FRIEND OR FOE? THE IMPACT OF TECHNOLOGY ON PROFESSIONAL SPORTS

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I. INTRODUCTION

In the age of YouTube, Facebook, Twitter, blogging, and instant media, more people are broadcasting their viewpoints on the Internet. Increasingly, camera phones, iPads, and iPods, supplement or supersede writing as a way to convey opinion—every individual is able to take a snapshot or video and simultaneously upload it along with their viewpoints to the site of their choosing. Professional sports are often the subject of discussion. The problem facing professional sports leagues is that anyone with a camera phone or computer now has the ability to widely disperse what they are viewing, hearing, or thinking; thus, fans put themselves in direct competition with the licensed materials owned by the professional sports leagues.

Professional sports leagues are frequently in the headlines regarding conflicts over the use of their trademarks and copyrights by third parties without permission. For example, Major League Baseball ("MLB") has

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1 See Mark Goodman & Mark Gring, The Internet: New Technology, Old Law, 45 THE FREEMAN – IDEAS ON LIBERTY 637 (1995) ("The American public has found its own voice on the internet. In fact, the internet has become the most fertile ground in history for the marketplace of ideas. The internet is a worldwide venue for discussion of ideas on a plethora of topics and a variety of voices.").


3 See, e.g., Mike Masnick, Is It Illegal to Describe the Sporting Event You’re Watching?, TECHDIRT (June 28, 2006), http://commcns.org/uWViTG; Adam Thierer, Who Can Film Video Clips at a Pro Football Stadium?, THE TECHNOLOGY LIBERATION FRONT (Sept. 19, 2006), http://commcns.org/sPi0SI.

4 See, e.g., Mike Masnick, Major League Baseball Claims Ownership of Game Description, TECHDIRT (Oct. 23, 2003), http://commcns.org/tNJe8G; Mike Masnick, It's the
claimed ownership of both the broadcast rights and the raw data of professional baseball games.\(^5\) The National Basketball Association ("NBA") and the National Football League ("NFL") have encountered similar problems.\(^6\) On the other hand, journalists and sports enthusiasts alike argue that they have a First Amendment right to disseminate their ideas.\(^7\)

Professional sports leagues believe that it is unlawful for people to observe a professional sporting event and recite to a friend a description of the game while using a mobile phone.\(^8\) The leagues claim that such action is the equivalent of rebroadcasting.\(^9\) Rebroadcasting is defined as the "reception by radio of the programs or other transmissions of a broadcast or any other type of radio station, and the simultaneous or subsequent retransmission of such programs or transmissions by a broadcast station."\(^10\) As up-to-the-second content dissemination continues to become more common, professional sports will continue to have problems protecting their trademarks and copyrights.\(^11\)

This Note argues that the issue needs to be swiftly and promptly settled and that the best way to do this is to amend current legislation or write new legislation that specifically addresses the differences between traditional media and social media. Part II will focus on the applicable statutes and cases interpreting them in the professional sports context.\(^12\) Next, Part III will conduct an examination of the competing arguments and why past approaches will prove to be insufficient to solve the disagreement. Lastly, Part IV will scrutinize several options capable of resolving the conflict. Until the issue is settled, either by the courts or the legislature, professional sports leagues will continue to clash with fans who take advantage of modern communications devices.

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\(^5\) Is It Illegal to Describe the Sporting Event You’re Watching?, supra note 3. See also Major League Baseball Claims Ownership of Game Description, supra note 4 (noting that Motorola won a lawsuit against the NBA, where the NBA claimed that Motorola infringed on its copyright by sending game data to pagers).

\(^6\) See generally Who Can Film Video Clips at a Pro Football Stadium?, supra note 3; Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).


\(^8\) Is It Illegal to Describe the Sporting Event You’re Watching?, supra note 3.

\(^9\) Id.

\(^10\) 47 C.F.R. § 73.1207 (2010).

\(^11\) See Is It Illegal to Describe the Sporting Event You’re Watching?, supra note 3.

II. BACKGROUND

Both copyright law and trademark law protect professional sports leagues products, logos, and marks. Congress has amended these statutes to offer more protection as trademark and copyright laws have struggled to keep pace with technology. In particular, the Digital Millennium Copyright Act of 1998 ("DMCA") amends copyright law to make it a crime to bypass electronic protection mechanisms. Additionally, Congress has introduced a plethora of legislation, most recently Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 ("PROTECT IP Act"), that would offer copyright holders strengthened remedies against websites that conduct infringing activities. The First Amendment and the fair use exception to copyright law shield sports fans.

A. Protection Afforded by Copyright Law

A copyright is the set of exclusive rights, including the right to copy, distribute and create derivative works, granted to the creator of an original work. A copyright does not, however, protect ideas themselves; only their expression. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the [p]rogress of [s]cience and useful [a]rts." In order to establish a claim for copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original expression.

Prior to its amendment in 1976, the Copyright Act did not directly address whether broadcasts describing or depicting sporting events would be entitled to copyright protection. When Congress drafted the 1976 Amendment, they

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16 U.S. CONST. amend. 1.
19 U.S. CONST. art. I, § 8, cl. 8.
21 Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997).
specifically extended copyright protection to recorded broadcasts of live events. The definition a "fixed" work was also amended to include a "work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." The House record states that "the bill seeks to resolve, through the definition of 'fixation' in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded." Congress was clearly targeting sporting events.

As non-broadcast communications came into widespread use, interpretation of the 1976 amendment became more difficult. In a seminal case, the NBA asserted copyright infringement claims with regard to both their underlying basketball games and to their broadcasts of the games against Motorola, manufacturer and promoter of "SportsTrax" hand-held pagers that provided real-time information about professional basketball games. Although Congress had expressly granted copyright protection to sports broadcasts in the 1976 amendment to the Copyright Act, the Second Circuit clarified the scope of that amendment by holding that such protection was not extended to the underlying events but only to the broadcast of such events. The Copyright Act of 1976 did not protect the underlying basketball games because sporting events are not one of the eight categories comprising works of authorship covered by the Act. Consequently, the court held that Motorola did not infringe on the NBA's copyright in their broadcasts because they reproduced only facts from the underlying sport event and not the

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22 17 U.S.C. § 102(a). The 1976 Act specifically insured simultaneously-recorded transmissions of sporting events would meet the Act's fixation requirement Id. § 102 note ("The bill seeks to resolve, through the definition of 'fixation' in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded.").

23 Id. § 101.
24 H.R. No. 94-1476 at 52.
25 Id.
26 Nat'l Basketball Ass'n, 105 F.3d at 843.
27 Id. at 843-44. The Copyright Act expressly afforded copyright protection to "simultaneously-recorded broadcasts of live performances." Id. at 845.
28 Id. at 846.
29 Id. Copyright Act of 1976 defines works of authorship to "include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." 17 U.S.C. § 102(a).
expression or description of the sport event constituting the broadcast.30

In Kregos v. Associated Press, Kregos sued for copyright infringement because the Associated Press began publishing a form used to compile statistics on baseball pitchers that was virtually identical to his.31 At first glance, the form appears to be copyrightable because it is an expression of an idea—a particular arrangement of statistics—and not the underlying idea.32 However, “even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.”33 This is the idea/expression merger doctrine. An author with a copyright that grants control over an idea has a weapon against other inventors, because that author has ability to bring suit against anyone using the underlying idea.

