

NOTES

IT'S A DEAL: FORGING MEDIA RIGHTS DEALS IN RESPONSE TO SPECTATOR LIVE STREAMING

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INTRODUCTION

Although Floyd Mayweather beat Manny Pacquiao in the much-anticipated “fight of the century” on May 3, 2015, it was really Twitter’s new live streaming app, Periscope, that “won by a knockout.”¹ While

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1. Arjun Kharpal, *Mayweather-Pacquiao: Periscope 'Won by Knockout,'* NBC NEWS

some people paid \$100 to watch the fight on Pay-Per-View, others simply watched the fight for free on two live streaming sites, Periscope and Meerkat.² At one point during the fight, as many as 10,000 people were watching one particular stream.³ Some people live streamed the broadcast of the fight on television while others live streamed it ringside.⁴ The companies who owned the rights to broadcast sent Periscope 66 takedown requests the night of the fight.⁵ Periscope took down 30 of the streams while other streams ended before Periscope took them down.⁶

While the *broadcast* of a live sporting event is protected under federal copyright law, the live sporting event *itself* is not protected.⁷ This distinction begs the question: since there is no federal copyright protection for the underlying game, was Periscope obligated to take down a stream from a spectator recording ringside? Under the current copyright regime, the answer is no.⁸ One could even argue that the spectator live streaming the fight owns the copyright to the production since he is the one “fixing”⁹ the work in a tangible medium of expression.¹⁰ While live streaming technology has existed for some time,¹¹ the ease and stealth with which people can now live stream poses new problems for major sports providers.¹² If people decide they would rather watch a spectator’s live stream of a sporting event online for free rather than a televised broadcast, television revenues would suffer a loss.¹³ This is especially problematic for professional sports leagues whose primary source of

(May 4, 2015, 9:47 AM), <http://www.nbcnews.com/tech/internet/Mayweatherpacquiaoperiscope-wonknockout-n353201>.

2. Ryan Gajewski, *Mayweather-Pacquiao Fight Plagued by Piracy on Periscope, Meerkat*, CNN (May 3, 2015, 12:11 PM), <http://www.cnn.com/2015/05/03/entertainment/feat-meerkat-periscope-piracy-maypac-fight-thr/>.

3. Jose Pagliery, *Mayweather-Pacquiao Fight Made Periscope the New Napster*, CNN (May 4, 2015, 4:05 PM), <http://money.cnn.com/2015/05/04/technology/live-stream-mayweather-pacquiao/>.

4. *Id.*

5. *Id.*

6. *Id.*

7. David Stephen Rivard, Jr., Note, *Through the Eyes of the Spectator: Solving Personal Streaming of Live Sports Under the Current Copyright Regime Through Federal Misappropriation*, 13 APPALACHIAN J.L. 197, 198 (2014); see *Balt. Orioles, Inc. v. MLB Players Ass'n*, 805 F.2d 663, 668–69 (7th Cir. 1986) (holding that because broadcasting a sporting event involves different types of shots, instant replays, and frame selection, the creativity required for copyright protection is satisfied); *NBA v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997) (holding that an underlying basketball game was not protected under copyright law).

8. See discussion *infra* Part II.B.

9. See 17 U.S.C. § 101 (2012).

10. See Rivard, *supra* note 7, at 197.

11. Kharpal, *supra* note 1.

12. See Rivard, *supra* note 7, at 208.

13. See discussion *infra* Part II.B.

revenue derives from the sale of broadcasting and media rights.¹⁴ Without further protection beyond the current copyright regime, sports leagues and broadcasters have no legal recourse against spectators who are broadcasting their own version of the same game.¹⁵

This Note explores why the law should address the issue of spectator live streaming and suggests a solution to this problem. This Note presents its arguments in four parts. Part I explains current copyright law and examines courts' interpretation of what is copyrightable in the context of live athletic events. Part II focuses on the growing popularity and use of live streaming technology, specifically Periscope, and the legal implications that arise while using this technology in the context of live sporting events. Part III explains why current legal remedies fail to adequately protect professional sports leagues and broadcasters against spectator live streaming. Finally, Part IV concludes with a solution, proposing that Periscope should use its advertising-based revenue system to forge media rights deals with sports leagues and broadcasters, and examines why media rights deals are the most effective means of protecting sports leagues from financial harm.

I. BACKGROUND

Technology continues to rapidly expand, creating new means by which people can share and communicate information quickly.¹⁶ Social media websites, such as Instagram, Facebook, and Twitter, have enabled individuals to spread information to a wider audience than ever before.¹⁷ Moreover, the popularity of smartphones and social media apps has resulted in nearly instantaneous access to information.¹⁸ The sports

14. *Broadcasting & Media Rights in Sport*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/ip-sport/en/broadcasting.html> (last visited Oct. 20, 2015) [hereinafter WORLD INTELL. PROP. ORG.].

15. See discussion *infra* Part III.A.

16. See David Bolton, *Smartphones are Now the Dominant Driver of Social Media*, ARC FROM APPLAUSE (July 16, 2015), <http://arc.applause.com/2015/07/16/social-media-consumption-on-smartphones-2015/>.

