets" like Netflix, YouTube, and even Twitter and Facebook, begin to broadcast sporting events.[68] Streaming live sports through different mediums presents an opportunity to reach more viewers, which is important for advertisers.[69] In 2015, the NFL took advantage of this opportunity when it streamed its first game accessible solely through the internet on Yahoo.[70]

64. *See* Bhandari, *supra* note 63 (noting Disney, parent company of ESPN and ABC, deal with NBA for $485 million per year, and TNT's deal with NBA for $445 million per year); *cf.* TOTAL SPORTEK, *supra* note 63 (stating NBA's total broadcasting deal worth $24 billion).

65. *See* Bhandari, *supra* note 63 (providing Fox's deal with MLB for $500 million per year); *cf.* TOTAL SPORTEK, *supra* note 63 (stating MLB's total broadcasting deals with Fox, TBS, and ESPN amount to $12.4 billion).

66. *See* Evans, *supra* note 60 (highlighting interest each franchise has in such contracts). Compare the amounts of these contracts with the fact the NFL generates about $14 billion per year. *See* Daniel Kaplan, *NFL Revenue Reaches $14B, Fueled By Media*, SPORTS BUS. J. (Mar. 6, 2017), https://www.sportsbusinessdaily.com/Journal/Issues/2017/03/06/Leagues-and-Governing-Bodies/NFL-revenue.aspx [https://perma.cc/76FH-QP89] (reporting $900 million increase compared to 2016 mostly due to media presence); *see also* Stephen J. Dubner, *How Sports Became Us*, FREAKONOMICS RADIO (Sept. 12, 2018), *available at* http://freakonomics.com/podcast/sports-ep-1/ [https://perma.cc/S7DS-DJFL] (discussing NFL's revenue with Victor Matheson, who states NFL generates $14 to $15 billion per year).

67. *See* Evans, *supra* note 60 (detailing one MLB team, Los Angeles Dodgers, has $8.3 billion contract to air games over twenty-five-year period with Time Warner Cable). Regional and local broadcast coverage is successful because "regional sports networks are money-printing operations that heavily promote the teams they carry and play on the loyalties and wallets of local fans." Richard Sandomir, *Regional Sports Networks Show the Money*, N.Y. TIMES (Aug. 19, 2011), https://www.nytimes.com/2011/08/20/sports/regional-sports-networks-show-teams-the-money.html [https://perma.cc/R4CW-ARWQ] (indicating large presence of local television station contracts).

68. *See* Evans, *supra* note 60 (stating "revenues will likely only grow" as streaming services get involved). As more consumers prefer to watch sporting events live, and streaming is becoming more accessible, "live sports telecast has become increasingly valuable real estate for advertisers desperate for eyeballs." Kaufman, *supra* note 3 (noting absence of commercial-free options).

69. *See* PWC SPORTS OUTLOOK, *supra* note 8, at 11 (discussing NFL's streaming partnership with Amazon as "giv[ing] TV providers an opportunity to generate incremental advertising dollars through these partnerships").

70. For further discussion of the NFL's first streamed game, see *infra* note 244 and accompanying text.

The Sports Broadcasting Act of 1961 ("SBA") is the best place to start in an examination of the advancements in streaming sports.[71] Sports broadcasting law has been fairly unchanged since Congress enacted the SBA because it provides immunity for leagues from federal antitrust broadcasting regulations.[72] In recent years, leagues have faced suits regarding broadcast agreements focusing on blackout restrictions, or actions banning events from airing in particular markets due to league broadcasting contracts with local markets.[73]

Blackout restrictions have led some consumers to pirate or illegally stream sporting events.[74] At the same time, sports leagues are opening the door to streaming more content, given the leagues are the ones providing the content.[75] Leagues should not be hesitant to provide streaming content because the SBA gives them the upper hand in distributing and controlling content.[76] Further, the

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71. *See generally* Sports Broadcasting Act of 1961, Pub. L. No. 87–331, 75 Stat. 732 (codified as amended at 15 U.S.C. §§ 1291–1295 (2006)). For further discussion of the importance of the SBA, advancements in sports broadcasting, and how it developed, see *infra* notes 80–105 and accompanying text.

72. *See* Mathews, *supra* note 1, at 203 (focusing on four major American professional sports leagues: football, hockey, basketball, and baseball).

73. *See id.* (noting league's "agreements were alleged to be in violation of federal antitrust laws" as restrictions limited viewers and increased price); *see generally* Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (reviewing blackout restriction case for NHL, holding plaintiffs adequately alleged participation of conspiracy to geographically divide market, but failed to state claim for conspiracy to monopolize market for video presentation and internet streaming of games); Garber v. Office of the Comm'r of Baseball, 120 F. Supp. 3d 334 (S.D.N.Y. 2014) (reviewing blackout restriction case for MLB); Trilogy Holding v. Nat'l Football League, Inc., 2:15CV10000 (S.D.N.Y. 2015) (reviewing blackout restriction case for NFL); William F. Saldutti IV, *Blocking Home: Major League Baseball Settles Blackout Restriction Case; However, a Collision with Antitrust Laws is Still Inevitable*, 24 JEFFREY S. MOORAD SPORTS L.J. 49 (2017) (examining blackout restrictions in MLB).

74. *See generally* Erik Malinowski, *WTF MLB? Baseball Strikes Out with its Streaming Policies*, ROLLING STONE (Jun. 5, 2015), http://www.rollingstone.com/ sports/ features/wtf-mlb-baseball-strikes-out-with-its-streaming-policies-20150605 [https:// perma.cc/8HJH-R3LS] (discussing use of proxy websites to mask where content is viewed); Bode, *supra* note 45 (reviewing why consumers pirate content in general, because, "an increase in exclusivity deals [ ] force subscribers to hunt and peck among a myriad of streaming services to actually find the content they're looking for").

75. *See generally* Mathews, *supra* note 1 (reviewing streaming in sports); *see also* Stephen W. Dittmore & Brett Hutchins, *Privilege Over Innovation: Sports Broadcasting, Mobile Television, and the Case of Aereo*, 27 J. LEGAL ASPECTS SPORT 3 (2017) (examining abilities of streaming apps to share sports leagues' content). For further discussion of significance of maintaining distribution of content, see *supra* notes 40–47 and accompanying text.

76. *See* Dittmore & Hutchins, *supra* note 75, at 6–8 (analyzing streaming apps under Copyright Act of 1976 and who has control of streamed content).

Copyright Act of 1976 and the Digital Millennium Copyright Act bolster the protection leagues receive from the SBA.[77] Leagues have struggled with how to best approach issues of streaming given their legal abilities to restrict consumers' access to content compared to the increase in availability to stream content and consumers' demands.[78] The major debate underlying changes in sports broadcasting is the antitrust law which seeks to "prevent monopolies," versus the intellectual property and copyright laws which seek to "enshrine" monopolies.[79]

A. Sports Broadcasting Act: Package and Monopolize

The SBA created the cable television bundle currently dominating broadcasts of professional sports.[80] The SBA was enacted in response to contract disputes between the NFL, the American Football League ("AFL"), and separate broadcasting stations.[81] Specifically, the SBA was formed in response to two lawsuits against the NFL in which the respective courts held the sale of packaged televised games to CBS violated Section 1 of the Sherman Antitrust Act.[82]

1. *The 1953 and 1961 Cases*

In *United States v. National Football League*,[83] the first lawsuit in 1953 (hereinafter "the 1953 case"), a dispute arose over the NFL's

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77. *See id.* (discussing Copyright Act of 1976). For further discussion of streaming services' abilities under the Digital Millennium Copyright Act, see *infra* notes 148–149 and accompanying text.

78. For further discussion of the leagues' dilemma with approaching streaming, see *supra* notes 16–45 and accompanying text.

79. *See* Johnson, *supra* note 41, at 761–62 (noting surprise sports leagues took so long to embrace intellectual property rights, because "it has always been a foregone conclusion that, as a business, sports would run headlong into antitrust issues"). Sports leagues are now more focused on intellectual property law since it provides a "sanctioned escape" from antitrust law. *See id.* ("The legal concepts of antitrust and [intellectual property] are each other's yin and yang.").

80. *See* Dittmore & Hutchins, *supra* note 75, at 6 (referring to congressmen reflecting on impact of SBA).

81. *See* PwC SPORTS OUTLOOK, *supra* note 8, at 12 ("The AFL-NFL merger wouldn't have happened if the AFL had not secured a broadcast deal with NBC . . . .").

82. *See generally* Steven Perry, *Home Run or Strikeout? The Unsettled Relationship Between the Sports Broadcasting Act and Cable Programming*, 25 No. 2 COMPETITION: J. ANTI., UCL & PRIVACY SEC. ST. B. CAL. 20, 21, *available at* https://www.mto.com/Templates/media/files/Reprints/Steve%20Perry/Home%20Run%20or%20Strikeout_Article_Fall%202016.pdf [https://perma.cc/GYB9-QUA3] (referring to AFL and NFL dispute of packaged deals).

83. 116 F. Supp. 319 (E.D. Pa. 1953).

newly proposed bylaws.[84] The issue revolved around what are now known as "blackout restrictions."[85] After the 1953 case, each NFL team entered into agreements with networks for television rights.[86] Prior to the second case in 1961, the NFL entered into a contract with CBS, and the AFL signed a five-year contract with ABC to air all league games.[87] In 1961, in *United States v. National Football League*,[88] the second suit of the same name (hereinafter "the 1961 case"), a district court ruled the NFL's attempt to package broadcasting rights to CBS violated Section 1 of the Sherman Antitrust Act.[89] In the 1961 case, the NFL asked the district court from the 1953 case to allow the league's proposed agreement with CBS, but the court declined to do so.[90] The court held the NFL teams "eliminated competition among themselves in the sale of television rights, in violation of a provision in the final judgment that barred restrictions."[91]

2. *Enactment of the SBA*

A few months after the 1961 case, Congress enacted the SBA.[92] The SBA allows a sports league to control all copyrighted broadcasting under the particular league's name.[93] The purpose of the SBA

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84. *See generally id.* at 327–39 (detailing new bylaws for broadcasting games); *see also* Perry, *supra* note 82, at 21–23 (discussing 1953 case).

85. *See* Perry, *supra* note 82, at 23 n.20 (referring to how Congress's "final judgment [ ] allow[ed] restrictions on the telecasts of games in the home territory of a team that was playing at home that day").

86. *See id.* (discussing result of 1953 case).

87. *See id.* (noting AFL later merged with NFL).

88. 196 F. Supp. 445 (E.D. Pa. 1961).

89. *See id.* at 447 (reviewing NFL's broadcasting plan with CBS).