In 1998, copyright law was again amended in order to account for changing technology. The Digital Millennium Copyright Act34 (“DMCA”) addressed the infringing activities that the 1976 Act could not have foreseen. The DMCA criminalizes the production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works.35 The DMCA also protects service providers that could unknowingly host infringing content from liability for the actions of their users.36 Service providers are shielded if they do not receive a financial benefit from infringing material posted to their site and have protocols for requesting the removal of such material.37 Specifically, the DMCA allows copyright holders to demand swift removal of alleged infringements.38 The process for removal under the DMCA requires the copyright holder to first give notice to the service provider.39 Then the service provider must remove the infringing content from their website.40 After the removal of the infringing content, the alleged infringer is allowed to make a counter-notification to the service provider explaining the removed content is not a copyright violation.41 If the service

30 Id. at 847 (“The ‘fact/expression dichotomy’ is a bedrock principle of copyright law that ‘limits severely the scope of protection in fact-based works.’” (citations omitted)).
32 Id. at 705 (“[t]he fundamental copyright principle that only the expression of an idea and not the idea itself is protectable” (citing Mazer v. Stein, 347 U.S. 201, 217 (1954))).
33 Id. (citations omitted).
36 Id. § 512 (2006 & Supp. IV 2010).
37 Id. § 512(c)(1)(B).
38 Id. § 512(b)(2)(E).
39 Id. § 512(c)(3).
40 Id. § 512(b)(2)(E).
provider agrees with the counter-notification the service provider is allowed to restore the content onto the website.\textsuperscript{42} After the round of notice, takedown, counter-notification, and restoration, the copyright holder is expected to contact the alleged infringer directly.\textsuperscript{43} This safe harbor enables sites like YouTube to function without the significant burden of pre-screening content to ensure that it does not infringe on any copyright. After users post on the site, the service provider’s only responsibilities are to provide a channel for copyright holders to file complaints and to remove the offending content.\textsuperscript{44} The copyright holder is responsible for informing the service provider that a copyright violation is occurring.\textsuperscript{45} The DMCA does not hold the intermediary—the service provider—liable for the actions of its infringing user, only for a prompt response after infringing content has been discovered.\textsuperscript{46}

In 2007, a class action lawsuit for copyright infringement spearheaded by the English Premier League was brought under the DMCA against YouTube.\textsuperscript{47} The class members contended that their copyrighted works had been infringed by YouTube users.\textsuperscript{48} In the class members’ complaint they alleged that “tens of thousands of videos on YouTube, resulting in hundreds of millions of views, were taken unlawfully from [their] copyrighted works without authorization.”\textsuperscript{49} YouTube, the service provider, and its owner Google, argued that they were entitled to safe harbor protection under the DMCA and consequently not liable for any copyright infringement occurring on their site.\textsuperscript{50} The class members countered that YouTube and Google should not be afforded the protection of the safe harbor provision of the DMCA because they had actual knowledge of the alleged infringement, as evidenced defendants’ knowledge that they “knew infringing videos generated 54 to 80 percent of the traffic on YouTube.”\textsuperscript{51} YouTube and Google, however, presented evidence that they have a designated an agent to “swiftly remove” infringing material when they receive “specific notice” of such infringement.\textsuperscript{52} The critical issue in the case became

\textsuperscript{42} Id. § 512(g)(2)(B)-(C).
\textsuperscript{43} Id. § 512(h).
\textsuperscript{44} Id. §§ 512(a)-(d). See also Matt Lynch, What's Mine Isn't Yours: Sports, Copyright and YouTube, MEDILL REPORTS (Jul. 9, 2007), http://commcnns.org/t7YZdK.
\textsuperscript{45} 17 U.S.C. §§ 512(a)-(d). See also What's Mine Isn't Yours: Sports, Copyright and YouTube, supra note 44.
\textsuperscript{46} 17 U.S.C. §§ 512(a)-(d). See also What's Mine Isn't Yours: Sports, Copyright and YouTube, supra note 44.
\textsuperscript{48} Id. at 518-19.
\textsuperscript{50} Viacom, 718 F. Supp. 2d at 516.
\textsuperscript{51} Brief of Petitioner, supra note 49, at 32.
\textsuperscript{52} Viacom, 718 F. Supp. 2d at 519.
whether the language contained in the DMCA required "a general awareness that there are infringements" or rather "actual or constructive knowledge of specific and identifiable infringements of individual items."53

The court rejected Premier League's argument. In holding that YouTube and Google were protected by the DMCA safe harbor provision, the court examined the legislative history and prior case law.54 Both the House and Senate committees agreed that service providers do not have an affirmative obligation "to seek out copyright infringement, but [a service provider] would not qualify for the safe harbor if it had turned a blind eye to 'red flags' of obvious infringement."55 To allow the knowledge of widespread infringement on the Internet in general to "impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA."56 The text of the DMCA is clear: "it shall not be construed to condition 'safe harbor' protection on 'a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.'"57

So far, case law has consistently sided with service providers. The case law interpreting the DMCA likewise does not hold the service provider responsible for locating, and subsequently removing, all infringing materials found on its sites.58 In Perfect 10, Inc. v. CCBill LLC, the Ninth Circuit refused to shift the burden of policing infringing materials from the copyright owner to the service providers.59 Specifically, the Ninth Circuit found that the "DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright."60 In view of the foregoing, the court concluded that YouTube and Google's alleged general knowledge of infringement did not impose on them a proactive duty to monitor for copyright infringement on their site.61 Unless the service provider is aware of specific instances of infringement on their site, the burden of identifying infringement remains with the copyright owners.62

53 Id.
54 Id. at 519-26.
55 Id. at 522 (quoting S. REP. NO. 105-190, at 48-9 (1998); H.R. REP. NO. 105-551, at 57-8 (1998)).
56 Id. at 523.
57 Id. at 524 (quoting 17 U.S.C. § 512(m)(1)).
58 Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007).
59 Id.; Viacom, 718 F. Supp. 2d at 523.
60 Perfect 10, 488 F.3d at 1113.
61 Viacom, 718 F. Supp. 2d at 526.
62 Id. at 525.
B. Proposed Copyright Legislation Expands Protection

Recognizing that technology is continuing to change, both the Obama Administration and the Senate are in the process of a third round of updates. In September 2010, Sen. Patrick Leahy and Sen. Orrin Hatch introduced the Combating Online Infringement and Counterfeits Act ("COICA") in the Senate.\(^{63}\) COICA would have expanded the power of the Attorney General to shut down websites "dedicated to infringing activities."\(^{64}\) Specifically, the AG would have been able to obtain an injunction requiring domain name registrars, registries, and Internet Service Providers to take necessary measures to block access to websites that are "primarily designed...to offer goods or services in violation of title 17, United States Code, or that enable or facilitate a violation of title 17."\(^{65}\) The proposed legislation supplements the DMCA, which requires the copyright holders to ask the service provider to remove infringing content.\(^{66}\) But COICA goes further than the DMCA because it allows the copyright holder to urge the government to forbid access to an entire domain, which could have the effect of blocking user access to both infringing and non-infringing content.\(^{67}\) While COICA passed the Senate Judiciary Committee with unanimous approval, the 111th Congress never voted on it.\(^{68}\) Although 112th Congress never reintroduced COICA, the Act was re-written and introduced on May 12, 2011 as the PROTECT IP Act by Senator Patrick Leahy.\(^{69}\) PROTECT IP creates an additional remedy that allows copyright holders to obtain court orders directing infringing websites to be blocked or de-listed.\(^{70}\) Despite PROTECT IP’s bi-partisan support,\(^{71}\) it has been the target of

\(^{63}\) See generally S. 3804.

\(^{64}\) Id. § 2(a)(1).

\(^{65}\) Id. See also Sam Gustin, Web Censorship Bill Sails Through Senate Committee, WIRED (Nov. 18, 2010, 2:50 PM), http://commcns.org/ucmUEP; Jaikumar Vijayan, Online IP Protection Bill Sparks Outrage, COMPUTERWORLD (Sept. 29, 2010), http://commcns.org/rS1C5n.


\(^{67}\) See Online IP Protection Bill Sparks Outrage, supra note 65.

\(^{68}\) S. 3804 (Sen. Leahy published a written report on COICA on Dec. 17, 2010, but the proposed bill received no further attention); Mike Pallante, What You Should Be Asking About Internet Legislation: Part I, QUESTIONAL (June 14, 2011), http://commcns.org/ru4hBF.


\(^{70}\) S. 968, § 4.