17. See Arjun Kharpal, *Facebook's Instagram Hits 400M Users, Beats Twitter*, CNBC (Sept. 23, 2015, 5:58 AM), <http://www.cnn.com/2015/09/23/instagram-hits-400-million-users-beating-twitter.html>; see also Facebook Reports Second Quarter 2015 Results, FACEBOOK (July 29, 2015), https://s21.q4cdn.com/399680738/files/doc_news/2015/FB_News_2015_7_29_Financial_Releases.pdf (Facebook has 968 billion daily active users). Twitter has approximately 316 million monthly active users, and about 500 million tweets are sent per day. *Twitter Usage/Company Facts*, TWITTER, <https://about.twitter.com/company> (last visited Oct. 21, 2015). Twitter's mission is "[t]o give everyone the power to create and share ideas instantly, without barriers." *Id.*

18. Bolton, *supra* note 16; see also Adam Lella et al., *The Global Mobile Report: How Multi-Platform Audiences & Engagement Compare in the U.S., Canada, U.K., and Beyond*,

industry is no stranger to these technological changes. Traditionally, media providers controlled what information would reach a consumer within a certain territory.¹⁹ New technology, however, has completely transformed the way information reaches consumers, presenting problems for traditional media providers as they “struggl[e] to protect their market and revenue sources.”²⁰

When Congress enacted the Copyright Act of 1976 (Act), it could not have imagined the Internet or its legal implications. To better understand spectator live streaming of sporting events as an example of technology outrunning the Act, this Part examines the current copyright regime as it relates to live athletic events. Specifically, this Part analyzes which works in the sports industry may be copyrightable and addresses certain rights copyright holders are entitled to under federal copyright law.

A. Copyright Protection of Sports Broadcasts

Copyright protection stems from the Constitution.²¹ The Copyright Clause to the Constitution permits Congress to “[t]o 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.”²² In 1976, Congress passed the Act, broadening the scope of copyright protection.²³ Under section 102 of the Act, copyright protection exists “in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁴ The Act then lists examples of works of authorship that are entitled to protection.²⁵ However, this Note is only concerned with “motion pictures and other audiovisual works,”²⁶ which “consist of a series of related images which are intrinsically intended to be shown by the use of machines.”²⁷

Courts have construed the Act to protect the *broadcast* of a live

COMSCORE 1, 32 (July 14, 2015), http://www.comscore.com/Insights/Presentations-and-Whitepapers/2015/The-Global-Mobile-Report?ns_campaign=GLOB_REG_JUL2015_WP_GLOBAL%20MOBILE&ns_mchannel=email&ns_source=comscore_elq_GLOB_REG_JUL2015_WP_GLOBAL%20MOBILE_US&ns_linkname=text_general&ns_fee=0 (“Developed internet markets like the U.S., Canada and UK are now mobile-first in terms of digital consumer behavior.”).

19. Rivard, *supra* note 7, at 198.

20. *Id.*

21. U.S. CONST. art. I, § 8, cl. 8.

22. *Id.*

23. *See generally* 17 U.S.C. § 101 (2006) (listing examples of copyrightable material).

24. 17 U.S.C. § 102(a) (2012).

25. *Id.*

26. 17 U.S.C. § 102(a)(6) (2012).

27. 17 U.S.C. § 101 (2012).

sporting event.²⁸ For example, in *Baltimore Orioles v. Major League Baseball Players Association*, the U.S. Court of Appeals for the Seventh Circuit explained that three conditions must be met for a work to be protected under the Act: “first, a work must be fixed in tangible form; second, the work must be an original work of authorship; and third, it must come within the subject matter of copyright.”²⁹ As to the first condition, the court reasoned that because telecasts of sporting events are simultaneously being recorded as they are being broadcast, “the telecasts are fixed in tangible form.”³⁰ The court explained that the second condition subsumes two separate requirements: “[1] the work must possess an independent origin and [2] a minimal amount of creativity.”³¹ As to the independent origin requirement, the court held that “telecasts are independent creations, rather than reproductions of earlier works.”³² The court also reasoned that telecasts satisfy the requisite creativity for copyright protection because a sports broadcaster must make decisions concerning “camera angles, types of shots, the use of instant replays and split screens, and shot selection.”³³ Thus, because the telecasts were independent creations and possessed a minimal amount of creativity, the court ruled that the second condition had been met.³⁴ Lastly, the court reasoned that a sports broadcast is an audiovisual work, which comes within the subject matter of copyright.³⁵ While the court did not directly state that the underlying game is entitled to copyright protection, it did state “that the [p]layers’ performances possess a modicum of creativity required for copyrightability.”³⁶ However, not all courts agree with the Seventh Circuit that an athlete’s performance possesses the requisite creativity for copyright protection.

B. Lack of Copyright Protection for Underlying Game

The U.S. Court of Appeals for the Second Circuit, on the other hand, disagreed with the Seventh Circuit’s contention that athletes’ performances possess creativity.³⁷ In *National Basketball Association v. Motorola, Inc.*, the Second Circuit addressed whether the Act preempted a “hot-news” misappropriation claim under state law.³⁸ There, Motorola

28. *Balt. Orioles, Inc. v. MLB Players Ass’n*, 805 F.2d 663, 668 (7th Cir. 1986).

29. *Id.*

30. *Id.* (citations omitted).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 668-69.

35. *Id.* at 669 (citing 17 U.S.C. § 101 (2012)).

36. *Id.* n.7.

37. *NBA v. Motorola, Inc.*, 105 F.3d 841, 846-47 (2d Cir. 1997).

38. *Id.* at 843.

had created a paging device that allowed people to receive live score updates and statistics of National Basketball Association (NBA) games.³⁹ Sports Team Analysis and Tracking Systems (STATS) supplied Motorola with the game information by having reporters watch or listen to the game and key in changes in scores and other information into a personal computer.⁴⁰ STATS then analyzed, compiled, and formatted this information for retransmission.⁴¹ This information passed through other mediums before finally reaching the end user.⁴² A lag of approximately two to three minutes occurred “between the events in the game itself and when the information appear[ed] on the pager screen.”⁴³ In response, the NBA sued Motorola and STATS for, among other things, a state law misappropriation claim and federal copyright infringement.⁴⁴ The district court dismissed the NBA’s copyright claim but enjoined Motorola and STATS from using the pager to prevent further misappropriation.⁴⁵ All three parties appealed.⁴⁶

The question on appeal was whether the Act preempted the misappropriation claim under state law.⁴⁷ To answer this question, the Second Circuit first had to decide whether parts of the game came within the subject matter of copyright.⁴⁸ The court decided that the underlying basketball game did not come within the subject matter of copyright for several reasons.⁴⁹ First, the court did not consider the underlying game a “work of authorship.”⁵⁰ While there is considerable preparation for a game, the court explained that games are competitive and may “result in wholly unexpected occurrences,”⁵¹ unlike movies and television programs, which are largely unscripted.⁵² Second, the court explained that copyrighting an athletic event would “impair the underlying competition in the future. A claim of being the only athlete to perform a feat doesn’t mean much if no one else is allowed to try.”⁵³ Ultimately, such a copyright would undermine the competitive nature of sports and

39. *Id.* at 843–44.