90. *See id.* (addressing discrepancy between two leagues and what each league was capable of).

91. *Id.* (internal quotation marks omitted) (quoting United States v. Nat'l Football League, 196 F. Supp. 445, 447 (E.D. Pa. 1961)).

92. *See generally* United States v. Nat'l Football League, 196 F. Supp. 445 (publishing opinion on July 20, 1961); *see also* 15 U.S.C. §§ 1291–1295 (being originally enacted on Sept. 30, 1961). Once the SBA was enacted, leagues were able to obtain control over the distribution of their sporting events, and the individual teams, clubs, and organizations "agreed not to compete in business matters related to the video presentation of live major-league . . . games." Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 473 (S.D.N.Y. 2012) (quoting Compl. at ¶ 5[7], Laumann, 907 F. Supp. 2d (No. 1:12-CV-01817), and Compl. at ¶ 8, Garber v. Office of the Comm'r of Baseball, 120 F. Supp. 3d 334 (S.D.N.Y. 2014) (No. 1:12-CV-0374)).

93. *See* Eric Gebert, *The Long Arm of the National Football League: Is the NFL's Copyright Policy Violating the Rights of Its Fans and Franchises?*, B.C. IP & TECH. FORUM, at 7 (2017), *available at* http://bciptf.org/wp-content/uploads/2017/02/Blog-The-Long-Arm-of-the-National-Football-League-Gebert.pdf [https://perma.cc/2MVF-J34Q] (citing *Directorate for Financial and Enterprise Affairs, Roundtable on Com-*

is to avoid antitrust laws, and it accomplishes this by allowing teams within sports leagues to combine their rights.[94] Combining leagues' rights results in telecasting games in a "package of pooled rights to a television network or other purchaser without thereby violating the antitrust laws."[95] The sporting leagues then use their market power through the antitrust exemption to package broadcast deals.[96] Notably, the AFL operated under this setup already, yet the 1953 case prohibited the NFL from doing so, which eventually prompted the 1961 case.[97]

3. *Function of the SBA Today*

Sports leagues urged Congress to enact the SBA because it would allow "the leagues to stay financially solvent amid technological innovation that permitted teams in larger markets to realize more broadcasting revenue than teams in smaller media markets."[98] Since its enactment, courts have held the SBA applies strictly to free commercial television and not to contracts with paid-for television.[99] "Free commercial television" includes networks

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petition and Sports, FED. TRADE COMM'N 1, 8. (June 8, 2010)); *see also* Johnson, *supra* note 41, at 773 (noting antitrust exemption to sports leagues allows leagues to pool broadcast rights as one package).

94. *See* 108 Cong. Rec. at 20059–60 (1961), *available at* https://www.govinfo.gov/content/pkg/GPO-CRECB-1961-pt15/pdf/GPO-CRECB-1961-pt15-4-2.pdf [https://perma.cc/F77L-HLPT] (discussing bill to amend antitrust laws to allow leagues to enter into television contracts).

95. *Id.* at 20059 (quoting Rep. Cellar).

96. *See* Dittmore & Hutchins, *supra* note 75, at 4 (discussing leagues' strong market control).

97. *See* Perry, *supra* note 82, at 23 (reviewing NFL's proposal to ask for judicial permission to contract with CBS in 1961). In a discussion on Congress's intent and this issue in 1961, one representative was quoted as saying:

> [T]he members of a professional sports league cannot lawfully act in concert to assure member clubs with weak teams or limited home territory television markets an adequate amount of television income and of television coverage for games played away from home. Yet, should these weaker teams be allowed to f[l]ounder, there is danger that the structure of the entire league would become impaired and its continued existence imperiled.

108 Cong. Rec. at 20060 (referring to Rep. Cellar's discussion on how H.R. 9096 is needed to supersede the 1953 and 1961 cases).

98. Dittmore & Hutchins *supra* note 75, at 11 (noting lobbyist attempts in Congress).

99. *See* Perry, *supra* note 82, at 20–21, 28–30 (relying on Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593 (7th Cir. 1996) and Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299 (3d Cir. 1999)). Specifically, the *Shaw* case on remand interpreted that the Court of Appeals "did not address whether broadcasting the games on the *Internet or cable television* was an exempt activity under the SBA, but only found that *satellite broadcasts* of NFL games were not exempted." Schwartz v. Dallas Cowboys Football Club Ltd., 157 F. Supp. 2d 561, 577 (E.D. Pa. 2001) (first emphasis added) (discussing narrower approach contrary to

like NBC and CBS, whereas paid-for television includes networks like TNT and ESPN.[100] Sports leagues may decide "to move their content to pay cable distributors," but the leagues would lose their exemption from antitrust laws under the SBA.[101]

Even with all of the legislation surrounding the SBA, only a small number of courts have examined whether sports broadcasting agreements with a league are exempt from antitrust laws under the SBA.[102] However, statutory interpretation does suggest the SBA exemptions apply to basic programming specifically.[103] Currently, due to antitrust exemptions, leagues are able to negotiate as a whole rather than through individual teams and organizations.[104] Ultimately, the SBA highlights the old-school style of leagues resisting change: package a deal and control the market.[105]

B. Copyright Act of 1976: Protect and Collect

1. *Enactment of the Copyright Act*

While the SBA gave leagues the ability to negotiate deals, the Copyright Act of 1976 (hereinafter "the Copyright Act") provided protection in the form of licensing for certain forms of media and

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broad interpretation of current parties, and noting Charles Shaw's dismissal as class representative, replaced by Bret D. Schwartz).

100. For further discussion of paid-for television, see *infra* notes 103, 132–136, and accompanying text.

101. *See* Dittmore & Hutchins, *supra* note 75, at 14 (expressing leagues' interests in preventing live streaming apps to keep antitrust status).

102. *See* Perry, *supra* note 82, at 20 ("[C]ontrary to what various commentators have assumed, no court has ever held that leaguewide agreements that license sports programming on basic cable channels are, or are not, exempt from the antitrust laws under the SBA.").

103. *See id.* at 20, 23–28 (relying on statutory interpretation in Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 808 F. Supp 646 (N.D. Ill. 1992)). "Since antitrust exemptions must be characterized narrowly, we conclude that TNT, like ESPN, falls outside the statutory meaning of 'sponsored telecasting.'" *Chi. Prof'l Sports*, 808 F. Supp. at 650 (reviewing historical interpretation of SBA's intent of "sponsored telecasting" in 1961 and determining it referred to free television, which TNT is not). "While telecasting on TNT may be considered sponsored telecasting because TNT does receive some revenues from advertising in addition to subscription fees, pure subscription or pay-per-view telecasts clearly are not considered sponsored telecasting." Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 874 F. Supp. 844, 856 n.12 (N.D. Ill. 1995) (citation omitted) (discussing how SBA only applies to agreements regarding "sponsored telecasting"), *vacated*, 95 F.3d 593 (7th Cir. 1996).

104. *See* Johnson, *supra* note 41, at 764 (discussing NFL's ability to negotiate as whole under the SBA and 15 U.S.C. § 1291, et seq. (2006)).

105. For further discussion of the SBA's application, see *supra* notes 80–104 and accompanying text.

produced works, including sports broadcasting rights.[106] Surprisingly, many leagues did not utilize the Copyright Act right away, most likely because of their antitrust exemption and because it is unnecessary to file a copyright to ensure protection of one's work from individuals illegally copying and reproducing material.[107] The Copyright Act is the basis for most copyright claims, and its text "ma[kes] specific reference to simultaneously recorded transmissions of live sporting events being 'fixed'" and copyrightable.[108] The Copyright Act protects "original works of authorship fixed in any tangible medium of expression . . . from which they can be *perceived, reproduced, or otherwise communicated*."[109] Moreover, the Copyright Act provides "copyright owners the exclusive right to perform or license the performance of copyrighted works publicly."[110] Ultimately, the Copyright Act is meant to ensure fair protection and return, typically monetary value through licensing or royalties, for a creative work.[111]

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106. *See generally* 17 U.S.C. § 101 (2018) (providing forms of media and produced works). For further discussion of enacting the Copyright Act of 1976, see *infra* notes 108–142 and accompanying text.

107. *See* 17 U.S.C. § 106 (detailing uncopyrighted material is still protected). For further discussion of protecting practices of copyrighted work, see *infra* note 122 and accompanying text.

108. *See generally* 17 U.S.C. § 101 (illustrating copyright law); *see also* Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) (addressing history of copyright disputes centered on Copyright Act). Notably, the Copyright Act of 1976 is an amendment that overturned two Supreme Court cases, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) and Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974). *See* Am. Broad. Co., Inc. v. Aereo, Inc., 573 U.S. 431, 437–43 (2014) (detailing Congress' intent of enacting Copyright Act of 1976 and specific changes made). The 1976 amendments resulted in three main changes: (1) determining both broadcasters and viewers "'perform,' because they both show the program's images and make audible the programs sounds"; (2) enacting the Transmit Clause, which depicts when an entity performs publicly; and, (3) "*regulat[ing] cable companies' public performances of copyrighted works*," including detailing complex licensing scheme and fees. *Id.* (emphasis added). Further, according to the court in *Aereo*: "Congress made these three changes to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act." *Id.* For further discussion of the Transmit Clause, see *infra* notes 124–125 and accompanying text.

109. 17 U.S.C. § 102 (emphasis added) (portraying works protected under copyright law).

110. Dittmore & Hutchins *supra* note 75, at 6 (describing specifically Section 106 of 1976 Act).

111. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (allowing authors and inventors exclusive right to their work under United States Constitution). Article I, Section 8 of the United States Constitution states Congress has the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. ART. I, § 8.

2. *Examples of the Copyright Act's Protections*

Providing real accounts of a live game without authorization of a league does not violate the Copyright Act.[112] Specifically, in *National Basketball Ass'n v. Motorola, Inc.*,[113] the Second Circuit held the Copyright Act does not protect the actual NBA basketball games or the source of the information created during the games, such as the statistics and results.[114] The Second Circuit reasoned athletic events and performances do not constitute original works under the Copyright Act.[115] Sporting events themselves are not original works of authorship, because the sporting event is competitive with "no underlying script."[116] Broadcasting, on the other hand, is an original authorship which is fixed via video recording.[117] Congress made this distinction clear when it determined authorship includes a sporting event covered with multiple cameras, "with a director guiding the activities of the [ ] cameramen and choosing which of their electronic images are sent to the public and in what order."[118] Other examples of protected work under the Copyright Act include literary, musical, and dramatic works, as well as pantomimes, choreography, pictorial works, motion pictures and other audiovisual works, sound recordings, and architecture.[119] This list is not exhaustive, nor is the protection boundless, because "the Copyright

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112. *See* Matthew J. Mitten, *A Triple Play for the Public Domain: Delaware Lottery to Motorola to C.B.C.*, 11 CHAP. L. REV. 569, 571 (2008) (citing *Motorola, Inc.*, 105 F.3d at 847) (referring to information created by sporting events not protected under copyright law).