\(^{71}\) Indicated by sponsorship: Patrick Leahy (D-VT); and co-sponsorship by Lamar Alexander (R-TN), Kelly Ayotte (R-NH), Michael Bennet (D-CO), Jeff Bingaman (D-NM) Richard Blumenthal (D-CT), Roy Blunt (R-MO), John Boozman (R-AR), Sherrod Brown
vigorouse opposition from various consumer rights groups, such as the Electronic Frontier Foundation, Reporters Without Borders, Human Rights Watch, Center for Democracy and Technology, and Demand Progress.\footnote{Abigail Phillips, *The "PROTECT IP" Act: COICA Redux*, ELEC. FRONTIER FOUND. (May 12, 2011, 8:37 AM), http://commcns.org/vrV0lq; Letter from American Association of Law Libraries et al., to Senator Patrick Leahy, Chairman, Comm. on the Judiciary, and Senator Chuck Grassley, Ranking Member, Comm. on the Judiciary (May 25, 2011), available at http://commcns.org/u6ENWo.}


The Obama Administration itself has made a proposal for the creation of new digital copyright laws.\footnote{See ADMINISTRATION WHITE PAPER, supra note 15.} In the proposal, the Obama Administration recommends sweeping revisions to copyright law, such as making the illegal streaming of audio and/or video a federal felony.\footnote{See id.} The Obama Administration is “concerned that ‘illegal streaming of content’ may not be covered by criminal law, saying ‘questions have arisen about whether streaming constitutes the distribution of copyrighted works.’”\footnote{Declan McCullagh, *White House Wants New Copyright Law Crackdown*, CNET NEWS (Mar. 15, 2011), http://commcns.org/sj43Ob. See also ADMINISTRATION WHITE PAPER, supra note 15.} In an effort to resolve the ambiguity regarding the illegality of streaming content, the Obama Administration proposes new legislation that will “clarify that infringement by streaming, or by means of other similar new technology, is a felony in appropriate circumstances.”\footnote{See ADMINISTRATION WHITE PAPER, supra note 15.}

C. Additional Protection Afforded by Trademark Law

Trademark law also enables professional sports leagues to protect their brands. A trademark is a “a word, name, symbol, device, or other designation, (D-OH), Benjamin Cardin (D-MD), Bob Casey, Jr. (D-PA), Thad Cochran (R-MS), Christopher Coons (D-DE), Bob Corker (R-TN), Richard Durbin (D-IL), Mike Enzi (R-WY), Dianne Feinstein (D-CA), Al Franken (D-MN), Kristen Gillibrand (D-NY), Lindsey Graham (R-SC), Chuck Grassley (R-IA), Kay Hagan (D-NC), Orrin Hatch (R-UT), Tim Johnson (D-SD), Amy Klobuchar (D-MN), Herb Kohl (D-WI), Mary Landrieu (D-LA), Joseph Lieberman (I-CT), John McCain (R-AZ), Bill Nelson (D-FL), Marco Rubio (R-FL), Chuck Schumer (D-NY), Jeanne Shaheen (D-NH), Tom Udall (D-NM) and Sheldon Whitehouse (D-RI). S. 968.
or a combination of such designations, that is distinctive of a person's goods or services and that is used in a manner that identifies those goods or services and distinguishes them from the goods or services of others."79 A plaintiff must prove two basic elements to establish a claim: that (1) a party holds a mark that is worthy of protection; and (2) the defendant's use of the allegedly infringing mark created a likelihood of confusion among customers regarding the origin of the goods that the defendant sold using the mark.80 Once a mark has been registered, proof of registration is conclusive evidence of the right to use the mark, but it does not prevent a defendant from attempting to prove a defense that would have been available to them if the trademark had not been registered.81 If a registrant has used his mark in connection with the goods or services specified on his registration for five continuous years after the registration date, his mark is deemed incontestable.82 Once a mark becomes incontestable "the mark is immune from challenge in an infringement action," and consequently the registration constitutes conclusive evidence of his right to use the mark, subject only to nine statutory defenses.83

82 Id. § 1065.

(1) That the registration or the incontestable right to use the mark was obtained fraudulently; (2) That the mark has been abandoned by the registrant; (3) That the registered mark is being used by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services on or in connection with which the mark is used; (4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin; (5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously used by such party or those in privity with him from a date prior to (A) the date of constructive use of the mark established pursuant to section 1057(c) of this title, (B) the registration of the mark under this chapter if the application for registration is filed before the effective date of the Trademark Law Revision Act of 1988, or (C) publication of the registered mark under subsection (c) of section 1062 of this title: Provided, however, That this defense or defect shall apply only for the area in which such continuous prior use is proved; (6) That the mark whose use is charged as an infringement was registered and used prior to the registration under this chapter or publication under subsection (c) of section 1062 of this title of the registered mark of the registrant, and not abandoned: Provided, however, That this defense or defect shall apply only for the area in
In 1998, NBA Properties and NFL Properties both brought trademark infringement claims against Dahlonega Mint, Inc. ("Dahlonega Mint"), a sports trading card manufacturer, claiming that Dahlonega Mint's sale of sports trading cards infringed upon the NBA and NFL trademarks. Dahlonega Mint sold three types of card designs: those with athletes in their uniforms, those with athletes in uniforms bearing no particular affiliation with an existing professional team, and those with athletes in their team uniforms, but with logos removed. The district court held that the first type of card was clearly trademark infringement. But those cards devoid of team names and logos presented a more difficult question. The test the court employed was to ascertain whether the team uniform designs created a likelihood that consumers would believe that the Plaintiffs licensed these sports cards. While both the NBA and NFL had proof of registration of their respective trademarks, registration itself is not the sole determinant of the issue. The Georgia District Court had to determine whether Defendants' use of the team uniform designs by themselves "created a likelihood of confusion." The Court considered seven factors: (1) the type of trademark at issue, (2) similarity of design, (3) similarity of services, (4) identity of purchasers and similarity of retail outlets, (5) similarity of advertising campaigns, (6) the defendant's intent, and (7) actual confusion. The determination ultimately comes down to a decision by the fact finder. When conducting its analysis the Court examined the "mark's relationship to the services provided by Plaintiffs, not the product being sold by Defendants." The district court held that there was an issue of fact as to whether the seven factors would permit a

which the mark was used prior to such registration or such publication of the registrant's mark; (7) That the mark has been or is being used to violate the antitrust laws of the United States; (8) That the mark is functional; (9) That equitable principles, including laches, estoppel, and acquiescence, are applicable.

15 U.S.C § 1115(b).

85 Id. at 1342.
86 Id.
87 Id. at 1346.
88 Id. Proof of registration does not preclude one who is sued for trademark infringement from proving "any legal or equitable defense or defect which might have been asserted if such mark had not been registered." Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1184 (5th Cir. 1980).
89 Nat'l Basketball Ass'n Props., 41 F. Supp. 2d at 1345.
90 Id. (citing Freedom Sav. & Loan Ass'n v. Way, 757 F.2d 1160, 1164 (11th Cir. 1982)).
See also Quokka Sports, Inc. v. Cup Int'l Ltd., 99 F. Supp. 2d 1105 (N.D. Cal. 1999).
91 Nat'l Basketball Ass'n Props., 41 F. Supp. 2d at 1347. See also Quokka Sports, 99 F. Supp. 2d at 1105.
92 Nat'l Basketball Ass'n Props., 41 F. Supp. 2d at 1347 (citations omitted).
reasonable fact finder to decide that trading cards featuring only the team uniform designs and colors created a sufficient likelihood of confusion, thereby infringing upon the NBA and NFL trademarks.\textsuperscript{93}

Another important trademark case in the world of professional sports occurred when World Championship Wrestling ("WCW") sued its rival association, World Wrestling Federation ("WWF"), for trademark infringement based on the claim that the WWF caused confusion. WCW alleged that WWF had incorporated pictures and videotapes of wrestlers formerly under contract to WWF but currently under contract to WCW in its promotional materials.\textsuperscript{94} WWF claimed it was merely exercising its copyrights in showing material in question.\textsuperscript{95} WWF argued that, to be actionable as trademark infringement, the communications must contain commercial speech and their use "should be considered 'expressive,' which is exempted from the Lanham Act and protected by the First Amendment."\textsuperscript{96} WCW argued that when the trademark infringement is defended on grounds that the use was expressive, not commercial, and merely done for purposes of source identification trademark law precluding dilution predominately overcomes the First Amendment right to free speech.\textsuperscript{97} WWF's promotional materials appeared to fall somewhere in between advertisements and art.\textsuperscript{98} As a result of being part advertisement and part art, the promotional materials contained both commercial and noncommercial elements.\textsuperscript{99} The Connecticut District Court considered the seven factors set forth in Dahlonega and observed that "[a]n expressive use does not become a commercial use solely because the use increases sales for a user."\textsuperscript{100} The court was also mindful of two competing interests. It recognized that "when the unauthorized use is done 'for the purpose of source identification, the trademark law [claim] generally prevails over the First Amendment.'"\textsuperscript{101} On the other hand, if the use of a mark was made for expressive purposes, as the defendants argued in this case, "the rights of the trademark owner must be weighed against the interests of free speech."\textsuperscript{102} In light of all the factors, the court remanded for jury trial, finding