40. *Id.*

41. *Id.* at 844.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 845.

49. *Id.* at 846.

50. *Id.*; *see also* 17 U.S.C. § 102(a) (2012) (providing the categories of “works of authorship”).

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

52. *Id.*

53. *Id.*

deter fans from watching.⁵⁴ Third, the court looked to other existing case law and did not find any cases that would suggest that organized events are entitled to federal copyright protection.⁵⁵ However, the Second Circuit did hold that federal copyright law protects the *broadcast* of a sporting event.⁵⁶

The court then addressed whether the information being transmitted to Motorola's pagers was protected under broadcast rights.⁵⁷ The "fact/expression" dichotomy under copyright law ensures that only expressions of an event, which constitute an author's originality, may receive protection under the Act.⁵⁸ Facts, on the other hand, are not protected because they lack an author's originality.⁵⁹ Agreeing with the district court, the Second Circuit held that since the pagers were merely reporting factual information about the event, Motorola and STATS did not extract copyrightable expressions from the basketball game.⁶⁰ The court further stated that "any patron of an NBA game could acquire [this information] from the arena without any involvement from the director, cameramen, or others who contribute to the originality of a broadcast."⁶¹ Thus, because the information Motorola and STATS transmitted lacked originality, it was not entitled to federal copyright protection.⁶²

Once the court held that the underlying facts of the game did not infringe on NBA's broadcast of the game, it next examined whether the Act preempted the state misappropriation claim.⁶³ Ultimately, it ruled that the Act did preempt the state law claim for the following reason:⁶⁴ because it is difficult to separate copyrightable material from uncopyrightable material, "adoption of a partial preemption doctrine—preemption of claims based on misappropriation of broadcasts but no preemption of claims based on misappropriation of underlying facts—would expand significantly the reach of state law claims and render the preemption intended by Congress unworkable."⁶⁵ Congress intended that underlying events remain in the public domain when it extended copyright protection to only broadcasts. Essentially, partial preemption would disregard this intent completely "by allowing state law to vest exclusive rights in material that Congress intended to be in the public

54. *Id.*

55. *Id.* at 847.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 848.

64. *Id.* at 849.

65. *Id.*

domain and to make unlawful conduct that Congress intended to allow.”⁶⁶

After the Second Circuit’s holding in *National Basketball Association v. Motorola, Inc.*, courts have consistently held that statistics and raw data lists constitute “facts” of an event,⁶⁷ and facts are not protected under federal copyright law.⁶⁸ For example, in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media*, a federal district court in Missouri reasoned that because the Major League Baseball (MLB) branch merely compiled a collection of statistics, the statistics at issue did not satisfy the creativity required under the Act.⁶⁹ Furthermore, the court ruled that the public domain lists of the players’ statistics did not meet the originality component of federal copyright law, and thus, were not entitled to copyright protection.⁷⁰ Similarly, in *C.B.S. Interactive, Inc. v. National Football League Players Ass’n*, the court addressed the use of players’ names and their statistics in the context of “fantasy football.”⁷¹ The court ultimately held that a fantasy football website containing professional players’ names and statistics did not violate the professional football league’s rights.⁷² Furthermore, it stated that the fantasy football website company was not required to obtain a license from the league to use information regarding professional players, such as performance statistics and injury updates.⁷³ Thus, these cases demonstrate that information about an athletic event lacks the requisite creativity and originality for federal copyright protection.

C. Digital Millennium Copyright Act—Limited Liability for Hosting Websites

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) to better address copyright infringement occurring over the Internet.⁷⁴ The DMCA permits a copyright holder to send a takedown

66. *Id.*

67. *See* *CBS Interactive, Inc. v. NFL Players Ass’n*, 259 F.R.D. 398 (D. Minn. 2009) (holding that using professional players’ statistics for a fantasy football league did not violate the rights of the professional league); *C.B.C. Distrib. & Mktg. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1101–03 (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007); *see also* Michelle R. Hull, *Note, Sports Leagues’ New Social Media Policies: Enforcement Under copyright Law and State Law*, 34 COLUM. J.L. & ARTS 457, 468–69 (2011).

68. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349–51 (1991) (holding that only expressions of raw facts are copyrightable; raw facts themselves are not entitled to copyright protection).

69. *C.B.C. Distrib. & Mktg.*, 443 F. Supp. 2d at 1101–03.

70. *Id.*

71. *CBS Interactive, Inc. v. NFL Players Ass’n*, 259 F.R.D. 398, 403 (D. Minn. 2009).

72. *CBS Interactive, Inc.*, 259 F.R.D. at 403.