113. 105 F.3d 841 (2d Cir. 1997).

114. *See id.* at 845 (pointing out accounts and results of event).

115. *See id.* (distinguishing original works).

116. *See id.* at 846–47 (explaining why sports are not original works of authorship but broadcasted coverage is); *see also* Edelman, *supra* note 16, at 481 ("A sporting event in itself does not generally constitute an 'original work of authorship' because sporting events 'are competitive and have no underlying script.'" (quoting *Motorola, Inc.*, 105 F.3d at 846)).

117. *See* Edelman, *supra* note 16, at 479 ("Generally, there is little doubt that televised broadcasts of traditional sporting events constitute 'original works of authorship' because the camera angles chosen for the broadcast and the manner of game announcing both entail at least 'a modicum of creativity.'" (quoting Feist Publn's, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991)).

118. H.R. REP. NO. 94-1476, at 52 (1976) (describing how football games are covered by four cameras with resulting broadcast representing authorship); *see also Feist Publn's, Inc.*, 499 U.S. at 346 (explaining "originality requires independent creation plus a modicum of creativity" including camera angles chosen and sports reporting).

119. *See generally* 17 U.S.C. § 102(a) (listing examples).

Act allows courts sufficient flexibility to protect other types of works."[120]

3. *Additional Legislation and Ongoing Challenges Under the Copyright Act*

The NFL appears to have begun "requir[ing] a copyright assignment as part of a telecast deal" in 1983 with the Copyright Office.[121] Notably, registration is considered good practice but is not required to maintain copyright ownership, although today the NFL consistently files copyrights.[122] Many sports leagues, including the NFL, provide warnings via announcements to notify listeners and viewers they are prohibited from retransmitting or reproducing copyrighted material.[123] The Copyright Act defines "transmit" as communication by a "device or process whereby images or sounds are received beyond the place from where they are sent."[124] Congress added the Transmit Clause to the Copyright Act to emphasize that when an entity provides coverage of an event, the public receives a transmission of the event.[125]

The Copyright Act also led to additional legislation to regulate transmissions, costs, and competition among providers.[126] For example, the Cable Television Consumer Protection and Competition Act of 1992 requires programming distributors, such as Verizon or AT&T through DirecTV, to obtain permission from broadcasters like ABC and CBS before they can carry the broadcaster's pro-

120. Edelman, *supra* note 16, at 478 n.52 (internal quotation marks omitted) (quoting H.R. REP. NO. 94-1476, at 52) (discussing how list exemplifies what bill is intended to protect, but list is not exhaustive).

121. Johnson, *supra* note 41, at 764–65 (noting copyright records before 1978 were not available in electronic database, but "starting in 1983, Copyright Office records reflect increasing registrations for television game coverage").

122. *See id.* at 765 (pointing out NFL had twelve games registered in 1983, but "now has a consistent practice of registering each and every game telecast"); *see also* 17 U.S.C. § 106 ("The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

123. *See* Kirk Biglione, *Warning: Those Copyright Warnings May Not Be Entirely Accurate*, MEDIALOPER (Aug. 2, 2007), http://medialoper.com/warning-those-copyright-warnings-may-not-be-entirely-accurate/ [https://perma.cc/2QX6-69XN] (reporting specifically on NFL and MLB, and providing example of warnings: "This copyrighted telecast is presented by authority of the Office of the Commissioner of Baseball. It may not be reproduced or retransmitted in any form, and the accounts and descriptions of this game may not be disseminated without express written consent").

124. 17 U.S.C. § 101 (referring to what is known as Transmit Clause).

125. *See* Dittmore & Hutchins, *supra* note 75, at 8 (indicating importance of defining transmission).

126. For further discussion of examples of issues covered by additional legislation, see *infra* notes 127–131 and accompanying text.

gram.[127] Programming distributors could include broadcasters under a "Must Carry" rule, thereby requiring a distributor with a certain number of "channels [to] set aside one-third of their channel capacity for local, free-to-air broadcasters."[128] If the broadcasters permit distributors to share their programming, it is known as "retransmission consent" or "carriage fees."[129] Retransmission fees for sporting events are extremely expensive because of the large audience and competition to obtain the rights.[130] A 2012 example details this process:

> Sunbeam Television Corporation operates WHDH, the NBC affiliate in Boston. On January 14, 2012, Sunbeam denied DirecTV access to its signal after DirecTV refused to pay a 300% increase in retransmission fees. The timing of the blackout occurred before popular NFL divisional playoff games. The dispute was settled on January 27, one week before the New England Patriots played in Super Bowl 46, a game for which NBC had broadcast rights.[131]

Currently, broadcast networks such as NBC, ABC, and CBS bid on rights to obtain exclusive content for sporting events.[132] Professional sports leagues have threatened to broadcast events on paid cable networks, including networks like ESPN and TNT, in order to avoid copyright infringements and make it more difficult to copy content on free-to-air broadcasters.[133] Many sporting events "have

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127. *See* Dittmore & Hutchins, *supra* note 75, at 8 (introducing retransmission fees and how video programming distributors developed their network).

128. *Id.* at 8–9 (noting in 1992 "some 40% of U.S. households relied on free-to-air broadcasters").

129. *See id.* at 9 (introducing terminology from course of business with distributors).

130. *See id.* (discussing how debate of consent for retransmission is often centered around live sports content).

131. *Id.* (providing example of retransmission fees and debates of retransmission consent).

132. *See id.* at 9–10 (introducing existing business models currently used by television networks with sports leagues); *see also* Cecilia Kang, *Bidding War Between Networks, Sports Leagues Will Increase Price of Cable TV*, WASH. POST (Jan. 23, 2015), https://www.washingtonpost.com/business/economy/bidding-war-between-networks-sports-leagues-will-increase-price-of-cable-tv/2015/01/23/d0cb19f4-9db8-11e4-a7ee-526210d665b4_story.html?utm_term=.feff5aed61bd [https://perma.cc/M2A5-VHMC] (reporting on networks like CBS, Fox, and TNT, bidding to air events on their stations, resulting in increased prices due to "the growing number of sports channels all bidding for the right to air popular events").

133. *See* Dittmore & Hutchins, *supra* note 75, at 11 (suggesting major sporting events would be made more restrictive on paid for networks because streaming services "cannot hijack and exploit their programming without authorization" (quoting Brief of Nat'l Football League and Major League Baseball as Amici Cu-

already moved to national and regional cable sports net[works]," but if courts rule against leagues in cases involving allegations of illegal streaming of events, leagues will "stampede" to paid-for networks.[134] However, if all sports move to paid cable networks, news outlets speculate this could lead to the "end of sports on free TV."[135] At the same time, many consumers are dropping cable bundles such as ESPN, which "lost an average of 10,400 subscribers a day between February 2016 and May 2016."[136]

One example of a recent case where the Supreme Court began addressing this issue is *American Broadcasting Co. v. Aereo, Inc.*[137] In *Aereo*, the Supreme Court sided with two sports leagues, the NFL and MLB, after the lower courts held for Aereo, a streaming service app.[138] The NFL and MLB argued the foundation of Aereo's business model takes broadcast retransmission rights and gives them to "unlicensed commercial strangers that inefficiently engineer distribution systems to avoid copyright liability"—a direct violation of the Copyright Act.[139] The Court defended the two leagues' abilities to prevent Aereo from providing sporting event content under free-to-air broadcasters, such as ABC, the party that initiated the suit.[140] The *Aereo* case highlights the central issue today's sports leagues and broadcasters face with illegal streaming: anyone may obtain access to the transmission and may thereby infringe on broadcasters' copyrights.[141] Sports leagues are protected under the Copyright

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riae Supporting Petitioners, Am. Broad. Co., Inc. v. Aereo, Inc., 573 U.S. 431 (2013) (No. 13-461))).

134. John Eggerton, *Leagues to Supremes: Aereo "Package" Is Game Breaker*, BROAD. CABLE (Mar. 10, 2014), http://www.broadcastingcable.com/news/ washington/leagues-supremes-aereo-package-game-breaker/129702 [https://perma.cc/SD54-FT2K] (discussing leagues' opposition to streaming service Aereo); *see also* Dittmore & Hutchins, *supra* note 75, at 11 (reviewing cost perspective of transmission from free-to-air and pay television networks).

135. *See, e.g.*, Dittmore & Hutchins, *supra* note 75, at 11 (providing news headlines from CNN "NFL and MLB: Aereo May Kill Sports on Free TV").

136. *Id.* at 14 (suggesting leagues may not actually want to produce content on broadcast networks). For further discussion of ESPN's loss in subscribers, see *infra* note 232 and accompanying text.

137. 573 U.S. 431 (2014).

138. *See generally id.* (focusing on NFL's and MLB's Copyright Act complaint).

139. *See* Brief of Nat'l Football League and Major League Baseball in Am. Broad. Co., Inc. v. Aereo, 712 F.3d 676 (2d Cir. 2013) (attempting to preserve existing business model and support retransmission fees) *rev'd and remanded sub nom.* 573 U.S. 431 (2014).

140. *See Aereo*, 573 U.S. at 450–51 (holding for professional sports leagues because Aereo's conduct was within scope of Copyright Act, infringing on sports leagues' rights).

141. *See generally* Dittmore & Hutchins, *supra* note 75, at 6–11 (detailing debate with Aereo and sports broadcasting).

Act, but if illegal streaming increases, the leagues fail to collect from potential viewers.[142]

C. Digital Millennium Copyright Act: Digitize and Stream

The need for new legislation arose as the internet grew into a platform for media and telecom conglomerates to share and produce content.[143] As a result, Congress passed the Digital Millennium Copyright Act ("DMCA") in 1998.[144] The DMCA provided a "compromise between copyright owners and digital content providers" by allowing sports leagues to instruct any party sharing copyrighted material to remove the content.[145] The DMCA criminalizes the production of devices and services intended to share copyrighted material.[146] It also enumerates the rights of owners of copyrighted material and explains how the owners may proceed when they believe their rights have "been infringed, particularly but not limited to, on the Internet."[147]

Title II of the DMCA, separately titled the Online Copyright Infringement Liability Limitation Act, protects internet service providers from liability if they follow "safe harbor guidelines and promptly block access to alleged infringing material."[148] Under Title II, internet service providers must remove copyrighted material when a copyright holder notifies the provider of an infringe-

142. For discussion of leagues' protections under the Copyright Act, see *supra* notes 106–141 and accompanying text.

143. For further discussion of new legislation focusing on internet services, see *infra* notes 145–155 and accompanying text.