\textsuperscript{93} \textit{Id.} at 1349.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 122-3.
\textsuperscript{97} \textit{Id.} at 123.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} World Championship Wrestling, 46 F. Supp. 2d at 123 (citing Dr. Seuss Enters. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1574 (S.D.Cal. 1996)).
\textsuperscript{101} \textit{Id.} (citing Yankee Publ'g Inc. v. News Am. Publ'g Inc., 809 F. Supp. 267, 276 (S.D.N.Y. 1992)).
\textsuperscript{102} \textit{Id.} (citations omitted).
that "the world of professional wrestling seems to be a hybrid of expressive performance and advertisement" requiring the balancing test. The balancing test involves both factual and legal issues and therefore was unable to be disposed of without consideration by the factfinder.\textsuperscript{103}

An important aspect of trademark law that is often overlooked is the applicability and scope of the Amateur Sports Act.\textsuperscript{104} The Amateur Sports Act affords the United States Olympic Committee ("USOC") broader trademark protection.\textsuperscript{105} In \textit{San Francisco Arts \& Athletics, Inc. v. U.S. Olympic Committee}, the Supreme Court addressed the constitutionality and the scope of the Amateur Sports Act.\textsuperscript{106} The Supreme Court held that the Act properly grants the USOC exclusive rights to Olympic marks in the context of commercial speech.\textsuperscript{107}

In that case, the USOC brought a claim of trademark infringement under the Amateur Sports Act against the publisher of an Olympic preview magazine, \textit{Olympics USA}.\textsuperscript{108} In determining whether there was infringement "the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the [marks] does not have available the normal statutory defenses."\textsuperscript{109} The Amateur Sports Act does not apply, however, to the use of protected Olympic marks in non-commercial speech.\textsuperscript{110} In determining whether the speech at issue was commercial the Supreme Court had to distinguish between speech that proposes a commercial transaction and other varieties of speech.\textsuperscript{111}

The court determined that the Amateur Sports Act and the Commercial Speech Doctrine "do[ not permit piracy of USOC's marks simply because they appear in a non-commercial writing."\textsuperscript{112} Non-commercial speech may be restricted where public interest in avoiding consumer confusion prevails over the First Amendment protection of free speech and expression.\textsuperscript{113}

In deciding whether the publication constituted commercial speech, the

\textsuperscript{103} Id.
\textsuperscript{105} Id.
\textsuperscript{107} Id. at 535-8. The Amateur Sports Act grants USOC the right to prohibit certain commercial and promotional uses of the word "Olympic" and other Olympic symbols, including the five interlocking rings. \textit{36} U.S.C. \textsection 220506.
\textsuperscript{109} Id. (citing \textit{S.F. Arts \& Athletics, Inc. v. U.S. Olympic Comm.}, \textit{483} U.S. 522, 531 (1987)).
\textsuperscript{110} Id. at 1209.
\textsuperscript{111} Id. at 1206-9 (the court needed to examine if the speech proposes a commercial transaction by focusing on the speech as a whole).
\textsuperscript{112} Id. at 1209.
\textsuperscript{113} \textit{Id. U.S. CONST. amend. I}.
court, following its Supreme Court precedent, narrowly defined commercial speech.\textsuperscript{114} The court held that the publisher’s use of “Olympics USA” for the name of its magazine, and the inclusion of Olympics paraphernalia in it, was non-commercial speech not in violation of Amateur Sports Act.\textsuperscript{115} Although customers were solicited to purchase the magazine, the magazine itself was not an advertisement.\textsuperscript{116} The magazine did not propose a commercial transaction and its content went far beyond the economic interests of the speaker and its audience.\textsuperscript{117}

D. Application of the First Amendment as an Exception to Protection

While professional sports leagues are entitled to protection under copyright law and trademark law, their rights are not absolute. The First Amendment protects sports fans from professional sports leagues. As the court noted in American Media, trademark law is counterbalanced by First Amendment Rights.\textsuperscript{118} The First Amendment also protects individuals who want to speak in, or report from, areas that are considered public forums, such as sports stadiums.\textsuperscript{119} Whether speech is commercial or not is important in this context since most of the users of new technology are using it for personal use and their speech is therefore still protected.\textsuperscript{120}

The Supreme Court has limited the First Amendment protections applicable to commercial speech.\textsuperscript{121} Any consideration of whether speech is commercial should rest on “the ‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to


\textsuperscript{115} \textit{Am. Media, Inc.}, 156 F. Supp. 2d at 1205.

\textsuperscript{116} \textit{Id.} at 1207.

\textsuperscript{117} \textit{Id.} at 1209.

\textsuperscript{118} U.S. CONST. amend. I.

\textsuperscript{119} \textit{Id.;} HENRY COHEN, CONG. RESEARCH SERV., FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 34-35 (2009). A significant percentage of professional sports clubs play in publicly owned and operated facilities: MLB (76.7%), NHL (46.7%), NBA (46.67%), and NFL (87.5%). Likewise, many “privately owned and operated facilities have received some form of government funding or other financial support (e.g. tax breaks, donated land, etc.).” Nick DeSiato, \textit{Silencing the Crowd, 20 MARQ. SPORTS L. REV.} 411, 414 n.18 (2010).

\textsuperscript{120} See \textit{Am. Media, Inc.}, 156 F. Supp. 2d at 1200.

\textsuperscript{121} See Bolger, 463 U.S. at 66. \textit{See also} Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973) (defining commercial speech as speech that does “no more than propose a commercial transaction”); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (noting that an advertiser will always have an economic interest, but that should not deprive the advertiser of First Amendment protection).
government regulation, and other varieties of speech." The Supreme Court has listed three factors that should be used to determine whether speech is commercial: (1) if the speech is concededly an advertisement, (2) if the speech references a specific product, and (3) if the speech is motivated by economic interest. Their combination "provides strong support for the...conclusion that the [speech can be] properly characterized as commercial speech.

The presence of profit alone does not define commercial speech. It is not the sole determinant because then doubt would be cast upon the traditional protections afforded publications such as books, newspapers, and magazines. An additional important consideration of the Commercial Speech Doctrine requires the court to examine the speech as a whole. When the speech at issue exhibits both commercial and non-commercial elements, it will be characterized as commercial speech only when its primary purpose is to propose a commercial transaction.

E. Application of Fair Use as a Further Exception to Protection

Fair use is a doctrine that acts as a limitation to the exclusive right granted to the copyright holder by copyright law. The fair use doctrine permits the use of copyrighted material without permission from the copyright holder for the limited purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." In order for the fair use doctrine to apply and allow the use of copyright material without permission from the copyright holder a balancing test will be conducted weighing factors including:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the

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123 Bolger, 463 U.S. at 66-67.
124 Id. at 67.
125 Id. (stating economic motivation by itself is insufficient to turn materials into commercial speech); Daily Herald Co. v. Munro, 838 F.2d 380, 384 n.4 (9th Cir. 1988) (noting that profit as a motive is irrelevant in determining whether content is commercial).
126 Am. Media, Inc., 156 F. Supp. 2d at 1207-8 (discussing the three conjunctive factors the Supreme Court uses to determine whether speech is commercial).
127 Id. at 1208.
130 Id.
copyrighted work. The four factors derive from the early opinion *Folsom v. Marsh* where defendant copied 353 pages from the plaintiff's biography of George Washington to produce a separate work of his own. The defendant raised fair use a defense to his use of the pages from plaintiff's work. The court rejected this argument because while an author may cite from the original work if his purpose is "truly to use the passages for the purposes of fair and reasonable criticism," here the defendant "cites the most important parts of the work...to supersede the use of the original work." In codifying the common law factors derived from *Folsom v. Marsh*, Congress intended § 107 as a guideline and "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."