73. *Id.*

74. Rivard, *supra* note 7, at 205; *see also* 17 U.S.C. § 512(c) (2012).

notice to websites containing copyright infringing material.⁷⁵ However, the DMCA limits a website's liability for copyright infringement if it meets certain conditions:⁷⁶ a hosting website is not liable for copyright infringement if it can prove that (1) it "does not have actual knowledge that the material" is infringing; (2) "in the absence of such knowledge, is not aware of facts or circumstances from which infringing activity is apparent;" or (3) if the hosting website does have knowledge or is aware of the infringing material, "acts expeditiously to remove, or disable access to, the material."⁷⁷

As a result of these broad protections shielding hosting websites from liability, the burden of enforcing copyrights has shifted to the actual copyright holders.⁷⁸ Moreover, courts have been reluctant "to force a website 'to determine whether content is infringing or not.'"⁷⁹ While "the hosting website has an incentive to remove infringing activity or face liability, . . . it rests on the content holder to enforce its own rights."⁸⁰ It is important to note here that these provisions only apply to *copyrighted* material, such as the broadcast of a sporting event.⁸¹ With an understanding of live sporting events under the current copyright regime, Part II will examine the rising popularity and legal implications of using live streaming technology in the context of live sporting events.

II. LIVE STREAMING TECHNOLOGY AND SPORTING EVENTS

Although live streaming technology has existed for some time,⁸² the ease and convenience with which this technology can now be used pose significant legal and financial problems for professional sports leagues and broadcasters. While much of the academic discussion has been on the live streaming of televised sports broadcasts and piracy,⁸³ advancements

75. 17 U.S.C. § 512(c) (2012); *see* Rivard, *supra* note 7, at 205.

76. 17 U.S.C. § 512(c)(1) (2012); *see* Rivard, *supra* note 7, at 205.

77. 17 U.S.C. § 512(c)(1) (2012).

78. Rivard, *supra* note 7, at 205.

79. *Id.*; *see e.g.*, Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1113 (9th Cir. 2007).

80. Rivard, *supra* note 7, at 205.

81. 17 U.S.C. § 512(c)(1) (2012).

82. Kharpal, *supra* note 1.

83. *See, e.g.*, Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 260 (2008) (analyzing Internet live sports telecasts piracy and the adoption of international initiatives and counter-technologies to curb this problem); Stephanie N. Horner, Comment, *DMCA: Professional Sports Leagues' Answer to Protecting Their Broadcasting Rights Against Illegal Streaming*, 24 MARQ. SPORTS L. REV. 435, 436 (2014) (outlining possible solutions professional sports leagues can take to stop unauthorized websites from showing their broadcasts online); Antwayne Robertson, *Internet Piracy of Sports Broadcasts: Finding the Solution in the United Kingdom and the United States*, 25 MARQ. SPORTS L. REV. 469, 469–70 (2015) (analyzing approaches the United Kingdom and the United States have taken to address sports broadcast

in live streaming technology have recently left sports leagues vulnerable to spectator live streaming.⁸⁴ This Part will examine the rising popularity of live streaming technology, specifically Periscope, followed by an analysis of the legal and financial implications this technology poses to professional sports leagues and broadcasters with whom their users have contracted.

A. Live Streaming Technology: Periscope

The ubiquity of smartphones and the popularity of social media have made it possible for people to share and communicate information nearly instantaneously.⁸⁵ Live streaming technology, while in existence for some time,⁸⁶ is now available as apps on smartphones.⁸⁷ The rising popularity of these apps is rather significant. In March 2015, for example, Twitter launched Periscope, its “standalone app for livestreaming video.”⁸⁸

Within four months of Twitter launching this app, ten million people already signed up for it.⁸⁹ Furthermore, the app has nearly two million daily active users watching videos on their smartphones.⁹⁰ The app permits registered users “to broadcast live video captured by their smartphone’s camera to fellow Periscope users, and promote the stream on Twitter to attract more viewers.”⁹¹ In addition, Periscope archives its streams for twenty-four hours.⁹²

The success of Periscope and other live streaming apps may be attributed to their ability to create a unique broadcasting experience.⁹³ These apps purport to go beyond a passive experience like television by

piracy).

84. See Pagliery, *supra* note 3.

85. Bolton, *supra* note 16.

86. Kharpal, *supra* note 1.

87. Stuart Dredge, *Twitter’s Periscope Video App Has Signed Up 10M People in Four Months*, GUARDIAN (Aug. 13, 2015, 3:06 PM), <http://www.theguardian.com/technology/2015/aug/13/twitter-periscope-video-app-10m-people>.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Glenn Peoples, *The Meerkat Minefield: Legal Issues with Live-Streaming Apps*, BILLBOARD (Mar. 30, 2015), <http://www.billboard.com/articles/business/6516936/meerkat-periscope-legal-issues-live-streaming-apps>.

93. See John Patrick Pullen, *You Asked: What is the Meerkat App?*, TIME (Mar. 13, 2015), <http://time.com/3742746/meerkat/> (“[T]his livestreaming technology has far-reaching potential for almost every other demographic: news hounds who want to watch events as they unfold, *sports addicts who want a view from the front row*, and gossip mongers who will hang on celebrities’ every word.”) (emphasis added).

allowing users to “step into someone else’s shoes.”⁹⁴ Moreover, viewers can interact with the broadcaster of a video by sending messages, for example.⁹⁵

These apps have been used for multiple purposes, from celebrities who want to connect to fans to brands that want to increase their digital and social marketing.⁹⁶ The Mayweather-Pacquiao fight demonstrates a problematic way in which these apps are being used: spectator live streaming of sporting events.⁹⁷ Periscope contains restrictions on content that may be live streamed, most importantly copyrighted content.⁹⁸ However, lack of federal copyright protection for an underlying game leaves sports leagues and broadcasters vulnerable to spectator live streaming.⁹⁹

B. Legal and Financial Implications of Spectator Live Streaming

The DMCA shields hosting websites from liability if the websites comply with the requirements of the DMCA’s safe harbor provisions, especially the notice and takedown process.¹⁰⁰ However, those provisions apply only to *copyrighted* material, such as the broadcast of a game.¹⁰¹ Because federal copyright laws do not protect the underlying game,¹⁰² hosting websites, such as Periscope, are essentially absolved of any liability if a spectator in a stadium or arena live streams a sporting event with the material appearing on these websites. Thus, hosting websites have no incentive to take down a spectator’s live streaming of a sporting event because the sporting event itself is not protected under copyright law.¹⁰³ As a result, major sports providers and broadcasters have no legal recourse for removing these live streams from hosting websites.