144. *See generally* DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (1998); *see also* U.S. Copyright Office, *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, 1, (1998) *available at* http://www.copyright.gov/legislation/dmca.pdf [https://perma.cc/VD3K-SZ6E] (noting date of Act and laying out how DMCA amended Title 17 of United States Code).

145. Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States*, 21 EUR. INTELL. PROP. REV. 236, 237 (1999) (describing NFL's use of removing content).

146. *See* U.S. Copyright Office, *supra* note 144, at 1 (discussing criminal aspects of act).

147. *What Is DMCA?*, DMCA.COM, https://www.dmca.com/faq/What-is-DMCA [https://perma.cc/AE72-WK2L] (last updated Apr. 20, 2017) (addressing obligations and protections).

148. Andrew Rissler, *Fair Use of Foul Balls: Major League Baseball Advanced Media and its Counterproductive Takedown Notices to Fans*, 27 MARQ. SPORTS L. REV. 133, 135 (2016) (describing internet service providers' duty and rights); *see also* Online Copyright Infringement Liability Limitation Act, S. REP. NO. 105-190 (1998) (codified as amended at 17 U.S.C. § 512 (2010)) (discussing and analyzing DMCA generally).

ment.[149] Importantly, under *Viacom International, Inc. v. YouTube, Inc.*,[150] internet service providers are not liable when their users illegally post copyrighted material.[151] In *Viacom*, the court found YouTube had not encouraged users to share copyrighted material, and it ruled similar internet service providers "have no duty to monitor their websites for infringing content posted by their users."[152]

The *Viacom* court based its holding on a provision of Title II requiring the internet service provider to receive immunity as long as it meets three criteria.[153] The provider must: (1) not have actual knowledge the material is infringing; (2) not receive financial benefit from the infringed activity; and, (3) remove material "expeditiously" upon notification.[154] Notably, the Copyright Act of 1976 "eliminated the requirement of notice on the part of the copyright holder, and there is no requirement in the DMCA to issue a takedown notice for every violation to maintain a copyright."[155] At bottom, *Viacom* suggests leagues may be hesitant to provide live streaming content because internet service providers do not need to monitor for users sharing pirated content.[156] However, such concern could be misguided, as DMCA provides the same protection as the Copyright Act, except on the same digital medium where streaming platforms are found.[157] As such, and as the next Section discusses in greater detail, leagues need not fear streaming and the threat of piracy.[158] Congress and the Court have given

149. *See* Rissler, *supra* note 148, at 135 (noting safe harbor provision also includes counter provision for internet service providers when user claims material is not infringing); *see also* 17 U.S.C. § 512 (discussing liability).

150. 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

151. *See id.* at 121 (reasoning provider cannot be liable without prior knowledge of violation).

152. *Id.* (determining YouTube did not have intent to share infringed material); *see also* Rissler *supra* note 148, at 136 (discussing duty to monitor for infringing material).

153. *See* 17 U.S.C. § 512 (requiring, generally, no actual knowledge, no financial benefit, and removal of material); *see also* Rissler *supra* note 148, 136–37 (considering importance of internet service provider having actual knowledge of material infringing on copyright and how service providers lose immunity under § 512).

154. *See* 17 U.S.C. § 512 (listing requirements for immunity).

155. Rissler *supra* note 148, at 139–40 (rejecting argument for adverse possession-like-approach for losing copyright abilities when no takedown notice is issued).

156. For further discussion of *Viacom*, see *supra* notes 149–153 and accompanying text.

157. For further discussion of DMCA's strength, see *supra* notes 143–149 and accompanying text.

158. For further discussion of leagues' fears on piracy and how it should not be considered a threat, see *infra* notes 160–171 and accompanying text.

leagues a wealth of statutes and caselaw to protect their product and to allow them to excel in the streaming market, just like consumers want them to.[159]

III. STREAMING FOR A CONTENT DRIVEN MARKET WHERE SPORTS ARE NO LONGER THE TREND SETTER

Sports leagues currently register every broadcasted game in order to maintain ownership over all televised material.[160] Courts consistently rule leagues are the sole authors of their broadcasts, and these rulings support the leagues' initiative to continually register every broadcasted event in recent years.[161] For example, an unauthorized party could post copyrighted material of an event, such as a live stream link to in-game-content, and the overseeing league could file for an infringement violation against the party.[162] The NFL specifically uses a different approach, opting to send "mass takedown notices" to unauthorized parties who infringe on the League's content.[163] Because these notices are sent in mass form, they fail to distinguish between posts violating copyright law and posts complying with the League's fair use policy.[164]

The NFL could learn from the NBA and MLB in this respect.[165] The NBA focuses on identifying parties who rebroadcast

159. For further discussion of leagues' collective wealth of statutes and caselaw, see *supra* notes 80–152 and accompanying text.

160. *See* Johnson, *supra* note 41, at 765 (discussing NFL's ownership interest of material); *see also* Gebert, *supra* note 93, at 1 (providing example of NFL's "aggressive intellectual property protections" with announcements for every NFL game: "This telecast is copyrighted by NFL Productions for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited"). However, leagues do not need to register their copyrights to maintain ownership. *See* 17 U.S.C. § 102 (1990) (creating automatic copyright protection where authors meet both originality and fixation requirements, but not requiring registration). For further discussion of copyright registration practice, see *supra* note 122 and accompanying text.

161. *See, e.g.*, Dryer v. Nat'l Football League, 814 F.3d 938, 942–45 (8th Cir. 2016) (reasoning for registering broadcasted events under copyright acts); *see generally* 17 U.S.C. § 301(a) (2018) (providing statute indicating who owns material).

162. For further discussion of examples, fair use practices, and violations, see *infra* notes 176–185 and accompanying text.

163. *See* Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J. L. SCI. & TECH. 387, 392, 399–400 (2009) (suggesting too much control by leagues in violation of fair use policy).

164. For further discussion of fair use policy, see *infra* notes 172–187 and accompanying text.

165. *See* Rissler *supra* note 148, at 13 ("[T]he NBA['s] marketing strategy seems to embrace the changes embodied by the new frontier of social media and view it as an ally and an asset.").

full, unauthorized games, "rather than chasing down every little image that may pop up and potentially frustrate its fans."[166] NBA Commissioner, Adam Silver, summarized the league's rationale for using this technique.[167] He said, "We have always believed that fans sharing highlights via social media is a great way to drive interest and excitement in the NBA. . . . Our enforcement efforts are not aimed at fans, but rather are focused on the unauthorized live streaming of our games."[168] The NFL could also follow the example of the MLB, which recently partnered with the social media platform Snapchat.[169] The two collaborated to create "Snapchat Day," where MLB players were allowed to use Snapchat during spring training games to engage with fans and live stream content.[170] The use of social media and sharing of content online is proof leagues can strike a balance to control copyrighted material.[171]

A. Fair Use Policy: Examining Equitable Consumption and Leagues' Unfair Takedown Tactics

The leagues' frequent use of DMCA takedown notices seems to contradict the fair use provisions of the Copyright Act.[172] The fair use provisions allow an individual to use copyrighted material without infringing on the copyright.[173] Fair use is the crux of copyright

166. *See id.* (providing examples of how NBA specifically is avoiding too much control but also encouraging fans to access material).

167. *See* Steven Perlberg, *Deadspin and SB Nation Are Back Tweeting Football GIFs*, WALL ST. J. (Oct. 20, 2015), http://www.wsj.com/articles/deadspin-and-sb-nation-are-back-tweeting-football-gifs-1445357918 [https://perma.cc/5FZ2-BLMP] (reviewing NBA's stance).

168. *Id.* (pointing out how sharing shorter clips and highlights promotes NBA compared to illegally streaming games which hurts revenue). The NBA has also embraced sharing video clips on social media in order to generate more interest in the sport among younger viewers which has been largely successful on such platforms. *See* Roberto A. Ferdman, *What the NBA Gets That the Other Big Sports Leagues Don't*, WASH. POST (Apr. 6, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/06/what-the-nba-getsthat-the-other-big-sports-leagues-dont/ [https://perma.cc/45WJ-CMHY] (discussing use of newer social media platforms).

169. *See* Rissler, *supra* note 148, at 145 (suggesting adding social media in sporting events follows encouraging view for fans' use of social media).

170. *See id.* (providing MLB Commissioner Rob Manfred's desire to share baseball "on as many platforms as possible. And . . . strike a realistic balance between protecting what we regard to be very valuable intellectual property rights on the one hand with allowing fans to use as many platforms as possible").

171. *See id.* (noting skepticism of piracy and issues surrounding fan use).

172. *See* 17 U.S.C. § 107 (2018) (depicting fair use practices). For further discussion of takedown notices violating fair use policy, see *infra* notes 187–192 and accompanying text.

173. *See* Edelman, *supra* note 16, at 478 (referring to fair use as "for a legitimate purpose" and how copyright protection is not boundless); *see also* Rissler,

law because it allows the public to use copyrighted works without asking permission from the copyright holder as long as the use of the material does not "unduly interfere with the copyright owner's market for a work."[174] There are four factors to consider to determine whether a particular use will "unduly interfere" with the copyright owner's rights: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality used in relation to the copyrighted work; and, (4) the effect of the use upon the potential market or value of the copyrighted work.[175]

Under the first factor, the central issue is whether the material differs or has been altered, and whether the alteration is transformative in that it creates a new expression or message.[176] Notably, the fair use provisions of the Copyright Act state "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is *not an infringement* of copyright."[177] This means a consumer may live stream a televised game for non-commercial use, but if the consumer is not streaming the game for an educational purpose or one of the other listed purposes, then the consumer is committing an infringement.[178] If a consumer streams a televised game and is accused of copyright infringement, he or she cannot argue the game is newsworthy and should therefore be protected under the First Amendment.[179] This argument would

supra note 148, at 145–50 (detailing fair use policy and application). For further discussion of fair use, see *infra* notes 174–186 and accompanying text.

174. Fred Von Lohmann, *Unintended Consequences: Twelve Years Under the DMCA*, ELEC. FRONTIER FOUND., at 9 (2010), *available at* https://www.eff.org/files/eff-unintended-consequences-12-years_0.pdf [https://perma.cc/KH7V-WE5J] (referencing fair use ability to use copyrighted material).

175. *See* 17 U.S.C. § 107 (listing factors).

176. *See* Rissler, *supra* note 148, at 148 (detailing purpose and use of material, and how if material is sufficiently different, then there is no infringement).

177. 17 U.S.C. § 107 (emphasis added) (noting what is not considered infringing on copyrighted material).