The application of fair use to the Internet is illustrated by *Lenz v. Universal Music Corp*. Copyright holders are not permitted under the DMCA to order the deletion of a file without first determining whether the posting constitutes fair use of the copyrighted material. One such case concerned a home video posted on YouTube by a mother, Lenz, showing her thirteen month old son dancing to the Prince song "Let's Go Crazy." The video totaled only twenty-nine seconds, and the song can only be heard "for approximately twenty seconds." Universal, the owner of the copyright to the song, ordered YouTube to remove the video pursuant to the DMCA, and YouTube complied. Subsequently, pursuant to the DMCA, Lenz notified YouTube that her video was within the scope of fair use, and demanded that it be restored. YouTube reposted the video and Lenz in due course sued Universal alleging misrepresentation, tortious interference with her contract with YouTube, and seeking a declaratory judgment of non-infringement. The judge found that under the DMCA the copyright holder must provide "[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner,
its agent, or the law."¹⁴¹ This means that a copyright holder cannot order the removal of their copyrighted material from a website without first determining whether the use of the copyright material would constitute fair use because the law defines a fair use as legal.¹⁴² The holding is consistent with the purposes of the DMCA, which is "prevent the abuse of takedown notices."¹⁴³ The legislative history of the DMCA likewise supports the holding because it was Congress’ hope that “[r]equiring owners to consider fair use will help *ensure[ ]* that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand” without compromising “the movies, music, software and literary works that are the fruit of American creative genius.”¹⁴⁴

III. CONTINUING DISAGREEMENTS BETWEEN PROFESSIONAL SPORTS LEAGUE AND FANS

Fans who use the Internet to communicate their ideas about games or events in real time are at odds with the leagues about what they are legally allowed to communicate and post online.¹⁴⁵ Professional sports leagues jealously guard their copyrights and trademarks; indeed, they claim they own every aspect of the game.¹⁴⁶ The problem, however, is that the stance of the professional sports leagues is at odds with changing technology.

A. The Effect of Mobility

While professional sports leagues continue to protect their copyrights and trademarks, sports fans are using new technology in order to gain access to the games they love.¹⁴⁷ Any person with access to a computer or cell phone is able to access the Internet and disseminate ideas.¹⁴⁸ The average sports fan is not financially motivated and broadcasts his ideas without considering the...

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¹⁴¹ Id. (citing 17 U.S.C. § 512(c)(3)(A) (2006)).
¹⁴² Id.
¹⁴³ Id. at 1156.
¹⁴⁵ Is It Illegal to Describe the Sporting Event You’re Watching?, supra note 3.
¹⁴⁶ Id. See also Major League Baseball Claims Ownership of Game Description, supra note 4.
¹⁴⁷ Some of the new technology being utilized by sports fans includes camera phones, blogging, live streaming of games on the Internet, to name a few. See Is It Illegal to Describe the Sporting Event You’re Watching?, supra note 3. See also Major League Baseball Claims Ownership of Game Description, supra note 4.
¹⁴⁸ See Who Can Film Video Clips at a Pro Football Stadium?, supra note 3.
copyright or trademark implications of his action.\textsuperscript{149} Sports fans' actions are considered amateur when they post their thoughts on the Internet.\textsuperscript{150}

A 2004 Pew Internet study found that more than fifty-three million American adults have uploaded their ideas to the Internet.\textsuperscript{151} Today, that group of people who have uploaded content onto the Internet has surely expanded in size.\textsuperscript{152} Decentralization of content blurs the line between what is amateur and what is mainstream media becomes less clear.\textsuperscript{153} This is especially true in light of new technology, such as camera phones, that make it easier for amateurs to infringe on another person's copyright or trademark by taking a picture of it and then simultaneously uploading it onto a website.\textsuperscript{154} This exacerbates the issue that currently faces professional sports leagues as more fans begin using new technology to post on the Internet. In the context of the sports world, there comes a point where "the dissemination of a certain amount of information is tantamount to broadcasting a game."\textsuperscript{155}

B. Professional Sports Leagues Claim Ownership

Professional sports leagues have taken various preventative measures and advanced several arguments in defense of their copyrights and trademarks in response to sports fans' increasing use of the Internet and new technology. Professional sports leagues are private clubs that are allowed to make private rules.\textsuperscript{156} The private rules enacted by professional sports leagues include rules governing who is permitted to telecast a game or event.\textsuperscript{157} During a broadcast

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 955 (quoting Amanda Lenhart et al., Pew Internet & American Life Project, \textit{Content Creation Online} 2 (Feb. 29, 2004), http://commcns.org/twZCi1p)). Examples of some of the content uploaded to the Internet include writings, art, video, and audio creations. Id.
\textsuperscript{152} See generally Jason Kincaid, \textit{Five Years In, YouTube Is Now Streaming Two Billion Views Per Day}, TECHCRUNCH (May 16, 2010), http://commcns.org/ttmhq0; Ben Parr, \textit{YouTube Surpasses Two Billion Video Views Daily}, MASHABLE (May 17, 2010), http://commcns.org/rpL9sH.
\textsuperscript{153} \textit{The Future of Blogging}, CNET NEWS (Apr. 5, 2005, 10:00 AM), http://commcns.org/sH9dXA.
\textsuperscript{154} \textit{Who Can Film Video Clips at a Pro Football Stadium?}, supra note 3.
\textsuperscript{156} "All professional sports leagues and their member teams are private entities..." MARK CONRAD, \textit{THE BUSINESS OF SPORTS: A PRIMER FOR JOURNALISTS} 12 (Routledge ed. 2011) (2006). See also \textit{Who Can Film Video Clips at a Pro Football Stadium?}, supra note 3.
\textsuperscript{157} \textit{Who Can Film Video Clips at a Pro Football Stadium?}, supra note 3 (for example, in the NFL, "The owners of [NFL] clubs get together and make private rules for their private club. And those rules include the rules governing who gets to telecast games.").
of a professional game of any sport there is always a disclaimer from the

of a professional game of any sport there is always a disclaimer from the
governing league that no rebroadcast or retransmission of the event or game is
allowed without expressed written consent. For example, the NFL employs
a “blanket policy prohibiting dissemination of accounts or descriptions of an
NFL game.” Additionally, the NFL has a policy that media cannot “use
Twitter or other social media to ‘approximate play by play’ during the
game.” Other professional sports leagues and teams have social media
policies to control the dissemination of information about their games, such
as the policy announced by Southeastern Conference in college athletics.
The policy specified that fans attending Southeastern Conference athletic
events could not “produce or disseminate (or aid in producing or
disseminating) any material or information about the Event, including, but not
limited to, any account, description, picture, video, audio, reproduction or
other information concerning the Event.” The U.S. Open, a professional
tennis tournament, takes strict policy to another level by prohibiting both
cell phones and cameras from the event premises. By forbidding both cameras
and cell phones, the U.S. Open organizers were able to ensure that all forms of
social media were inaccessible during the event. Combined, these policies

demonstrate that professional sports leagues are adamant about protecting their
intellectual property rights.

Professional sports leagues have not been content with these audience-

Professional sports leagues have not been content with these audience-
centric policies. They have sent complaints to alleged trademark and copyright
infringers and initiated lawsuits. MLB continues to “insist that they own the

158 Major League Baseball Claims Ownership of Game Description, supra note 4. Professional sports leagues are motivated to protect their broadcasts because those broadcast

158 Major League Baseball Claims Ownership of Game Description, supra note 4. Professional sports leagues are motivated to protect their broadcasts because those broadcast
devices are a significant source of revenue. Andrew Brandt, TrueHoop: Things Not So Bleak
For Upcoming Season, ESPN (Sept. 13, 2011), http://commcns.org/vnY0T. See, e.g., CBS,
NFL Extend Broadcast Rights of AFC, CBSSPORTS.COM, http://commcns.org/uhycJ3 (last

159 Brian Kumnick, Sports and Social Media, Part 1: The Crackdown, TARNISHED
TWENTY (Sept. 3, 2009), http://commcns.org/vcXJN9 (referring to “the boilerplate [warning]
you hear announcers speed-reading toward the end of a televised game.”).