Lacking any effective legal recourse, sports leagues face a serious economic threat. Professional sports leagues rely heavily on the sale of

94. *Up Periscope*, MEDIUM, <https://medium.com/@periscope/up-periscope-f0b0a4d2e486#.al8ief1ze> (last visited Feb. 25, 2017).

95. *Id.*; see also Pullen, *supra* note 93.

96. See Christopher Heine, *Here is a List of Celebrities Who are Already on Meerkat and Periscope: Jimmy Fallon, Madonna, Shaq, Rand Paul, and Many More*, ADWEEK (Mar. 27, 2015, 6:39 PM), <http://www.adweek.com/news/technology/here-list-celebrities-who-are-already-meerkat-and-periscope-163744>; Samuel Edwards, *How Brands are Paving the Way for Periscope Marketing*, ENTREPRENEUR (July 1, 2014), <http://www.entrepreneur.com/article/247920>.

97. See discussion *supra* Introduction.

98. See *Periscope Copyright and DMCA Policy*, PERISCOPE, <https://www.periscope.tv/content> (last visited Oct. 24, 2015) (“We will respond to notices of alleged copyright infringement that comply with applicable law and are properly provided to us.”).

99. See discussion *infra* Part I.B.

100. See discussion *supra* Part I.C.

101. 17 U.S.C. § 512(c)(1) (2012).

102. See discussion *supra* Part I.B.

103. See discussion *supra* Parts I.C. & I.B.

broadcasting and media rights to receive a constant revenue stream.¹⁰⁴ Before the Internet, one could only watch professional sports via televised broadcasts.¹⁰⁵ Now, the Internet and social media permit people to quickly share and communicate information to an even wider audience, without regard for the property implications of sharing that information.¹⁰⁶ Some academics contend that sports leagues do not need extra copyright protection as an incentive to continue producing sporting events.¹⁰⁷ However, these academics ignore the fact that “over two-thirds of the total revenues of the NFL and over half of the revenues of the [NBA] and [MLB]” come from television, and these revenues hinge on the sport entities’ exclusive control over the broadcasters’ rights to televise games.¹⁰⁸ The nature of sporting events is extremely time-sensitive.¹⁰⁹ “Sports fan care not only about the final results of the game but also about the progression of a game.”¹¹⁰ Due to its time-sensitive nature, professional sporting events are especially vulnerable to live streaming.¹¹¹ If sporting events are available on the Internet for free, it would significantly affect a professional sports league’s broadcast value.¹¹² The cost of producing a professional football event, for example,

104. See WORLD INTELL. PROP. ORG., *supra* note 14; see also Brent Schrottenboer, *NFL Takes Aim at \$25 Billion, but at What Price?*, USA TODAY (Feb. 5, 2014, 1:42 PM), <http://www.usatoday.com/story/sports/nfl/super/2014/01/30/super-bowl-nfl-revenue-denver-broncos-seattle-seahawks/5061197/> (noting that the NFL receives “[a]bout \$5 billion from media and television rights to broadcast games . . . CBS, Fox, NBC, and ESPN provide the NFL with a total of about \$5 billion to \$6 billion annually from contracts that run through 2021–22.”); Cork Gaines, *The NFL Makes \$6 Billion Annually Just From National Television Contracts*, BUS. INSIDER (Sept. 11, 2014, 4:36 PM), <http://www.businessinsider.com/chart-national-tv-contracts-nfl-mlb-nba-nhl-2014-9> (estimating the annual revenue major sports leagues receive from television contracts. The MLB receives \$1.6 billion, the NBA receives \$0.9 billion, and the NHL receives \$0.6 billion annually.).

105. See Rivard, *supra* note 7, at 205.

106. *Id.*; Hull, *supra* note 67, at 463–64 (“The emergence of online peer sharing, coupled with growing global interest in professional sports, means that potential broadcast revenue generated by television contracts is likely to be undercut and devalued.”).

107. Hull, *supra* note 67, at 463–64; see, e.g., Michael E. Platinga, Note, *An Amended Doctrine that Will Silence the NFL: The Demise of the Existing Fair Use Doctrine as it Relates to Uses of Digital Sports Entertainment Media*, 14 J. TECH. L. & POL’Y 51, 74 (2009) (noting that years of pirating have not meaningfully impacted the NFL’s multi-billion dollar annual revenues).

108. Hull, *supra* note 67, at 464.

109. See Schrottenboer, *supra* note 104. (“NFL games are one of the few remaining programs that huge audiences want to watch live instead of recording to watch later.”); Hull, *supra* note 67, at 464 (“Sports leagues’ performance products have time-sensitive value on the day that they are broadcast to the public.”); Rivard, *supra* note 7, at 211 (“The actual events of the game, and being able to watch them as they transpire in real-time, is at the very core of the production of a broadcast.”).

110. Hull, *supra* note 67, at 464.

111. *Id.*

112. *Id.*

may range from \$150,000 to \$250,000.¹¹³ If professional sports leagues begin experiencing a reduction in broadcast revenues, there are fewer incentives to produce these athletic events.¹¹⁴ While there is no federal copyright protection for the underlying game, sports leagues and broadcasters can pursue alternative legal remedies.¹¹⁵ The next Part will examine these remedies and will argue that these remedies are insufficient to effectively protect professional sports leagues and broadcasters.

III. THE INSUFFICIENCY OF ALTERNATIVE LEGAL REMEDIES

Because federal copyright law does not protect the underlying game, major sports leagues must seek alternative remedies to cope with this issue.¹¹⁶ Some major sports leagues have outlined restrictions on live recording on the back of tickets or have alternatively sought lost profits, among other remedies.¹¹⁷ Part III will argue that these remedies are insufficient to effectively protect major sports leagues from the harms of spectator live streaming.