178. *See, e.g.*, New Bos. Television v. Entm't Sports Programming Network (No. 81-1010-Z), 1981 WL 1374, at *2 (D. Mass. Aug. 3, 1981) (suggesting violations of fair use policy even if stream is non-commercial and not for educational purposes). In *Bos. Television*, the court held rebroadcasting highlights from a news program, without a license, could constitute substantiality for purposes of a fair use analysis. *See* Edelman, *supra* note 16, at 480 (reviewing *Bos. Television* and rejecting "any argument that the live streaming of televised game broadcasts from one's television set constitutes 'fair use'").

179. *See* Edelman, *supra* note 16, at 480 (discussing potential scenario).

fail because the fair use doctrine does not permit a consumer to stream an event by copying the protected broadcast.[180]

The second factor in the fair use analysis pertains to the nature of the copyrighted work, and it focuses on the actual act of broadcasting games, rather than the material shown.[181] The third factor, which looks at the amount and substantiality used in relation to the copyrighted material, usually focuses on the length of the infringement for streaming infringement cases.[182] Under this factor, live rebroadcasting of smaller portions of an event may be perceived as substantial.[183] Finally, the fourth factor pertains to the effect of the use upon the market and value of the work, and it focuses on the material's overall impact on the broadcasting and sports industries.[184] Copyright holders have a strong incentive to protect their works and may determine when and how a copyright is violated.[185] The fair use provisions provide a useful framework for determining when an action constitutes a violation of a copyright holder's rights.[186]

Given the context of the fair use policy, it appears the NFL is ignoring the fair use statute to monopolize and control any material associated with its name.[187] The NFL goes too far to prevent consumers from using or streaming content in ways that would be deemed fair uses.[188] *National Basketball Association v. Motorola, Inc.*[189] suggests the NFL may be extending its reach with the NFL's

180. *See id.* (arguing courts should not use fair use doctrine to ignore copyrights when underlying material is of public importance).

181. *See* Rissler, *supra* note 148, at 148 (distinguishing results and actual showing of event).

182. *See id.* at 149 (discussing social media app, Vine, which shows only six second clips and "would almost certainly qualify as 'de minimis' infringement of a copyright").

183. *See, e.g.*, *New Bos. Television*, 1981 WL 1374, at *2 (holding unlicensed rebroadcasting of highlights would likely violate fair use purposes).

184. *See* Edelman, *supra* note 16, at 480 ("[T]here is little doubt that the live streaming of televised sports broadcast has a negative effect on the market.").

185. *See, e.g.*, *New Bos. Television*, 1981 WL 1374, at *3 (establishing that copyright holder brings claim alleging injury from negative effect in markets).

186. *See* Rissler, *supra* note 148, at 145–46 (examining fair use provisions' application).

187. *See* David Post, *Are You Ready for Some Football? (Copyright Department)*, WASH. POST (Feb. 3, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/03/are-you-ready-for-some-football-copyright-department/?utm_term=.6697dfb3ece6 [https://perma.cc/HR5B-X74P] (reporting on monopoly-like grasp used by NFL).

188. *See id.* (discussing whether legally and morally wrong for NFL to aggressively litigate against individuals over copyright disputes).

189. 105 F.3d 841 (2d Cir. 1997).

telecast warning.[190] *Motorola* reasoned a league makes inaccurate statements when it delivers a warning against the use of pictures, descriptions, or accounts of the game without the league's consent because the "sporting event itself and the data resulting from it are not 'authored' content that is copyrightable."[191] Therefore, the telecast warnings are deceptive, misrepresent copyright law, and mislead consumers' fair use rights.[192]

Even though the SBA protects leagues against antitrust violations, the NFL's telecast warnings arguably conflict with Section 1 of the Sherman Antitrust Act when handling social media.[193] Section 1 of the Sherman Antitrust Act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine.[194]

Most copyright infringements are not used for a commercial nature and therefore would not violate the fair use policy.[195] Similarly, most infringements do not have a significant influence on the market or value of the copyrighted work and therefore would also not violate the fair use policy.[196] Such infringements are likely safe within the fair use statute.[197] The fair use provisions put the NFL at a high risk of exposure to lawsuits from falsely accused infringers,

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190. *See id.* at 846 (reviewing legality of telecast warning).

191. *See* Gebert, *supra* note 93, at 5 (quoting *NBA v. Motorola Inc.*, 105 F.3d at 846) (discussing what is protected under copyright law in context of sporting events).

192. *See* Eric Bangeman, *FTC Complaint Flags NFL, MLB, Studios for Overstating Copyright Claims*, ARS TECHNICA (Aug. 1, 2007, 9:00 AM), https://arstechnica.com/tech-policy/2007/08/ftc-complaint-flags-nfl-mlb-studios-for-overstating-copyright-claims/ [https://perma.cc/JU4B-9RJB] (suggesting overreach by NFL's warnings); *see also* Rissler, *supra* note 148, at 140, 152 (arguing that relaxing aggressive policy on takedown notices would be more reasonable approach).

193. *See* Gebert, *supra* note 93, at 7 (discussing issues with antitrust violations).

194. 15 U.S.C. § 1 (providing text of Sherman Act).

195. *See* 17 U.S.C. § 107 (pointing out copyrighted broadcasts); *see also* Rissler, *supra* note 148, at 147 (discussing fair use policy).

196. *See* 17 U.S.C. § 107 (noting commercial use).

197. *See id.* (stating safe harbor provisions).

adding another reason why leagues should opt to stream their own content.[198]

B. Boxing It All Up: Leagues Should Adapt Coverage and Provide Easy Access to Sports Outside the TV Box, or Fight Off Piracy

Sports leagues can and should capitalize on consumers' attraction to live streams of sporting events to optimize the amount of consumers they reach and earn more money from advertisers.[199] The NFL, despite its aforementioned shortcomings, successfully did this when it awarded Yahoo the sole rights to stream coverage of a football game.[200] This was the first time the NFL awarded streaming rights, and Yahoo made the game available on all of its digital platforms.[201]

Despite the potential for increased revenue, the sports industry remains concerned about the surge in live streaming technology because of the potential for unauthorized broadcasts of games.[202] For sports leagues, "live-streaming apps . . . threaten TV's golden egg."[203] Leagues worry "piracy is easier than ever" because consumers can "[j]ust hold a smartphone up to a television to record and stream what is airing."[204] As a result, some leagues have imple-

198. For discussion of fair use provisions application and interpretation, see *supra* notes 172–197 and accompanying text.

199. *See* Kevin Clark, *Yahoo Wins Rights to NFL's First Streaming-Only Game*, WALL ST. J., https://www.wsj.com/articles/yahoo-wins-rights-to-nfls-first-internet-only-streaming-game-next-season-1433343642 [https://perma.cc/YCL3-6XAH] (last updated Jun. 3, 2015, 3:53 PM) (suggesting first live streamed game would attract many online viewers).

200. *See id.* (reporting Yahoo as first to live stream NFL game).

201. *See id.* (discussing use of "a Web browser, within a Yahoo app on a mobile phone, or on a television equipped for streaming video").

202. *See* Edelman, *supra* note 16, at 476 n.34 (referring to Compl. at ¶ 38, Showtime Networks, Inc. v. John Doe (No. 2:15-CV-03147), 2015 WL 1910767 (C.D. Cal. Apr. 28, 2015) and temporary restraining order would prevent defendant from infringing on exclusive broadcast rights of boxing match including "the critical right of first transmission and publication of an extremely valuable sporting event").

203. *See* Cecilia Kang & Will Hobson, *Periscope and Other New Apps Threaten TV's Golden Egg: Live Sports*, WASH. POST (May 6, 2015), https://www.washingtonpost.com/business/economy/new-apps-threaten-tv-networks-golden-egg-live-sports/2015/05/05/b5d0b836-f347-11e4-84a6-6d7c67c50db0_story.html?noredirect=on&utm_term=.14542420d26c [https://perma.cc/82FQ-9RP9] (discussing controversial view on live streaming sporting events and its threat to television).

204. *Id.* (noting piracy issues and smartphone capabilities); *see also* Bode, *supra* note 45 ("Many users flocked to [streaming] services because they provided a less-expensive, more flexible alternative to traditional cable. Now, if the industry isn't careful, it could lose a sizeable chunk of this newfound audience back to *piracy* . . . .") (emphasis added).

mented stricter policies, including policies prohibiting media members from streaming any content other than interviews after the games.[205]

1. *The Boxing Industry's Embrace as a Model*

Leagues can still transition into streaming content despite the apprehension they may have to do so.[206] The boxing industry provides a strong example of a successful transition, especially given the piracy issues it faced during the boxing match between Floyd Mayweather, Jr. and Manny Pacquiao.[207] The 2015 match between Pacquiao and Mayweather led to one of the largest mass piracy events involving live streaming and sports.[208] HBO and Showtime broadcasted the fight, as the sole licensors, and sold access to view the fight for approximately one hundred dollars.[209] The networks called it the "Fight of the Century" due to ongoing speculation of the bout for years.[210] Additionally, HBO and Showtime invested heavily in advertising the match.[211] They expected a massive gain from selling pay-per-view access, and they ultimately made more than four hundred million dollars in sales.[212] But Manny Pacquiao's promoter, Todd DeBoef, expressed concern over potential piracy issues with the fight.[213] He emphasized how piracy has changed from "stealing pay-per-view through the boxes, and then it

205. *See* Edelman, *supra* note 16, at 476 (describing NBA and NHL policies).

206. For further discussion of an example of a league's transition into streaming, see *infra* notes 207–228 and accompanying text.

207. For further discussion of boxing's success and lessons, see *infra* notes 208–229 and accompanying text.

208. *See* Edelman, *supra* note 16, at 476 (citing Andrew Wallerstein, *Did Boxing Match Start Fight Between Twitter, Hollywood?* CHI. TRIB., May 6, 2015, at 6) (noting fight occurred on May 2, 2015 and although piracy via live streaming is not new, "it may well have achieved a new level of visibility this weekend").

209. *See id.* (citing Scott Mayerowitz, *Problems with the Fight? You Weren't the Only One*, VIRGINIAN-PILOT (May 4, 2015)) (discussing price of boxing match and producers' cut).

210. *See id.* (suggesting hype and known success of fighters would attract large audience).

211. *See id.* (indicating event was heavily promoted).

212. *See* Don Kaplan & Christian Red, *Live Streams of Mayweather-Pacquiao Fight Latest Battle in Fight Against Online Piracy*, N.Y. DAILY NEWS (May 4, 2015), https://www.nydailynews.com/sports/online-piracy-cuts-hbo-profit-mayweather-pacquiao-article-1.2210041 [https://perma.cc/QBY7-L7L9] (noting revenue despite mass piracy and live streaming of boxing match).