160 Id. Giving play-by-play information over the Internet through social media websites
such as Twitter is considered by the leagues to be a rebroadcast of the game. Id.

161 Ken Belson and Tim Arango, Leagues See Bloggers in the Bleachers as a Threat,

162 Adam Ostrow, Social Media Banned from College Stadiums, MASHABLE (Aug. 17,
2009), http://commcns.org/tjynRC.

163 Id.

164 Id.

165 Id.

166 The legal channels include watching the game either in person, on television, or
through a website that has been granted the right from the copyright holder to stream the
game live.

167 See Mike Masnick, NFL Wants to Remind You That Having People Over to Watch
facts related to a game, and no one can use them without paying MLB first.”

The NFL has complained to advertisers regarding the use of the trademarked phrase “Super Bowl.” In order to protect their trademark, the NFL has forced advertisers to refer to it as “the Big Game.” The NFL has also complained against churches that show the Super Bowl on big screen. The original complaint was that the church was charging an admittance fee. After receiving the complaint the church agreed to make the event free. The NFL then issued a second complaint alleging that the church was still infringing on their copyright by showing the game on a screen larger than fifty-five inches. A primary reason for the complaints, according to NFL spokesman Brian McCarthy, is that these large gatherings “shrink TV ratings and can affect advertising revenue.” The NFL maintains that the “same policy applies to all NFL games and to movie theaters, large halls and other venues with big-screen TVs.”

Moreover, supplementing their individual complaints, the professional sports leagues have been pressuring the government to intervene on their behalf. In response, on February 2, 2010, federal investigators “seized the domain names of ten foreign-owned sites that had become hubs for sports fans looking for free sports broadcasts online.”

Lastly, when their policies are breached, complaints go ignored, and government entities refuse to intervene, professional sports leagues may initiate lawsuits as the last resort to protect their trademarks and copyrights.

The Ultimate Fighting Championship (“UFC”), a mixed martial arts league, has filed suit against the website Justin.tv and various other websites for

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The Super Bowl On a Big Screen Is Copyright Infringement, TECHDIRT (Feb. 2, 2007) [hereinafter Big Screen Copyright Infringement], http://commcns.org/lsqTCY; Social Media Banned from College Stadiums, supra note 162; Sports Leagues Battle Video Pirates Showing Bootleg Live Games on Internet, supra note 4.

Id. Big Screen Copyright Infringement, supra note 167.

Id. Additionally, in 2002 the Chicago Cubs sued bars that overlook Wrigley Field for charging patrons to watch Cubs games from the roof. PAUL C. WEILER ET AL, SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 440 (4th ed. 2010).

Id. Big Screen Copyright Infringement, supra note 167.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Jacqueline L. Salmon, NFL Pulls Plug On Big-Screen Church Parties for Super Bowl, WASH. POST (Feb. 1, 2008), http://commcns.org/vFgKBO.

Id.

For example, professional sports leagues have been “lobbying for more aggressive copyright legislation.” Sports Leagues Battle Video Pirates Showing Bootleg Live Games on Internet, supra note 4.

Id.

Id.
"allegedly promoting unauthorized streams of its fights." Professional sports leagues have sued other websites, such as YouTube, for allowing copyright infringement to occur on their sites. Professional sports leagues enact policies, send complaints and initiate lawsuits against sports fans because they believe the current statutory framework supports their position, that they own all aspects associated with their games. In taking the aforementioned actions, the professional sports leagues do not acknowledge the differences between the exhibition of a game or event on television, radio or the Internet. They believe it is illegal for a fan to sit in the stands at a game or event and broadcast a description, audible or pictorial, of the game or event to a friend using a mobile phone. Their argument is that any person that communicates or displays real-time information about the game or event is in effect rebroadcasting said game or event and therefore in violation of league policy and the law.

But, the leagues argue further that the DMCA does not provide adequate protection for live events. The DMCA requires sites to maintain protocols for copyright holders to report copyright infringement occurring on their site and subsequently remove such infringing material upon notification. The professional sports leagues are of the opinion that the process designated by the DMCA is "meaningless for live sporting events, where people can get the full value of a match after watching only the final few minutes." Time-sensitivity is also a factor. Professional sports leagues argue that sports are different than other forms of entertainment. Other forms of entertainment are not as time sensitive as professional sports. Sports are unique because "'[w]ith sports, they very much have this one shot to get you to watch

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180 Id.
182 See discussion, supra Part III.B.
183 MLB Takes Hardball Stance on Web Sites' Use of Its Data, supra note 155 ("Bob Bowman, who oversees Major League Baseball Advanced Media, says it's time to assert property rights: 'One way to exhibit a live baseball game is TV. Then there's radio. The third is offering real-time data online. To us, there's no difference.'” (emphasis in original)).
184 Is It Illegal to Describe the Sporting Event You’re Watching?, supra note 3.
185 Major League Baseball Claims Ownership of Game Description, supra note 4.
186 See Sports Leagues Battle Video Pirates Showing Bootleg Live Games on Internet, supra note 4 (“How does the DMCA even apply to live events?” asks Epstein, the UFC’s general counsel.”).
188 Sports Leagues Battle Video Pirates Showing Bootleg Live Games on Internet, supra note 4.
189 Tim Arango, Online Piracy Menaces Pro Sports, N.Y. TIMES (Dec. 28, 2008), http://commcns.org/vyOWJE (“David Price, the head of piracy intelligence at Envisional, a consultant that helped prepare the O.E.C.D. report, said: ‘I think it’s different than looking at movies or music. You might not go to the cinema, but you’ll buy the DVD.’”

the game. If suddenly there is a way to get that live transmission for free, then there is a real threat to their business." Under the current statutory framework professional sports leagues have little recourse in addressing trademark and copyright infringement. Presently, professional sports leagues have the following five options: (1) do nothing, (2) create policies, (3) send complaints, (4) initiate lawsuits, and (5) lobby the government to intervene or draft new, or amend existing legislation.

C. Fans Have the Right to Be Fans

While professional sports leagues argue that fans are infringing on their trademarks and copyrights, sports fans argue that they have a right to use professional sports' copyrights and trademarks under the First Amendment and the current statutory framework. Fans argue that data, such as statistics or a description of what is happening at a game or event, are facts and therefore incapable of obtaining copyright protection. Fans are not sharing clips or information about entire games, only select video clips, statistics or a brief description to a friend. Even if the fans are infringing upon the professional sport league's copyright or trademark, they have several First Amendment defenses. Some of the defenses available to the fans include the right to free speech, fair use, and the fact that fans are not using the copyright or trademark material for commercial purposes, especially when they are only relaying the information to a friend on a cell phone and not making a post to the Internet. Many fans are only describing the games or posting information about them because of their enthusiasm for the sport. For example, one news outlet is finding it difficult with "17 full-time sports writers" to satiate sports fans' desire to keep abreast the current news. In an effort to keep up with consumer demand the news outlet has launched two new websites that will feature not only "professional writers' stories, columns and blogs," but also "daily video updates, chats, polls, community blogs, and professional

190 Id.
191 Sports Leagues Battle Video Pirates Showing Bootleg Live Games on Internet, supra note 4.
192 See id.
193 See Who Can Film Video Clips at a Pro Football Stadium?, supra note 3.
194 Major League Baseball Claims Ownership of Game Description, supra note 4. See also Who Can Film Video Clips at a Pro Football Stadium?, supra note 3.
195 Is It Illegal to Describe the Sporting Event You're Watching?, supra note 3.
196 See Jeffrey S. Kravitz, Fair Use or Foul Play by EA in Video Game Dispute?, SPORTS LITIGATION ALERT (Sept. 10, 2010), http://commcns.org/tjhDTx.
198 Id.
Due to the high demand for professional sports leagues products, it is "difficult to see how [amateur sports bloggers and local television broadcasters] will negatively affect the league or any team's revenue stream."200