In response to the economic threat social media poses to professional sports leagues, sports leagues have developed policies restricting the recording of live sporting events.¹¹⁸ Tickets to sporting events are essentially a contract between the purchaser of the ticket and the professional sports league.¹¹⁹ While sports leagues may contend through their ticket agreements that a spectator's recording becomes the property of the team, it is unlikely that a court would view this breach as copyright infringement.¹²⁰ Instead, a sports league would only be able to bring a

113. *Id.* at 464–65; *see also* David Biderman, *Football Games Have 11 Minutes of Action*, WSJ (Jan. 15, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704281204575002852055561406>.

114. Hull, *supra* note 67, at 465.

115. *See* discussion *infra* Part III.A.

116. Rivard, *supra* note 7, at 208.

117. Hull, *supra* note 67, at 461 n.23; Rivard, *supra* note 7, at 208.

118. *See, e.g., Official NFL Ticket Exchange*, NFL, http://www.ticketexchangebyticketmaster.com/NFL/NFL/TicketExchange_Terms_and_Conditions_1.html (last visited Oct. 24, 2015) (“You agree not to record or transmit, or aid in recording and transmitting, any description, account, picture, or reproduction of the event.”); *see, e.g., Season Ticket Card Terms and Conditions, Washington Wizards*, NBA, <http://www.nba.com/wizards/season-ticket-card-terms-and-conditions> (“The Holder agrees not to transmit, distribute, or sell (or aid in transmitting, distributing, or selling), in any media now or hereafter existing, any description, account, picture, video, audio, game information or other form of exploitation or reproduction of the Event.”).

119. Rivard, *supra* note 7, at 208.

120. *NBA v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997) (holding that federal copyright law only protects the broadcast of a game and not the actual game itself).

breach of contract claim.¹²¹ With technology becoming harder to detect, however, it may be harder for professional sports leagues to enforce the terms of their contracts.¹²² By bringing a breach of contract claim, a sports league could seek lost profits, but those can be difficult to calculate.¹²³ Thus, these legal remedies are insufficient.

Another legal remedy that sports leagues and broadcasters may seek is to argue that spectator live streaming videos are copies of their sports broadcasts and constitute copyright infringement. In fact, the NBA used a similar argument in *Motorola*.¹²⁴ To prevail on this argument, sports leagues and broadcasters would need to prove that they (1) own a valid copyright and (2) that a spectator copied original elements of a broadcast in the spectator's live streaming video.¹²⁵ While sports leagues and broadcasters can successfully prove the first element,¹²⁶ the second issue is much more difficult to prove. The second issue requires two separate inquiries.¹²⁷ First, courts must determine whether a spectator actually used the protected elements of a broadcast in the spectator live streaming video.¹²⁸ Second, courts must determine whether there is substantial similarity between the protected elements of a broadcast and the spectator live streaming video.¹²⁹ Because sports broadcasters and a spectator are *simultaneously* recording the sporting event, it will be difficult to argue that the spectator used the protected elements of a broadcast.¹³⁰ In other words, there is simply not enough time for a spectator to borrow protected elements of a broadcast because the broadcast is being created at the same time as the spectator's live streaming video. The spectator is merely live streaming the underlying sporting event, which is not protected under copyright law.¹³¹

Alternatively, one could argue that the broadcast of the sporting event on a jumbotron may inspire the spectator to copy some of the same creative decisions the broadcasters' cameramen make, such as the timing and types of shots, which are protected elements of the broadcast.¹³²

121. Rivard, *supra* note 7, at 208.

122. *Id.*

123. *Id.*

124. *See* NBA, 105 F.3d at 847.

125. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

126. *See* Balt. Orioles, Inc. v. MLB Players Ass'n, 805 F.2d 663, 668–69 (7th Cir. 1986).

127. *See* Bridgmon v. Array Sys. Corp., 325 F.3d 572, 576 (5th Cir. 2003).

128. *Id.*

129. *Id.*

130. If the spectator had instead recorded live sports footage displayed on a jumbotron, sports leagues and broadcasters would likely prevail on the infringement claim since jumbotrons display broadcasts of a sporting event. This Note, however, does not focus on the previous scenario. Rather, it deals with spectator live streaming of the sporting event itself.

131. *See* NBA v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997).

132. *See* Balt. Orioles, Inc. v. MLB Players Ass'n, 805 F.2d 663, 668 (7th Cir. 1986).

However, due to the fact that the spectator and cameramen are following the same sporting event, the timing of a shot may simply coincide with the occurrences of the sporting event itself, not necessarily because of creative decision-making on the cameraman's part. Even if the spectator live streaming video copied protected elements of a broadcast, a substantial similarity analysis as well as the overarching infringement claim would require judicial inquiry.¹³³ This judicial inquiry would only occur after the spectator live streaming has happened. Additionally, judicial inquiry may be difficult as a whole considering the fact that Periscope only archives live streaming videos for twenty-four hours.¹³⁴ Therefore, copyright infringement based on copies of broadcasts will most likely fail as a remedy.

The major problem with these legal remedies is that sports leagues and broadcasters can only use them after the harm has already been done. Currently, no legal recourse exists to stop the spectator streaming of a live sporting event as it is occurring or to effectively prevent it from happening. As previously mentioned, the broadcast value of a sporting event is highly time-sensitive.¹³⁵ While major sports leagues may be able to recover some of those lost profits due to spectator live streaming, it is hard to know exactly how much damage a live stream did. With live streaming apps, it is difficult to estimate how many viewers watched a video because the number of viewers watching a video changes constantly. Thus, the best solution to the problem of spectator live streaming is one that allows live streaming apps, such as Periscope, a chance to forge media rights deals with professional sports leagues and broadcasters. Part IV will now propose a media rights deal solution to this issue.