213. *See* Darren Rovell, *Periscope a Focus in Concern Over Lost Mayweather-Pacquiao PPV Orders*, ESPN (May 5, 2015), http://www.espn.com/boxing/story/_/id/12822727/illegal-streaming-periscope-arises-concern-lost-pay-per-view-orders-floyd-mayweather-manny-pacquiao-fight [https://perma.cc/F3ZF-V65T] (highlighting apps used for streaming).

moved to digital cards, and then it was through YouTube and websites, and now, it's [live streaming]."[214] Unfortunately for the networks, DeBoef's concerns proved to be valid.[215] Although it is unclear exactly how many pay-per-views of the fight were lost because of illegal streaming, one streaming site reported more than 10,000 people watched its live stream of the fight.[216] The high volume of streamers also caused delays and lags on the networks' pay-per-view streams of the fight.[217] An HBO executive even asked to delay the fight by thirty minutes so the network could receive additional pay-per-view orders and then allow access for those viewers.[218]

2. *Applying Boxing's Model in the Leagues*

The boxing industry learned from its streaming issues and is now embracing streaming as a method for reaching a wider audience.[219] This decision to embrace streaming is a smart one, especially in light of a recent announcement by HBO, the leading network in boxing coverage for the past forty-five years.[220] HBO announced on September 27, 2018, it would no longer televise boxing.[221] In a statement accompanying the news, HBO wrote, "Our

214. *Id.* (referring to Twitter's live streaming app Periscope as well as other streaming services used to pirate fight).

215. *See id.* (discussing illegal streaming of event).

216. *See id.* (referring to link used by writer for tech site Mashable, meaning if 10,000 viewers were on one link at one hundred dollars per view, the result would be one million dollars in lost revenue). Consider a more recent fight, also including Floyd Mayweather, against Conor McGregor, where reports suggest nearly three million people pirated the fight. *See* Terry Collins, *Millions Illegally Streamed Mayweather-McGregor Fight*, CNET (Aug. 29, 2017, 6:37 AM), https://www.cnet.com/news/illegal-streaming-of-mayweather-mcgregor-fight-reaches-millions/ [https://perma.cc/8462-UBNY?type=image] ("The company didn't have data about how many illegal streams had been created for Mayweather's fight with fellow boxing champ Manny Pacquiao in 2015.").

217. *See* Rovell, *supra* note 213 (discussing issues with streaming).

218. *See id.* (noting those who paid to view fight had issues with their own stream). DirecTV spokesman, Darris Gringeri suggested any large broadcasting event comes with traffic jams when he said: "[t]his was the largest pay-per-view event in our history, and, as with every other TV provider, there was a temporary traffic jam that affected a small percentage of our consumers." *Id.* (suggesting any large broadcasting event comes with traffic jams).

219. For further discussion of boxing's lesson from streaming events, see *infra* notes 221–237 and accompanying text.

220. *See* Dan Rafael, *HBO to Drop Its Boxing Coverage at End of 2018*, ESPN (Sept. 27, 2018), http://www.espn.com/espnw/sports/article/24814171/hbo-drop-boxing-coverage-end-2018 [https://perma.cc/2EGV-SHEN] (giving history of HBO's boxing events).

221. *See id.* (discussing HBO's plan to abandon boxing coverage); *see also* Wallace Matthews, *HBO Says It is Leaving the Boxing Business*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/sports/hbo-boxing.html [https://

mission at HBO Sports is to elevate the brand. We look for television projects that are high-profile, high access, and highly ambitious."[222] The announcement came after one of HBO's recent fights, the bantamweight title eliminator of Juan Francisco Estrada versus Felipe Orucuta.[223] The fight drew only 298,000 viewers, thereby becoming "one of the lowest-viewed fights in HBO history."[224] At HBO's height in boxing coverage, it attracted as many as five million viewers per fight.[225] Now, of the nearly forty million people who subscribe to HBO, an average of only 820,000 viewers watched its boxing telecast in 2018.[226] HBO's statement touched on the lack of consumers who watch televised fights, and it cited streaming as part of its decision to cut boxing from its programming.[227] Specifically, the network pointed out that although "[t]here is more boxing than ever being *televised and distributed*," streaming services and other programs have taken over, and the programing is no longer unique.[228]

HBO's statement about the prevalence of streaming is accurate.[229] For example, one subscription video streaming service, DAZN, recently signed a one billion dollar agreement with the promotional company Matchroom Boxing to provide a streaming service for boxing fights over the next eight years.[230] Additionally, in August 2018, ESPN agreed to a deal with Top Rank, a boxing promotion company, to air fifty-four matches, including on ESPN Plus,

perma.cc/B5XQ-DDTJ] (noting HBO had no fights scheduled after October 27, 2018).

222. Rafael, *supra* note 220 (noting announcement was not shocking because "[t]he network's commitment to the sport has clearly waned in recent years and its *quality of fights has dropped at a time when there has been more competition*") (emphasis added).

223. *See id.* (noting when HBO made its decision).

224. *Id.* (pointing out decline in viewership of HBO covered fights); *cf.* Matthews, *supra* note 221 (noting viewers at 349,000 for same fight, but still listing as "one of the lowest-rated boxing matches in HBO's history").

225. *See* Matthews, *supra* note 221 (discussing peak of HBO's boxing coverage).

226. *See id.* (suggesting viewership is about two percent of total audience, opposed to one third of its consumers during peak of boxing coverage).

227. *See* Rafael, *supra* note 220 (examining HBO's decision to abandon boxing).

228. *Id.* (emphasis added) (suggesting programing is not unique enough to consistently attract more viewers).

229. For further discussion of prevalence of streaming boxing events, see *infra* notes 230–232 and accompanying text.

230. *See* Matthews, *supra* note 221 (providing fights on DAZN at $9.99 per month through internet and smartphone apps).

a subscription-based streaming service.[231] However, even though ESPN has a streaming service, the boxing matches it streams may continue to reach a smaller audience because ESPN saw its subscribers decline from one hundred million to eighty-seven million in 2012.[232]

ESPN's deal with Top Rank also benefits the network by providing it with an opportunity to collaboratively dictate the schedule of fights aired, further illustrating the value added when embracing streaming.[233] Typically, the major sports leagues are able to control the scheduling, thereby limiting ESPN's say in its broadcasting choices.[234] During this process, the sports leagues would buy commercial slots on the broadcasted channel to advertise an event, and the sports league would sell sponsorship to the venue signs.[235] However, because ESPN and Top Rank invested together, the two are able to "smooth out" the most important aspect—the advertising dollars—by engaging in a collaborative process to sell as much advertising as possible.[236] So far, ESPN has achieved this by airing Top Rank fights after other notable events, such as college football's Heisman award ceremony, and future NBA All-Star games and Super Bowls.[237]

The boxing industry's success with streaming has kept the sport afloat at a time where ratings have decreased in major sports leagues in recent years.[238] During the majority of the 2017 season,

231. *See* Kevin Draper, *Checking in on ESPN's Big Bet on Boxing. (Yes, Boxing.)*, N.Y. TIMES (Dec. 17, 2017), https://www.nytimes.com/2017/12/17/sports/espn-boxing.html?module=inline [https://perma.cc/8HK2-LRPG] (noting seven-year deal to air on various outlets, including ESPN and ABC, both owned by Disney, and ESPN Plus, its streaming service, with aim to "alter the economics and *visibility* of boxing") (emphasis added).

232. *See id.* (suggesting consumers decide to live more and more without pay-for channels); *see also* Mathews, *supra* note 1, at 220–21 (indicating ESPN "is now feeling the effects of the changing media landscape"). In 2015, reports suggested ESPN lost seven percent of its subscription base since 2011. *See* Becky Sullivan, *Once Immune to Cord-Cutting, 'King of Live Sports' Finds Throne Shaken*, NPR (July 19, 2015, 5:36 PM), http://www.npr.org/2015/07/19/424447488/ onceimmune-to-cord-cutting-king-of-live-sports-finds-throne-shaken [https://perma.cc/9XL4-HF9V] ("[T]he trend is accelerating: 3.2 million subscribers have left since May 2014.").

233. For further discussion of boxing's ability to plan and schedule with ESPN, see *infra* notes 234–237 and accompanying text.

234. *See* Draper, *supra* note 231 ("ESPN usually falls prey to . . . major sports leagues that set the scheduling.").

235. *See id.* (juxtaposing how Top Rank and ESPN are operating).

236. *See id.* (obtaining this advertising goal "has so far eluded the sport").

237. *See id.* ("Top Rank doesn't particularly care on which Saturday nights its bouts take place. It happily created a card for after the Heisman ceremony . . . .").

238. *See, e.g.*, Ken Belson et al., *TV Viewership Falls in N.F.L. and Premier League: A Blip, or Something Worse?*, N.Y. TIMES (Oct. 26, 2016), http://www.nytimes.com/

the NFL's television ratings were down by eight percent.[239] Verizon, as the parent company of Yahoo, expanded its role in live streaming by agreeing to a deal with the NFL to live stream all local market and national games on Verizon-owned media properties.[240] A unique aspect of the deal allows Verizon to create jointly developed original NFL content.[241]

The NFL started to expand streaming options in 2014 when Verizon agreed to stream games for free via the NFL Mobile app.[242] The NFL continued to offer live streams of games in 2015 when it struck a deal to allow Yahoo to provide free live streaming of a game in London, and in 2017 when the NFL allowed Amazon to stream eleven Thursday night national football games.[243] NFL Commissioner Roger Goodell apparently recognizes that streaming is a significant trend.[244] He stated that more fans are moving to devices such as smart phones to obtain content, and he said the

2016/10/27/sports/football/tv-viewership-falls-in-nfl-and-epl-a-blipor-something-worse.html [https://perma.cc/V67M-3CL9] (focusing on Premier League ratings, English soccer league, and NFL ratings decrease). A recent report looked at the ratings dip in NFL viewership, focusing on political protests, but found cord cutting, good football, and home team loyalty controlled the audience more. *See* Matt Wynn & John Kelly, *In NFL Ratings, Good Football Trumps Politics*, USA TODAY (Oct. 9, 2018, 12:16 PM), https://www.usatoday.com/in-depth/news/2018/10/09/trump-nfl-ratings. . .rotests-what-data-really-show-anthem-kneeling-viewership/996531002/ [https://perma.cc/K2HX-R2YK] ("The data show that quality football and home team loyalty drove the TV audience far more than political tribalism."). USA Today's report looked at areas where ratings dropped the most, as well as President "Trump-leaning markets" which happened to have "bad football." *See id.* (discussing decrease in ratings is not surprising given how often people are cutting their cable). "The NFL remains the king of TV ratings. All TV programming is taking a ratings hit as cord-cutting consumers *switch to streaming services and other digital entertainment options*. . . . [A] whopping 37 of the 50 top-rated shows in 2017 were NFL games, Nielsen says." *Id.* (emphasis added) (pointing out success and consumer's preferences with streaming abilities).