Sports fans can likewise argue the professional sports leagues are misusing trademark and copyright law. The purpose of trademark law is to prevent the use of a trademark in a misleading or confusing manner.201 Trademarks are not meant to afford the trademark holder broad protection equivalent to exclusive control.202 Professional sports leagues, however, stretch the protection of their trademarks so that they emulate exclusive control. For example, the NFL has required advertisers to cease using the trademarked Super Bowl and only refer to the Super Bowl as the "Big Game."203 In order to make this demand, the NFL must show that the advertiser's use of Super Bowl is misleading or confusing to consumers.204 This is not a plausible argument however, because "[n]o one could make a credible claim that an advertiser mentioning the Super Bowl is somehow confusing people into believing that they're officially associated with the game."205 Professional sports leagues are heavy-handed with their interpretation of the scope of their copyrights.206 For example, the NFL no longer allows churches to host Super Bowl events on a big screen because they allege this is the equivalent of public performance.207 The NFL believes that the "same policy applies to all NFL games and to movie theaters, large halls and other venues with big-screen TVs."208 Taking the NFL policy to its extreme, sports fans can only wonder how long it will be until professional sports leagues begin alleging copyright infringement by sports fans who watch games on a big screen television in personal home theaters.209

Professional sports leagues and sports fans are far apart in their convictions about what is permitted under the current statutory framework. In order to prevent continuing disagreements between the parties, action must be taken to

\[\text{References}\]

199 Id.
200 Who Can Film Video Clips at a Pro Football Stadium?, supra note 3.
201 15 U.S.C. §§ 1114, 1125(a); Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 918 (9th Cir. 1980). See also Smith v. Chanel, Inc., 402 F.2d 562, 566-70 (9th Cir. 1968); HMH Publ'g Co., Inc. v. Brincat, 504 F.2d 713, 716 (9th Cir. 1974).
202 Int'l Order of Job's Daughters, 633 F.2d at 918; It's the Super Bowl of Trademark Misuse!, supra note 4.
203 It's the Super Bowl of Trademark Misuse!, supra note 4.
204 15 U.S.C. §§ 1114, 1125(a); Int'l Order of Job's Daughters, 633 F.2d at 918; It's the Super Bowl of Trademark Misuse!, supra note 4.
205 It's the Super Bowl of Trademark Misuse!, supra note 4.
206 NFL Pulls Plug On Big-Screen Church Parties For Super Bowl, supra note 175.
207 Id. A screen is considered to be a "big screen" when it is larger than fifty-five inches.
208 Id.
209 Id.
201 Big Screen Copyright Infringement, supra note 167.
alleviate the tension.

IV. RESOLUTION

Continued litigation is not a preferable option because it alienates sports fans. Both sports fans and professional sports leagues have strong arguments. Courts’ strained interpretation of decades-old law complicates the situation by creating bad law. Therefore, Congress must act to resolve the impasse.

A. Alternatives to Solve the Problem

There are a variety of alternatives that have the capability of solving the dispute between the professional sports leagues and sports fans using new technology. Among these alternatives, drafting or amending legislation appears to be the strongest option to quell the disagreement. Copyright law as it currently stands appears to be the weakest due to judicial precedent.

1. Update Current Legislation

The current statutory framework, including both copyright and trademark law, is out of date and needs to be updated to reflect advancing technology. Past solutions to technological advances in this country have been to enact or update the then existing statutory framework.\(^{210}\) Congress should take the same approach in this dealing with the current problem between professional sports leagues and sports fans because the Internet and camera phones have changed the technological landscape in the United States.

a. Copyright Law Needs to Account for Modern Technology

"The typical modern outcome to heated technology battles...has been technology-specific regulations."\(^{\text{211}}\) Rethinking copyright from the perspective of promoting amateur-to-amateur content would be a big first step in creating the next generation of legislation dealing with technological advancements.\(^{212}\) Copyright law is out of date because it has not adequately kept pace with all of the modern day technology.

Under the current statutory framework, “any Web cast of a sports game, no matter how ‘granular’ or realistic, may be legal under a Motorola-type analysis

\(^{210}\) See discussion, supra Part II.


\(^{212}\) See id.
so long as the [protectable] elements of the league's or team's broadcast are not reproduced.213 The Internet can make the professional sports leagues' claims even weaker if an amateur poster does not watch the actual television broadcast but instead relies solely on a description from a friend on a cell phone at the game or event, other audio or data posted on the Internet.214

As it stands, copyright law only protects the television broadcasts made available by the professional sports leagues through telecast agreements with television stations.215 However, the fact that Congress did not extend such protection to the games or events themselves does not mean that they meant to preclude any protection of the events in the future.216 Congress has made sports-specific changes in the past to the Copyright Act of 1976, and would likely do so again.217

Further, Section 102(a) lists eight categories of “works of authorship” covered by the Act.218 The list does not specify that sporting events are a work of authorship,219 nor could it comfortably fit within any of the existing categories.220

Adding sports events as a new category of authorship would help to clarify matters. In order to update copyright law, it is necessary to add a new category of sporting events or games so that professional sports are able to obtain the same protection as motion pictures. In light of the motion pictures category, the addition of sporting events as a new category would not be unprecedented due to similarities between the two categories. Sporting events involve several quarters the way movies involve several scenes. Additionally, sporting events have a cast of characters, the athletes playing, as movies have a cast of characters in the actors and actresses that are portraying the various personas that make up the film.221 While a sporting event is not scripted, neither are reality shows and those would appear to fit within the motion pictures and other audiovisual works category of the act.222 On the other hand, a sporting event is a live, one time event unlike motion pictures which are created for

213 Freeman, supra note 7, at 7-8.
214 Id. at 8.
216 Id. § 101 et seq..
217 Congress also had sporting events in mind when they amended the Copyright Act in 1976. See H.R. No. 94-1476 at 52.
219 Id.
220 “In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship’ under 17 U.S.C. § 102(a).” Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997); 17 U.S.C. § 102(a).
222 Id.
enjoyment in the theater or at home on DVD. While sporting events share similarities with motion pictures, their marked differences prohibit sporting events from inclusion in the existing category. As a result, in light of the fact that sporting events are similar to the motion pictures and other audiovisual works categories, but not similar enough so as to come within it, the Copyright Act of 1976 should be amended, as it has been amended in the past, to incorporate sporting events.\(^{223}\)

In addition to changes being made to the Copyright Act of 1976, the DMCA also needs to be amended to account for live streaming.\(^{224}\) The DMCA requires service providers to promptly remove copyright infringing material from their site when notified by copyright holders.\(^{225}\) The requirements of the DMCA are "meaningless for live sporting events, where people can get the full value of a match after watching only the final few minutes."\(^{226}\) Sports differ from other industries that hold copyrights, such as the entertainment industry, because all professional sports are live events.\(^{227}\) Fans of the music, television, and motion picture industry may not attend the event, such as going to the theater to watch a movie or attending a concert, but they may buy the DVD or watch it through On-Demand services provided by their cable provider.\(^{228}\) Sports fans, however, are primarily going to watch the game as it is occurring and "[i]f suddenly there is a way to get that live transmission for free, then there is a real threat to [professional sports leagues'] business[es]."\(^{229}\) Therefore, in order to adequately protect professional sports leagues the DMCA must be amended to enable these copyright holders to act more immediately rather than through a notification process.

\(b.\) **Leveraging the Amateur Sports Act**

In addition to amending copyright legislation, trademark legislation likewise must be amended in order to offer adequate protection to professional sports leagues. The broad protection afforded the USOC should be expanded to include professional sports leagues.\(^{230}\) Alternatively, a similar statute could be enacted that uses much of the same language and is specific to professional

\(^{223}\) *Id.*


\(^{227}\) *Id.*

\(^{228}\) *Id.*

\(^{229}\) Arango, *supra* note 189, at B1.

\(^{230}\) The Amateur Sports Act offers the USOC broader protection of its marks than traditional trademark law. 36 U.S.C. § 220506.
It is not uncommon for Congress to amend legislation with sports in mind. Additionally, Congress should extend the amended, or professional sports league version, of the Amateur Sports Act to apply to non-commercial speech. It is also extremely important to provide for broader copyright protection in the new legislation as well because currently the Amateur Sports Act only applies to USOC trademarks. Professional sports leagues face obstacles in protecting both their trademark and copyright interests and therefore the new, or amended, legislation should reflect these obstacles.