IV. PROPOSED SOLUTION: FORGING MEDIA RIGHTS DEALS

Any effective solution to the issue of spectator live streaming would need to take into account the highly time-sensitive nature of sports.¹³⁶ The best recourse for sports providers and sports broadcasters would permit these actors to prevent the financial harm associated with spectator live streaming. With live streaming technology becoming harder to detect, enforcing prohibitions on spectator recording will become increasingly difficult.¹³⁷ The better solution would be for sports leagues and broadcasters to embrace the potential for revenue and marketing

133. See *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003).

134. See discussion *supra* Part II.A.

135. See *supra* Part II.B.

136. See Hull, *supra* note 67, at 464.

137. See discussion *supra* Part III.A.

capabilities that spectator live streaming can offer. This Part will first examine Snapchat's, another live streaming app, attempt to forge media rights deals with sports leagues and broadcasters. Since Periscope already has an advertising-based revenue model in place,¹³⁸ this Note proposes that Periscope and other live streaming apps should follow Snapchat's approach. In other words, this Note proposes that Periscope use its advertising-based revenue model to forge media rights deals with sports leagues and broadcasters, splitting ad revenue with sports leagues and broadcasters.

A. Snapchat's Attempt to Forge Media Rights Deals

Snapchat is making a push into live sports broadcasting.¹³⁹ It is "a mobile app that allows users to capture videos and pictures that self destruct after a few seconds."¹⁴⁰ On June 17, 2014, it released "Our Story," which "allows Snapchat to splice together 'snaps'—photo and video messages—from willing users, thus turning them into a curated, multimedia story available to all Snapchat users."¹⁴¹ A Story revolves around a specific event, and sporting events are becoming increasingly popular stories.¹⁴² Similar to Periscope, Snapchat's Stories allow viewers to get closer to the action by showing different points of view of an event.¹⁴³ Prior to attempting to forge deals with sports leagues and broadcasters, Snapchat had been creating these sports-related Stories "without the explicit permission of the leagues themselves."¹⁴⁴

To avoid infringement issues and to legitimize Stories, Snapchat began creating media rights deals with sports leagues and broadcasters.¹⁴⁵ Snapchat's approach has been to "sell brand sponsorships for these [S]tories and . . . to split the ad revenue among the sports leagues, the

138. See *Pre-Roll Ads for Periscope*, BUSINESS INSIDER (Mar. 29, 2017, 10:11 AM), <http://www.businessinsider.com/pre-roll-ads-for-periscope-2017-3>.

139. See John McDermott, *Coming to Snapchat: Live Sports Broadcasting*, DIGIDAY (Mar. 11, 2015), <http://digiday.com/platforms/madness-snapchat-moves-closer-becoming-sports-broadcaster/>.

140. See Larry Magid, *What is Snapchat and Why Do Kids Love It and Parents Fear It? (Updated)*, FORBES (May 1, 2013, 4:14 PM), <http://www.forbes.com/sites/larrymagid/2013/05/01/what-is-snapchat-and-why-do-kids-love-it-and-parents-fear-it/#5508919b2551>.

141. See McDermott, *supra* note 139 (citing *Introducing Our Story*, SNAPCHAT BLOG (June 17, 2014, 8:45 AM), <http://blog.snapchat.com/post/89064817345/introducing-our-story>).

142. See *id.* (citing *Introducing Our Story*, SNAPCHAT BLOG (June 17, 2014, 8:45 AM), <http://blog.snapchat.com/post/89064817345/introducing-our-story>) ("Snapchat released a Story for the World Cup final game last summer (<http://digiday.com/platforms/snapchat-delves-second-screening/>) and released several college football-related Stories throughout the season last fall.").

143. See *Introducing Our Story*, SNAPCHAT BLOG (June 17, 2014, 8:45 AM), <http://blog.snapchat.com/post/89064817345/introducing-our-story>.

144. See McDermott, *supra* note 139.

145. See *id.*

broadcasters, and itself.”¹⁴⁶ The starting point for Snapchat to feature footage from live sporting events was the National Collegiate Athletic Association (NCAA) Final Four, a deal involving both the NCAA and Turner.¹⁴⁷ Even though this deal involves both the sports league and the broadcaster, this is the exception to Snapchat’s approach.¹⁴⁸ Rather, Snapchat plans to create deals with just sports leagues.¹⁴⁹ While it has previously worked with sports broadcasters, it “is not planning to splice in game footage recorded by those networks. Stories will remain entirely user-generated and curated by Snapchat’s own team, but now with the approval of the leagues and, when needed, the leagues’ broadcast partners.”¹⁵⁰ With an understanding of how Snapchat’s process works, it is important to understand what motivates sports leagues and broadcasters to accept these deals.

B. Benefits of Forging Media Rights Deals

The benefits of creating media rights deals are numerous. First, it allows sports leagues to receive a portion of the revenue an app generated from selling advertisements. One of the main concerns surrounding spectator live streaming is that it presents serious financial concerns to a sports league’s revenue stream.¹⁵¹ As previously mentioned, major sports leagues rely heavily on the sale of broadcasting and media rights to receive a constant revenue stream.¹⁵² Online video ads are expected to be a \$17 billion business by 2017.¹⁵³ Additionally, Cisco Systems predicts that by 2019, 80% of all consumer Internet traffic will be video.¹⁵⁴ Thus, a deal stipulating the sharing of ad revenue resolves the revenue stream problem facing sports leagues and broadcasters. Not only can sports leagues and broadcasters expect to receive a portion of ad revenue as a result of this deal, they will be entering a booming business. Second, a media rights deal allows sports leagues “to grow the popularity of their brand, providing another tool to engage with their fanbase, as well as

146. *Id.*

147. *See Impact of Live Streaming on Sports Broadcasts*, STATS Blog (Nov. 18, 2015), <http://www.stats.com/blog/2015/11/18/impact-of-live-streaming-on-sports-broadcasts/> [hereinafter *STATS Blog*]; McDermott, *supra* note 139.