239. *See* Daniel Roberts, *Verizon Strikes Extensive Live-Streaming Deal with NFL*, YAHOO! FINANCE (Dec. 11, 2017), https://finance.yahoo.com/news/verizon-strikes-extensive-live-streaming-deal-nfl-132440572.html/ [https://perma.cc/GKQ7-DVU9] (noting through thirteen of seventeen weeks of NFL season and how political controversy has added to this decline).

240. *See id.* (providing deal is available for all consumers regardless of mobile network via Verizon media properties such as Yahoo Sports and AOL). Local market games include those within a certain area—for example: "You will still not be able to stream an out-of-market Sunday game, such as the Patriots vs Broncos on a Sunday at 1pm if you live in New York City." *Id.* (reporting that national market games include those broadcasted for every market).

241. *See id.* (highlighting importance of original content).

242. *See id.* (detailing expansion to streaming).

243. *See id.* (laying out deals made over past several years); *see also* Kaufman, *supra* note 3 (reporting on Amazon buying out Twitter's deal with NFL for Thursday night games).

244. *See* Roberts, *supra* note 239 (noting leagues' awareness of streaming trends).

NFL expects to receive two hundred million unique visitors per month on its mobile and digital sources.[245] Twitter also agreed to live stream NFL games, and it struck additional streaming deals with the MLB, NHL, the Wimbledon tennis tournament, and Pac-12 college sports.[246]

3. *An Example of Networks Embracing Streaming*

Several broadcast stations have set up sports networks, similar to the flagship ESPN program.[247] For example, CBS Sports HQ provides twenty-four-hour free content across different devices, and it provides news, highlights, and analysis, including, "live news and reporting with game previews . . . projects, and statistical break-downs."[248] CBS saw success with CBSN, its streaming news network, and it hopes to replicate CBSN with CBS Sports HQ and provide material to digital platforms.[249] The goal with CBS Sports HQ is to attract viewers who do not subscribe to television programs.[250] Younger viewers are more attracted to programming online through "on-demand subscription services like Netflix, or over-the-top live TV services like Sling TV, Hulu Live TV, YouTube TV and

245. *See id.* (suggesting partnership with streaming devices may reach more users or in conjunction with television reach wider audience); *cf.* Henry Bushnell, *Inside the Complex World of Illegal Sports Streaming*, YAHOO! SPORTS (Mar. 27, 2019, 12:08 AM), https://sports.yahoo.com/inside-the-complex-world-of-illegal-sports-streaming-040816430.html (reporting NBA relies on research that indicates there is more interest in games than ratings reflect, likely due to piracy and streaming calculations).

246. *See* Dittmore & Hutchins, *supra* note 75, at 14 (indicating "sports organizations are turning to alternative ways of reaching consumers").

247. *See, e.g.*, Sarah Perez, *CBS Launches a 24/7 Streaming Sports News Network, CBS Sports HQ*, TECH CRUNCH (Feb. 2018), https://techcrunch.com/2018/02/26/cbs-launches-a-24-7-streaming-sports-news-network-cbs-sports-hq/ [https://perma.cc/XF6N-C9MY] (describing launch of CBS Sports HQ).

248. *Id.* (explaining content provided); *see also* Brian Steinberg, *CBS Launches Streaming Sports-News Outlet CBS Sports HQ*, VARIETY (Feb. 26, 2018, 5:00 AM), https://variety.com/2018/digital/news/cbs-sorts-hq-live-streaming-1202710150/ (reporting how CBS Sports HQ will be available through "TV devices including Amazon Fire TV, Apple TV and . . . mobile app[s] for iOS and Android").

249. *See* Perez*, supra* note 247 ("[CBSN] grew to 287 million streams in 2017, up seventeen percent over 2016—which was an Election year . . . .").

250. *See id.* (noting "younger viewers" no longer watch television because of canceled subscriptions or they never signed up to begin with); *see also* Sahil Patel, *CBS Aims To Grow Sports HQ within its Network of Streaming Channels*, DIGIDAY (Dec. 24, 2018), https://digiday.com/media/cbs-aims-to-grow-sports-hq-within-its-network-of-streaming-channels/ [https://perma.cc/Q9PW-BJR3] (noting CBS Sports HQ as "free, *ad-supported* streaming channel" focusing on viewers who no longer pay for cable) (emphasis added).

others."[251] This is what CBS is trying to mimic by adapting its sports coverage and providing easy access to its content outside traditional television.[252]

C. Changes in Consumers: Following the Ad Dollars, Increasing Prices, and Unbundling Sports from Cable

Amidst the change in technology, cable costs have gone up, and viewership has gone down.[253] With these developments, consumers tend to look for different options within pay-TV, or cable bundles, to satisfy their interests.[254] In 2013, the pay-TV industry lost subscribers for the first time in history after customers switched to smaller bundled packages.[255] For example, by 2014, ESPN reached fewer homes than it had in 2010.[256] Many advertisers are "terrified" of the ratings plunge, which is directly attributable to the rise in streaming services.[257]

Viewership fluctuated during the 2018 NFL season.[258] For example, CBS's coverage of the 1:00 PM week-one NFL games was

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251. Perez*, supra* note 247 (discussing streaming services); *see also* Patel, *supra* note 250 (reporting on CBS Sports HQ's "strong interest from advertisers" due to digital inventory).

252. *See* Perez*, supra* note 247 (highlighting CBS's goal, as former Chairman and CEO Leslie Moonves stated: "we are creating best-in-class direct-to-consumer streaming platforms that are positioning us to be leaders in the future of *premium content distribution*") (emphasis added). Over-the-top TV is a term used for content provided via internet, without a cable subscription or satellite pay-TV. *See* Sahil Patel*, WTF is OTT?,* DIGIDAY (July 7, 2015), https://digiday.com/media/what-is-over-the-top-ott/ [https://perma.cc/Y8CV-F7HU] (explaining OTT as over-the-top, and looking at its development in streaming and traditional cable).

253. *See* Mathews, *supra* note 1, at 204 (examining increase in cost for traditional cable TV, due to live sports broadcasting rights, although consumers have begun canceling subscriptions at record rates); *see also* Wynn & Kelly, *supra* note 238 ("As has been well-documented, NFL viewership on TV was down in most places."). For further discussion of decrease in viewership, see *supra* note 239 and accompanying text.

254. *See* Popper, *supra* note 7 (reporting loss of subscribers and decline in viewership, not just of cable, but sport broadcasts as well).

255. *See id.* (observing decline in customers and change in preferences).

256. *See id.* (suggesting change in trends for viewership). For further discussion of ESPN's decreased viewers, see *supra* note 232 and accompanying text.

257. *See* Popper, *supra* note 7 (discussing advertisers' fear); *see also* Suzanne Vranica & Shalini Ramachandran, *Cable TV Group Blames Subscription Web TV for Ratings Woes*, WALL ST. J. (Mar. 10, 2015, 6:41 PM), https://blogs.wsj.com/cmo/2015/03/10/cable-tv-group-blames-subscription-web-tv-for-ratings-woes/ [https://perma.cc/SR8J-64X7] (suggesting forty percent of recent ratings decline in 2014 and 2015 were attributed to subscriptions like Netflix, Amazon and Hulu).

258. *See generally* Shalise Manza Young, *NFL ratings: Early Games See Big Bounce, Primetime Game Slight Dip*, YAHOO! SPORTS (Sept. 10, 2018, 11:16 AM), https://sports.yahoo.com/nfl-ratings-early-games-see-big-bounce-primetime-game-slight-dip-151625983.html [https://perma.cc/6NGL-T3XJ] (noting viewer increase in earlier scheduled games but decrease in nationally covered games).

shown on roughly ten and a half percent of all United States televisions, up twenty-three percent from 2017.[259] However, Fox's NFL coverage of the 4:00 PM week-one national game reached roughly fifteen and a half percent of United States televisions, less than several other week-one showings in the last decade.[260] The viewership statistics for the primetime game were more surprising.[261] NBC's broadcast at 8:30 PM drew fewer viewers than it did in 2017 and 2016.[262] Meanwhile, ESPN's Monday Night Football also saw a drop in viewership compared to recent years.[263] The dip in ratings has been attributed to political protests, blowouts in games, and other scheduled programming.[264] But it is also attributable to a general decrease in television viewership, a fact which supports why the NFL should consider more streaming deals.[265]

For example, consumers no longer find value in the traditional cable TV bundling structure.[266] Bundling cable originally appealed to consumers by giving them the ability to package numerous channels.[267] It also allowed networks to reduce transaction costs, resulting in an easier profit for networks.[268] However, bundling's value

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259. *See id.* (suggesting successful reach of NFL).

260. *See id.* (pointing out Fox's coverage was shown in eighty percent of markets, due to blackout restrictions of other local games, and 15.7 percent is ranked "seventh-most watched late-afternoon game since 2004").

261. *See generally* Chris Cwik, *ESPN's 'Monday Night Football' Ratings Down After Two Weeks*, YAHOO! SPORTS (Sept. 18, 2018, 1:40 PM), https://sports.yahoo.com/espns-monday-night-football-ratings-two-weeks-174026627.html [https://perma.cc/A7N3-F2UR] (reviewing primetime ratings of NFL games).

262. *See* Manza, *supra* note 258 (noting decrease from 15.8 percent to 14.4 percent this year).

263. *See* Cwik, *supra* note 261 (discussing past years and potential reasons).

264. *See id.* (listing President Donald Trump's concerns with NFL, TV shows "no longer pull massive ratings," Monday Night Football's Week 1 game resulted in blowout, and Week 2 aired during seventieth Primetime Emmy Awards). "ESPN's Week 2 game had to compete with the Emmys . . . which also hit a new low for ratings." *Id.* (noting potential explanations for drop in viewership). For further discussion of the Emmys, see *supra* note 6 and accompanying text.

265. *See generally* James Surowiecki, *Bundles of Cable*, THE NEW YORKER (Jan. 25, 2010), https://www.newyorker.com/magazine/2010/01/25/bundles-of-cable [https://perma.cc/V95Z-FMK3] (reporting on decreased viewership and less cable subscribers). For further discussion of a general decrease in television viewership, see *infra* notes 266–274 and accompanying text.