2. Agreements Between Professional Sports Leagues and Websites

Another option is for professional sports leagues to enter into agreements with the online video providers like YouTube. These websites are protected from copyright infringement liability under the DMCA, so long as they establish protocol for copyright holders to notify the site of copyright infringement by the sites users. After notification of infringement by the copyright holder, websites have the ability to remove posts from their users per their standard terms and conditions, which all users must agree to prior to being granted the ability to post on the site. Therefore, the websites act as an intermediary between leagues and fans. The websites are notified of the copyright infringement and subsequently remove such infringing materials before any further disagreements occur between the professional sports leagues and the sports fans.

One example of a website that is taking advantage of such agreements is YouTube. YouTube has struck numerous such partnership deals with copyright holders such as CBS, BBC, Universal Music Group, Sony Music Group, Warner Music Group, NBA, The Sundance Channel and many more. Both the NBA and the NHL have entered into agreements with YouTube “which afford the leagues their own channel through which they can

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231 H.R. No. 94-1476 at 52.
232 The Amateur Sports Act only applies to commercial speech but is not applicable to the use of protected Olympic marks in non-commercial speech. 36 U.S.C. § 220506(c).
233 Id.
235 See, e.g., Terms of Service, YouTube, http://commcns.org/sV5E3P (last visited Dec. 15, 2011) (“YouTube will remove all Content if properly notified that such Content infringes on another’s intellectual property rights. YouTube reserves the right to remove Content without prior notice”).
237 What’s Mine Isn’t Yours: Sports, Copyright and YouTube, supra note 44.
disseminate content to YouTube’s massive audience."\textsuperscript{239} The NBA YouTube channel allows users of the site to find highlights and content posted by the NBA.\textsuperscript{240} The NBA channel also contains a section where the sites users are able to post their own content, such as their own highlights and highlight mixers of NBA content.\textsuperscript{241} While site users are able to post NBA copyright material on the NBA Channel, the NBA still monitors the site for copyrighted material that appears outside their channel and “remains in regular contact with YouTube about taking down [their] copyrighted content.”\textsuperscript{242}

College Basketball was also able to benefit from an agreement with YouTube in order to protect their broadcast of NCAA March Madness.\textsuperscript{243} The agreement’s success is representative of the effectiveness of agreements with such websites in general.\textsuperscript{244} Specifically, CBS Sports, the NCAA, and Pontiac entered into an agreement with YouTube to allow broadcast of NCAA March Madness.\textsuperscript{245} By signing the agreement the three parties were able to monetize their content on the Internet.\textsuperscript{246}

An additional benefit to making agreements with websites is that these sites are proactive in protecting copyrights and trademarks because they do not want to lose their protection from liability under the DMCA.\textsuperscript{247} For example, YouTube has initiated several programs to eliminate trademark and copyright infringement by users on their site.\textsuperscript{248} In October 2007, YouTube started “YouTube Video Identification” aimed at assisting copyright holders in protecting their materials.\textsuperscript{249} YouTube Video Identification allows copyright holders to upload their content to the service and then “complex algorithms are applied against YouTube’s library of clips to see if any match the uploaded content.”\textsuperscript{250} Clips that are found to match copyrighted materials can then be removed from the site.\textsuperscript{251} In 2010, YouTube enacted several more changes to better protect trademarks and copyrights.\textsuperscript{252} Specifically, YouTube pledged to

\textsuperscript{239} What’s Mine Isn’t Yours: Sports, Copyright and YouTube, supra note 44.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} CBS Adds YouTube For March Madness, WEBPRONEWS (Mar. 15, 2007), http://commcns.org/vjQoR3.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Making Copyright Work Better Online, supra note 247.
act on takedown requests within twenty-four hours, improve the submission process to make it easier for copyright holders to submit DMCA takedown requests, prevent terms closely associated with piracy from appearing in autocomplete searches, expel violators from the AdSense program, and make authorized preview content more readily accessible in search results.\(^\text{253}\)

The agreements the professional sports leagues enter into with websites are generally not made for profit, with the exception of the broadcast of the NCAA Tournament, the leagues likely will profit because they will be protecting their copyrights and trademarks.\(^\text{254}\) Moreover, because professional sports leagues would be endorsing the posts to these websites, such agreements offer users an outlet to post their materials without apprehension of prospective claims of copyright or trademark infringement.

B. Which Path to Follow?

At first glance, professional sports leagues entering into an agreement with websites appears to be the best path to follow. But it is not because professional sports leagues are not completely satisfied.\(^\text{255}\) These agreements are problematic because professional sports league believe these websites are not enforcing their responsibilities under the DMCA.\(^\text{256}\) As websites such as YouTube continue to “benefit from the rising popularity of fan-generated sports content, the leagues who own the copyrights to that content are faced with a choice: [c]ut a deal and try to find a mutually beneficial partnership, or dig in for some lengthy and expensive litigation.”\(^\text{257}\) However, professional sports leagues are sometimes dissatisfied with these arrangements. For example, Mark Cuban, owner of the Dallas Mavericks, believes that YouTube is part of the copyright infringement problem and not part of the solution.\(^\text{258}\) Cuban attributes YouTube’s success to helping users gain access to

\(^{253}\) Id.

\(^{254}\) The websites have an obligation under the DMCA to monitor their content for infringement. 17 U.S.C. §512(c). The professional sports leagues will mitigate the costs they would have spent on the enforcement of their copyrights and trademarks. For an example of the costs associated with filing lawsuits to enforce intellectual property rights, see Mike Masnick, RIAA Spent $17.6 Million In Lawsuits... To Get $391,000 In Settlements?, TECHDIRT (July 14, 2010), http://commcns.org/tvmДI0 (In 2007 the RIAA spent “$21 million in legal fees, plus another $3.5 million for ‘investigative services.’”).


\(^{256}\) See, e.g., id.

\(^{257}\) What's Mine Isn't Yours: Sports, Copyright and YouTube, supra note 44.

According to Cuban, "Take away all the copyrighted material and you take away most of Youtube's traffic. Youtube turns into a hosting company with a limited video portal." A prime example of these websites failing to adhere to their responsibilities is the class action lawsuit spearheaded by the Premier League. The Premier League alleges that YouTube has allowed copyright infringement to continue even after the Premier alerted YouTube to infringement occurring on its website through "Advance Notices of Potential Infringement." Further, many individuals maintain their own sites on their own individually registered website domains, such as blogs, which therefore receive essentially no monitoring because there is no one besides the website author monitoring the content. It is expensive for professional sports leagues to monitor every website on the Internet and requires more resources than are currently available.

Congress can also amend the DMCA to make it more effective in handling websites live streaming of sporting events. A good example of how the DMCA can be amended to adequately handle live sporting events is PROTECT IP, a Senate proposal that received bi-partisan support. In contrast to the DMCA, PROTECT IP allows copyright holders to receive injunctive relief against infringing website content, such as the live streaming of professional games, by allowing the Department of Justice to shut down access to the entire domain.

V. CHANGE IS BETTER THAN MERE CO-EXISTENCE

As it stands, it is impractical for professional sports leagues to co-exist with new technology because the professional sports leagues believe they are losing revenue as a result of the new technology's widespread use. In the age of technological advancements it is becoming increasingly more difficult to monitor and restrict the conduct of individuals online. The world of professional sports is still learning this lesson the hard way. Until current laws are amended or new laws are drafted, professional sports leagues need to find a way to balance policing their intellectual property rights and respecting their

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259 Id.
260 Id.
261 The Football Ass'n Premier League Ltd., 633 F. Supp. 2d at 159.
262 Id. at 166-7; 17 U.S.C. §§ 411(c), 412.
263 Michael Liedtke, New Google Search Engine Boosts 'Blogging,' USA TODAY (Sept. 14, 2005), http://commcns.org/vS70HG ("blogs have become an increasingly popular vehicle for sharing opinions and information.").
264 Sports Leagues Battle Video Pirates Showing Bootleg Live Games on Internet, supra note 4.
265 S. 968.
266 S. 968, §§ 3-4.
fans enthusiasm. Until the legislature takes action the fans will be free to manifest their viewpoints about these professional leagues, the teams, the players, etc., through the advent of modern technology. The outcome of the battle between professional sports leagues and sports fans will affect other areas industries, such as music and entertainment, which face similar issues and will be watching closely to see the outcome of this disagreement in determining how to face their respective disagreements.