148. *See* McDermott, *supra* note 139.

149. *See id.*

150. *Id.*

151. *See* discussion *supra* Part II.B.

152. *See* discussion *supra* Part II.B.

153. *See supra* note 138.

154. *See Cisco Visual Networking Index: Forecast and Methodology, 2014–2019*, CISCO (May 27, 2015), at 2, http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.pdf.

offering the potential to attract new fans to the team and sport.”¹⁵⁵ Live streaming apps allow sports leagues and broadcasters to reach an audience that is farther both geographically and electronically. Third, it improves “fan experience and engagement both inside and outside the stadium.”¹⁵⁶ Spectators can directly contribute to and participate in a broadcast while engaging others who are not at the sporting event. With live streaming a sporting event, others outside of a stadium can get even closer to the action and experience different points of view.¹⁵⁷ Fourth, it avoids litigation, notably breach of contract claims,¹⁵⁸ by permitting spectators to live stream in accordance with the sports league and broadcaster’s policy. Given these benefits, this Note proposes that Periscope forge a media rights deal with sports leagues and broadcasters.

C. Periscope Should Forge Media Rights Deals

The best solution to the issue of spectator live streaming is to simply embrace it by creating a media rights deal among live streaming app companies, sports leagues, and sports broadcasters. Not surprisingly, Periscope has previously entered into a media rights deal. In fact, “[t]he Seattle Reign of the National Women’s Soccer League was the first professional sports club to live-stream an entire game on the Periscope app when they broadcasted a preseason contest in March 2015.”¹⁵⁹ This live streaming differed from Snapchat’s Story¹⁶⁰ because Periscope itself live streamed the game rather than spectators at the game. To further monetize their products, sports leagues and broadcasters should enter into media rights deals similar to the ones Snapchat entered into,¹⁶¹ in which spectators live stream the sporting event.

For sports leagues and broadcasters to reap the financial benefits of a media rights deal, live streaming apps must develop a method to sell ads. Fortunately, Periscope currently has an advertising-based revenue model.¹⁶² Given the online video ad business forecast, the recent release of Periscope compared to Snapchat,¹⁶³ and competition from Snapchat as

155. STATS Blog, *supra* note 147.

156. *Id.*

157. See discussion *supra* Part IV.A.

158. See discussion *supra* Part III.A.

159. STATS Blog, *supra* note 147.

160. See discussion *supra* Part IV.A.

161. See discussion *supra* Part IV.A.

162. See *Pre-Roll Ads for Periscope*, *supra* note 138.

163. Snapchat was initially released in July 2011. J.J. Colao, *The Inside Story of Snapchat: The World’s Hottest App or a \$3 Billion Disappearing Act?*, FORBES (Jan. 6, 2014), <https://www.forbes.com/sites/jjcolao/2014/01/06/the-inside-story-of-snapchat-the-worlds-hottest-app-or-a-3-billion-disappearing-act/2/#7d69d5f5d017>. Periscope was initially released in March 2015. Kevin Weil, *Introducing Periscope*, TWITTER BLOGS (Mar. 26, 2015, 1:58 PM),

the up and coming “SportsCenter of cultural moments,”¹⁶⁴ Periscope will probably enter this business as well. While Snapchat is only looking to forge media rights deals with sports leagues,¹⁶⁵ sports broadcasters need to negotiate with sports leagues and encourage Periscope to create media rights deals with broadcasters. With an advertising-based revenue model already in place, Periscope has the potential to greatly increase its revenue and attract more users while sports leagues and broadcasters have the potential to receive a portion of this revenue and market their teams and sports to a bigger audience. In the end, media rights deals benefit live streaming app companies, sports leagues, and sports broadcasters.

CONCLUSION

With the increasing popularity and convenience of live streaming apps,¹⁶⁶ major sports leagues face serious problems regarding their revenue stream.¹⁶⁷ As already mentioned, sports leagues rely heavily on their sale of broadcasting rights to receive a constant stream of revenue.¹⁶⁸ Due to the highly time-sensitive nature of sports,¹⁶⁹ spectator live streaming videos are in direct competition with copyrighted sports broadcasts.¹⁷⁰ While copyright law currently protects sports broadcasts,¹⁷¹ the underlying game itself is not protected.¹⁷² Thus, sports leagues and broadcasters cannot send takedown notices to websites containing live streaming videos of their sporting events.¹⁷³ Additionally, the current legal alternative remedies available to sports broadcasters and leagues do nothing to prevent spectator live streaming or to stop it as it is happening.¹⁷⁴ To prevent the financial harm facing sports leagues and broadcasters as a result of spectator live streaming, sports leagues and broadcasters should embrace media rights deals with Periscope. Not only does this solution avoid litigation¹⁷⁵ and improve marketing for sports leagues, it allows sports leagues and broadcasters to receive a share of ad revenue generated by Periscope, resolving the serious revenue stream

<https://blog.twitter.com/2015/introducing-periscope>.

- 164. STATS Blog, *supra* note 147.
- 165. See discussion *supra* Part IV.A.
- 166. See discussion *supra* Part II.A.
- 167. See discussion *supra* Part II.B.
- 168. See discussion *supra* Part II.B.
- 169. See Hull, *supra* note 67, at 464.
- 170. See discussion *supra* Part IV.B.
- 171. See discussion *supra* Part I.A.
- 172. See discussion *supra* Part I.B.
- 173. See discussion *supra* Part II.B.
- 174. See discussion *supra* Part III.A.
- 175. See discussion *supra* Part IV.B.

problem sports leagues face because of spectator live streaming.¹⁷⁶

176. See discussion *supra* Part IV.B.