266. *See* Mathews, *supra* note 1, at 218 (suggesting TV bundling has played large role for live sports and television industry); *see also* Surowiecki, *supra* note 265 ("[C]able TV has always relied on 'bundling' . . . .").

267. *See* Mathews, *supra* note 1, at 218 (detailing how bundling channels works).

268. *See id.* (suggesting consumers may perceive bundling as "a bargain" and reduced costs due to "option value"); *see also* Surowiecki, *supra* note 266 ("It also offers what economists call option value: you may never watch those sixty other channels, but the fact that you could if you wanted to is worth something.").

has declined because of the loss of viewers and subscribers.[269] Nevertheless, the cost of cable TV continues to surpass inflation rates year after year.[270] The consistent rise in cable TV costs is directly attributable to live sports.[271] This argument is based on the notion that "live sport is immune to changes in viewing patterns[,]" giving the sports leagues a monopoly-like grasp on the TV industry.[272] The leagues effectively have their say when they negotiate agreements with networks, and they are able to demand increased prices for their product.[273] This causes subscribers to pay more for bundled TV programs, whether they actually watch sports or not.[274]

The NFL's decision to stream games for free, especially its decision to stream its first game in London, suggests that the league is focused on using streaming to increase revenue and reach unserved markets.[275] The NFL may have also been drawn to streaming because it enables sports leagues to "bypass the cable TV providers" and offer the content easily and directly to consumers.[276] If the NFL and other leagues opt to stream games, networks like ESPN

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269. *See* Mathews, *supra* note 1, at 218 (relying on fact entire TV industry is declining in growth).

270. *See id.* at 218–19 n.131 (citing In re Implementation of Section 3 of the Cable Television Consumer Prot. and Competition Act of 1992, 31 F.C.C. Rcd. 11498, 11513 (2016)) (examining years between 2005 and 2015).

271. *See id.* (implying leagues' "monopolistic position" controls prices in TV industry); *see also* Matthew Garrahan, *TV Networks Face Shaky Future in Changing Media Landscape*, FIN. TIMES (Aug. 27, 2015), https://www.ft.com/content/15f65100-4c9c-11e5-b558-8a9722977189 [https://perma.cc/P63K-K4HN] ("[S]port[s] is an expensive business. . . . NBC Sports and Fox Sports are vying for the same rights as ESPN. This has driven up the prices . . . a cost that is passed on to the cable and satellite companies that pay to carry ESPN and, ultimately, to the consumers . . . .").

272. Garrahan, *supra* note 271 (suggesting live sports as cornerstone of broadcasting industry).

273. *See* Mathews, *supra* note 1, at 219 (discussing leagues' power to raise prices).

274. *See* Surowiecki, *supra* note 266 (reporting on bundled packages including channels which may never be watched).

275. *See* Mathews, *supra* note 1, at 220 (broadening NFL's reach to markets outside United States and areas affected by blackout restrictions).

276. *See* Greg Satell, *How the Collapse of the Cable Business Model Will Bring a New Era of Television*, FORBES (Aug. 16, 2015), http://www.forbes.com/sites/gregsatell/2015/08/16/how-the-collapse-of-the-cable-businessmodel-will-bring-a-new-era-of-television/#3e83f3a413de [https://perma.cc/NQD4-J67Z] (calling streaming opportunities like this "over the top" as it bypasses cable TV). Television companies profited from controlling distribution and determining which channels to carry. *See id.* ("Rather than relying solely on advertising, they now had access to fees from cable operators and, because the cable companies had near monopoly pricing power, those fees could be substantial . . . ." (referring to MICHAEL WOLFF, TELEVISION IS THE NEW TELEVISION: THE UNEXPECTED TRIUMPH OF OLD MEDIA IN THE DIGITAL AGE (Portfolio 2015)).

will be directly affected.[277] Agreements to stream content via other sources have directly affected ESPN because ESPN is losing contracts to broadcast those events.[278] Before leagues reexamine their broadcasting contracts with television networks, they will need to wait for their current contracts to expire.[279]

Future contracts may include significant changes to how content is distributed.[280] For example, internet companies could be the ones to gain from future sports broadcasting.[281] This would explain many of the mergers among large television, media, and internet service conglomerates, as well as their decisions to keep content in-house.[282] Likewise, if consumers use internet services to access content, then they obtain the material on-demand while avoiding any copyright issues.[283] Other options could include a pay-per-view structure as opposed to free or all-access content on

277. *See* Sullivan, *supra* note 232 (touching on live streaming's impact).

278. *See id.* (claiming ESPN is no longer immune to changes in TV industry). For an example of how ESPN is addressing the loss of broadcasts, see *supra* notes 231–237 and accompanying text.

279. *See* Michael Colangelo, *Future of Sports TV: Digital, A La Carte and Increased Competition*, FIELDS OF GREEN (Sept. 15, 2015), http://thefieldsofgreen.com/2015/09/15/future-of-sportstv-digital-a-la-carte-and-increased-competition/ [https://perma.cc/Y7J3-T3ZL] (explaining that NFL's deal runs until 2022, NBA until 2023, and both NHL and MLB in 2021). For further discussion of current television contracts with sports leagues and the dates in place, see *supra* notes 63–65 and accompanying text.

280. *See* Mathews, *supra* note 1, at 221–22 (speculating about future of sports broadcasting, end TV bundling, and potential a-la-carte programming on internet services); *see also* Colangelo, *supra* note 279 (discussing a-la-carte programming).

281. *See, e.g.*, Fischer, *supra* note 40 (reporting Disney's ownership of ESPN, acquisition of 21st Century Fox, and its majority stakeholder position of Hulu). Competition over rights to air sporting events may become difficult between internet providers and television networks. *See* Kevin Draper, *Is the Live Sports Rights Bubble Finally Bursting?*, DEADSPIN (May 03, 2016, 6:10 PM), https://deadspin.com/is-the-live-sports-rights-bubble-finally-bursting-1774516030 [https://perma.cc/77M4-CQJV] ("Twitter is currently paying 1/45th of what CBS and NBC are paying to broadcast NFL games. Nobody knows yet how to monetize the internet, and rightsholders' future profits in large part depend upon them being the ones to finally figure it out.").

282. *See, e.g.*, Cecilia Kang & Edmund Lee, *AT&T-Time Warner Deal Approval Gets Justice Department Challenge*, N.Y. TIMES (July 12, 2018), https://www.nytimes.com/2018/07/12/business/justice-department-plans-appeal-of-att-time-warner-merger-approval.html [https://perma.cc/E4LH-YSN5] (examining eighty-five billion dollar deal approved by federal judge to allow AT&T and Time Warner merger, which companies view as "necessary to better compete against tech giants like Netflix and Amazon"); *see also* Mathews, *supra* note 1, at 221–23 (hinting at internet service providers holding power for future broadcasting). "[T]he emergence of internet streaming options will ultimately change the structure of sports broadcasting rights." Mathews, *supra* note 1, at 221–23 ("[G]iven the recent surge in internet[-]based streaming of video, including live events.").

283. *See* Mathews, *supra* note 1, at 222 (pointing to consumers' desires).

the internet.[284] In a pay-per-view structure, consumers can pay online any time they wish to view an event.[285] Regardless of whether a pay-per-view structure would work, one idea stands out: consumers' preferences are changing, meaning internet providers and cable television have some adjustments to make.[286]

IV. CONCLUSION: EMBRACE THE GAME AS IT CHANGES TO STREAMING

Consumers are abandoning cable because internet services are taking over and providing easy, commercial-free streaming options.[287] Sports leagues should stay ahead of the game and embrace streaming options with internet service providers, instead of relying on legislation to prevent unauthorized streaming of live sports content.[288] The SBA and copyright laws provide protection to the leagues and attempt to prevent illegal streaming.[289] However, if leagues continue to cling to these laws to defend their content, then leagues may lose the consumers and viewers who are abandoning traditional cable.[290]

The fear of piracy is not a legitimate excuse for avoiding a transition to streaming services.[291] In recent court decisions involving sporting events and live streaming, courts have issued favorable rulings for the leagues.[292] Thus, the leagues' fears of piracy should be diminished.[293] Leagues and sports broadcast partners can still rely on copyright law to prevent and recover when unlicensed parties live stream an event.[294] Moreover, in the event an unlicensed party

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284. *See id.* (suggesting future options similar to a-la-carte style).

285. *See id.* (discussing potential viewing structure).

286. For further discussion of consumers and changes in cable, see *supra* notes 266–274 and accompanying text.

287. For further discussion of streaming options, see *supra* notes 7–52 and accompanying text.

288. For further discussion of embracing streaming abilities compared to restrictive legislation, see *supra* notes 58–79 and accompanying text.

289. For further discussion regarding SBA and copyright law's protection, see *supra* notes 80–142 and accompanying text.

290. For further discussion of legislation and changes in traditional cable, see *supra* notes 143–155 and 253–285 and accompanying text.

291. For further discussion of piracy and lessons from past issues, see *supra* notes 207–229 and accompanying text.

292. *See e.g.*, Am. Broad. Co. v. Aereo, Inc., 573 U.S. 431 (2014) (ruling in leagues' favor over streaming app Aereo); *see generally* Dittmore & Hutchins, *supra* note 75 (detailing *Aereo* case).

293. For further discussion of piracy and lessons from past issues, see *supra* notes 207–229 and accompanying text.

294. For further discussion of copyright law, see *supra* notes 106–141 and accompanying text.

does live stream a game, the relevant league or sports broadcast partner can still defend its right to its own content.[295]

Finally, if leagues are concerned with ad dollars, they should focus on the consumers.[296] The money always comes from the consumers, and today's consumers are focused on easy access to content through live streaming.[297] Streaming is also a reliable source of future income for sports leagues, because consumers and fans continue to embrace technological changes in streaming.[298] The success of the numerous companies already streaming and controlling their own content confirms the benefit of embracing change.[299] Leagues should follow their example and adopt live streaming as an alternative to the traditional methods of sports broadcasting.[300]

*Gregory Bailey**

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295. For further discussion of controlling content, see *supra* notes 35–49 and accompanying text.

296. *See* PwC SPORTS OUTLOOK, *supra* note 8, at 10–13 (suggesting consumers want to control the content and competition with streaming devices will increase ad revenue).

297. For further discussion of consumers and ad dollars following streaming services, see *supra* notes 253–285 and accompanying text.

298. *See generally* PwC SPORTS OUTLOOK, *supra* note 8 (predicting sports market through 2022 focusing on sports media rights).

299. For further discussion of controlling content, see *supra* notes 35–49 and accompanying text.

300. For further discussion of future streaming services and success, see *supra* notes 7–52 and accompanying text.

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